OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-141-704-001

ISSUE

1. Whether Claimant substantially complied with the statutory requirements for objecting to the Final Admission of Liability (FAL) and requesting a Division IME (DIME).

FINDINGS OF FACT

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

1. Claimant works as a signal technician supervisor for Employer. (Tr. 41:19-20). Claimant sustained an admitted injury to his lower back on June 27, 2019. (Ex. A).

2. Authorized Treating Physician (ATP) Joan Mankowski, M.D., placed Claimant at maximum medical improvement (MMI) on June 22, 2020. Respondent filed a FAL admitting for the MMI date and permanent partial disability benefits consistent with the impairment rating and apportionment. The FAL was mailed to Claimant on July 10, 2020. (Ex. A).

3. [Redacted, hereinafter LLH] was an insurance adjuster for Respondent. On July 13, 2020, Ms. LLH[Redacted] left a voicemail message for Claimant regarding the FAL. According to the note in her file, she "explained MMI, PP award, maintenance, apportionment of rating, 30-day objection period, advised injured worker to read through the final admission, once received, and to call if he has any questions." (Tr. 27:3-12).

4. On or about August 5, 2020, Claimant called Ms. LLH[Redacted] and left a voice message regarding the paperwork he received, including the FAL. (Ex. 2).

5. Claimant credibly testified that Ms. LLH[Redacted] called him back and they spoke. He told Ms. LLH[Redacted] that he objected to the MMI determination and wanted to get another opinion. Ms. LLH[Redacted] told Claimant he would be responsible for the payment to the DIME physician, and that he had to fill out the paperwork and send her a copy.[1] (Tr. 47:16 – 48:2)

6. The ALJ infers that by early August 2020, Ms. LLH[Redacted] knew Claimant objected to the MMI date and planned to request a DIME.

7. On August 8, 2020, Claimant, who was not represented by counsel at the time, mailed a handwritten letter to the Division of Workers' Compensation (Division), which read: "I, Fernando Hurtado would like a re-evaluation of MMI. I feel that the current MMI is inaccurate. Any questions please feel free to contact me any time. Greatly

[1] During the hearing, Respondent's counsel made a Motion to Strike Claimant's testimony, which the ALJ took under advisement. The ALJ denies the Motion to Strike Claimant's testimony.

appreciated!!!" Claimant attached the Notice and Proposal, and Application for DIME. (Exs. B and 3).

8. Claimant testified that he emailed the letter, Notice and Proposal, and Application for DIME to Ms. LLH[Redacted]. (Tr. 48:6-12). Claimant presented no documentary evidence of this email.

9. Claimant further testified that he sent the email to Ms. LLH[Redacted] from his work email address. (Tr. 59:4-10). Despite this testimony, Claimant presented no documentary evidence of ever using his work email to communicate with Ms. LLH[Redacted] at any other time.

10. The Division received Claimant's objection and DIME request. On September 1, 2020, the Division wrote to Claimant, copying Respondent via U.S. Mail, and advised Claimant that the Notice and Proposal, and Application for DIME he filed was incomplete. The Division gave Claimant 20 days to refile the documents correctly. (Ex. E).

11. Claimant timely refiled a corrected Notice and Proposal, and Application for DIME on or about September 17, 2020. In the corrected Notice, Claimant listed LLH[Redacted] as the adjuster, and identified her email as, [Redacted]. (Ex. 6). The ALJ infers that Claimant and the Division used this email address when emailing Ms. LLH[Redacted]. Claimant testified he emailed the Notice to Ms. LLH[Redacted]. (Tr. 49:6-15). Claimant presented no documentary evidence of this email.

12. In relation to this litigation, Respondent's IT Department did a search on Ms. LLH's [Redacted] email, [Redacted]. They looked at three specific parameters: Claimant's name, Claimant's personal e-mail address, and the WC number of the case for the time period from July 10, 2020 to December 31, 2020. (Tr. 23:20-24:12). Respondent did not use Claimant's work e-mail address as a parameter for the search. Respondent recovered multiple emails from Claimant and the Division related to the DIME process, addressed to [Redacted]. (Ex. R). The ALJ infers that both [Redacted] and [Redacted] were active emails for Ms. LLH[Redacted].

13. On October 22, 2020, the IME Unit of the Division designated a physician panel and sent it to Respondent, via email, to [Redacted]. (Ex. 7). This email was delivered to Ms. LLH's[Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

14. The IME Unit sent a DIME Physician Confirmation and invoice to Respondent on November 9, 2020, via email, to [Redacted]. (Ex. 8). This email was delivered to Ms. LLH's [Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

15. On December 17, 2020, Claimant's counsel filed an Entry of Appearance. (Ex. J). Respondent's counsel filed an Entry of Appearance on December 23, 2020. (Ex. K)

16. Claimant scheduled an appointment with the DIME physician, Joseph Morreale, M.D., for January 15, 2021, and provided notice to the IME Unit and Respondent, via

email. Claimant sent the notice of the appointment to [Redacted] on December 7, 2020. (Ex. 9). This email was delivered to Ms. LLH's[Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

17. Counsel communicated on or about January 19, 2021. Claimant's counsel advised Respondent's counsel that a DIME had taken place with Dr. Morreale and that Dr. Morreale was requesting the records. On January 20, 2021, Respondent agreed to produce the records to Dr. Morreale so that he could complete his report, but Respondent clarified that the production of medical records to Dr. Morreale was not a waiver of Respondent's right to challenge the jurisdiction of the DIME. (Ex. L).

18. Dr. Morreale examined Claimant on January 15, 2021, and issued a DIME report on February 4, 2021, finding Claimant not to be at MMI. (Ex. M). The Division issued a "Not-at-MMI" notice on June 25, 2021. (Ex. N).

19. [Redacted, hereinafter AH] is Employer's Claims Manager. Mr. AH[Redacted] reviews claims that come to his office, assigns them to staff, and manages the process of claims handling. (Tr. 19:15-22).

20. Ms. LLH[Redacted], the only claims adjuster with whom Claimant communicated, retired from Employer on August 31, 2020. (Tr. 20:24-25).

21. Mr. AH[Redacted] testified that he and a few other adjusters monitored Ms. LLH[Redacted]'s files after her retirement. He did not assign a new adjuster to handle Claimant's matter until late September 2020, approximately a month after Ms. LLH[Redacted] retired. (Tr. 21:1-8). Mr. AH[Redacted] assigned Claimant's claim to adjuster [Redacted, hereinafter TM]. (Tr. 22:24-23:8)

22. Mr. AH[Redacted] further testified that no one monitored the emails sent to Ms. LLH[Redacted] after her retirement on August 31, 2020. (Tr. 21:9-11). The ALJ infers that Respondent did not see the emails delivered to Ms. LLH[Redacted]'s email account from the Claimant and the Division regarding the DIME because no one monitored Ms. LLH[Redacted]'s email after her retirement.

23. Mr. AH[Redacted] testified that an autoreply was set up on Ms. LLH[Redacted]'s email after her retirement. (Tr. 21:9-22). The autoreply was attached to the email: [Redacted]. The autoreply stated: "LLH[Redacted] is no longer with the City and County of Denver. If you need assistance, please call 720-913-3330 and you will be redirected." As of January 19, 2021, the autoreply associated with this email was functioning. (Ex. D).

24. Claimant credibly testified that he never received this autoreply when he emailed Ms. LLH[Redacted]. There is no evidence that Respondent attached an autoreply to the email, [Redacted], which is the email address Claimant and the Division used.

25. Mr. AH[Redacted] testified that he received a copy of the September 1, 2020 letter from the Division regarding Claimant's incomplete objection and DIME request and made a note in Claimant's claim file. (Tr. 22:3-13). He entered a note on September 8, 2020 that read: "we received copy of letter dated 9/1/20 addressed to clt from the DOWC DIME

Unit stating that they had received an incomplete request for a DIME . . . the letter givem [sp] him 20 days to remedy this. I put letter out to file. It's up to clt to fix this if he wants to proceed." (Ex. 5).

26. Mr. AH[Redacted] testified he took no other action after receiving the September 1, 2020 letter from the Division because it was Claimant's responsibility to correct the deficiencies in the objection to the FAL and DIME request. (Tr. 22:3-23). He testified he had no thoughts to investigate or retrieve the items from Ms. LLH[Redacted]'s email account after she retired because an autoreply email was sent out stating that Ms. LLH[Redacted] was no longer employed and provided a telephone number to call for additional assistance, if needed. (Tr. 34:15-25).

27. WCRP 5-13 requires Respondent to notify the Division and Claimant of any change in the adjuster handling a claim within 30 days of the change. Despite having notice that Claimant objected to the FAL and requested a DIME, Respondent never advised Claimant, nor the Division, nor the DIME Unit that Ms. LLH[Redacted] retired or that Claimant's claim had been assigned to Ms. TM[Redacted]. (Tr. p. 31:18-25).

28. Mr. AH[Redacted] further testified that Respondent was not aware that Claimant was objecting to the FAL and requesting a DIME until sometime in late December 2020, or January 2021. (Tr. 27: 18-23). The ALJ does not find this testimony credible. The ALJ infers that Mr. AH[Redacted], who was monitoring Claimant's claim, knew on or about September 1, 2020, that Claimant was objecting to the FAL and requesting a DIME.

29. Claimant credibly testified that to the best of his knowledge he emailed Ms. LLH[Redacted] his objection to the FAL and request for a DIME, and the subsequent refiling of these documents. Claimant credibly testified he did not receive an autoreply notifying him that Ms. LLH[Redacted] was no longer working for employer.

30. The ALJ finds that Respondent's failure to notify Claimant that Ms. LLH[Redacted] retired, and that his claim had been reassigned, along with Respondent's failure to monitor Ms. LLH[Redacted]'s email, directly led to Respondent not seeing the communications from Claimant and the Division regarding the DIME.

31. The ALJ finds that Respondent had notice in early September 2020 that Claimant objected to the FAL and requested a DIME.

32. The ALJ finds that that Claimant substantially complied with the requirements of § 8-43-203(2)(b)(III), C.R.S.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Substantial Compliance

Where a party wishes to challenge the ATP's findings as to MMI, the Act sets for the following procedure:

> If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this

> subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

§ 8-42-107.2(2)(b), C.R.S. (2020).

While the requirements of the statute may be characterized as a jurisdictional prerequisite to obtaining a DIME, courts have recognized that requirements may be met by substantial compliance. *Lockyear v. May's Concrete, Inc.*, W.C. No. 4-623-424 at *3 (November 4, 2008). Substantial compliance with the statute can be sufficient to prevent closure of a claim. *See Stefanski v. Indus.Claim Appeals Office, 128 P.3d 282 (Colo. App.2005)* (any pleading which adequately notifies employer that claimant does not accept FAL constitutes substantial, if not actual, compliance with statutory obligation to provide written objection), *aff'd Sanco Indus. v. Stefanski,147 P.3d 5 (Colo. 2006)*; *see also EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office, 74 P.3d 516 (Colo.App.2003)* (concept of *substantial compliance* has been applied to various *notice* requirements in workers' compensation proceedings). "To determine whether there has been substantial compliance with a statute, a court will consider whether the allegedly complying acts fulfill the statute's purpose." *Koontz v. Bowser Boutique, Inc.*, W.C. No. 4-359-795 at *6 (January 13, 2012). The purpose of section 8-42-107.2(2)(b) of the Colorado Revised Statutes is to ensure that the party requesting the DIME provides timely notice to the non-requesting party of the request for a DIME. There must be evidence that Claimant made a genuine effort to comply with the statutory requirements. *See Pinon v. U-Haul*, W.C. No. 4-632-044 (April 25, 2007), *aff'd sub. nom. Pinon v. Indus. Claim Appeals Office* (Colo. App. 07CA0922, April 3, 2008) (NSOP) (substantial compliance requires party intent or to actually make good faith or colorable effort to comply with statutory requirements).

The ALJ finds that Claimant made a good faith effort to comply with the requirements of section 8-42-107.2(2)(b) of the Colorado Revised Statutes, and Respondent had timely notice of Claimant's request for a DIME. Claimant spoke with Ms. LLH[Redacted] in early August 2020, and discussed what he needed to do to object to the FAL and request a DIME. (Findings of Fact ¶ 5). Claimant timely filed his objection to the FAL and request for a DIME with the Division on or about August 8, 2020. *Id.* at ¶ 7. The Division received Claimant's objection to the FAL and his request for a DIME, and notified Claimant it was incomplete. *Id.* at ¶ 10. The Division sent a copy of this letter to Respondent, and Respondent made a note in the file, but took no other action. *Id.* at ¶¶ 25-26. Claimant timely refiled the corrected objection to the FAL and request for a DIME with the Division on September 17, 2020. *Id.* at ¶ 11. Over the next several months, Claimant and the Division sent emails to [Redacted] regarding the DIME process. *Id.* at ¶¶ 13-14 and16. Respondent received these emails, but no one was monitoring Ms. LLH[Redacted]'s email following her retirement. *Id.* at ¶ 22. Claimant continued to attempt to communicate with Ms. LLH[Redacted] regarding the DIME because Respondent never notified him, as required by WCRP 5-13 that Ms. LLH[Redacted] retired and his claim had been reassigned. ¶ 27.

ORDER

It is therefore ordered that:

1. Claimant substantially complied with the statutory requirements for objecting to the Final Admission of Liability and requesting a Division IME.

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

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

DATED: January 3, 2022

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

ISSUES

- Did Claimant prove a right total knee arthroplasty (TKA) recommended by Dr. Vanmanen is causally related to his March 30, 2015 admitted work accident?

FINDINGS OF FACT

1. Claimant has worked for Employer in various capacities since 1997. He currently works as a loader. The job is physically demanding, requiring heavy lifting and prolonged standing and walking. Claimant is currently 63 years of age.

2. Claimant suffered an admitted injury to his right knee on March 30, 2015. He was helping a customer in the plywood aisle when another customer asked for assistance. When he turned to address the second customer, he felt a sharp pain in his right knee and had difficulty walking.

3. Claimant was referred to CCOM for authorized treatment. He was diagnosed with a right knee strain and given a knee brace.

4. A right knee MRI was completed on April 23, 2015. It showed: (1) mild to moderate osteoarthritis along the medial femoral condyle, (2) grade 3 patellar chondromalacia, (3) a small joint effusion, and (4) a small tear in the posterior horn of the medial meniscus.

5. Respondents' expert, Dr. Fall, credibly testified the meniscal tear could have been acute or degenerative, but nevertheless was likely the primary pain generator.

6. Claimant was referred to Dr. Shawn Nakamura, an orthopedic surgeon. At his initial appointment on June 1, 2015, Claimant described "intermittent" 3/10 sharp, aching pain in the right knee. The knee had relatively good range of motion and no instability. X-rays showed "mild" tricompartmental degenerative changes with "very mild" narrowing of the medial compartment and "mild" narrowing of the patellofemoral joint. Claimant had some medial joint line tenderness and pain with McMurray testing. Dr. Nakamura recommended an arthroscopic medial meniscectomy.

7. The surgery was denied after a Rule 16 peer review by Dr. Frank Polanco. He opined surgery was premature because Claimant had not done any physical therapy.

8. Claimant was subsequently referred to PT.

9. Dr. Nakamura gave Claimant a cortisone injection on September 18, 2015. He did not recommend surgery at that time. He recommended Claimant continue with his exercises and follow up "as needed."

10. On November 16, 2015, Dr. Merchant at CCOM documented Claimant was improving with exercise and modified duty. He stated, "[Claimant] is still not interested in surgery." Physical examination was largely benign with relatively good range of motion and minimal medial joint line tenderness.

11. Dr. Merchant put Claimant at MMI on November 23, 2015. Dr. Merchant assigned a 16% lower extremity rating for the meniscal tear and range of motion deficits. He opined Claimant required no ongoing medications and no additional surgery was anticipated. He indicated Claimant may need additional injections in the future.

12. Respondent filed a Final Admission of Liability on January 5, 2016 based on Dr. Merchant's rating. The FAL admitted for reasonably necessary medical treatment after MMI.

13. Claimant sought no further treatment for his right knee for almost three years. He returned to Dr. Nakamura on October 18, 2018. Claimant stated the previous injection in September 2015 was "extremely helpful," but he was currently experiencing 5/10 stabbing and burning pain in the knee. X-rays of both knees now showed "moderate" narrowing in the medial compartments bilaterally and a possible lose osteochondral body on the right. This represents a progression of the medial joint space narrowing on the right as compared to the 2015 x-ray findings. Dr. Nakamura diagnosed "degenerative joint disease" in the right knee and gave Claimant another cortisone injection. No surgery was recommended.

14. Claimant returned to Dr. Nakamura on April 18, 2019. He was having difficulty with prolonged walking and standing, particularly after a long day of work. Dr. Nakamura noted "these injections do work well for him, but they start to lose their efficacy about 2 months prior to his [next] injection." Dr. Nakamura discussed the possibility of a knee replacement for Claimant's "advanced arthritis," but Claimant was "not quite ready for surgery at this time."

15. Claimant saw PA-C Brandon Madrid at CCOM on June 17, 2020. Claimant told Mr. Madrid he received cortisone injections "for about a year and a half and they stopped working." He felt the knee had worsened and believed it was related to the March 2015 work accident. Claimant described 10/10 pain 100%. Mr. Madrid ordered x-rays and an MRI and prescribed a Medrol Doespak.

16. X-rays on June 17 showed moderately severe medial joint space narrowing that "has progressed bilaterally" since the October 2018 imaging.

17. A right knee MRI on June 29, 2020 showed a complex degenerative tear involving the anterior and posterior horns of the medial meniscus, an intra-articular loose body, and full-thickness cartilage loss with subchondral edema over the medial femoral condyle and tibial plateau.

18. Claimant was referred back to Dr. Nakamura for further evaluation. Dr. Nakamura had moved out of town in the interim, so Claimant saw Dr. Michael Vanmanen instead. Claimant told Dr. Vanmanen his knee pain had never improved after the March

2015 work accident. He was becoming increasingly frustrated with his daily activities and difficulty engaging in activities because of the knee pain. Physical examination findings were largely identical on both knees, including positive medial McMurray test, 1+ effusion, patellofemoral crepitus, and weakness of the quadriceps and hamstrings. Dr. Vanmanen documented,

> We had a lengthy discussion regarding the patient's previous MRI, as well as x-rays and physical exam today. He does have end-stage arthritis of both the right and left knee with severe medial tibiofemoral joint arthritis. Both knees are painful throughout the knee. . . . [H]is daily activities are severely compromised [and] he wants bilateral total knee replacements. We said we would start with the right and then do the left.

19. Claimant saw Dr. Centi at CCOM on July 22, 2020. Dr. Centi thought it was questionable whether the proposed TKA was causally related to the March 2015 work accident.

20. Claimant filed a Petition to Reopen on January 14, 2021 based on a change of condition.

21. Dr. Allison Fall performed an IME for Respondent on May 5, 2021. She issued a report and testified at hearing. She opined the recommended right TKA was reasonably necessary but not causally related to the work accident. Dr. Fall emphasized Claimant has end-stage degenerative joint disease in both knees. She noted the original accident involved no significant impact or trauma but merely involved "turning" to the left. At the time, Claimant had early degenerative changes, but the primary pain generator was presumed to be the meniscal tear. Claimant subsequently developed severe "end-stage" osteoarthritis in both knees, which is the reason he now needs bilateral TKAs. She thought the end-stage degeneration in Claimant's uninjured left knee is strong evidence the degeneration in the right knee was unrelated to any trauma. Dr. Fall concluded the work accident did not cause, aggravate, or accelerate the severe osteoarthritis that now necessitates bilateral TKAs.

22. Dr. Fall's opinions regarding causation of the recommended right TKA are credible and persuasive.

23. Claimant failed to prove the proposed right TKA is causally related to the March 2015 work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Medical benefits can continue after MMI if additional treatment is reasonably needed to relieve the effects of the injury or prevent deterioration of a claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if the respondents admit liability for medical benefits after MMI, they retain the right to dispute the relatedness of any particular

treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As an initial matter, although Claimant filed a Petition to Reopen, the medical portion of his claim remains open based on the January 5, 2016 FAL. Therefore, reopening is not a prerequisite to an award of additional medical benefits. Nevertheless, Claimant still must prove a causal nexus between the requested treatment and the original injury.

There is no doubt the proposed right TKA is reasonably necessary. But Claimant failed to prove it is causally related to the March 2015 work accident. Claimant appears to be an affable fellow, and by all accounts is a dedicated, hardworking employee. But the outcome in this case does not hinge on Claimant's credibility. Rather, it involves a causation determination primarily based on medical factors. In that regard, Dr. Fall's analysis and conclusions are persuasive regarding the absence of any causal relationship between the work accident and the current need for a right TKA. The initial accident was minor and involved no significant force or trauma. At the time, Claimant had early osteoarthritis, but his symptoms were related to the meniscal tear. Claimant was put at MMI and returned to full duty less than 9 months after the accident. He thereafter sought no additional treatment for almost three years. When Claimant returned to Dr. Nakamura in October 2018, the degenerative changes had progressed and were similar in both knees. Claimant's osteoarthritis continued to worsen and was at "end-stage" in both knees by June 2020. Dr. Vanmanen now recommends replacing both knees, and the decision to start with the right knee appears to be based primarily on administrative concerns or convenience, rather than relative severity. As Dr. Fall explained, the uninjured left knee serves as a control and confirms that Claimant would have required a right knee TKA regardless of the March 2015 work accident. The need for a right TKA reflects the natural progression of Claimant's underlying osteoarthritis, without contribution from the work accident.

ORDER

It is therefore ordered that:

1. Claimant's request for a right total knee arthroplasty under his workers' compensation claim is denied and dismissed.

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

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

DATED: January 6, 2022

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

STIPULATIONS

During the November 4, 2021 hearing, the parties agreed to specifically place the medical billing for Claimant's September 30, 2020 lumbar MRI conducted at Colorado Springs Imaging before the ALJ for resolution should the claimed injury be found compensable. The parties further stipulated that the amount billed for the aforementioned MRI was $1,742.00. (Resp's. Exh. T, p. 490). Finally, the parties agreed that if it were determined that Respondents were liable for this bill, the actual amount owed would be determined pursuant to the workers' compensation fee schedule. These stipulations are approved.

REMAINING ISSUES

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

II. If Claimant established that he sustained a compensable injury to his low back on July 16, 2021, what medical benefits are reasonable, necessary and related to this injury.

III. If Claimant established that he sustained a compensable low back injury, what temporary disability benefits are owed.

IV. If Claimant established that he sustained a compensable low back injury and his entitlement to temporary disability benefits, whether Respondents are entitled to the imposition of late reporting penalties pursuant to C.R.S. § 8-43-102(1) (a).

V. Claimant's Average Weekly Wage (AWW).

Because the ALJ concludes that Claimant failed to establish that he suffered a low back injury arising out of his employment with Respondent, this order does not address issues II-V as outlined above.

FINDINGS OF FACT

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

1. The record in this matter is voluminous and the testimony presented is substantially conflicting.

2. Claimant is a former ranch hand for Respondent-Employer. He began working for Employer on June 3, 2020. (Resp's Exh. C, pp. 7, 22) (10/12/21 Hrg. Tr. p. 34, ll. 8-13; p. 91, ll. 3-8). Claimant's job duties included moving irrigation sprinklers and hose reels using a tractor or a four-wheel ATV (quad), mowing and performing some equipment maintenance. (10/12/21 Hrg. Tr. p. 34, ll. 14-25; p. 91, ll. 16-23). Claimant's job was full time, but seasonal in nature, encompassing the summer and early fall with the actual end date depending on the weather. (10/12/21 Hrg. Tr. pp. 91-92, ll. 24-5).

3. [Redacted, hereinafter KB] is the ranch foreman for Respondent-Employer. He was Claimant's supervisor during the time that he was employed at the ranch. (10/12/21 Hrg. Tr. pp. 90-91, ll. 2-11). Mr. KB[Redated] testified that all ranch hands had Saturdays off and that Claimant had two additional days of the week off. (10/12/21 Hrg. Tr. p. 92, ll. 6-12). He testified further that both he and Claimant were scheduled to work on Sundays. (10/12/21 Hrg. Tr. p. 92, ll. 13-14). According to Mr. KB[Redated], weather could cause the work hours to vary, sometimes causing a workday to be shorter than scheduled, and sometimes resulting in Claimant not reporting to work at all for one or more days at a time. (10/12/21 Hrg. Tr. pp. 92-93, ll. 20-5; p. 115, ll. 11-18). During his testimony, Claimant agreed that weather-related issues sometimes affected his work hours and work schedule. (10/12/21 Hrg. Tr. pp. 75-76, ll. 22-13). Claimant also testified that he did not work seven days a week and that he believed he had Saturdays off. (10/12/21 Hrg. Tr. p. 75, ll. 6-17).

4. Claimant testified that his last job prior to beginning work for Respondent-Employer was as a car mechanic for Meinecke Car Care Center (Meinecke) in approximately 2010. (10/12/21 Hrg. Tr. p. 35, ll. 17-21). During the course of his employment with Meinecke, Claimant suffered a work related injury to his low back while lifting a transmission in December 2010. Claimant was unable to return to work after this injury. Rather, he was approved for social security disability and did not work for a number of years before returning to work for Respondent-Employer on June 3, 2020. (10/12/21 Hrg Tr. pp. 35-36, ll. 22-17) (Resp's Exh. O, pp. 482-489).

5. Claimant alleges that he sustained a compensable injury to his low back on July 16, 2020, while driving a tractor with an attached mower 1-2 miles per hour down a dirt road when a dog or coyote jumped out in front of him prompting him to swerve and go down an embankment adjacent to the roadway. (10/12/21 Hrg. Tr. pp. 43-44, ll. 23-1). The tractor came to a rest on the side of the ditch with the attached mower high centered on the ground. Claimant presented photographs demonstrating the position of the tractor and mower after the incident occurred. (Clmt's. Exh's. 1-2). The photographs show that the tractor upright and parked on the side of the ditch. (Clmt's Exh. 2) (10/12/21 Hrg. Tr. pp. 44-45, ll. 13-5). Claimant also acknowledged the following details regarding this incident:

- The incident occurred at approximately 9:00 in the morning while he was driving 1-2 miles mph down the roadway. (10/12/21 Hrg. Tr. p. 43, ll. 11-13).

- The mower that the tractor was pulling was not in operation;

Claimant was merely transporting it and was not actually mowing anything at the time. (10/12/21 Hrg. Tr. pp. 73-74, ll. 14-1).

- Immediately prior to the incident, Claimant was driving the tractor and attached mower down the middle or center part of the road. (10/12/21 Hrg. Tr. p. 73, ll. 17-19).

6. During cross-examination, Claimant conceded that he had an extensive history of low back problems and had undergone multiple surgeries directed to the low back prior to the July 16, 2020 tractor incident. (10/12/21 Hrg. Tr. p. 71-72, ll. 23-1; pp. 72-73, ll. 19-1). Despite surgery, Claimant continued to have low back problems and pain following his December 2010 injury at Meinecke Car Care Center. (10/12/21 Hrg. Tr. pp. 72-73, ll. 19-5). Indeed, Claimant testified, and the medical records support a finding that he continued to obtain low back treatment for his December 2010 lifting injury, which included injections and the use of medication up to the July 16, 2020 tractor incident. (Id. at p. 73, ll. 2-5) (See, also, Resp's. Exh. G).

7. Claimant testified that he experienced an increase in low back pain following the July 16, 2020 tractor incident, and that he first sought treatment for his alleged July 16, 2020 injury about 2-3 weeks after the incident. (10/12/21 Hrg. Tr. p. 48, ll. 13-20; p. 49, ll. 9-13; pp. 54-55, ll. 24-22). Careful review of the evidentiary record fails to establish any contemporaneous medical records referencing an evaluation of or treatment directed to the low back for an injury purportedly caused by a July 16, 2020 injury arising out of running a tractor into a ditch. Rather, the medical records contemporaneous with Claimant's alleged July 16, 2020 injury include an August 4, 2020 report from Physician Assistant (PA-C) Joshua Stoneburner, and an August 8th and August 31, 2020 report authored by PA-C Kristen Viehman whom Claimant regularly sees for chronic pain management stemming from his 2010 low back injury. (Resp's Exh. G). The aforementioned reports support a finding that Claimant was following up with his chronic management providers for care associated with lumbar post laminectomy syndrome. During these appointments, Claimant reported 8-9/10 pain across his back that radiates down his legs to the bottom of his feet for which he was provided with prescription refills. As noted, these records are devoid of any reference to an increase in Claimant's pain or his having suffered a new low back injury as a consequence of running a tractor off the road on July 16, 2020. (See Resp's. Exh. G, pp. 130-140). Careful review of the medical record evidence supports a finding that no medical provider has issued an opinion that a July 16, 2020 tractor accident caused or contributed to Claimant's ongoing back problems in any way.

8. Although Claimant testified that increased pain caused his inability to perform his work duties following the tractor incident (10/12/21 Hrg. Tr. pp. 54-55, ll. 24-22), PA-C Viehman's August 31, 2020 follow up report indicates that Claimant was enjoying his work in the fields on the ATV. (Resp's Exh. G, p. 132).

9. Claimant testified that his last day of performing work tasks for Respondent-Employer was sometime in mid-August 2020. (10/12/21 Hrg. Tr. p. 48, ll.

21-23; p. 51, ll. 7-9; p. 84, ll. 15-17). He testified further that he was told by Mr. KB[Redated] to not come to work if he was physically unable to do the job, and that he missed more than three days of work prior to September 18, 2020 because of the July 16, 2020 tractor injury. (10/12/21 Hrg. Tr. p. 51, ll. 10-23). The following evidence contradicts Claimant's testimony regarding his lost time from work:

- Claimant's time sheets and wage records reflect that he continued to work, and be paid for such work, through September 18, 2020. (Resp's Exh. C, pp. 7-11, 13-21). Claimant testified that he had no reason to believe that he would get paid by the Employer for hours or days that he did not actually work supporting an inference that he actually worked after mid-August 2020. (10/12/21 Hrg. Tr. p. 85, ll. 12-16). Moreover, Claimant's unemployment compensation form (completed by the Employer) also indicates that his last day worked was September 18, 2020. (Resp's Exh. C, pp. 22-23).

- Claimant's testimony regarding his purported inability to work as a result of the July 16, 2020 tractor incident is also contradicted by the testimony of Mr. KB[Redated]. Mr. KB[Redated] testified that, when he first spoke with Claimant about the tractor incident at approximately 11:00 a.m. on July 16, 2020 (approximately two hours after the accident occurred), Claimant advised him that he was not hurt. Claimant then returned to work and completed his full shift with no apparent problems. (10/12/21 Hrg. Tr. pp. 95-96, ll. 3-17; p. 101, ll. 10-17; p. 109, ll. 22-24). Mr. KB[Redated] also explained that the time sheets – which reflect that Claimant worked 8 hours on July 16, 2002, 8 hours on July 17, 2020, 10 hours on July 19, 2020, and 9 hours on July 20, 2020 – were accurate and consistent with his recollection of the actual hours that Claimant worked immediately following the July 16, 2020 tractor incident. (Resp's Exh. C, p. 9) (10/12/21 Hrg. Tr. p. 109, ll. 13-18). Mr. KB[Redated] also testified that Claimant did not say anything to him about having injured his back or wanting to see a doctor, even though they discussed the tractor incident again on July 19, 2020. Mr. KB[Redated] also testified that he did not observe anything to suggest that Claimant was having problems with his back in the days immediately following the July 16, 2020 incident. (10/12/21 Hrg. Tr. pp. 102-103, ll. 19-15).

- Mr. KB[Redated] spoke to the information on the time sheets that indicates that Claimant did not work from July 29, 2020 through August 12, 2020. According to Mr. KB[Redated], the reason Claimant missed work during this approximate 2 week period was because he was sick and had to wait for the results of a Covid test before he was able to return to work. Regarding the nature of his

illness, Mr. KB[Redated] testified that Claimant advised him that he was experiencing symptoms such as a fever and a cough, without mention of any problems with his back at the time. (Resp's Exh. C, pp. 9-10) (10/12/21 Hrg. Tr. pp. 103-104, ll. 22-9).

- Mr. KB[Redated] further testified regarding the information on the time sheets reflecting that Claimant did not work between September 5, 2020 and September 10, 2020, a period of six days. (Resp's Exh. C, p. 11). Mr. KB[Redated] testified that this time off (to the extent it exceeded Claimant's regularly scheduled days off) was due to weather issues and did not have anything to do with problems surrounding the condition of Claimant's low back. (10/12/21 Hrg. Tr. p. 104, ll. 10-18).

- In addition to the above referenced evidence, Claimant's testimony regarding his post July 16, 2020 work history is inconsistent with and contradicted by his subsequent testimony during cross-examination. Despite his testimony that he had an increase in pain following the tractor incident that caused his inability to work beyond mid-August 2020, Claimant later acknowledged that he sent a text message to Mr. KB[Redated] in September 2020 advising that he could not come into work as scheduled because he had hurt his back the day before. (10/12/21 Hrg. Tr. p. 74, ll. 10-17). Clearly, if Claimant had stopped working for the Employer in mid-August, there would have been no need for him to advise his supervisor on a day in September that he was not able to come to work that day. A screen shot of the text message reflects that it was sent by Claimant to Mr. KB[Redated] on September 20, 2020. In this text message, Claimant stated that he "jacked [his] back up pretty good" the day before (September 19, 2020), that he was making an appointment to see his doctor, and that he would not be able to make it in to work that day. (Resp's Exh. C, pp. 12) September 19, 2020 was a Saturday, Claimant's day off.[1] Claimant acknowledged sending this text message to Mr. KB[Redated] and initially testified that he had "re-jarred" his back the day before. (10/12/21 Hrg. Tr. p. 74, ll. 12-14). He then denied that any incident occurred on September 19, 2020 resulting in his inability to work. Rather, he testified, he was just being "jarred around" at work and there were fewer and fewer days he felt that he could actually work. (10/12/21 Hrg. Tr. pp. 74-75, ll. 18-5).

- Mr. KB[Redated] confirmed that since September 19, 2020 was

[1] The ALJ took administrative notice that both July 18, 2020 and September 19, 2020 were Saturdays. (10/12/21 Hrg. Tr. p. 121, ll. 8-11)

a Saturday, Claimant was not scheduled to work that day. (10/12/21 Hrg. Tr. p. 104, ll. 19-23). Mr. KB[Redated] further testified that Claimant was scheduled to work on September 20, 2020 but did not come to work that day. (10/12/21 Hrg. Tr. pp. 104-105, ll. 24-3). Instead, Mr. KB[Redated] testified, he received Claimant's text message stating that he had "jacked [his] back up pretty good yesterday", after which he called Claimant to check on him. Mr. KB[Redated] spoke to Claimant on September 20, 2020 after receiving the aforementioned text message. Mr. KB[Redated] testified that during their September 20, 2020 conversation, Claimant advised him that he had tripped on a sidewalk and hurt his back. (10/12/21 Hrg. Tr. p. 105, ll. 4-25; pp. 106-107, ll. 15-4).

- Mr. KB[Redated] testified that Claimant was also scheduled to work on September 21, 2020. (10/12/21 Hrg. Tr. p. 107, ll. 5-7). Mr. KB[Redated] testified that he called Claimant again on September 21, 2020 to see how his back was doing. According to Mr. KB[Redated], Claimant advised him that his back was still hurting and that he did not know when he would be able to come in to work. (10/12/21 Hrg. Tr. p. 107, ll. 8-21). Mr. KB[Redated] testified that he then advised Claimant that since they were at the end of the season and the weather was changing, he could exercise the option of taking his lay off, so that he would not have to come to work with a sore back. (10/12/21 Hrg. Tr. p. 107-108, ll. 22-2). The time records and unemployment compensation form support Mr. KB[Redated] recollection that the last day Claimant actually worked for Respondent-Employer was September 18, 2020, the day before the Saturday (September 19, 2020) when Claimant tripped over a sidewalk and "jacked" up his back. (Resp's Exh. C, pp. 11, 22) (10/12/21 Hrg. Tr. p. 108, ll. 3-6). Mr. KB[Redated] testified that Claimant's early lay off had nothing to do with the July 16, 2020 tractor incident, but rather was due to the back injury that occurred on September 19, 2020 on Claimant's day off when he tripped on the sidewalk. (10/12/21 Hrg. Tr. p. 122, ll. 3-23).

10. Mr. KB[Redated] testified that, up through the time that Claimant left his employment at the ranch, he never said anything to about having suffered a back injury as a result of the July 16, 2020 tractor incident. Moreover, he testified that he never observed Claimant demonstrate any signs consistent with having back problems following that incident. (10/12/21 Hrg. Tr. p. 108, ll. 9-19; p. 111, ll. 6-10). Mr. KB[Redated] also testified that, *other than in connection with the September 19, 2020 injury that occurred on his day off*, Claimant did not request any time off work because of problems with his back. (10/12/21 Hrg. Tr. p. 108, ll. 20-23). Mr. KB[Redated] testified that he did not become aware that Claimant was alleging to have sustained an

injury to his back as a result of the July 16, 2020 tractor incident until Claimant filed the "lawsuit" regarding this claim, weeks after all the seasonal employees had been laid off. (10/12/21 Hrg. Tr. p. 111, ll. 11-22).

11. The evidence presented, including Claimant's time records, persuades the ALJ that Mr. KB[Redated]' testimony regarding Claimant's work schedule and ability to work after the July 16, 2020 tractor incident is more credible and persuasive than the testimony of Claimant.

12. Regarding the occurrence of the July 16, 2020 tractor incident, Mr. KB[Redated] testified that he learned of the incident soon after it had happened when another employee who worked directly under him texted him about it. (10/12/21 Hrg. Tr. p. 95, ll. 1-8). Mr. KB[Redated] testified that, although he was scheduled to be off that day, he went in to work to check everything out. Mr. KB[Redated] testified that he went straight to where the tractor was where he met with and spoke to Claimant. (10/12/21 Hrg. Tr. pp. 95-96, ll. 9-3). Mr. KB[Redated] testified that first he asked Claimant if he was okay and Claimant responded that he was fine, albeit a little embarrassed. Claimant did not say anything about having injured his back. (10/12/21 Hrg. Tr. p. 96, ll. 4-12). Mr. KB[Redated] further testified that during this conversation, he discussed with Claimant what happened to cause the tractor to go into the ditch. According to Mr. KB[Redated] , Claimant told him that a fox or a dog ran out in front of him, causing him to swerve to the side of the road and into the ditch. (10/12/21 Hrg. Tr. p. 96, ll. 18-22).

13. Mr. KB[Redated] testified that he did not believe that this is what happened. Mr. KB[Redated] testified that coming from the middle of the road, it would have taken quite a bit of speed in order for someone to jerk the wheel and move the tractor as far off the road as it was positioned when he arrived on scene. (10/12/21 Hrg. Tr. pp. 98-99, ll. 17-8). Mr. KB[Redated] testified that based on the tracks in the dirt, it appeared that Claimant had driven straight off the road onto the side of the embankment, rather than having swerved to avoid an animal running in front of the tractor. (10/12/21 Hrg. Tr. p. 100, ll. 4-16) Mr. KB[Redated] further testified that, based on the position of the tractor and attached mower and what he observed at the scene of the accident, it appeared that Claimant had high centered the mower on the side of the roadway, and that this would not have jarred him at all. (10/12/21 Hrg. Tr. p. 111, ll. 14-17). Mr. KB[Redated] testified that later that day he asked Claimant again about the tractor incident, and Claimant maintained his explanation that a fox/dog ran out and caused him to swerve into the ditch. (10/12/21 Hrg. Tr. pp. 101-102, ll. 18-5)

14. Mr. KB[Redated] testified that on July 19, 2020, Claimant confessed to him that contrary to his earlier indication, no fox or dog had run in front of the tractor causing him to swerve onto the side of the ditch. Rather, Mr. KB[Redated] testified that Claimant admitted that he had simply not been paying attention and had just driven off the road. (10/12/21 Hrg. Tr. pp. 102-103, ll. 19-3; pp. 120-121, ll. 18-3). Nonetheless, Mr. KB[Redated] testified that Claimant did not report any injury to his back and did not request an opportunity to see a doctor at that time. (10/12/21 Hrg. Tr. p. 103, ll. 4-9). Based upon the position of the tractor in the pictures admitted into evidence, the ALJ

credits the testimony of Mr. KB[Redated] to find that Claimant probably simply drifted to the side of the road toward the ditch and when the mower made contact with the ground and high centered, Claimant shut the tractor down. Indeed, it does not appear from the pictures that the tractor abruptly swerved off the roadway into the ditch. The tractor is not actually in the ditch. Rather, it is positioned on the side of the embankment with its nose and wheels parallel to the roadway. (Clmt's Exh. 1-2). Based upon the totality of the evidence presented, the ALJ is not convinced that a four-legged animal darted in front of Claimant's tractor causing him to suddenly and unexpectedly to swerve into the ditch.

15. As noted above, Claimant had been evaluated at Comprehensive Pain Specialists shortly after the July 16, 2020 incident where he was evaluated by PA-C Viehman on August 8, 2020 and August 31, 2020. Claimant followed up with PA-C Viehman on December 8, 2020. During this encounter, PA-C Viehman noted that Claimant had just finished putting up the Christmas tree and decorations and was now having increased back pain. PA-C Viehman further noted that Claimant was planning to see spinal surgeon Dr. Lloyd Mobley after January 1 to discuss the next steps for surgery, as he would be having a change in his insurance plan. (Resp's Exh. G, pp. 105-111)

16. Claimant was evaluated by Dr. Mobley on January 14, 2021, during which appointment; Claimant reported that he had been having "severe difficulty with low back pain over the past year." (Resp's. Exh. F, p. 81). Dr. Mobley did not document a cause for Claimant's back pain other than to indicate that he "has a history of lumbar fusion L4-S1", has adjacent level disease at L3-4, and requires a lumbar fusion (Id.) Despite an exhaustive review of Dr. Mobley's January 14, 2021 report, the ALJ is unable to find any indication that Claimant's need for additional treatment, including the recommended L3-4 fusion, is related to an alleged July 16, 2020 injury after driving a tractor off the side of the road.

17. Claimant testified resolutely that, during the 2-3 years immediately preceding the July 16, 2020 tractor incident, no doctor had recommended additional back surgery, and he did not intend to undertake further surgery to his low back. (10/12/21 Hrg. Tr. p. 41, ll. 7-16; p. 42, ll. 4-18; p. 54, ll. 19-23; p. 69, ll. 5-7; p. 81, ll. 11-20). In this case, Claimant asserts that his disability and need for additional treatment/surgery was precipitated by jarring he experienced when he drove Respondent's tractor onto the side of the ditch on July 16, 2020. The ALJ finds Claimant's inference unconvincing. By report dated May 27, 2020 (approximately 7 weeks before the July 16, 2020 tractor incident), Dr. Mobley noted that Claimant had been having left lower back pain at about L4-5 or L3-4 and that it started after a car accident in February of 2019. (Resp's Exh. F, p. 89). Dr. Mobley further opined that Claimant had adjacent level degeneration at L3-4 for which he recommended a lumbar fusion at L3-4. Dr. Mobley noted that Claimant wished to consider undergoing such intervention but would not be able to proceed until the winter. (Resp's Exh. F, p. 90). The fact that Claimant had been diagnosed with adjacent level disease in May 2020 for which surgical correction had been recommended severely undermines his claim that

the need for this surgery is causally related to the July 16, 2020 tractor incident.

18. Claimant underwent an additional two part lumbar spinal surgery as performed by Dr. Mobley on March 1 and 3, 2021. The specific procedures performed were an anterior/posterior lumbar internal fixation and fusion at L3-4. (Resp's Hrg. Exh. F, pp. 73, 76).

19. Respondent sought the opinions of Dr. Timothy O'Brien as to whether Claimant's need for spinal surgery, as performed March 1st and 3rd was causally related to the July 16, 2020 tractor incident. Dr. Timothy O'Brien conducted an independent medical examination (IME) on July 16, 2021 and issued a report outlining his findings/opinions on September 17, 2021. (Resp's Exh. D).

20. As part of his IME, Dr. O'Brien performed a physical examination. He also completed a records review wherein he reviewed medical and imaging reports dating back to 2009. At the conclusion of his IME, Dr. O'Brien opined that Claimant did not suffer a work related injury as a consequence of driving his tractor into the ditch on July 16, 2020. Because there was a complete absence in the record of any historical input documenting that an injury occurred on July 16, 2020, which stood in sharp contrast to Claimant's consistent habit of reporting all prior injuries/symptoms involving the low back, Dr. O'Brien opined that it was virtually medically impossible that a low back injury occurred on July 16, 2020. (Resp's. Exh. D, p. 434).

21. Dr. O'Brien also opined that Claimant's pain score of 9/10 on July 7, 2020 (9 days before his alleged injury) versus his 9/10 pain score on August 4, 2020, approximately 3 weeks after his alleged July 16, 2020 injury supported a conclusion that he had no increase in his pain levels, which underscored the fact that Claimant did not injure himself at work on July 16, 2020. (Resp's. Exh. D, p. 43).

22. Dr. O'Brien also noted that there were no changes in Claimant's imaging studies obtained prior to and following the alleged July 16, 2020 injury. According to Dr. O'Brien, the absence of additional new radiographic findings serves to support a conclusion that no injury occurred on July 16, 2020. (Resp's. Exh. D, pp. 43-44).

23. Finally, Dr. O'Brien opined that secondary gain issues were driving Claimant's reports of increased low back pain following the July 16, 2020 tractor incident. According to Dr. O'Brien, Claimant was likely magnifying his pain in an effort to continue to obtain opioid pain medication. Dr. O'Brien went so far has to opine that Claimant was a narcotic drug seeker and had a history of "fabricating or manufacturing pain in order to 'seek more narcotics.'" (Resp's. Exh. D, p. 45). Accordingly, Dr. O'Brien questioned the reliability of Claimant's history and exam performance.

24. Dr. O'Brien also testified at hearing as a board certified, Level II Accredited retired orthopedic surgeon. Dr. O'Brien maintains a forensic practice only; he does not treat patients nor does he perform surgery. Dr. O'Brien testified consistently with his September 17, 2021 IME report. He testified that, although he reviewed "many

thousands" of pages of medical records as part of his IME, he did not outline every single medical record reviewed in his IME report. (11/4/21 Hrg. Tr. p. 26, ll. 7-15). Dr. O'Brien testified that Claimant's medical records reflect an extensive history of low back issues, including chronic pain and multiple treatments and surgeries, prior to July 16, 2020. (11/4/21 Hrg. Tr. p. 27, ll. 15-23). Dr. O'Brien testified that a December 20, 2011 ER report documents not only that Claimant sustained an injury to his low back while lifting a transmission the day before, but also that Claimant had spinal arthritis that had been symptomatic prior to this date. (Resp's Exh. O, pp. 482-489) (11/4/21 Hrg. Tr. pp. 28-29, ll. 11-12). In addition to the December 2011 transmission injury, Dr. O'Brien testified, that the medical records reflect numerous claimed back injuries, as well as episodes of increased back pain without specific injury, prior to July 16, 2020. (11/4/21 Hrg. Tr. p. 29, ll. 13-23).

25. Regarding Claimant's prior low back surgeries, Dr. O'Brien testified that the medical records reflect that he underwent the following procedures prior to July 16, 2020:

- February 7, 2012 - diskectomy and decompression at L4-5 by Dr. Ghiselli (Resp's Exh. N, pp. 293-295) (11/4/21 Hrg. Tr. pp. 35-37, ll. 25-19);

- July 20, 2012 – decompression and fusion at L4-5 by Dr. Jamrich, based on Dr. Jamrich's belief that the previous diskectomy and decompression at L4-5 had failed (Resp's Exh. N, pp. 293-294) (11/4/21 Hrg. Tr. p. 37, ll. 20-25; p. 38, ll. 16-24);

- November 12, 2014 – revision and extension of fusion at L4-5 and L5-S1 by Dr. Kuklo, based on Dr. Kuklo's assessment that there was a non-union of bone from L4-5 and a stenosis or constriction of the spinal elements around the spinal cord at the level of the cauda equina and the nerve roots at that level, causing ongoing radiculopathy (Resp's Exh. J, p. 243) (11/4/21 Hrg. Tr. pp. 39-40, ll. 1-7);

- October 12, 2016 – revision posterior arthrodesis/fusion at L4-S1 augmented with an anterior arthrodesis at those levels by Drs. Schoeff and Syre, due to an ongoing failure to heal at L4-5 and L5-S1 (Resp's Exh. J, pp. 239-242) (11/4/21 Hrg. Tr. pp. 40-41, ll. 8-15);

- January 15, 2018 – spinal cord stimulator implant by Dr. Mobley to try to relieve ongoing pain at the L4-S1 levels (Resp's Exh. O, pp. 300-301) (11/4/21 Hrg. Tr. pp. 41-42, ll. 19-23);

- December 26, 2018 – removal of spinal cord stimulator by Dr.

Mobley due to malfunctioning with shocking pains (Resp's Exh. O, pp. 296-297) (11/4/21 Hrg. Tr. pp. 42-43, ll. 24-25).

26. Dr. O'Brien testified that, based on what he saw in the medical records, there was never a period of time between 2012 and July 16, 2020 when Claimant did not have ongoing back pain and other symptoms, or when Claimant had stopped treating his low back pain. Rather, Dr. O'Brien testified, Claimant had a chronic condition that was unrelenting and has never let up since it started. (11/4/21 Hrg. Tr. pp. 44-45, ll. 19-6).

27. Regarding Claimant's reporting an "immediate" onset of pain following the July 16, 2020 tractor incident; Dr. O'Brien testified that this would not necessarily mean that any trauma or injury occurred at that time. Rather, Dr. O'Brien testified, within the backdrop of an extensive arthritic condition in the spine, an increase in pain could simply be the manifestation of an underlying condition, similar to when Claimant has pain when getting out of bed or when arising from a seated position.[2] (11/4/21 Hrg. Tr. pp. 83-85, ll. 21-1)

28. Dr. O'Brien testified regarding May 27, 2020 clinical note of Dr. Mobley. (Resp's Exh. F, pp. 87-90) Regarding Dr. Mobley's notation that Claimant was post-op fusion L4-5, L5-S1 "with good results", Dr. O'Brien testified that this could mean that the fusion had finally consolidated, such that there was a solid column of bone from L4-S1. Alternatively, Dr. O'Brien testified, the reference to "good results" could mean that there was pain relief. (11/4/21 Hrg. Tr. pp. 45-46, ll. 7-10). As it pertains to Claimant's situation, Dr. O'Brien questioned whether the reference was intended to indicate pain relief because Dr. Mobley wrote that Claimant had adjacent level degeneration at L3-4, which appeared to be indicating that there were still ongoing symptoms emanating from that spinal level. In addition, a spinal cord stimulator, which had been placed to relieve pain, had failed and had been removed. Consequently, Dr. O'Brien testified, he interpreted the reference to "good results" to indicate that there was solid arthrodesis but ongoing symptomatology. (11/4/21 Hrg. Tr. p. 46, ll. 10-17).

29. Regarding Dr. Mobley's assessment in his May 27, 2020 report of adjacent level degeneration at L3-4 (Resp's Exh. F, p. 90), Dr. O'Brien explained that this was the level above the prior fusion mass, and that Dr. Mobley was indicating that this level has gone on to degeneration. (11/4/21 Hrg. Tr. p. 47, ll. 14-16). Dr. O'Brien testified that this degeneration was expected and happens almost 100% of the time, because the removal of two motion segments – at L4-5 and L5-S1 – creates incredible stress above and below the fusion mass, causing the segments that remain mobile to have to do more work since the fused segments are no longer contributing. (11/4/21 Hrg. Tr. pp. 46-47, ll. 18-17). Dr. O'Brien also testified that in addition to stating that the L3-4 level had degenerated, Dr. Mobley was indicating that this level was causing symptoms leading to the recommendation for a L3-4 fusion to treat those symptoms. (11/4/21 Hrg. Tr. p. 47, ll. 17-20).

[2] Consistent with Dr. O'Brien's testimony, Claimant reported to PA-C Viehman on July 7, 2020, that moving aggravated his pain and that getting up and off the tractor caused pain. (Resp's Exh. G, p. 143)

30. As referenced, Claimant was seen at Dr. Drennan's office (Comprehensive Pain Specialists) on July 7, 2020, and again on August 4, 2020, i.e. 9 days *prior to* and 19 days *after* the July 16, 2020 tractor incident, respectively. (Resp's Exh. G, pp. 134-140, 140-145). When asked to compare Claimant's reported back symptoms on these two dates, Dr. O'Brien testified (as he had alluded to in his September 17, 2021 IME report), that the reports are identical, not only in terms of the pain score and reported level of pain, but also in terms of the characterization of where the pain is and where it goes. (Resp's Exh. G, pp. 138 and 143) (11/4/21 Hrg. Tr. pp. 52-53, ll. 17-18; p. 54, ll. 3-14; p. 81, ll. 20-25; p. 100, ll. 4-13).

31. Dr. O'Brien also reviewed the findings referenced in the May 21, 2020 lumbar MRI report completed approximately *3 ½ weeks prior to* the July 16, 2020 tractor incident with those of the September 30, 2020 lumbar MRI report completed approximately *9 ½ weeks after* the July 16, 2020 tractor incident. (Resp's Exh. P, pp. 490-491; pp. 493-494) Dr. O'Brien testified that the May 21, 2020 MRI report showed arthritis at nearly every level in the lumbar spine, post-surgical changes, ongoing disc protrusions, and facet arthropathy or facet degeneration. (11/4/21 Hrg. Tr. pp. 54-55, ll. 18-1) Dr. O'Brien testified that all the classic findings of spinal arthritis were present on this MRI, including disc bulging, annulus degeneration, and ligament and flavum degeneration. (11/4/21 Hrg. Tr. p. 55, ll. 20-22). In addition, Dr. O'Brien testified, the May 21, 2020 MRI report showed a retrolisthesis at L3-4 caused by that joint trying to compensate for the lack of motion at the fused levels at L4-S1. According to Dr. O'Brien, the L3-4 spinal segment was shifting on itself, or subluxating. (11/4/21 Hrg. Tr. p. 55, ll. 14-19).

32. When asked to compare the findings in the May 21, 2020 lumbar MRI report with those in the September 30, 2020 MRI report, Dr. O'Brien testified that the September 30, 2020 MRI showed the same post-surgical changes, the same arthritic changes, and was essentially saying the same things as the May 21, 2020 MRI report. (Resp's Exh. P, pp. 490-491; pp. 493-494) (11/4/21 Hrg. Tr. pp. 56-57, ll. 18-7). Dr. O'Brien testified that there were no significant changes noted in the September 30, 2020 lumbar MRI report as compared to the May 21, 2020 lumbar MRI report. (11/4/21 Hrg. Tr. p. 57, ll. 8-17). He testified further that the radiologist who interpreted the September 30, 2020 lumbar MRI expressly noted that he had a comparative study dated May 21, 2020, and that he used terms such as "similar to the prior study," "no significant interval change," and "retrolisthesis unchanged". Dr. O'Brien testified that this indicated that, when the radiologist was comparing the two studies and determining in his own mind whether something has changed, he opined that there was no significant change or no change at all. (11/4/21 Hrg. Tr. pp. 57-58, ll. 18-4).

33. On cross examination, Dr. O'Brien acknowledged that the September 30, 2020 MRI report used the language "broad based disc bulge" at L2-3 and L3-4, and that this particular terminology was not used in the May 21, 2020 MRI report. (11/4/21 Hrg. Tr. pp. 82-83, ll. 18-13). While he agreed that the September 30, 2020 MRI report used the term "broad based disc bulge", Dr. O'Brien did not agree that this meant that there was a change in Claimant's MRI between those two dates. (11/4/21 Hrg. Tr. p. 85, ll. 5-15).

Dr. O'Brien explained that there is no scientific definition for a disc bulge, and what one radiologist identifies as a disc bulge may be interpreted differently by another radiologist. (11/4/21 Hrg. Tr. p. 85, ll. 19-24). Moreover, Dr. O'Brien testified, in looking at the specific descriptions of the radiologists' findings in their MRI reports, the L2-3 disc bulge, the L3-4 disc bulge, and the mild bilateral foraminal impingement noted in the September 30, 2020 MRI report were all referenced in the May 21, 2020 MRI report, but stated in different words. Dr. O'Brien testified that the two radiologists were saying the same things with different nomenclature. (11/4/21 Hrg. Tr. p. pp. 100-102, ll. 23-9; pp. 107-108, ll. 9-12). Further, Dr. O'Brien testified, it was known from the September 30, 2020 MRI report that the radiologist had the May 21, 2020 MRI for comparison and in his mind found the two MRI studies to be similar or identical with no significant changes. (11/4/21 Hrg. Tr. p. 102, ll. 10-20). Dr. O'Brien testified that there were so many references in the September 30, 2020 MRI report to "no change" that, despite the use of different terminology, he believed the radiologists were seeing the same thing, and that if there were significant interval changes in the MRI's, those changes would have been referenced. (11/4/21 Hrg. Tr. p. 108, ll. 15-19).

34. The ALJ has carefully reviewed the MRI's reports in question and notes that the May 21, 2020 MRI references the following:

- L2-3: There is retrolisthesis measuring 4 mm. Central posterolateral, and foraminal protrusions and osteophytes are seen. There are also far lateral protrusions and osteophytes.

- L3-4: Thickening of the ligamentum flavum is present. There is retrolisthesis measuring 5 mm. A central, posterolateral, foraminal, and far lateral protrusion and osteophyte is identified. There is moderate left and mild right lateral recess narrowing. There is mild right and moderate left foraminal narrowing.

* * *

- IMPRESSION:

  2. There is retrolisthesis at L2-3 and L3-4.

  3. There are protrusions and osteophytes at the L2-3 and L3-4 segments. (Resp's. Exh. P, pp. 493-494).

35. The ALJ has also carefully reviewed the remaining imaging studies and finds the MRI report from August 24, 2018, particularly relevant to the question of whether the disc bulging referenced at L2-3 and L3-4 in the September 30, 2020 MRI represents an new finding and thus an interval change in the extent of pathology in Claimant's lumbar spine following the July 16, 2020 tractor incident. The August 24, 2018 MRI indicates that there is a "mild disc bulge" at L2-3 and L3-4. (Resp's. Exh. P, p. 498). Consequently,

there was objective evidence of disc bulging at L2-3 and L3-4 prior to Claimant's July 16, 2020 tractor incident and September 30, 2020 MRI. Based upon the imaging study reports the ALJ is sufficiently persuaded that the broad based disc bulging observed on the September 30, 2020 MRI is probably not a new finding. Indeed, it is likely that such bulging has been present since August 2018. While the May 21, 2020 MRI does not use the term "bulge", it does reference that there are "protrusions" at L2-3 and L3-4. Given the MRI findings of bulging at L2-3 and L3-4 on August 24, 2018 and September 30, 2020, the ALJ is convinced that the reference to "protrusions" at these levels in the May 21, 2020 MRI is describing similar pathology, i.e. bulges with different terminology. Accordingly, the ALJ is not convinced that the July 16, 2020 tractor accident caused new pathology in the lumbar spine, which gave rise to Claimant's disability and need for medical treatment, including the staged L3-4 fusion surgery performed by Dr. Mobley.

36.. Dr. O'Brien testified that the surgery Dr. Mobley recommended in his May 27, 2020 report consisted of the procedures he actually performed on March 1 and 3, 2021. (Resp's Exh. F, p. 90) (11/4/21 Hrg. Tr. p. 61, ll. 7-18). Dr. O'Brien further testified that the fact that the surgery had been recommended before the July 16, 2020 tractor incident occurred indicates that Dr. Mobley felt that all surgical indications – including the arthritis, the adjacent level degeneration, and the symptoms – existed in May 2020, prior to the July 16, 2020 incident. (11/4/21 Hrg. Tr. pp. 61-62, ll. 19-4). The ALJ credits the reports of Dr. Mobley and the testimony of Dr. O'Brien to find that, because all surgical indications existed as of May 27, 2020, it is improbable that the July 16, 2020 tractor incident aggravated, accelerated, or combined with Claimant's pre-existing low back condition causing his need for surgical intervention. To the contrary, the evidence presented supports a reasonable inference that Claimant's need for treatment/surgery was pre-existing and related to the natural and probable progression of a degenerative condition in his lumbar spine, which was significantly symptomatic in the weeks leading up to the July 16, 2020 tractor incident. Indeed, Claimant's condition had become so symptomatic by May 27, 2020 that Dr. Mobley recommended surgical correction to cure and relieve him of his ongoing pain.

37. Dr. O'Brien testified that Claimant's medical records show that, historically, he takes care of his pain when it occurs, whether due to a manifestation of his underlying arthritis or due to a new injury. He does not delay in reporting things and he does not delay in seeking medical attention. Rather, Dr. O'Brien testified, based on the medical records, Claimant either urgently or emergently gets care when he notes back pain that he feels is new or increased above his baseline. (11/4/21 Hrg. Tr. p. 49, ll. 19-23; p. 50, ll. 10-14). Furthermore, Dr. O'Brien testified that the medical records reflect that Claimant was seen at Dr. Drennan's office on August 4, 2020, and that there is no indication in this report, either historically or in the providers assessment, that there was an injury which had occurred on July 16, 2020. (Resp's Exh. D, pp. 134-40) (11/4/21 Hrg. Tr. pp. 50-52, ll. 15-16). Dr. O'Brien testified that Dr. Drennan and his physician assistants have, on numerous occasions, discussed Claimant's waxing and waning pain and the etiology of that pain, whether a manifestation, a minor injury or a more substantial injury. (11/4/21 Hrg. Tr. p. 92, ll. 19-23). Dr. O'Brien testified that Dr. Drennan and the providers in his office have proven to be meticulous and detailed historical recorders of facts, such that he

believed that if Claimant had reported an injury from the July 16, 2020 tractor incident, Dr. Drennan would not have failed to record it. (11/4/21 Hrg. Tr. pp. 92-93, ll. 23-3; p. 97, ll. 11-23). Based upon the evidence presented as a whole, the ALJ finds no record support to medical evidence to buttress Claimant's assertion that he sought treatment in connection with a back injury that occurred as a result of the July 16, 2020 tractor incident, or as found that he reported this incident to any of his medical providers.

38. Dr. O'Brien testified about his concerns regarding evidence of Claimant's addiction, drug-seeking behavior and secondary gain motives. Similar to other secondary gain situations, Dr. O'Brien testified, the needs caused by an addiction to narcotics can alter the way an injured person interacts in the workers' compensation system. (11/4/21 Hrg. Tr. pp. 65-66, ll. 4-3). Regarding the information in the medical records that indicated a history of addiction and drug-seeking behavior, Dr. O'Brien noted that there was documentation that Claimant had been fired from pain clinics and from orthopedic clinics because of addiction and drug-seeking behavior. (11/4/21 Hrg. Tr. pp. 66-67, ll. 24-14). Dr. O'Brien testified that there were many references in the records by a number of practitioners indicating that Claimant had a history of addiction, withdrawal, narcotic dependency, drug-seeking behavior, and conversion disorders. (11/4/21 Hrg. Tr. p. 67, ll. 15-20). Further, Dr. O'Brien noted, Claimant remained on narcotics and by definition is still addicted. Dr. O'Brien testified that the definition of addiction is whether a person has withdrawal symptoms if the substance is removed. Dr. O'Brien testified that Claimant's earlier medical records document previous episodes of withdrawal, and he would continue to have withdrawal symptoms right now as he has been on narcotics too long and his body has become too dependent. (11/4/21 Hrg. Tr. pp. 95-96, ll. 25-16).

39. Claimant does not dispute that due to his preexisting back injury he is prescribed and uses opioid medications to control his pain. Claimant testified he was taking pain medication during the year prior to the incident and this pain medication was prescribed by Dr. Drennan. (10/21/21 Hr. Tr. p. 48). Claimant testified he was taking 20-milligrams of oxycodone and Dr. Drennan is his pain management physician. (Id.) Careful review of Claimant's records from Comprehensive Pain Specialists fails to establish that Claimant in anyway is using the opioid pain medications prescribed to him inappropriately or improperly. (Resp's. Exh. G). To the contrary the records indicate Claimant has been utilizing the prescription medications as he has been directed to by his treating pain management physician. There is no reference in the records from Comprehensive Pain Specialists of drug seeking behavior or in the records of any other post July 16, 2020 medical provider. The only reference to the potential for the over use of narcotic medication was one note over five years prior to the July 16, 2020 injury, a fact which Dr. O'Brien admitted during his cross-examination.

40. Based upon the evidence presented, the ALJ agrees with Claimant that the stated concern surrounding Claimant's continued use of opioid medications to support Dr. O'Brien's claim of secondary gain constitutes a "Red Herring" in this case. The evidence presented fails to support a finding that Claimant filed his claim so he could continue to obtain opioid medication. While Dr. O'Brien concludes that secondary gain is playing a role in this case, the ALJ finds a dearth of evidence to support the

suggestion. Indeed, Claimant was already receiving narcotics for his admitted and well-documented low back problems prior to the July 16, 2020 tractor accident. Absent evidence of excessive use or diversion, the ALJ finds that Claimant probably would continue to receive opioids from his pain specialist providers removing the specter that fabrication of symptoms is at play here. Absent evidence of excessive medication use or misappropriation to support a conclusion that Claimant is magnifying his pain to secure additional opioid medication, the ALJ is disinclined to accept Dr. O'Brien's conclusion as anything other than his personal belief that Claimant is a drug seeker. The ALJ finds Dr. O'Brien's opinions/theories concerning the presence of secondary gain in this case gratuitous and irrelevant given the volume of other objective medical evidence that more persuasively establishes the probable cause of Claimant's increasing low back pain.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

The Alleged Mechanism of Injury (MOI) and Claimant's Credibility

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

draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. Here, a question exists regarding whether the MOI described by Claimant may be causative of his alleged increased pain and findings demonstrated on the September 30, 2020 MRI. As presented, the evidence establishes that Claimant most likely drifted off the edge of the road while driving tractor on July 16, 2020. The ALJ credits the testimony of Mr. KB[Redated] to conclude it unlikely that Claimant was jarred or tossed about violently in the cab of the tractor causing an increase in his symptoms based on the position of the tractor in the pictures admitted into evidence. Indeed, the medical records are devoid of any mention or indication that Claimant told any of his medical providers about the July 16, 2020 tractor incident, much less reporting that he sustained a back injury as a consequence of being tossed about inside the cab when he traveled toward the ditch. To the contrary, the report from PA-C Viehman dated August 31, 2020, approximately 2 weeks after the incident in question, indicates that Claimant continued to enjoy his work riding around the fields on an ATV. Consequently, the ALJ is not convinced that Claimant suffered debilitating pain as a consequence of the July 16, 2020 incident when the tractor in question drifted off the road.

E. Furthermore and as found, Claimant's testimony was contradicted a number of times throughout the hearing and he called his own credibility into question when he confessed that he did not swerve off the road to avoid a four legged animal and when he changed his testimony regarding tripping on a sidewalk on September 19, 2020. Such inconsistences and lack of candor cannot be reconciled with the balance of the competing evidence nor ignored by the court. Accordingly, the ALJ concludes that Claimant's testimony regarding the events he asserts caused a low back injury are unreliable and unpersuasive. Given the totality of the evidence presented, the ALJ agrees with Respondents to find/conclude that Claimant probably did not suffer an injury during the July 16, 2020 tractor incident.

Compensability

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

G. The phrases "arising out of" and "in the course of" are not synonymous

and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury." An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). In this case, the following evidence supports the conclusion that Claimant failed to prove he suffered a compensable injury:

- Mr. KB[Redated] , Claimant's former supervisor, testified that Claimant advised him that he was fine and that at no time did Claimant ever indicate to him that he had injured his back or that he was in need of medical treatment for a back injury from the July 16, 2020 incident.

- The medical records are devoid of any mention or indication that Claimant told any of his medical providers about the July 16, 2020 tractor incident, much less reporting that he sustained a back injury as a result. To the contrary, according to a report

from PA Viehman dated August 31, 2020, Claimant reported that he was enjoying his work riding around the fields in an ATV.

- There is no credible evidence to indicate that any medical treatment was sought or necessitated as a result of the July 16, 2020 tractor incident. The medical records document that Claimant has a history of readily and expediently seeking treatment after experiencing a significant increase in his back pain, whether due to an injury such as a fall or due to a minor incident such as twisting while shopping at a grocery store. In stark contrast to this pattern of behavior, Claimant did not seek any treatment for several weeks following the July 16, 2020 incident. When he did seek treatment, he saw the same providers that he had been seeing prior to July 16, 2020 for routine follow up visits with no mention of the July 16, 2020 tractor incident. While Claimant did undergo an L3-4 fusion surgery by Dr. Mobley on March 1 and 3, 2021, Dr. Mobley had already recommended this surgery on May 27, 2020, approximately seven weeks before the July 16, 2020 tractor incident even occurred. At that time, Dr. Mobley noted that Claimant would not be able to proceed with the surgery until the winter. In a December 8, 2020 report, PA Viehman in Dr. Drennan's office noted that Claimant was planning to see Dr. Mobley after January 1 to discuss the next steps for surgery, as he will have a change in his insurance plan. The need for the the L3-4 fusion, and Claimant's decision to undergo the surgery at the time that he did, bear no causal relation to the July 16, 2020 tractor incident.

- As Dr. O'Brien explained, and as evidenced by the findings described and the language used by the radiologist in the September 30, 2020 lumbar MRI report, the September 30, 2020 lumbar MRI demonstrated no change compared to the May 21, 2020 lumbar MRI.
-
- Claimant's subjective symptom report was also unchanged on August 4, 2020 as compared to July 7, 2020, based on the medical records from Dr. Drennan's office.

J. Not only does the evidence outlined above support the conclusion that no compensable injury occurred as a result of the July 16, 2020 tractor incident, this evidence also supports the conclusion that Claimant's employment related duties did not aggravate, accelerate or combine with his pre-existing low back condition so as to cause a disability or need for any treatment. Rather, the evidence presented supports a conclusion that Claimant's ongoing pain and subsequent need for treatment, including

surgery was, more probably than not, related to the natural progression of a chronic pre-existing degenerative condition in Claimant's lumbar spine.

K. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

L. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted by Respondents, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found, the ALJ credits the opinions of medical records of Dr. Mobley and the testimony of Dr. O'Brien to find and conclude that Claimant's low back pain/dysfunction, more probably than not, is related to and emanating from the natural progression of a pre-existing condition rather than the duties of his employment. Accordingly, Claimant has failed to establish the requisite causal connection between his alleged injury and his work activities. Because Claimant has failed to establish he suffered a compensable injury, his claim must be denied and dismissed. Consequently, his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

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

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

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

DATED: January 7, 2022

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-169-895-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery and post-surgical therapy and medications were reasonably necessary to cure or relieve the effects of an industrial injury.

2. Whether Respondents are responsible for payment and/or reimbursement of medical expenses associated with the surgery.

FINDINGS OF FACT

1. On January 27, 2021, Claimant sustained an admitted injury to his right shoulder arising out of the course of his employment with Employer.

2. Claimant's injury occurred when he was moving a sheet of plate steel that had fallen from the bed of his work truck. Claimant lifted the steel, slipped on ice, and felt a sensation in his right shoulder. Claimant reported the incident to Employer on January 27, 2021. The record is insufficient to determine if Claimant indicated he wished to seek medical care, or if Respondents provided Claimant with a list of designated physicians at this time, although Claimant testified that no list was provided.

3. On February 3, 2021, Claimant went to UCHealth Family Medical Clinic for evaluation of his right shoulder. Claimant initially denied his injury was work-related, but accurately described his mechanism of injury. Claimant had decreased range of motion of the right shoulder, with pain on raising the arm higher than 60 degrees abduction or forward flexion, tenderness in the anterior deltoid and decreased strength. Claimant was diagnosed with a right shoulder injury and referred to the Orthopedic Center of the Rockies for further evaluation. (Ex. M).

4. On February 16, 2021, Claimant saw Jeffrey Ebel, D.O., at the Orthopaedic & Spine Center of the Rockies (OCR). Claimant reported he was initially seen by his primary care physician. After examining Claimant, Dr. Ebel recommended a right shoulder MRI, and noted that if Claimant were a candidate for surgical repair, he would be referred to one of the clinic's shoulder specialists. (Ex. 5, BS 400-401 & 411).

5. On February 17, 2021, Claimant underwent a right shoulder MRI at Loveland MRI, which showed "a massive rotator cuff tear with complete tearing of the supraspinatus and infraspinatus tendons," chronic degenerative tearing of the superior labrum, and several acromioclavicular joint arthrosis with joint space widening. (Ex. 3).

6. On March 2, 2021, Claimant saw Christopher Stockburger, M.D., at OCR, on referral from Dr. Ebel. Dr. Stockburger reviewed Claimant's x-rays and MRI study, and conducted an examination. He described Claimant's injury as a "large acute-on-chronic rotator cuff tear with some fatty infiltration and significant retraction," and noted that the

"majority of his joint is well preserved." He recommended surgery, to include a right shoulder arthroscopic rotator cuff repair, subacromial decompression, possible biceps tenotomy, and possible superior capsular reconstruction. (Ex. 5, BS 403-405). Claimant was initially scheduled to undergo surgery on March 18, 2021. (Ex. P, p. 62).

7. On March 16, 2021, Claimant informed Dr. Stockburger's office that his injury was work-related. Dr. Stockburger's office contacted Insurer and was advised that a worker's compensation claim had been filed that day. On March 16, 2021, Dr. Stockburger's office submitted a request for authorization of the surgery to Insurer. Insurer advised that Claimant had not seen an occupational medicine physician yet, and Dr. Stockburger's staff advised him to see a designated physician as soon as possible. (Ex. P, p. 62).

8. On March 19, 2021, Claimant saw Lori Long-Miller, M.D., at Concentra. Dr. Long-Miller was an authorized treating physician (ATP). Dr. Long-Miller examined Claimant and diagnosed a superior labrum anterior-to-posterior (SLAP) tear of the right shoulder, and a traumatic complete tear of the right rotator cuff. Claimant reported he had seen his primary car provider and "then ortho OCP." The ALJ infers OCP is a reference to Orthopaedic & Spine Center of the Rockies and the "ortho" referenced is Dr. Stockburger. Dr. Long-Miller noted that Claimant was initially scheduled for surgery on March 18, 2021 but Claimant's health insurer denied the claim because it was a work-related injury. Dr. Long-Miller indicated that Clamant needed a referral for surgery. In the WC 164 form Dr. Long-Miller completed, she noted that the "Treatment Plan" included only "Orthopedic specialist referral," and noted that the MMI date was unknown because of "surgery." She then referred Claimant to "OCR Ft. Collins" "to have surgery" and instructed Claimant to return 10 days after surgery or within 3 weeks. (Ex. 7). Dr. Long-Miller's referral to "OCR Ft. Collins" was a referral to Dr. Stockburger at the Orthopaedic & Spine Center of the Rockies.

9. On March 30, 2021, William Ciccone, M.D., conducted a medical record review at Insurer's request to opine on the reasonableness, necessity, and relatedness of the surgery requested by Dr. Stockburger. Based on his review of records, Dr. Ciccone opined that Claimant sustained a sprain/strain to the right shoulder and that his "rotator cuff tear is chronic, preexisting and is unrelated to the work event." Dr. Ciccone offered no persuasive rationale for this opinion, and did not address the Claimant's lack of prior symptoms. Dr. Ciccone's statement that "on 3/2/21 the orthopedist reviews the MRI scan and feels the claimant has a large chronic rotator cuff tear with fatty infiltration," is not an accurate characterization of Dr. Stockburger's 3/2/21 MRI review or his diagnosis. While Dr. Stockburger acknowledged that some of Claimant's pathology was chronic, he also indicated Claimant's rotator cuff tear was an "acute -on-chronic" injury, indicating that some portion of Claimant's pathology was acute. Dr. Ciccone also opined that the recommended surgery was not reasonable, necessary, or work-related, based on his opinion that Claimant's pathology was chronic. Dr. Ciccone's opinion regarding the Claimant's injury and the reasonableness, necessity and relatedness of the proposed surgery is not credible or persuasive. (Ex. A).

10. On April 7, 2021, Insurer notified Dr. Stockburger that authorization for surgery was denied based on Dr. Ciccone's opinion. (Ex. C)

11. On April 15, 2021, Claimant returned to Dr. Long-Miller. Dr. Long-Miller addressed Insurer's denial of surgical authorization as follows: "Pt reports surgery denied after ortho review of records, no pt interview or exam. Pt is very clear that he slipped and fell while moving plate and heard and felt shoulder pop on [date of injury]. Prior to injury no shoulder pain or problems or ROM difficulty. Regardless of any findings that ortho feels were pre-existing, this is an injury made worse by work related fall/injury and should therefore be covered." Dr. Long-Miller noted that Claimant was willing to participate in physical therapy and referred him for physical therapy. Dr. Long-Miller further noted "I feel that this is a work-related injury regardless of any chronic findings on MRI because pt reports no pain and full function prior to work fall." She again noted that Claimant was not at MMI because he required surgery. (Ex. 7).

12. Claimant returned to Dr. Long-Miller on April 22, 2021, at which time she noted that Claimant's condition was unchanged and that he was in constant pain. She noted that physical therapy gave a few hours of relief. Finally, Dr. Long-Miller indicated "this is a work-related injury, needs surgery." (Ex. 7).

13. On May 10, 2021, Insurer filed a General Admission of Liability admitting only for medical benefits. (Ex. A).

14. On May 19, 2021, Claimant returned to Dr. Stockburger. Dr. Stockburger described the findings on Claimant's MRI as follows: "He eventually had an MRI demonstrating a large[,] retracted tear with some proximal migration and some evidence of fatty infiltration consistent with some of this being chronic, but clearly had an acute injury at work with significant weakness." He noted that Claimant and done physical therapy, activity modification, anti-inflammatories and continued to have significant functional deficits with a massive rotator cuff tear in a young, health patient without significant arthritis, which I consider a major problem and he certainly is indicated for surgical intervention for this." Dr. Stockburger's impression was "acute-on-chronic massive rotator cuff tear with near pseudoparalysis on exam." Again, he reiterated that he believed surgery was reasonable. Claimant then decided to proceed with surgery. (Ex. 1).

15. On June 3, 2021, Dr. Stockburger performed surgery on Claimant's right shoulder. The procedures performed were a right shoulder rotator cuff repair, right shoulder biceps tenotomy and right shoulder acromia decompression. (Ex. 1).

16. At follow up visits, Dr. Stockburger indicated that Claimant was doing well with physical therapy at ProActive physical therapy, and that he was receiving therapy multiple times per week. (Ex. 1). By September 29, 2021, Dr. Stockburger noted that Claimant had weaned out of therapy and was progressing with strength and motion., with no major concerns. He was scheduled for a final follow up visit six weeks later, which would have occurred sometime in mid-November 2021. (Ex. 1).

17. Claimant credibly testified that before January 27, 2021, that he had no prior injuries to his right shoulder, and no prior shoulder treatment. Claimant's medical records from before January 27, 2021, show no prior injuries to Claimant's shoulder, although he did have some prior issues with pain radiating to his shoulder from a cervical spine injury. Claimant testified that on January 27, 2021, he felt a pop in his shoulder and felt immediate symptoms. Claimant also had difficulty raising his arm above his head. Claimant testified that after Insurer denied prior authorization for his surgery, he went to OCR for surgery, and that a claim was submitted to his personal insurer. He testified that after surgery, his shoulder rapidly improved. Following surgery, Claimant had twenty-two physical therapy visits until authorization by his personal health insurance expired. Claimant paid co-pays for physical therapy and surgery, and paid for medications. Claimant testified he would like to continue therapy if warranted.

CONCLUSIONS OF LAW

Generally

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

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

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). “The claimant bears the burden of proof to establish that a need for medical treatment was proximately caused by an injury arising out of and in the course of employment.” *In re Claim of Daniely*, W.C., No. 5-124-750 (ICAO, Feb. 26, 2021), citing 8-41-301(1), C.R.S,. and *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), “Further, treatment necessitated by an industrial aggravation or acceleration of a pre-existing condition is compensable.” *Id*. Whether medical treatment is reasonable and necessary is a question of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In addition to being “reasonable and necessary,” treatment must be “authorized.” “‘Authorization’ and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 (“authorized medical benefits” refers to legal authority of provider to deliver care). All treatment provided by an “authorized treating physician” is “authorized.” *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). “However, treatment is not compensable unless it is also ‘reasonable and necessary’ to cure or relieve the effects of the industrial injury.” *Id*.

An employer is liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm’n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not “authorized,” a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Claimant has established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery was reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant’s ATP, Dr. Miller, opined that Claimant “needs surgery” on his right shoulder and that the need for surgery was the result of his industrial injury. Further Dr. Stockburger also opined that the surgery was reasonable and necessary

and was the result of an "acute-on-chronic" injury. Dr. Ciccone's opinion that Claimant sustained only a strain/sprain of his right shoulder is not credible or persuasive. Given the fact that Claimant was asymptomatic and fully functional prior to his industrial injury, and experienced significant symptoms and limitations not relieved by conservative treatment, the ALJ concludes that the surgery was reasonable and necessary to cure or relieve the effects of Claimant's work injury. Moreover, the ALJ concludes that post-surgical therapy and medications were also reasonable and necessary to cure or relieve the effects of Claimant's work injury.

Respondents appear to argue that Claimant's surgery was not "authorized" for two reasons. First, that Dr. Stockburger was not an ATP, and second, that Insurer denied prior authorization under W.C.R.P. 16. The ALJ concludes that Dr. Stockburger was an "authorized treating provider" as of March 19, 2021, and therefore the treatment was "authorized." On that date, Dr. Miller referred Claimant to Dr. Stockburger for surgery. By virtue of this referral, Dr. Stockburger became an ATP. Thus, any treatment Dr. Stockburger provided after March 19, 2021 was "authorized."

That Claimant underwent surgery after Insurer's denial of prior authorization under W.C.R.P. 16 does not lead to a different conclusion. The purpose of "prior authorization" under W.C.R.P. Rule 16, is to "offer[] protection to the authorized treating physician from providing treatment which the insurer considers non-compensable. In the absence of pre-authorization, a treating physician's treatment expenses are not protected." *Repp, supra.* "However, nothing in [Rule 16] precludes a claimant from proving the disputed treatment is reasonable, necessary, and authorized at a subsequent evidentiary hearing." *Id*. Even where a physician fails to comply with Rule 16 and seek prior authorization for a procedure, a claimant is not precluded from having the issue of medical treatment adjudicated by an ALJ and obtaining an order which requires respondents to pay for treatment. *Arszman v. Target Corp.*, W.C. No. 4-798-406 (ICAO Dec. 15, 2011).

Because the June 3, 2021 surgery was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and Dr. Stockburger was an ATP within the chain of referral from Dr. Miller, Respondents are responsible for reimbursement of the surgery and post-surgical therapy. Pursuant to § 8-42-101(6)(a), C.R.S., Claimant, and his health insurer, are entitled to reimbursement for amounts paid for treatment rendered by Dr. Stockburger after March 19, 2021, Claimant's post-surgical therapy and post-surgical medications.

ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery and post-surgical therapy and medications were reasonably necessary to cure or relieve the effects of an industrial injury.

2. Respondents are responsible for payment and/or reimbursement of medical expenses associated with Claimant's June 3, 2021 surgery, including post-surgical therapy and medications.

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

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

DATED: January 7, 2022

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

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the left L5-S1 Artificial Disc Replacement (ADR) surgery requested by Stephen Pehler, M.D. is reasonable, necessary and causally related to his May 11, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is a 23 year old male who worked as a concrete finisher for Employer. On about May 11, 2020 Claimant was picking up a concrete form and dragging it over a grassy area at work. He lost his balance, stepped into a hole with his right foot and twisted his lumbar spine to the left side. He immediately experienced lower back pain.

2. Claimant continued to work for about one week before seeking medical treatment. On May 18, 2020 he visited Denver Health and reported that about one week earlier he had stepped into a hole and twisted. He immediately suffered lower back and left leg pain.

3. On May 21, 2020 Claimant visited Lutheran Medical Center. He reported left leg pain for the previous five days and worsening back pain for the past 10 days. Claimant was diagnosed with acute bilateral lower back pain with left-sided sciatica.

4. On May 27, 2020 Employer completed a First Report of Injury. Under the mechanism of injury section, Employer noted Claimant "stepped wrong." Claimant then began treatment at Workwell Occupational Medicine with Authorized Treating Physician (ATP) Brenden Matus, M.D.

5. On June 10, 2020 Claimant underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion mildly indenting the dural sac and markedly deforming the left S1 root sleeve. Dr. Matus referred Claimant for physical therapy and to Samuel Chan, M.D. Dr. Chan administered two sets of lumbar Epidural Steroid Injections (ESIs). Dr. Matus remarked that the ESIs provided a diagnostic response. On August 14, 2020 Dr. Matus referred Claimant to Stephen Pehler, M.D. for an orthopedic surgical evaluation.

6. Dr. Pehler reviewed Claimant's lumbar imaging. He noted that the x-rays revealed mild spondylosis and the MRI reflected a left-sided disc herniation at L5-S1 that compressed the descending S1 nerve root. Based on the failure of conservative care and the imaging findings, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

7. On November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. Dr. Pehler documented an extreme amount of pressure from the disc herniation that was causing severe compression of the descending S1 nerve root. He

also addressed a large disc herniation with an extruded fragment. Dr. Pehler testified that there were no complications during the surgery.

8. After his microdiscectomy, Claimant continued to receive treatment through Workwell. Claimant acknowledged that his lower back condition improved for about five months following surgery. The medical records support Claimant's account of his recovery. For example, on December 2, 2020 Claimant notified Maria Kaplan, PA-C at Dr. Pehler's office that overall he was doing quite well and had experienced significant relief of both his lower back and left lower extremity pain. By December 17, 2020 Dr. Chan noted Claimant was feeling much better and no longer using narcotics. On December 23, 2020 Dr. Matus reported Claimant's overall pain had improved with less frequent leg symptoms. He assigned work restrictions of "lift and carry 5 pounds max and only around waist/chest area. No lifting from ground level. Avoid repetitive bending, twisting or stooping at the waist. Wear back brace with activity."

9. On January 8, 2021 Dr. Matus reported Claimant was being weaned from his back brace, his pain level was 3/10 and his work restrictions were decreased. By January 29, 2021 Claimant's restrictions were reduced to the following: "[l]imit lift and carry 15 pounds max and only around waist/chest area. Avoid repetitive bending, twisting or stooping at the waist."

10. On February 8, 2021 Claimant returned to Dr. Pehler for an examination. Claimant reported that overall he was feeling well, with significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On February 9, 2021 Dr. Chan also remarked that Claimant was doing quite well with pain levels of 3/10.

11. On February 12, 2021 Claimant again visited Workwell for an evaluation. Teresa Ayandele, PA-C noted Dr. Pehler had removed Claimant's work restrictions. PA-C Ayandele advised Claimant to continue physical therapy and home exercises. She remarked that Claimant should follow-up in two weeks with the possible "transition to work conditioning." Although PA-C Ayandele had noted that Dr. Pehler removed Claimant's work restrictions, she stated that the limitations remained unchanged as follows: "[l]imit lift and carry 20 pounds max and only around waist/chest area. Avoid repetitive bending, twisting or stooping at the waist."

12. On March 11, 2021 Claimant visited Dr. Chan for an evaluation. Dr. Chan recounted that Claimant had undergone a discectomy with Dr. Pehler on November 10, 2020 and was improving. Claimant had undergone physical therapy, massage therapy and chiropractic care. Dr. Chan commented that Claimant's work restrictions had been removed but he had not yet returned to work. He summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

13. Claimant testified that his condition significantly worsened following an incident at home while playing with one of his children in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twist, and immediately felt pain in his back.

14. On March 12, 2021 Claimant returned to Workwell for an examination. PA-C Ayandele noted that Claimant had increased his activities. However, he aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Jones Logan, D.O. of Workwell commented that Claimant had aggravated his condition playing with his kids a few weeks earlier. Dr. Logan referred Claimant for a new lumbar MRI.

15. On April 2, 2021 Claimant underwent a lumbar MRI. The imaging revealed a broad-based central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve.

16. On April 12, 2021 Claimant returned to Dr. Pehler for an evaluation. Dr. Pehler documented that a few weeks earlier Claimant was playing with his kids and suffered a twisting event. Claimant described a recurrence of symptoms in his left lower extremity. After reviewing Claimant's lumbar MRI, Dr. Pehler remarked that Claimant had a slight repeat disc protrusion at the left L5-S1 level. Dr. Pehler recommended conservative treatment.

17. On May 3, 2021 Claimant visited Emily Halla, PA at Dr. Pehler's office. PA Halla reported that Claimant had undergone a left-sided L5 microdiscectomy seven months earlier. She remarked that Claimant suffered an injury a couple months ago that caused a repeat protrusion at the left L5-S1 level. PA Halla recounted that Claimant's pain was located in his lower back and radiated to his left buttock through his legs down to his toes with associated numbness, tingling and burning.

18. On June 4, 2021 Claimant again visited Dr. Pehler for an evaluation. Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain. He explained that Dr. Chan had administered left L5-S1 ESIs that provided only minimal relief. Because of Claimant's fairly broad-based disc protrusion, Dr. Pehler requested a left L5-S1 Artificial Disc Replacement (ADR).

19. On June 16, 2021 orthopedic surgeon E. Patrick Curry, M.D. reviewed Dr. Pehler's surgical request. Dr. Curry recommended denial of the ADR because it did not meet the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). He explained that lumbar ADRs are only appropriate in cases where surgical fusion is an option. However, fusion surgery was not a consideration for Claimant. Moreover, ADRs are recommended for discogenic lower back pain rather than Claimant's radicular symptoms. On June 17, 2021, Insurer denied Dr. Pehler's ADR request based upon Dr. Curry's opinion.

20. On August 19, 2021 Claimant applied for a hearing asserting that Dr. Pehler's L5-S1 ADR request was reasonable, necessary and related to the present claim. On August 27, 2021 Respondents filed a response to the application for hearing contending that Dr. Pehler's ADR request was not reasonable, necessary and related to his May 11, 2020 work injury.

21. On November 3, 2021 Claimant underwent an independent medical examination with orthopedic spine surgeon Brian Reiss, M.D. Dr. Reiss reviewed Claimant's medical records, performed a physical examination and considered Claimant's April 2, 2021 lumbar MRI. Based upon his evaluation and experience, Dr. Reiss determined that a L5-S1 ADR was not reasonable, necessary or causally related to Claimant's industrial injury. He further noted that a repeat microdiscectomy was the best surgical option.

22. Dr. Pehler testified at the hearing in this matter. He explained that Claimant substantially improved following his November 10, 2020 microdiscectomy, but then suffered a recurrence. Dr. Pehler specified that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. He acknowledged that he would not have recommended the ADR absent the incident at home. The recurrent herniation and larger, broader protrusion caused the need for the ADR.

23. Dr. Pehler remarked that, based on Claimant's mechanism of injury in which he re-herniated his disc at home, his chances of an additional herniation were very high. Replacing the disc through an ADR would remove any chance of another disc herniation and was the best and quickest method to return Claimant to full function. Dr. Pehler explained that Claimant is a good candidate for an ADR. He emphasized that Claimant's April 2, 2021 MRI clearly demonstrated a larger, broad-based protrusion that affects his right side with a recurrence on the left side.

24. Rule 17, Ex. 1 (G)(11)(a), addresses the criteria for a lumbar ADR. Notably, the patient must meet fusion criteria, and "if the patient is not a candidate for a fusion, a disc replacement should not be considered." Dr. Pehler initially testified that Claimant satisfied the criteria delineated in the *Guidelines* for an ADR. He specified that Claimant has single level disease, has no facet arthropathy or arthritis, has failed conservative treatment, continues to be symptomatic, has a single pain generator, has a component of spondylosis, and has some degeneration at the L5-S1 level. However, he also acknowledged that Claimant is not a candidate for fusion surgery.

25. Dr. Reiss maintained that the ADR proposed by Dr. Pehler is not reasonable and recommended a microdiscectomy as the proper surgical procedure. He explained that a lumbar ADR is a much more aggressive, complex, risky procedure than a microdiscectomy. In a young patient like Claimant, an ADR will cause additional stress and issues with the structures around the artificial disc, the device will not last forever, and removing or revising an artificial disc is very difficult. Dr. Reiss noted that Claimant's central disc bulge was present prior to the first surgery, still contained within the annulus and was not on the verge of exploding. He thus concluded that a repeat microdiscectomy would be sufficient to address Claimant's condition. Dr. Reiss detailed that there was only a 5-10% possibility of a re-herniation following a repeat microdiscectomy. He thus strongly disagreed with Dr. Pehler's opinion that Claimant has a "high probability" of a recurrent herniation if he undergoes a repeat microdiscectomy.

26. Dr. Reiss agreed that Claimant was doing well prior to his early March, 2021 accident at home. However, Claimant likely suffered a recurrent L5-S1 disc herniation

when twisting while playing at home with his children. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not had the prior microdiscectomy.

27. Claimant has failed to prove that it is more probably true than not that the left L5-S1 ADR surgery requested by Dr. Pehler is reasonable, necessary and causally related to his May 11, 2020 industrial injury. Initially, on about May 11, 2020 Claimant stepped into a hole and twisted his lumbar spine to the left side while working for Employer. He immediately experienced lower back pain. After receiving conservative care, he underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion. Based on the failure of conservative care and the imaging studies, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

28. On November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. By February 8, 2021 Claimant reported significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On March 11, 2021 Dr. Chan remarked that Claimant was still improving after his microdiscectomy. Claimant had received physical therapy, massage therapy and chiropractic care. Dr. Chan summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

29. Claimant testified that his condition significantly worsened following an incident at home in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twisting movement, and immediately felt back pain. On March 12, 2021 PA-C Ayandele noted that Claimant had aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Dr. Logan commented that Claimant had aggravated his condition while playing with his kids a few weeks earlier and referred him for a new lumbar MRI. The April 2, 2021 lumbar MRI revealed a broad-based, central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve. On June 4, 2021 Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain when he suffered a twisting event while playing with his children. He remarked that Dr. Chan had administered left L5-S1 ESIs and Claimant obtained only minimal relief. Because Dr. Pehler was concerned that a revision microdiscectomy would only provide minimal relief, he recommended an L5-S1 ADR.

30. Dr. Reiss explained that Claimant suffered a recurrent L5-S1 disc herniation while at home playing with his children in early March, 2021. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent

disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not undergone the prior microdiscectomy. Dr. Pehler also noted that, following the November 10, 2020 microdiscectomy, Claimant substantially improved, but suffered a recurrent disc herniation. He agreed that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. Dr. Pehler remarked that he would not have recommended the ADR absent the event at home.

31. The record reveals that Claimant, Dr. Reiss and Dr. Pehler agreed the accident at home in early March, 2021 significantly changed Claimant's condition. Following his intervening accident, Claimant's lower back and leg symptoms substantially worsened, his pain level increased, he required extensive treatment not contemplated before the accident (an MRI, ESIs, and surgery), and his post accident lumbar MRI identified a recurrent disc herniation. In fact, Claimant's April 2, 2021 lumbar MRI revealed not only a broad-based, central disc protrusion that existed prior to his microdiscectomy, but also a right-sided disc protrusion. The incident at home in early March, 2021 triggered Claimant's need for additional surgery. Because of the intervening event at home Claimant's recurrent disc herniation was unrelated to his May 11, 2020 industrial injury.

32. Based on the medical records and persuasive medical opinions, the early March, 2021 accident constituted an intervening event that severed the causal connection to Claimant's original May 11, 2020 work-related accident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that his recurrent disc herniation is causally related to his May 11, 2020 work accident. Accordingly, Claimant's request for an L5-S1 ADR is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAO, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

5. As found, Claimant has failed to prove by a preponderance of the evidence that the left L5-S1 ADR surgery requested by Dr. Pehler is reasonable, necessary and causally related to his May 11, 2020 industrial injury. Initially, on about May 11, 2020 Claimant stepped into a hole and twisted his lumbar spine to the left side while working for Employer. He immediately experienced lower back pain. After receiving conservative care, he underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion. Based on the failure of conservative care and the imaging studies, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

6. As found. on November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. By February 8, 2021 Claimant reported significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On March 11, 2021 Dr. Chan remarked that Claimant was still improving after his microdiscectomy. Claimant had received physical therapy, massage therapy and chiropractic care. Dr. Chan summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

7. As found, Claimant testified that his condition significantly worsened following an incident at home in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twisting movement, and immediately felt back pain. On March 12, 2021 PA-C Ayandele noted that Claimant had aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Dr. Logan commented that Claimant had aggravated his condition while playing with his kids a few weeks earlier and referred him

for a new lumbar MRI. The April 2, 2021 lumbar MRI revealed a broad-based, central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve. On June 4, 2021 Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain when he suffered a twisting event while playing with his children. He remarked that Dr. Chan had administered left L5-S1 ESIs and Claimant obtained only minimal relief. Because Dr. Pehler was concerned that a revision microdiscectomy would only provide minimal relief, he recommended an L5-S1 ADR.

8. As found, Dr. Reiss explained that Claimant suffered a recurrent L5-S1 disc herniation while at home playing with his children in early March, 2021. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not undergone the prior microdiscectomy. Dr. Pehler also noted that, following the November 10, 2020 microdiscectomy, Claimant substantially improved, but suffered a recurrent disc herniation. He agreed that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. Dr. Pehler remarked that he would not have recommended the ADR absent the event at home.

9. As found, the record reveals that Claimant, Dr. Reiss and Dr. Pehler agreed the accident at home in early March, 2021 significantly changed Claimant's condition. Following his intervening accident, Claimant's lower back and leg symptoms substantially worsened, his pain level increased, he required extensive treatment not contemplated before the accident (an MRI, ESIs, and surgery), and his post accident lumbar MRI identified a recurrent disc herniation. In fact, Claimant's April 2, 2021 lumbar MRI revealed not only a broad-based, central disc protrusion that existed prior to his microdiscectomy, but also a right-sided disc protrusion. The incident at home in early March, 2021 triggered Claimant's need for additional surgery. Because of the intervening event at home Claimant's recurrent disc herniation was unrelated to his May 11, 2020 industrial injury.

10. As found, Based on the medical records and persuasive medical opinions, the early March, 2021 accident constituted an intervening event that severed the causal connection to Claimant's original May 11, 2020 work-related accident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that his recurrent disc herniation is causally related to his May 11, 2020 work accident. Accordingly, Claimant's request for an L5-S1 ADR is denied and dismissed. *See Vargas v. United Parcel Service*, W.C. No. 4-325-149, (ICAO Aug. 29, 2002) (where the claimant underwent a spinal fusion and was involved in a motor vehicle accident six months after reaching MMI that worsened his symptoms and required additional back surgery not previously contemplated, the motor vehicle accident constituted an intervening event that severed the causal connection between the claimant's initial fusion surgery and need for additional medical treatment); *Wingstrom v. Wal-Mart Stores, Inc.*, W.C. No. 4-633-188 (ICAO July 14, 2010) (where the claimant reached MMI for her admitted lower back injury in October 2004, throwing a blanket onto her bed in 2008 was an intervening event

because the claimant's condition was stable until August 2008 and her work injury related to the left side of her lower back while her complaints after August 2008 involved the right side of her lower back). *Compare Reynal v. Home Depot USA, Inc.*, W.C. No. 4-585-674-05 (ICAO June 25, 2012) (where the claimant suffered a lower back injury in 2003 while working for one employer and developed additional back pain in 2011 while working for a different employer, the 2011 injury was not an intervening event and the claimant was entitled to permanent total disability benefits based on his 2003 work injury because the 2011 incident was a "temporary exacerbation [that] did not result in . . . a new injury.").

ORDER

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

1. Claimant's request for an L5-S1 ADR is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 7, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the Claimant suffered a right knee injury and is entitled to a lower extremity scheduled impairment.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage was $559.79. The parties further stated that Respondents would be filing an admission with regard to the impairment of the cervical spine provided by the Division or Workers' Compensation Independent Medical Examiner, Dr. Stephen Lindenbaum of 17% whole person impairment.

FINDINGS OF FACT

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

1. Claimant was 68 years old at the time of the hearing and was working for Employer as a shuttle driver, until approximately April 2020 when his Employment was terminated due to the COVID-19 pandemic. His job duties included escorting customers, driving customers to and from the dealership, shoveling snow off the sidewalks, throwing down deicer, cleaning off snow from the vehicles and driving them to the service areas.

2. Claimant testified that he had had a prior work related injury to his left knee, including treatment, but never had any problems with the right knee prior to the admitted work related accident.

3. On February 7, 2020 he was exiting the west door of the service building, which was the door used by the employees. He proceeded to cross a parking lot that had a slight incline. There was a dusting of snow on the ground and Claimant slipped and fell. He testified that his legs went out from under him, hyperextending the right knee and landed on his right side, hitting his head on the concrete, which knocked his hat and hearing aids off. Claimant continued to work the rest of the day, mainly sitting in the waiting area, but did not report the injury that day. He reported the injury to his supervisor the following Monday, February 10, 2020, his next scheduled shift. Claimant stated that he had initial pain in his right knee, neck, right shoulder and back. He requested medical care and was sent to Concentra.

4. Claimant was first seen on February 10, 2020 by Dr. Nancy Strain at Concentra Medical Centers in Lakewood. Dr. Strain documented that Claimant presented with a slip and fall, right knee and shoulder pain, and hit his head. She reported that Claimant was not sure what happened to his knee but that it "pops and clicks very

loud with certain movements." He reported that he had no prior right knee problems. Dr. Strain further noted that the pain in the knee was moderate, had clicking and stiffness, no decreased range of motion, no swelling, and was exacerbating by using the stairs. On exam she noted that there was tenderness over the medial joint line, had pain with range of motion, and had a positive medial Apley's grind test.[1] She assessed an internal derangement of the right knee; ordered x-rays and an MRI of the right knee; and returned Claimant to full work duties.

5. The First Report of Injury was completed on February 12, 2020 and specifically noted that the body part affected was the lower extremities—knee, falling backwards hitting his right side shoulder.

6. Claimant retuned to see Dr. Strain on February 13, 2020 and she changed restrictions to lift, push and pull up to 20 lbs. occasionally but was awaiting the MRI results.

7. An MRI read by Dr. Michael Otte performed on February 24, 2021 showed posterior horn medial meniscus tear through the root ligament implantation and debris in the posterior joint line, as well as fibrillation in the posterior horn lateral meniscus root implantation. Claimant had osteoarthritis in all three compartments and intact ligaments and was developing osteophytes along the extensor mechanism from the patella. Dr. Otte noted particularly that the medial collateral ligament was intact and free from sprain pattern. He found no edema in the lateral collateral ligament or conjoined tendon and that the soft tissue and neurovascular structures were unremarkable. The only moderate edema was in the soleus muscle.[2]

8. Claimant was evaluated by Dr. Kathryn Bird, of the Littleton Concentra office, on March 4, 2020. Claimant reported that any symptoms of the right knee were getting better as his wife was doing massage as she was a massage therapist and he continued working modified duty. On exam she found a positive lateral McMurray test and positive medial McMurray test and positive Thessaly's.[3] She diagnosed a right knee strain. However, she noted that the knee was getting better so they would be focusing on his right shoulder complaints. She continued the prior restrictions at that time. She referred Claimant to physical therapy.

9. Claimant saw physical therapist Kenneth Marshall on March 4, 2020. Mr. Marshall noted Claimant was diagnosed with a right knee strain and recommended therapy to address the strain and improve range of motion and proceeded with neuromuscular reeducation, exercise, hot packs and electrical stimulation.

[1] Apley's grind test or Apley Compression test is used to evaluate patients for problems of the meniscus in the knee.
[2] Soleus muscle is located on the back of the lower leg from the shin bone to the heel bone as part of the Achilles tendon.
[3] Tests that assess detection of meniscal tears.

10. Dr. Bird rechecked Claimant on March 16, 2020 and noted that Claimant was taking no medications at that time. There was no notation of Claimant complaining of knee pain during this visit.

11. On March 19, 2020 Claimant was evaluated by Dr. Failinger primarily for the right shoulder and on exam showed mild crepitus and focal medial joint line pain. Minimal and benign physical examination findings were found by Dr. Failinger during his examination of the right knee. Dr. Failinger assessed medial compartment degenerative joint disease, with meniscus tear. At that time Dr. Failinger suggested cortisone injection for the right knee, which Claimant declined, in exchange for ongoing therapy.

12. Claimant returned to see Dr. Failinger on April 16, 2020 and Claimant advised that he thought his knee was better and that both therapy and time were helping with his knee symptoms.

13. On April 17, 2020 Dr. James Linberg, an orthopedic surgeon performed a medical records review and assessed that Claimant had significant preexisting arthritis and a posterior horn tear, which were not caused by the slip and fall injury but by wear and tear with age.

14. On April 20, 2020 Dr. Bird examined the right knee and stated that the appearance of the right knee was normal, had normal strength, palpation and tone, though had some tenderness over the lateral joint line.

15. On April 21, 2020 Dr. Allison Fall examined Claimant and stated that Claimant's right knee was doing better. The remainder of the three page report concerned only other body parts.

16. Dr. Failinger examined Claimant on April 23, 2020 but only focused on the right shoulder complaints.

17. On May 12, 2020 Claimant reported to Dr. Bird some pain in the right knee with a similar evaluation as the last. The majority of the evaluation and complaints involved the right shoulder and neck. She continued to recommend physical therapy.

18. Claimant was attended by Dr. Robert Kawasaki, a physiatrist, who only mentions in passing Claimant's right knee injury and specifically reported that Claimant reported his right knee was doing much better and was "not problematic." There is also mention that Claimant had difficulty with toe walking and heel walking related to balance related to the head and neck injury, as well as right foot pain from an old injury. Subsequent reports are equally limited regarding any mention of right knee problems. For, example on February 16, 2021, Dr. Kawasaki stated that Claimant had treated for right knee pain. Dr. Kawasaki noted that symptoms were as indicated in the history and physical. "Otherwise negative for other joint pain, need for walking aids, muscle cramps, joint stiffness, fractures, pain elsewhere." The report only addressed pain in the shoulder and neck.

19. Claimant made no complaints of knee problems on August 31, 2020 when he was evaluated by Dr. Bird. Most of that evaluation involved the shoulder and neck complaints and denials of care for them. The only diagnosis was for the right shoulder. He returned for assessment with Dr. Bird on October 1, 2020. While he did complain of right knee pain at that time he reported to Dr. Bird that his knee problems had improved with physical therapy. Again, she did not provide an assessment or treatment recommendations for the knee. On October 20, 2020 Dr. Bird again evaluated Claimant, failed to examine or diagnose any right knee condition, and reviewed the plan for treatment and diagnosis with Claimant, who expressed understanding.

20. Claimant was placed at maximum medical improvement by Dr. Bird on November 11, 2020. She assigned an impairment rating for loss of range of motion of the lower extremity, though she stated that the right knee MRI findings cannot be attributed to this work injury. She provided restrictions with regard to the upper extremity injury including lifting ten pounds constantly and no lifting overheard. On February 17, 2021 Dr. Bird stated, because Claimant reported he was quite functional with the right knee, that an impairment was inappropriate, revising the impairment to only rate the cervical spine.

21. On April 21, 2021 Claimant underwent a DIME with Dr. Stephen Lindenbaum. He noted that Claimant's main complaint was his cervical spine. The DIME physician noted on exam that Claimant had full extension and some limitation on flexion of the right knee, but no instability and Claimant had measurements of both thighs at equal distance above the knee with no difference in circumference and no evidence of effusion. Dr. Lindenbaum stated that the MRI showed evidence of chronic chondromalacia of all three compartments that contributed to his meniscal abnormality as well as the fact that Claimant is grossly overweight. He stated that he provided an impairment of the right lower extremity based on the fact that Claimant had no history of prior injury to the right knee.

22. The ALJ credits the Claimant's testimony and reports of Dr. Bird and Dr. Failinger that Claimant sustained a strain of the right knee on February 7, 2020. Claimant proved by a preponderance of the evidence that he sustained a right knee strain when he hyperextended his right lower extremity when he slipped and fell on ice in the course and scope of his employment with Employer.

23. The ALJ credits the reports of Drs. Bird, Dr. Failinger, and Dr. Kawasaki that physical therapy and the massage therapy provided by Claimant's wife improved the right knee strain, over the contrary report of Dr. Lindenbaum. The ALJ further credits the report of Dr. Lindberg (in part) that the significant preexisting arthritis and a posterior horn tear, were not caused by the slip and fall injury but by wear and tear with age. Claimant failed to show by a preponderance of the evidence that Claimant is entitled to an impairment rating for the right lower extremity.

24. Evidence and inference contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Permanent Impairment

Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error.

See Gonzales v. Browning Ferris Industries of Colorado, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the *AMA Guides* in his opinions.

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in Sec. 8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of Sec. 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). In *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) the court, citing *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996), noted that whether a particular component of the Claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the *AMA Guides*. Therefore, the *Egan* court determined that in order to challenge and overcome the causation conclusion by the DIME physician, a party must present clear and convincing evidence. However, the *Egan* court further explained that the statutory scheme, requiring causation questions to be challenged through a DIME, applies only to injuries resulting in whole person impairment. When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ continues to have jurisdiction to resolve the dispute. The Division IME physician's causation determination is not afforded any special weight in a scheduled disability and the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. The determination of the impairment rating by the DIME physician regarding a scheduled impairment is thus not entitled to presumptive effect, including any prerequisite findings of relatedness. *Yeutter v. Industrial Claim Appeals Office*, 487 P.3.d 1007 (Colo. App. 2019); *Morris v. Olsen Heating & Plumbing Co.*, No. 4-980-171-002 (ICAO, July 6, 2018).

Claimant has the burden to establish causation of a scheduled injury, as a scheduled impairment is not a DIME determination referenced by Sec. 8-42-107.2(4)(c). *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007). In *City Market v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003) the court acknowledged that the question of whether the claimant sustained a scheduled or whole person rating is one of fact for the ALJ, and is not determined by the "rating physician." See also *Morris v. Olson Heating and Plumbing*, ICAO, W.C. No. 4-980-171-02 (July 6, 2018). A rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with

which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

With regard to an extremity impairment, the claimant bears the burden to prove a scheduled rating by a preponderance of the evidence. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

Here, Claimant had the burden of proving that the lower extremity injury was causally related to the work-related fall and that he is entitled to an impairment rating. Addressing the work-related fall and the question of causation, it is found that Claimant did have an admitted slip and fall which caused a strain of the right lower extremity. Claimant credibly testified that when he slipped on the ice, his legs went from under him, and his right knee hyperextended. This caused the Claimant's right knee strain as initially diagnosed by Dr. Strain. Claimant reported the right knee pain at the initial appointment with the designated provider and subsequent providers including Dr. Bird, Dr. Failinger, Dr. Fall, Dr. Kawasaki, and therapist Marshall.

As found, Claimant has failed to show by a preponderance of the evidence that he is entitled to receive Permanent Partial Disability (PPD) benefits for a right knee injury. Even if Respondents had the burden of proof to show that the DIME physician's opinion was incorrect by a preponderance of the evidence, as may be suggested by several ICAO non-binding opinions, Respondents have done so. The totality of the evidence in this case shows that Claimant's knee complaints related to the strain of the right knee diminished and resolved as evidenced by Dr. Kawasaki's credible remarks that the right knee was not problematic, which is credible, and in contrast with the less persuasive report of Dr. Lindenbaum. The strain was treated and the strain resolved. This is supported by Dr. Bird's records of therapy improving the knee condition as well as Dr. Failinger and Dr. Fall's reports. Dr. Bird persuasively explained that he had been able to return to functional status. Claimant received significant physical therapy at Concentra, which improved the strain. This is shown in multiple reports by Dr. Bird as well as in the other provider records. Claimant also declined treatment, including injections offered by Dr. Failinger. Further, the MRI of the right knee failed to show significant effusion, edema or signs of an acute injury that was a result of the strain, only osteoarthritic and degenerative changes that can be expected give the Claimant's age and body habitus. Neither did the medical records reflect persuasive evidence of swelling or other trauma following the incident. As found, the bulk of the persuasive medical evidence reflects that a rating for Claimant's right knee is not warranted. Accordingly, Claimant has failed to show by a preponderance of the evidence that he is entitled to an impairment rating of the right lower extremity and is not entitled to any additional impairment rating for the right knee.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for an impairment rating of the lower extremity is denied and dismissed.

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

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

DATED this 11th day of January, 2022.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-108-612-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the April 30, 2021 surgery performed on Claimant's left ankle was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant was a correctional officer employed by Employer. Claimant reported that on May 17, 2019, he sustained an injury in the course and scope of his employment while descending stairs, when he twisted his right ankle. Respondents contested that Claimant sustained a compensable injury and the matter was adjudicated at a hearing before ALJ Edwin Felter on November 6, 2019. On November 27, 2019, ALJ Felter issued an Order in which he determined that Claimant sustained a compensable injury to his right ankle in the form of an aggravation and acceleration of a pre-existing right ankle condition. ALJ Felter further ordered that Respondents are responsible for the cost of all authorized, causally related, and reasonably necessary medical care and treatment related to Claimant's May 17, 2019 right ankle injury. (Ex. 1).

2. Following Claimant's injury on May 17, 2019, Claimant was initially seen at North Suburban Medical Center emergency room where x-rays of his right ankle were negative.

3. Claimant then received treatment from Karen Hill, D.O., at Concentra. The ALJ infers that Dr. Hill was Claimant's authorized treating provider. Claimant was then referred to for an orthopedic consult and saw resident Henry Yu, M.D., and Robert Leland, M.D. at the UC Health Foot and Ankle Center, on August 1, 2019. Claimant testified that Dr. Leland is a foot and ankle specialist. (Ex. F).

4. Initially, Drs. Yu and Leland diagnosed Claimant with a sprain of the deltoid ligament of the right ankle and closed ankle fracture. Claimant was placed in a lace-up brace and recommended to participate in a home exercise program focusing on ankle strength, range of motion and proprioception. (Ex. D).

5. At his October 17, 2019 visit, Claimant reported that he had reinjured his right ankle in early September 2019. Claimant continued to have medial ankle pain which he reported had been persistent since his injury. On examination, Dr. Leland noted that Claimant was tender in the region of his deltoid ligament, and opined that Claimant had a probable medial ankle impingement secondary to a deltoid ligament tear. He recommended an MRI to better delineate the deltoid ligament, and instructed Claimant to follow up after the MRI for further evaluation. (Ex. D).

6. Claimant did not undergo an MRI as recommended by Dr. Leland, and did not return to Dr. Leland until December 10, 2020. At that time, he reported continued ankle

pain that had not improved. Dr. Leland's examination of Claimant's ankle demonstrated tenderness along the anterior medial aspect of the ankle with pain on dorsiflexion, but was otherwise normal. Dr. Leland's assessment was right medial ankle impingement. He recommended physical therapy with deep tissue mobilization and indicated that if the recommended treatment did not resolve his symptoms surgical debridement would be recommended. (Ex. D).

7. On February 11, 2021, Respondent scheduled Claimant for a demand appointment with Dr. Leland to take place on February 18, 2021. (Ex. 4).

8. Claimant returned to Dr. Leland on February 18, 2021, without improvement of his ankle symptoms. Dr. Leland opined that Claimant's pain was likely caused a hypertrophied deltoid ligament causing impingement in the ankle joint. Dr. Leland performed a steroid injection in the right ankle and indicated if it did not provide lasting benefit surgery would be scheduled. (Ex. D).

9. On March 4, 2021, in response to correspondence from Respondent's counsel, Dr. Leland indicated that physical therapy and possible arthroscopic debridement of the ankle would be reasonably necessary to cure or relieve the effects of Claimant's May 17, 2019 injury. (Ex. 4). The ALJ finds Dr. Leland's statement credible.

10. Claimant received approximately two weeks of improvement with the steroid injection, but the pain ultimately returned. On April 8, 2021, Dr. Leland indicated that Claimant had "essentially exhausted his nonsurgical treatment options" and that an ankle arthroscopy and debridement would be considered.

11. On April 30, 2021, Dr. Leland performed an arthroscopic evaluation and limited debridement of Claimant's right ankle. During the procedure, Dr. Leland noted that "Examination of the joint revealed some hypertrophic tissue both anterolateral and anteromedial consistent with the patient's impingement symptoms. With dorsiflexion of the ankle, there was noted to be evidence of impingement on the talar dome." After tissue was debrided, Dr. Leland noted there was no sign of any further impingement. (Ex. E).

12. On May 26, 2021, Claimant underwent an independent medical examination (IME) with Timothy S. O'Brien, M.D. At the time of the IME, Dr. O'Brien had not yet reviewed Dr. Leland's operative report, and indicated that he was not certain as the precise procedure performed. He did note "As Dr. Leland suggested, an arthroscopic debridement and removal of any medial impinging lesions was performed …" Dr. O'Brien further noted that "[t]his is a very limited surgery and is not highly traumatic." Dr. O'Brien did not opine on the reasonableness or necessity of the surgery in his IME report. (Ex. F). Dr. O'Brien was testified at hearing as an expert in orthopedic surgery. He testified that the procedure performed by Dr. Leland was not reasonable or necessary, and characterized the procedure as "bad medicine." Dr. O'Brien testified that Dr. Leland should not have performed surgery because no MRI was performed prior to surgery, no "differential injections" were performed, that Claimant's pain was "migratory." and that Claimant's pain generator was not clearly identified prior to surgery.

13. He further state that there was no scientific basis for using an arthroscopic scope as an investigative procedure in an ankle. Dr. O'Brien testified that there is no medical literature, or reported double-blind clinical studies, to support an arthroscopic investigation of the ankle. He referenced the lack of double-blind studies, which compare the results of a proposed "real" procedure to a placebo procedure to determine the effectiveness of the "real" procedure. He testified that he is not aware of any such studies being performed.

14. Dr. O'Brien's testimony is not persuasive. As Dr. O'Brien testified, there is little anatomic distance within the ankle. Claimant's ankle pain was described throughout his treatment as tenderness to the anterior medial aspect of his ankle. Although there were slight variations in the area of reported tenderness, given the anatomy of the ankle, the ALJ does not find these variations significant. The steroid injection performed by Dr. Leland in February 2021 did provide relief for two weeks, following which Dr. Leland determined that surgery was appropriate. During surgery, Dr. Leland indicated that he identified and debrided hypertrophic tissue that was consistent with the Claimant's impingement symptoms. The lack of clinical trials for arthroscopic evaluation of the ankle as no credible evidence was presented to indicate how such a procedure would be amenable to a double-blind study, or whether investigatory surgeries are routinely subjected to clinical trials.

CONCLUSIONS OF LAW

Generally

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

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

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

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

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

Claimant has established by a preponderance of the evidence that the April 30, 2021 surgery was reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Leland credibly opined in March 2021 that arthroscopic debridement was reasonably necessary to cure or relieve the effects of Claimant's injury. Dr. Leland, a foot and ankle specialist, deemed it appropriate to perform surgery on Claimant's ankle after Claimant experienced ongoing symptoms for approximately two years. Although no MRI was performed, Dr. Leland was able to identify pathology in the ankle during surgery to which he attributed Claimant's impingement symptoms. When considering all the evidence, the ALJ finds it more likely than not that the surgery was reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's April 30, 2021 left ankle surgery performed by Dr. Leland was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

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

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

DATED: January 13, 2022

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of his employment with Employer.

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

3. Whether Claimant's right knee treatment was provided by an Authorized Treating Physician (ATP).

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

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reimbursement for out-of-pocket expenses related to the medical treatment and surgery on his right knee.

FINDINGS OF FACT

1. Employer is a global corporation that focuses on aerospace, arms, defense, information security and technology. Claimant is a 59 year old male who works for Employer as an assembler and electrical tester. His typical job duties are mostly sedentary in nature involving sitting and handling small computer components.

2. Claimant earned $27.97 per hour and worked 40 hours per week. His shifts commenced at 5:00 a.m. and generally ended at about 3:30 p.m. over four days each week. Claimant thus earned an Average Weekly Wage (AWW) of $1,118.80.

3. At approximately 11:30 a.m. on February 9, 2021 Claimant realized he and a co-worker needed office supplies. Office supplies are stored downstairs in an older section of the building. Claimant noted that the stairs are different from those he uses to go to lunch or enter and exit the building. The steps Claimant used to retrieve office supplies are about 75 yards from his workstation and steeper than those he regularly uses in the newer part of the building. He remarked that he obtains office supplies from downstairs about once every two months.

4. On February 9, 2021 Claimant went down the steps and picked up lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a "pop" and experienced immediate pain in his right knee. As soon as Claimant returned to his workstation he reported the injury to his supervisor.

5. Approximately one hour after the injury Claimant visited Erika Spadafora, NP at Employer's medical clinic. Claimant told NP Spadafora that at 11:30 a.m. earlier in the day he had been walking from lunch back to his office when he "felt a pop" in his right knee. NP Spadafora noted Claimant was not carrying anything at the time of his injury and there were no hazards on the stairs. She recommended using ice packs three times per day for 15-minute intervals in addition to taking Motrin and Tylenol. NP Spadafora concluded that Claimant's injuries were likely not related to his work activities based on his history of present illness. She commented that Claimant would follow-up in one week for re-evaluation.

6. Claimant disagreed with the history of present illness as recorded by NP Spadafora. He specifically noted that he was carrying items at the time. Furthermore, he commented that he was on a specific errand to retrieve office supplies and not returning from his lunch break.

7. On February 15, 2021 Claimant returned to Employer's medical clinic and visited Authorized Treating Physician (ATP) Andrew Plotkin, M.D. for an examination. On the date of the injury, Claimant had signed a Notice of Designated Provider, pursuant to the requirements of W.C.R.P. 8-1(C)(2), acknowledging his awareness that Dr. Plotkin was the designated provider for his work injury. Dr. Plotkin recorded that on February 9, 2021 Claimant was ascending stairs at work when he felt a pop in his right knee. Claimant remarked that nothing unusual, such as twisting or stepping incorrectly, had occurred during the incident. Dr. Plotkin noted Claimant had visited his Primary Care Provider (PCP) and obtained right knee x-rays. The x-rays revealed degenerative changes in the patellofemoral compartment. Dr. Plotkin concluded that Claimant's injury was not compensable because there was no work-related mechanism of injury or hazard and the "activity [was] a normal life activity." He commented that Claimant "understands this is not considered work-related and is going to follow-up with his PCP after the MRI scan."

8. Dr. Plotkin testified at the hearing in this matter and maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. He remarked that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

9. Robert Michael, M.D. was Claimant's PCP. At the referral of Dr. Michael, Claimant underwent an MRI of his right knee on February 19, 2021. The MRI revealed "horizontal tear posterior horn of medial meniscus with parameniscal cyst formation." He was referred to Panorama Orthopedics for a surgical consultation.

10. On April 29, 2021 Claimant underwent a surgical repair of the complex tear over the posterior horn of his medial meniscus, extending from the posterior middle to the anterior horn, with James Johnson, M.D. at Panorama Orthopedics. The procedure was covered through Claimant's private health insurance policy Cigna. All of the treatment Claimant received related to his right knee pathology documented by the MRI has been covered under his private health insurance policy. The payments Claimant made for treatment of his right knee totaled $5,145.32.

11. After undergoing surgery, Claimant missed two weeks of work. During the two week period Claimant received short-term disability benefits.

12. On August 10, 2021 Claimant underwent an independent medical evaluation with John R. Burris, M.D. He reviewed Claimant's medical records and performed a physical examination. Dr. Burris recounted that on February 9, 2021 Claimant was walking up a set of stairs between the supply area and his workstation. On approximately the fourth step Claimant felt a pop in his right knee and immediately experienced pain. He was not carrying anything heavy at the time and there were no hazards or obstacles on the stairs. Based on Claimant's account, Dr. Burris reasoned that the February 9, 2021 work incident "represent[ed] an activity of daily living and not a unique or special hazard of employment." Dr. Burris remarked that, because Claimant's normal work activities are sedentary and mostly seated, they "would not introduce a risk for a knee condition." He explained that Claimant's right knee symptoms were thus likely "independent and unrelated to his employment." Therefore, Claimant's right knee condition was not work-related.

13. On December 9, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Burris. Dr. Burris maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus.

14. Dr. Burris explained that the Division of Workers' Compensation discussion of a proximate cause requires an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to

have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

15. Claimant has failed to establish that it is more probably true than not that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of her employment with Employer. Initially, on February 9, 2021 Claimant went down a flight of stairs to retrieve lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a "pop" and experienced pain in his right knee. He immediately reported the injury to his supervisor. After initially receiving medical treatment through ATP Dr. Plotkin, Claimant had a right knee MRI through his PCP that revealed a meniscus tear. He subsequently underwent arthroscopic surgery on April 29, 2021.

16. Although Claimant maintained that he injured his right knee while performing his job duties on February 9, 2021, the persuasive medical evidence reveals that the mechanism of injury did not cause his right knee meniscus tear. Approximately one hour after the injury Claimant visited NP Spadafora at Employer's medical clinic. NP Spadafora determined that Claimant's injuries were likely not related to his work activities based on his history of present illness. Furthermore, Dr. Plotkin persuasively maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. Claimant was ascending stairs at work when he felt a pop in his right knee. Nothing unusual, such as twisting or stepping incorrectly, occurred during the incident. Dr. Plotkin commented that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

17. Dr. Burris also persuasively maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal

tear of the posterior horn and body of the medial meniscus. Dr. Burris explained that proximate cause contemplates an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

18. Based on Claimant's right knee x-rays and MRI he suffered from degenerative, pre-existing pathology in his right knee. The persuasive medical opinions reveal that Claimant's activity of ascending stairs at work would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Claimant's assertion that his symptoms arose after the performance of a job function does not create a causal relationship based solely on temporal proximity. The mechanism of injury was insufficient to constitute the proximate cause of Claimant's right knee medial meniscus tear. Accordingly, Claimant's work activities on February 19, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work activities does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of”

employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05. For example, if an employee was struck by lightning while at work, the resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. However, the Court also concluded that the but-for test does not relieve the employee of proving causation, nor does it suggest that all injuries that occur at work are compensable. *Id*. at 505.

9. Claimant asserts that the matter should be analyzed under the “employment risk” or first category of injuries delineated in *City of Brighton*. He specifies that at the time of his injury he was in the process of carrying office supplies upstairs as required to complete his job duties. The action of climbing stairs thus proximately caused his injury, necessitated the need for medical treatment and resulted in disability. However, Claimant’s appeal to the *City of Brighton* analysis fails because the decision was not concerned with the question of whether an injury occurred. The decision instead involved whether and when an injury "arises out of” the course and scope of employment. In *City of Brighton* there was no dispute the claimant fell down a set of stairs and suffered injuries. Here, however, the persuasive medical evidence reveals that the specified mechanism of injury did not cause Claimant’s meniscal tear or aggravate his pre-existing condition. Because Claimant did not suffer an injury, there is no question of whether the injury “arose out of” employment. Accordingly, the *City of Brighton* analysis is not instructive in the present matter.

10. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of her employment with Employer. Initially, on February 9, 2021 Claimant went down a flight of stairs to retrieve lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a “pop” and experienced pain in his right knee. He immediately reported the injury to his supervisor. After initially receiving medical treatment through ATP Dr. Plotkin, Claimant had a right knee MRI through his PCP that revealed a meniscus tear. He subsequently underwent arthroscopic surgery on April 29, 2021.

11. As found, although Claimant maintained that he injured his right knee while performing his job duties on February 9, 2021, the persuasive medical evidence reveals that the mechanism of injury did not cause his right knee meniscus tear. Approximately one hour after the injury Claimant visited NP Spadafora at Employer’s medical clinic. NP Spadafora determined that Claimant’s injuries were likely not related to his work activities

based on his history of present illness. Furthermore, Dr. Plotkin persuasively maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. Claimant was ascending stairs at work when he felt a pop in his right knee. Nothing unusual, such as twisting or stepping incorrectly, occurred during the incident. Dr. Plotkin commented that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

12. As found, Dr. Burris also persuasively maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Dr. Burris explained that proximate cause contemplates an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

13. As found, based on Claimant's right knee x-rays and MRI he suffered from degenerative, pre-existing pathology in his right knee. The persuasive medical opinions reveal that Claimant's activity of ascending stairs at work would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Claimant's assertion that his symptoms arose after the performance of a job function does not create a causal relationship based solely on temporal proximity. The mechanism of injury was insufficient to constitute the proximate cause of Claimant's right knee medial meniscus tear. Accordingly, Claimant's work activities on February 19, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

ORDER

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

Claimant did not suffer a compensable injury while working for Employer on February 9, 2021. Accordingly, his claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: January 14, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-161-549-001

ISSUES

I. Whether Respondents overcame the opinion of the Division Independent Medical Examiner, Dr. Macaulay, that Claimant is not at MMI.

II. Whether the medical treatment recommended by the Division Examiner is reasonable and necessary and whether the ALJ can order Respondents to pay for the medical treatment recommended by the DIME physician.

FINDINGS OF FACT

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

1. On October 16, 2020, Claimant sustained a compensable work-related injury to her nose.
2. Claimant reported a paper towel dispenser cap fell and hit her on the nose. Claimant testified, "Well, I put my hand in to check the towels, and the lid fell off, and it fell on my nose." Hrg. Tran. pg. 73, lines 17-20.
3. Claimant reported the accident to her supervisor, "Cecelia", within 20 minutes after the event. Cecelia completed some paperwork, but she told Claimant that she did not recommend that Claimant go to the doctor because they would administer a coronavirus test and would not let her return to work for two weeks. She did not give Claimant any names of clinics or physicians (Hg. Tr., pp. 75-76)
4. Claimant experienced pain at the 8-9 level in the area of the bridge of her nose the day after the and she felt "pins and needles as if [I] had ants [in the nose]." (Hg. Tr., pp. 76-77).
5. After requesting medical care from her supervisor "Cecelia," for months after the injury without a referral, Claimant ultimately went to human resources. A human resources representative finally sent Claimant to Dr. Sadie Sanchez at Midtown Occupational. (Hg. Tr., pp. 77-78).
6. One of the reasons Claimant did not go to a doctor during the months after the accident is that the doctors she contacted only gave telemedicine visits due to the COVID pandemic. As a result, Claimant did not seek any medical treatment from October 16, 2020, through January 10, 2021. Hrg. Tran. pg. 51, lines 11-18 and pg. 79.
7. On January 11, 2021, Dr. Sadie Sanchez evaluated Claimant. Claimant reported she was restocking a paper towel container when the lid fell onto her nose. She stated her nose swelled. She denied loss of consciousness, but "her pain was so

bad, she blacked out for a minute." She denied any nose bleeding or lesions on her nose. Claimant reported the next day she had a brown mucus discharge from her nose. Claimant further complained of headaches, poking pain at 4-5/10, body fatigue, daily headaches, and vision changes. There were further times where she felt she could not breathe. Dr. Sanchez noted, "The patient has not returned to work at the company of record due to confusion regarding COVID testing and this injury with her employer. She has been working full duty with another employer (she had this job at the time of injury and continues to work there)." Respondents' Ex. I at pgs. 100-101.

8. Dr. Sanchez referred Claimant for x-rays. The x-rays were normal. Respondents' Ex. J, pg. 105. *See also Respondents' Ex. I, pg. 101*.

9. Following review of the x-rays, Dr. Sanchez opined,

> The patient's objective findings do not correlate with subjective complaints and she exhibited mild pain behaviors at today's visit. I explained to the patient that the MOI would have suggested at least a nasal contusion and possibly a fracture. However, the x-ray taken today does not demonstrate concern for nasal fracture. Furthermore, without an abrasion or laceration or any evidence of a more serious injury, it is difficult to entertain that any internal derangement occurred due to the injury. The intermittent swelling cannot easily be explained…. To summarize, I would not expect long-term sequela from this type of injury without a fracture, and therefore, I am not able to offer the patient any further treatment.

   Dr. Sanchez concluded, "She does not require any work restrictions or impairment rating. She was encouraged to see her PCP to consider non-work-related diagnosis." Dr. Sanchez opined Claimant was at MMI with no impairment. Respondents' Ex. I Pg. 102, 103.

10. Based on the evidence submitted at hearing, the ALJ finds that Claimant was hit on the nose when the cap or lid of a paper towel dispenser fell and hit her.

11. On February 11, 2021, a Final Admission of Liability was filed consistent with Dr. Sanchez's MMI report. The Final Admission of Liability denied any permanent impairment or maintenance care. Respondents' Ex. A, pgs. 2-10.

12. Before the work-incident, Claimant sought medical treatment from 2012 through 2017 for a myriad of issues. Respondents' Ex. L, pgs. 125-148.

13. On March 8, 2012, Claimant sought treatment for eyestrain and headaches. *Id.* at pgs. 128-130.

14. On October 3, 2012, Claimant underwent a lung check due to a history of tuberculosis. *Id.* at pgs. 131-133.

15. On December 11, 2012, Claimant sought treatment for having left ear pain, arm pain and headaches. *Id.* at pgs. 135-136.

16. On August 6, 2014, Claimant sought treatment for blurred vision. *Id*. at pgs. 139-140.

17. On March 21, 2017, Claimant returned to her PCP complaining of frontal, bilateral and temporal headaches over the last two months. Her physician noted, "She almost always had headaches after 4:00, but sometimes wakes up with headaches. Further, her vision is sometimes very blurry, occurs at any time of day and not always associated with headaches." Claimant was diagnosed with tension headaches. *Id.* at pgs. 144-145.

18. On July 11, 2017, Claimant returned to her PCP. She complained of blurry vision and frontal headaches. She also noted eye watering. *Id.* at pgs. 146-147.

19. Between July 11, 2017, and October 16, 2020, over a three-year period, Claimant did not actively treat on a regular basis for blurry vision or headaches.

20. On June 15, 2021, Dr. Hugh Macaulay performed a Division Independent Medical Examination (DIME). Claimant reported while working with a paper towel dispenser the device struck her on the nose. She stated she felt like her nose was going to fall into pieces. She admitted her nose did not bleed but reported that "liquid came out of both sides of her nose." She stated she did not seek medical treatment due to potential COVID issues. Respondents' Ex. K, pg. 108.

21. Claimant further reported she could not breathe out of the right side of her nose. This caused her fear and anxiety. She noted she felt she would stop breathing and die and a choking sensation. Despite having a history of headaches, Claimant asserted she had no problems with headaches before the incident. *Id.* at pg. 108-109.

22. Claimant admitted she had been working full-duty and full-time at her job of cleaning. *Id.* at pg. 110.

23. Dr. Macaulay's HEENT, neurological and cognitive examination were all normal. He noted, "Ms. Gonzalez has a normal neurological examination. She does have evidence for moderate anxiety secondary to concerns that she feels have not been addressed and may result in her death. Her nasal passages appear patent and the tissues without evidence of significant inflammation." *Id.* at pg. 116.

24. Dr. Macaulay noted,

> The medical records indicate prior events of headaches, nasal congestion and blurring of vision and occasional symptoms associated with upper respiratory infection. Most of her treatments have been for health maintenance without reflection of symptoms similar to those associated with her industrial accident…Ms. Gonzalez does not feel that she has been evaluated and has significant fears associated with the potential long-term effects of her industrial event.

Dr. Macaulay concluded claimant was not at MMI. He recommended an ENT and neuropsychological evaluation to assist in determining Claimant's current condition and the cause of such. *Id.* at pg. 112. *See also pg. 116*.

25. On September 16, 2021, Dr. Allison Fall performed an Independent Medical Examination (IME). Claimant reported her nose was swelling and "it feels like there are small ants in her nose." Respondents' Ex. J. pg. 118.

26. Claimant testified the day following the incident, "I feeling right where I was injured, pins and needles as if I had ants." Hrg. Tran. pg. 76, lines 9-13.

27. The medical records indicate, Claimant did not report a feeling of "ants in her nose" to Dr. Sanchez or Dr. Macaulay.

28. As to the reporting of the incident, Claimant reported she was offered to go to human resources but did not go because she would have had to take a COVID test. Respondents' Ex. K, pg. 108; Respondents' Ex. J pg. 119.

29. Claimant reported despite Dr. Sanchez's recommendations she did not get her eyes checked because the vision clinic was closed. *Id.*

30. Claimant testified that she obtained new glasses in October 2020 for reading, but yet also wears them while driving. Hrg. Tran. 83, lines 13-19; pg. 90, lines 8-9.

31. Claimant reported to Dr. Fall before the accident she had no problems with headaches. Dr. Fall noted, "Records indicate otherwise." Respondents' Ex. J, pg. 121.

32. As to her complaints related to vertigo and throat, Dr. Fall noted, "She did not complain of this to me, nor would it be related." *Id.*

33. After evaluating Dr. Macaulay's provisional 10% whole person impairment rating, Dr. Fall opined,

> I would concur that blunt nasal trauma was work related but would not relate headaches or dizziness to the contusion. This is out of proportion to objective findings and not supported by the medical documents. Also, she had preexisting headaches, and the etiology of the headaches has not been determined. Certainly, they are not from a head injury.

Id. at pg. 121.

34. As to Dr. Macaulay's opinion Claimant was not at MMI, Dr. Fall opined,

> Given no loss of function, this additional workup would not be indicated.
>
> In my opinion the only diagnosis related to the incident is a nasal contusion. There is no objective medical evidence to support her ongoing complaints. In fact, she is erroneously attributing complaints to the nose which are not related such as her throat, breathing, vision changes and headache pain. Records document prior similar complaints for other reasons. Being struck on the nose would not cause ongoing breathing problems or vision problems, headaches, vertigo, dizziness and/or choking. Her complaints are out of

> proportion to the evidence and out of proportion to the fact that she did not pursue immediate medical treatment. There are likely psychosocial issues playing a role in her issues given that there was the issue of her being off work after the COVID test and then being told there was no longer a position for her.

Id. at pg. 122.

35. Dr. Fall concluded that:

> There is no evidence that her headaches are impeding her function. In fact, she is working full duty at her primary job cleaning houses. Also, Dr. Macaulay only finds her [not] at MMI based upon subjective complaints without correlating objective findings. He himself indicates he did not know the etiology of her subjective complaints. She is at MMI for the nasal contusion which did not require any treatment. The surveillance video is consistent with one leading a normal functional life without limitation from a remote nasal contusion, which is what would be anticipated.

Id.

36. Claimant testified that on several occasions a brown substance came out of her nose. "It came out the day of the injury, also the next day, and it kept coming out for, I don't remember if it was 15-days or 22-days." Hrg. Tran. pg. 80, lines 23-25.

37. Claimant's testimony is inconsistent with the medical records as she told Drs. Fall and Dr. Sanchez she had brown discharge the next day, not for an ongoing period of time. Respondents' Ex. J, pg. 119; Ex. Respondents' Ex. I, pg. 101.

38. Respondents took the evidentiary deposition of Dr. Macaulay on October 5, 2021. The Respondents went through the medical record in detail with Dr. Macaulay. The Respondents addressed with Dr. Macaulay:

- The minor nature of the accident.
- The various inconsistencies in the medical record.
- The extent of Claimant's preexisting headaches.
- The change in symptoms as time went on.
- The extent of the global symptoms reported by Claimant for what appeared to be a very minor accident.

39. In order to show the minor nature of the accident, Respondents showed Dr. Macaulay a short video of what purported to happen during the accident. The video apparently demonstrated the lid of a paper towel dispenser hit another person on the head.[1] Dr. Macaulay was also made aware that when Claimant was evaluated by Dr. Sanchez, Claimant denied any nose bleeding or any visual

[1] The video was not admitted into evidence at the hearing.

lesions to her nose. As for the inconsistencies in the medical records, Respondents went through the discrepancy regarding Claimant's description of when – and for how long – she noticed a brownish colored discharge from her nose. Respondents also went through Claimant's prior records from 2012 through 2017 that demonstrated Claimant sought medical treatment for headaches, but yet denied having prior headaches to Dr. Macaulay. Respondents also went through the extent of Claimant's symptoms, and how Claimant started to complain about different symptoms as time went on. For example, Claimant did not complain of vertigo when she was evaluated by Dr. Sanchez or Dr. Fall, but she did complain about vertigo when she was evaluated by Dr. Macaulay. Lastly, Respondents went through the global nature of Claimant's symptoms for what appeared to be a very minor accident. For example, Respondents went through the various symptoms Claimant contends were caused by the accident. These symptoms include headaches, breathing problems, vertigo, vision problems, a choking sensation and throat issues.

40. Dr. Macaulay was also asked whether he believed Claimant's injury was minor. He answered, "Well, it depends on how one defines 'minor,' but it would not appear to be a life-threatening or significant injury that would involve the structure of the nasal pyramid." Respondents' Ex. F, pg. 41, lines 14-19.

41. He was also asked as to whether he agreed Dr. Sanchez's physical examination was normal. He replied, "Yes. For what was evaluated, yes it was." *Id.*, lines 20-22.

42. Dr. Macaulay was asked whether Claimant complained of any issues with her vision, breathing or throat when she presented to Dr. Sanchez. He replied:

> She did note an issue associated with her vision that was attributed to her glasses or some issue, we don't know what, noting that her prescription was changed about three months prior to the evaluation by Dr. Sanchez, and that she did have some problems with breathing in the morning, though it is not clear whether that was due to nasal or distal pulmonary issues.

Dep. Trans. pgs. 41-42, lines 23-8.

43. When asked whether ongoing drainage would be associated with the work-incident, Dr. Macaulay replied, "I would say that it would be relatively unlikely. I won't go so far as to say it is medically improbable. But, you know, just on the by-and-by, I would say that it would be relatively unlikely." *Id.* at pg. 19, lines 2-9.

44. As to whether mild traumatic brain injuries typically improve and not deteriorate over time as the case here, Dr. Macaulay testified, "That would be the normal progression. Normally, it will get better, usually within 90 to 120 days. Sometimes, however, when you have a concussive-type event, it can persist for years." *Id.* at pg. 47, lines 4-10.

45. Dr. Macaulay testified he did not see any visual or nasal issues on his physical examination. He also confirmed his examination of claimant's tongue and throat

were normal. Lastly, her cognitive examination was "rather good." *Id.* at pgs. 47-48, lines 16-9.

46. Dr. Macaulay testified it was unlikely Claimant sustained any brain damage as a result of the work incident. *Id.* at pg. 79, lines 9-11.

47. Dr. Macaulay was asked whether Claimant's ongoing complaints were possibly psychological. He testified, "Yes." *Id.* lines, 21-23.

48. Despite bringing all of these issues to the attention of Dr. Macaulay, he still concluded that Claimant is not at MMI. Dr. Macaulay is of the opinion that Claimant is not at MMI because she needs additional medical treatment to determine the extent of her injuries, if any, that flow from the accident, and whether further active treatment is necessary. Dr. Macaulay concluded that Claimant needs to be seen by an ear nose and throat (ENT) doctor to determine whether Claimant has an injury to her nose that requires additional medical treatment. He also concluded that an ENT evaluation is required to assess whether Claimant's vertigo might have been caused by the accident by performing a series of studies that can help determine whether there is a disturbance to Claimant's balance mechanism that is either peripheral or central. And, based on those findings, the ENT should be able to diagnose the cause of Claimant's vertigo, whether it was caused by the accident, and whether additional medical treatment is warranted.

49. He also concluded that Claimant's symptoms might be caused by anxiety. But, to determine whether Claimant's symptoms are due to anxiety, or the work-related trauma, a neuropsychologist should assess Claimant and make that determination.

50. Thus, Dr. Macaulay concluded that Claimant needs additional medical treatment to determine the extent of her injuries, if any, and whether additional medical treatment is necessary to cure and relieve Claimant from the effects of her injury and is therefore not at MMI.

51. Dr. Macaulay concluded that the initial – and only – medical appointment Claimant had under this claim with Dr. Sanchez was insufficient. In other words, based on her report, he could not tell whether Dr. Sanchez adequately addressed the extent of Claimant's work accident. As a result, he concluded that Claimant needs additional evaluations to determine the extent of her injury and whether she needs additional treatment before she can be placed at MMI.

52. Dr. Macaulay's opinion is a reasonable interpretation of the underlying medical records combined with Claimant's reported symptoms. While the ALJ agrees that the mechanism of injury seems very inconsequential, Claimant does have some complaints that arguably warrant an evaluation by a physician that specializes in nasal symptoms – such as an ENT. Moreover, while Claimant's global symptoms seem to be out of proportion to the mechanism of injury, and may be related to an underlying psychological disorder, Dr. Macaulay's opinion that Claimant should be evaluated by a neuropsychologist is also not unreasonable. Claimant did get hit on her nose/head and is reporting symptoms

that Dr. Macaulay said are consistent with a mTBI (mild traumatic brain injury). As a result, the ALJ finds Dr. Macaulay's opinion that Claimant is not at MMI to be credible and persuasive.

53. Dr. Fall testified at the hearing. Dr. Fall testified regarding Claimant's report of a brown discharge the day after the injury, Dr. Fall testified, "Well it wouldn't typically cause a bloody nose that would show up the next day. Hrg. Tran. pg. 20, lines 20-22. So I don't know what that accounts for. I don't know what to make of that." *Id.* at lines 22-23.

54. When addressing Claimant's failure to seek medical treatment for months, Dr. Fall testified, "If her situation was that dire, she would have gone in for treatment. There was access to treatment. She could have received treatment. Treatment was available for her." Hrg. Tran. pg. 52, lines 22-25.

55. As to her vision, Claimant testified, "So I went to get glasses made. At the health clinic they suggested that I get glasses made so that my head wouldn't hurt and things like that." Hrg. Tran. pg. 83, lines 13-19.

56. Claimant testified that "I told the doctor that about 2-months before – I don't remember, but I had gone to get the lenses about five months before maybe, and she said that's why I had headaches and I felt a little disoriented." Hrg. Tran pg. 86, lines 16-19.

57. Claimant was asked when she received new glasses. She testified, "In October." Hrg. Tran pg. 90, lines 8-9.

58. Dr. Fall further testified Claimant's poor eyesight and/or new prescription glasses could be the cause of her ongoing complaints of headaches and visual issues. Hrg. Tran pg. 21, lines 18-20. *See also pg. 30, lines 5-8*.

59. Dr. Fall reviewed the x-rays and Dr. Sanchez's report. Dr. Fall testified that:

> I mean, the x-rays don't rule out every abnormality, but Dr. Sanchez did a thorough, you know, explanation of how she came to her conclusions that she couldn't account for those symptoms having been caused by the reported mechanism of injury and that she didn't see any evidence of a fracture of the nose where it had been hit. So there was really no treatment to be offered.
>
> So you know, there weren't any objective findings at that point in time that could be attributed or at that time, and the symptoms couldn't be attributed to the nasal contusion.

Hrg. Tran pg. 22, lines 4-17. *See also pgs. 28-29, lines 20-4*.

60. Dr. Fall testified Claimant was properly placed at MMI by Dr. Sanchez, did not require further medical treatment and or require any impairment rating. Hrg. Tran pp. 22-23, lines 18-2.

61. When reviewing the DIME report, Dr. Fall noted the DIME took place nearly one-year after the injury. She testified:

> That is, you know, another piece of information, which you know is consistent with my opinion. That fact that she's you know, showing up to meet with Dr. Macaulay and telling him there's new symptoms even as of, you know, two weeks ago and worsening with other symptoms would not be consistent with, you know, these normal examinations of Dr. Sanchez, myself and Dr. Macaulay all have.

Hrg. Tran. pg. 29, lines 9-20.

62. When asked whether Claimant admitted to preexisting conditions to Dr. Macaulay, Dr. Fall testified, "No she denied any preexisting conditions. Q. Is that true to the medical records? A. No. When you look at the medical records, she did have the complaints of the, you know, blurry vision and headaches, and you know, possibly prediabetes." *Id.* at pg. 30, lines 9-17. *See also Respondents' K pg. 109, 110*.

63. Dr. Fall was asked whether Claimant would have sustained injuries of this magnitude based on the mechanism of injury, Dr. Fall testified,

> Not that would be consistent with the symptom's she's currently reporting. I think she could have had a lot of pain when that piece hit her nose. It can be really painful, but there wouldn't be any, you know, ongoing – there was no evidence even when Dr. Sanchez saw her earlier on of any structural or physical change that occurred.

Hr. Tran. pgs. 30-31, lines 18-2.

64. Dr. Fall testified Dr. Macaulay's physical examination was normal. She testified, "Yes. I even read through his deposition earlier today, and that was gone through, and everything he checked was normal." *Id.* at pg. 31, lines 3-10.

65. Following review of Dr. Macaulay's deposition testimony where he testified Claimant's complaints could be psychological, Dr. Fall testified:

> I would agree that her complaints are likely expounded, if that's the right word -- confounded by psychological complaints. So, you know, who knows. Maybe when she feels nasal stuffiness, in her mind it, you know, escalated into something bigger like, 'I can't breathe.' And so yeah, I do think psychological issues are playing a role. Whether that's the underlying reason why she has headaches and vision problems, I don't know.

Hrg. Tran. pgs. 32-33, lines 16-1.

66. Dr. Fall testified Dr. Macaulay erred in his DIME report for several reasons. She testified:

    a. The first error that is at the top of my head that I'll start off with is in the impairment rating when he assigned a 10% for episodic neurological impairment for the headaches. We are taught in our Level II

reaccreditation that we can use that category for headaches when they're caused by a head injury. He testified that he thought it was unlikely that she sustained a head injury, traumatic brain injury, concussion. So he is incorrect in using the brain injury portion of the guidelines to rate a subjective complaint of a headache given that the headache was not caused by a brain injury.

b. He erred in causation. So he is attributing these symptoms to the incident when he's kind of having to go around four back doors to come up with some kind of explanation when if you look at actually what happened and how she was able to function normally after, it's just not medically plausible that the incident caused the complaints she's currently having…The psychological testing may show that she has anxiety and tends to be, you know, a somatic compliant, that's not going to help us with the actual incident and what it caused. If the ENG notes that she has chronic sinusitis, that's not going to change the issue of causation…So nothing they're going to find is going to be caused by the piece of metal hitting her nose.

Hrg. Trans. at pgs. 33-34, lines 6-14. *See also pgs. 60-61, lines 18-13*.

67. As to her function, Claimant testified she could go to work, cook, clean, and take care of her children. *Id.* at pg. 93, lines 11-23. But merely being able to perform her job does not mean she was not injured and that she does not require additional medical treatment to determine the extent of her injury that was caused by the accident.

68. Claimant was asked, "Q. So mainly bending is your issue? A. Yes. When I bend down I feel as if my nose is going to fall off, as if something's loose in there. Q. But otherwise you do the things you typically do correct? A. Well, when I sleep, I can't sleep facedown because my nose hurts. When I was my face, I can't touch my nose that much or be rough with it because my nose hurts a lot." *Id.* at pg. 94, lines 5-12.

69. Claimant testified she had sought no medical treatment after seeing Dr. Sanchez as they were only allowing telehealth appointments and she wanted to be seen in person. Claimant testified she was seen in person by Drs. Sanchez, Macaulay and Fall. *Id.* at pgs. 95-96, lines 5-11. The ALJ finds that Claimant's explanation for not seeking medical treatment right after the accident is credible.

70. Overall, the ALJ finds Claimant's testimony to be credible to the extent that she is honestly reporting her symptoms – as she perceives them – and as she remembers them developing. While there are some inconsistencies, the inconsistencies do not rise to a level of finding the Claimant not credible. For example, although Claimant stated to Dr. Macaulay that she did not have any prior headaches – and the records demonstrate otherwise - Claimant had not actively treated on a regular basis for headaches for approximately 3 years before the accident. Thus, Claimant was arguably not having headaches for a reasonable period of time before the accident.

71. Dr. Fall testified Claimant sustained a nasal contusion and there was no objective evidence to support Claimant sustained a head injury as previously concluded by Dr. Macaulay. Hrg. Trans. pg. 25, lines 19-23; pgs. 26-27, lines 22-4.

72. When comparing Claimant's complaints from her IME report to Dr. Macaulay's DIME report, Dr. Fall testified Claimant did not report any chest pain, swallowing issues, breathing issues or dizziness during the IME, unlike her complaints to Dr. Macaulay. Hrg. Trans. pg. 23, lines 3-23.

73. Dr. Fall also testified Dr. Macaulay erred in finding Claimant had not reached MMI and that Claimant's work incident resulted in an impairment rating.

74. The ALJ finds Dr. Fall's opinions to be founded on a reasonable interpretation of the evidence. That said, the ALJ does not find her opinions to represent clear and convincing evidence that Dr. Macaulay erred and that his conclusion regarding MMI is wrong.

75. The evaluation by an ENT and a neuropsychologist consists of diagnostic treatment that offers a reasonable prospect for defining Claimant's condition and suggesting further treatment. As a result, such treatment is inconsistent with a finding that Claimant is at MMI.

76. The evaluation by an ENT and a neuropsychologist are not found to be tests that are essential for the DIME physician to solely render an impairment rating. As found, the tests are essential to define Claimant's condition and suggest further treatment and are inconsistent with a finding of MMI.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Respondents overcame the opinion of the Division Independent Medical Examiner that Claimant is not at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing

evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

The ALJ must focus on the evidence submitted in this case. As found, Claimant was involved in an accident in which the lid or cap of a paper towel dispenser hit Claimant on the nose. Based on the accident, Claimant reports a myriad of symptoms. While the extent of her symptoms, and the global nature of her symptoms, seems out of proportion to the event, Dr. Macaulay, the DIME physician, is of the opinion that Claimant is not at MMI. His opinion is based on his conclusion that the medical treatment provided to date – a single evaluation by Dr. Sanchez – failed to address Claimant's complaints which Claimant attributes to her work accident. As a result, he is of the opinion that Claimant needs additional medical treatment in the form of an evaluation by an ENT and a neuropsychologist to define the extent of Claimant's work accident, the conditions which flow from the accident, if any, and to determine whether additional medical treatment is reasonably necessary to cure and relieve Claimant from the effects of her work injury. As found, Dr. Macaulay's conclusion is a reasonable interpretation of the evidence.

Respondents had Claimant evaluated by Dr. Fall. Dr. Fall concluded that the accident could not have caused anything more than a mere contusion and that Claimant's complaints and symptoms – which Claimant associates to the accident – are unrelated. As a result, she determined Claimant is at MMI with no impairment. She also concluded that Dr. Macaulay erred in his assessment of this case. The court also found that Dr. Fall's conclusions were a reasonable interpretation of the evidence in this case. The court further found, however, that her opinion does not rise to the level of clear and convincing evidence.

The ALJ also found Claimant to be credible regarding her perception and reporting of her symptoms. In other words, the court found that Claimant is honestly reporting her symptoms and the timing of such to the best of her ability – regardless of whether they are related to the industrial accident. It is, however, the symptoms that need to be evaluated by other physicians in order to determine causation and whether additional treatment is reasonably necessary and related to the industrial accident. While there are some inconsistencies in Claimant's testimony, it must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event. *See People v. Brassfield*, 652 P.2d 588, (Colo. 1982).

As a result, the ALJ finds and concludes that based on the entire record, Respondents have failed to present clear and convincing evidence that Dr. Macaulay erred, and that Claimant is at MMI. In reaching this conclusion, the court has considered WCRP 11-5(D). Rule 11-5(D) provides that the DIME physician can order tests that are essential to providing an impairment rating. In this case, it is arguable that the testing suggested by Dr. Macaulay will assist in determining Claimant's impairment rating. However, in this case, the tests are not being recommended to merely assist in providing Claimant an impairment rating. In this case, the medical treatment is being recommended to define the extent of Claimant's work accident and define future treatment, if any. Then, after Claimant has been provided the proper medical treatment, Dr. Macaulay can assess Claimant for an impairment rating. Thus, the ALJ finds and concludes that applying Rule 11-5(D) in this case would result in Claimant receiving pre-MMI medical treatment after being placed at MMI. The ALJ therefore finds and concludes that the treatment being recommended by Dr. Macaulay is inconsistent with a finding of MMI based on the facts and circumstances of this case.

As a result, the ALJ finds and concludes that Respondents have failed to overcome the opinion of Dr. Macaulay that Claimant is not at MMI by clear and convincing evidence. Therefore, the ALJ finds and concludes that Claimant is not at MMI.

II. Whether the medical treatment recommended by the Division Examiner is reasonable and necessary and whether the ALJ can order Respondents to pay for the medical treatment recommended by the DIME physician.

The ALJ has found that Claimant is not at MMI. Claimant, however, has requested the ALJ to order Respondents to pay for the treatment recommended by Dr. Macaulay.

Rule 11-5(D) does allow an ALJ to order Respondents to pay for testing that is essential for an impairment rating. However, as found here, the treatment recommended by Dr. Macaulay is not merely essential for Dr. Macaulay to determine Claimant's impairment rating. The treatment recommended by Dr. Macaulay is to define the extent of Claimant's work accident and define future treatment, if any, before Dr. Macaulay can determine MMI and provide an impairment rating. The treatment is therefore necessary to obtain MMI and inconsistent with post MMI treatment necessary to perform an impairment rating as allowed under Rule 11-5(D).

Moreover, an ALJ cannot order Respondents to provide specific diagnostic testing, evaluations, or both, which have not been prescribed by an authorized treating physician or when such treatment is inconsistent with Rule 11. *See* WCRP 11-5(D) *and Potter v. Grounds Service Co.,* W.C. No. 4-935-523-04 (August 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018.) As a result, Claimant's request for an order that orders Respondents to pay for an assessment by an ENT and a neuropsychologist, which have been recommended by Dr. Macaulay – the DIME physician - is denied. If, however, an authorized treating physician prescribes an evaluation by an ENT and/or a neuropsychologist, that is a separate issue and is not addressed in this order.

ORDER

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

1. Respondents have failed to overcome the opinion of the DIME physician by clear and convincing evidence. Claimant is thus not at MMI.

2. Claimant's request for an order for Respondents to pay for an evaluation with an ENT and a neuropsychologist, as recommended by the Division Examiner, is denied.

3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: January 18, 2022.

/s/ Glen Goldman

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his March 29, 2021 industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 29, 2021 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $702.62.

FINDINGS OF FACT

1. Employer is a tree care company. Claimant is a 63-year-old male who worked for Employer as a Groundsman. His job duties involved cleaning debris from beneath trees as his co-worker trimmed branches.

2. Claimant testified that on March 29, 2021 he went to a job site with tree trimmer [Redacted, hereinafter DW]. He detailed that at approximately 11:30 a.m. Mr. DW[Redacted] cut a 20-30 foot long crabapple tree limb that was about 6-8 inches in diameter. Claimant remarked that the limb fell, struck him on the head and knocked him to the ground. He experienced significant neck pain and reported his symptoms to Mr. DW[Redacted]. Claimant continued to work with Mr. DW[Redacted] until they returned to Employer's office at approximately 7:30 p.m. Claimant noted that at Employer's office he reported his injury to supervisor [Redacted, hereinafter MP].

3. The record reflects that Claimant has a long history of cervical spine and neck issues. Claimant testified that he suffered a neck injury due to a motor vehicle accident when he was 15 years old. He also had a prior Workers' Compensation claim from an incident on April 22, 2020 that involved his cervical spine and radicular pain in his left arm. A cervical spine MRI on May 26, 2020 revealed degenerative changes at C4-5, C5-6, and C6-7. John P. Ogrodnick, M.D. determined that Claimant's cervical condition was not work-related. On July 7, 2020 he reasoned that Claimant had reached Maximum Medical Improvement (MMI) without impairment or work restrictions. Claimant reported a 75% improvement in his condition upon reaching MMI.

4. Claimant explained that, prior to his March 29, 2021 work accident he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant remarked that he was unsure about how long he was unconscious. He did not seek medical attention after the fall.

5. Claimant's coworker [Redacted, hereinafter BE] testified that he and Claimant went out drinking on March 16, 2021. He remarked that, when he dropped Claimant off at home, Claimant was "buzzed." Mr. BE[Redacted] saw Claimant enter his residence through the garage but did not witness a fall.

6. Claimant acknowledged that he told numerous coworkers about his fall at home. Coworkers DW[Redacted], Mr. MP[Redacted], and Mr. BE[Redacted] all commented that Claimant showed them a laceration on his head and a picture of a pool of blood on his garage floor on the work day after the incident. Claimant also told his coworkers he was knocked unconscious as a result of the fall.

7. Mr. DW[Redacted] and Mr. MP[Redacted] also disputed Claimant's account regarding the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue until they returned to Employer's office at approximately 7:30 p.m. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury.

8. Owner of Employer [Redacted, hereinafter O] testified that the jobs Claimant and Mr. DW[Redacted] completed on March 29, 2021 involved pruning and shaping crabapple and ash trees. However, there was no reason to remove a large limb, such as the one described by Claimant, from the trees.

9. Claimant testified that on March 30, 2021 he attended an appointment with his primary care physician (PCP) for a physical examination. He remarked that his PCP immediately noticed a problem with his neck and referred him to a Workers' Compensation provider for an evaluation.

10. Later on March 30, 2021 Claimant visited Dr. Ogrodnick at SCL Health Medical Group. Claimant reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. He believed he was unconscious for hours because when he woke up it was dark and his face was "slimy" with blood. Claimant told Dr. Ogrodnick he was beginning to improve, but on March 26, 2021 at work a heavy crabapple tree branch fell across the chipper, hit him in the head and knocked him to the ground. Claimant noted that he suffered pain throughout his

entire body, but finished his shift. Furthermore, Claimant commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Claimant reported to Dr. Ogrodnick that he suffered a headache, blurred vision and loss of balance. Dr. Ogrodnick determined that Claimant had significantly limited cervical range of motion. He diagnosed Claimant with a traumatic head injury and a neck strain. Dr. Ogrodnick restricted Claimant from working and referred him for an MRI. The MRI revealed only degenerative changes.

11. On March 31, 2021 Claimant visited the emergency department at Lutheran Medical Center after his PCP notified him that he was anemic. Claimant reported "moderate constant aching neck pain since a slip and fall approximately 10 days ago, also states tree limbs fell and dropped on his head on March 17." Imaging revealed an acute nondisplaced fracture of the right C2 lateral mass and right C2 transverse process. Claimant then saw neurosurgeon Mark Edward John Magner, M.D. for a consultation. Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck on the head by a heavy tree branch on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Dr. Magner diagnosed Claimant with a C2 fracture that was structurally stable and recommended a cervical collar.

12. On April 2, 2021 Claimant returned to Dr. Ogrodnick for an evaluation. After reviewing the imaging findings from Lutheran Medical Center Dr. Ogrodnick determined "[i]t is not clear when [Claimant] sustained [his] cervical fracture. "[T]ransverse process fracture not typical with axial load from tree branch on top of head."

13. On May 12, 2021 Claimant was involved in a single vehicle automobile accident. He explained that he was not feeling well and was driving to the hospital when he rolled his van. Claimant commented that he did not sustain any injuries in the crash, but awoke in an oxygen "tent" at the hospital due to a COVID-19 diagnosis. At the emergency department Claimant was intubated and assessed with numerous rib fractures, a left pleural effusion, a scalp hematoma/laceration, lactic acidosis, alcohol intoxication with a blood alcohol of .317 and an "old" C2 fracture.

14. On November 18, 2021 Albert Hattem, M.D. conducted a records review of Claimant's claim. Dr. Hattem explained that on March 31, 2021, when Claimant visited the Lutheran Medical Center emergency department as recommended by his PCP for an evaluation of anemia, he also reported neck pain. Claimant attributed his neck pain to the slip and fall 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant told Dr. Ogrodnick that, when he fell, he struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. Finally, Dr. Hattem agreed with Dr. Ogrodnick that the tree branch incident did not likely cause Claimant's cervical spine fractures.

15. Dr. Hattem also testified at the hearing in this matter. He maintained that the March 29, 2021 tree branch accident did not likely aggravate, accelerate or combine with Claimant's pre-existing condition to cause his cervical spine fracture. Dr. Hattem explained that the following factors are considered in performing a causation analysis: (1) whether the diagnosis is consistent with the mechanism of injury; (2) pre-existing injuries; (3) subsequent injuries; (4) consistency of complaints relating to the mechanism of injury; and (5) credibility of the injured worker. After considering the preceding factors, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely cause of his cervical spine fracture. Notably, Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. In fact, a transverse process fracture is more consistent with a bad fall.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021. Initially, Claimant explained that, while working for Employer on March 29, 2021, he was struck in the head and knocked to the ground by an approximately 20-30 foot long, 6-8 inch diameter crabapple tree limb. He was subsequently diagnosed with a cervical spine fracture. Despite Claimant's assertion, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of his account. Moreover, the persuasive medical opinions reflect that Claimant more likely suffered his cervical spine fracture in an injury at home on March 16, 2021 and the mechanism of injury of a falling tree branch was unlikely to cause a cervical spine fracture. Accordingly, the March 29, 2021 accident did not likely aggravate, accelerate, or combine with Claimant's pre-existing condition to produce a need for medical treatment.

17. Claimant's description of the cause of his cervical spine injury is internally inconsistent. Although Claimant testified that he was injured by a falling branch on March 29, 2021, the medical records provide multiple accounts regarding the cause of Claimant's injury. Claimant explained that, prior to his March 29, 2021 work accident he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant did not seek medical treatment after the fall. When Claimant visited Dr. Ogrodnick on March 30, 2021 he reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. Claimant told Dr. Ogrodnick he was beginning to improve, but on March 26, 2021 at work he was struck in the head by a heavy crabapple branch that hit him in the head and knocked him to the ground. Claimant also commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Moreover, in a visit with Dr. Magner on March 31, 2021 Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck by a heavy tree branch on his head at work on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Based on Claimant's three different descriptions to medical providers and pre-existing history, it is speculative to attribute his cervical spine injury to a March 29, 2021

accident at work. As Dr. Ogrodnick noted after reviewing Claimant's imaging findings "[i]t is not clear when [Claimant] sustained [his] cervical fracture."

18. Mr. DW[Redacted] and Mr. MP[Redacted] also credibly disputed Claimant's description of the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury. Finally, Mr. O[Redacted] testified that there was no reason why large limbs, such as the one described by Claimant, would have been removed from the trees on March 29, 2021.

19. The medical records reveal that the most likely cause of Claimant's cervical spine fracture was his slip and fall at home on March 16, 2021. On March 31, 2021 at Lutheran Medical Center Claimant attributed his neck pain to a slip and fall that had occurred approximately 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. After performing a causation analysis, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely case of his cervical spine fracture.

20. The medical records also reflect that a falling tree branch on March 29, 2021 did not likely cause Claimant's cervical spine fracture. Specifically, a tree branch falling on top of the head is not a mechanism of injury typically associated with a cervical spine fracture. Dr. Ogrodnick noted "transverse process fracture not typical with axial load from tree branch on top of head." Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. The numerous internal inconsistencies in Claimant's account, conflicts with credible witnesses and persuasive medical opinions reveal it is unlikely Claimant suffered a cervical spine fracture while working for Employer on March 29, 2021. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

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

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

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

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

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021. Initially, Claimant explained that, while working for Employer on March 29, 2021, he was struck in the head and knocked to the ground by an approximately 20-30 foot long, 6-8 inch diameter crabapple tree limb. He was subsequently diagnosed with a cervical spine fracture. Despite Claimant's assertion, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of his account. Moreover, the persuasive medical opinions reflect that Claimant more likely suffered his cervical spine fracture in an injury at home on March 16, 2021 and the mechanism of injury of a falling tree branch was unlikely to cause a cervical spine fracture. Accordingly, the March 29, 2021 accident did not likely aggravate, accelerate, or combine with Claimant's pre-existing condition to produce a need for medical treatment.

9. As found, Claimant's description of the cause of his cervical spine injury is internally inconsistent. Although Claimant testified that he was injured by a falling branch on March 29, 2021, the medical records provide multiple accounts regarding the cause of Claimant's injury. Claimant explained that, prior to his March 29, 2021 work accident, he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant did not seek medical treatment after the fall. When Claimant visited Dr. Ogrodnick on March 30, 2021 he reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. Claimant told Dr. Ogrodnick he was

beginning to improve, but on March 26, 2021 at work he was struck in the head by a heavy crabapple branch that hit him in the head and knocked him to the ground. Claimant also commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Moreover, in a visit with Dr. Magner on March 31, 2021 Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck by a heavy tree branch on his head at work on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Based on Claimant's three different descriptions to medical providers and pre-existing history, it is speculative to attribute his cervical spine injury to a March 29, 2021 accident at work. As Dr. Ogrodnick noted after reviewing Claimant's imaging findings "[i]t is not clear when [Claimant] sustained [his] cervical fracture."

10. As found, Mr. DW and Mr. MP[Redacted] also credibly disputed Claimant's description of the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury. Finally, Mr. O[Redacted] testified that there was no reason why large limbs, such as the one described by Claimant, would have been removed from the trees on March 29, 2021.

11. As found, the medical records reveal that the most likely cause of Claimant's cervical spine fracture was his slip and fall at home on March 16, 2021. On March 31, 2021 at Lutheran Medical Center Claimant attributed his neck pain to a slip and fall that had occurred approximately 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. After performing a causation analysis, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely case of his cervical spine fracture.

12. As found, the medical records also reflect that a falling tree branch on March 29, 2021 did not likely cause Claimant's cervical spine fracture. Specifically, a tree branch falling on top of the head is not a mechanism of injury typically associated with a cervical spine fracture. Dr. Ogrodnick noted "transverse process fracture not typical with axial load from tree branch on top of head." Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. The numerous internal inconsistencies in Claimant's account, conflicts with credible witnesses and persuasive medical opinions reveal it is unlikely Claimant suffered a cervical spine fracture while working for Employer on March 29, 2021.

Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: January 21, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that the disc arthroplasty surgery recommended by Dr. Michael Janssen is reasonable, necessary and related to her admitted May 8, 2019 work injury.

II. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment on March 17, 2021, thus precluding wage loss benefits after this date.

FINDINGS OF FACT

The evidence in this matter is voluminous. The parties submitted in excess of 800 pages of exhibits and testimony was taken over approximately 6 ½ hours. Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Employer operates an assisted living facility known as [Facility name redacted] Care Center. (Resp's. Exh. DDD). Claimant was working for Employer in her capacity as a certified nursing assistant (CNA) when she injured her low back on May 8, 2019, while transferring a resident to obtain her weight. According to Claimant, the resident wrapped her hands around her neck and then went "dead weight" causing her to strain her low back. (Resp's. Exh. A, WW).

2. Claimant was seen later that day by Terrence Lakin, DO at Southern Colorado Clinic ("SCC"), who diagnosed her with a lumbosacral strain. He assigned work restrictions that generally limited Claimant to 10-15 pounds occasional lifting. His report documented a past medical history that included fibromyalgia, arthritis, depression and multiple car accidents. Claimant also disclosed a prior lumbar injury which was treated with injections. (Resp's. Exh. A). On May 10, 2019, Claimant underwent lumbosacral x-rays that demonstrated only mild degenerative changes. (Resp's. Exh. B).

3. Over the next few weeks, Claimant treated at SCC reporting moderate (4/10) pain and functional improvement. Claimant reported at her first physical therapy (PT) session on June 12, 2019, that she did not have too many limitations with activity, and the therapist noted that she sat comfortably in the chair with no visible distress or gait deviations. (Resp's. Exh. D). She then went an entire week without *any* pain at all. (Resp's. Exh. F).

4. Claimant also reported to Dr. Lakin's Physician Assistant (PA) on June 27, 2019 – just seven weeks post-injury – that she was already walking 3-5 miles per day, was able to carry a one-gallon jug without pain and was performing "some yard work now." (Resp's. Exh. H). She then acknowledged to her therapist that she spent June 25 and June 26 performing yard work, which required "deep" and "repetitive" squatting, and

thereafter only had some muscle soreness, with no "actual pain" that next day, at which time she was able to perform all of her therapy exercises. (Resp's. Exh. G). She similarly reported to her therapist on August 1 that she spent two hours grocery shopping and lifted a lot of items from the shelf to the cart, and while she did have some soreness thereafter, she did not report "pain". (Resp's. Exh. I). Throughout this time, Claimant continued working for Employer with restrictions and repeatedly indicated that she was "having no issues" doing so, and described her pain generally at a level of 3-4/10. (Resp's. Exhs. C-R).

5. The content of the admitted medical records supports a finding that Claimant was making gains in her functional status over the first weeks and months following this strain injury. (See generally, Resp's. Exhs. R-W). This evidence provides important context to Claimant's later subjective reports, regarding her ability to perform modified duty in 2021, her need for surgery and the credibility of the extreme functional limitations that she is now claiming.

6. On August 19, 2019, a lumbar MRI demonstrated a "[d]esiccated degenerative bulging disc, osteophyte and loss of disc height at L5-S1 with severe foraminal narrowing, left greater than right" along with a "5 mm central disc protrusion at L4-L5 without significant canal stenosis. (Resp's. Exh. J).

7. On September 30, 2019, Claimant was evaluated by physiatrist Michael Sparr, MD, who noted that her most problematic issues seemed to be left sacroiliitis with a strong element of left L5-S1 greater than L4-L5 facet dysfunction and arthralgias and foraminal stenosis that may cause intermittent radiculitis. On November 6, he performed a left SI joint injection. (Resp's. Exh. K, M).

8. On December 11, 2019, Claimant reported to Dr. Sparr that she was resistant to undergo conservative modalities, and was concerned that chiropractic treatment could cause her headaches, although Dr. Sparr assured her that manipulation of the pelvis would not do so. She also wanted to avoid massage due to alleged hypersensitivity. (Resp's. Exh. N).

9. On December 16, 2019, Claimant complained to Dr. Lakin that she was not happy with her last appointment with Dr. Sparr because he "pressed" on her facets which she reported caused her to collapse onto the exam table.[1] Claimant suggested that if she had not fallen onto the exam table she would have fallen to the floor because Dr. Sparr was "not ready" to catch her. She then reportedly needed several minutes to regain her strength to continue with additional testing. Finally, Claimant expressed her "aversion" to starting any new medications as an adjunct to her treatment. It was hoped that additional facet injections would "calm her lumbar extension pain down" so that she could progress to maximum medical improvement (MMI) by January or February 2020. (Resp's. Exh. O).

[1] Dr. Barton Goldman would later explain that collapsing from a facet examination constituted a nonphysiologic examination response. (Hearing testimony of Dr. Goldman).

10. After Claimant underwent a first set of medial branch blocks (MBBs), she again told Dr. Sparr that she was wanted to defer chiropractic treatment due to her concern over headaches. On February 13, 2020, Dr. Lakin was considering a release to full duty, although Claimant expressed apprehension. He explained to her that if she continued to fail to report any consistent improvement, she would be at MMI. Repeatedly, he said, Claimant would "improve only to have exacerbation of pain and we start all over again." He believed that a psychological evaluation could be necessary. (Resp's. Exhs. P-U).

11. On May 19, 2020, after she was administered a second set of MBBs, Claimant underwent a psychological evaluation with Herman Staudenmayer, PhD, to whom she stated a belief that when she had been afforded a rhizotomy she would be "fully healed." Claimant expressed frustration concerning the timeliness of her treatment, noting that if she had received timely treatment her pain would have been resolved. Dr. Staudenmayer administered "The Battery for Health Improvement-2 (BHI-2) which revealed a moderately high (68% tile) score for somatic complaints, which was higher than the level of somatic complaints observed in the normal population. Dr. Staudenmayer noted that Claimant endorsed 16 of 26 somatic complaint items, leading him to conclude that it may be possible that Claimant was indirectly venting unrecognized psychological distress through physical complaints. He also noted that Claimant's tile score of 58% regarding her perceived level of dysfunction was also higher than what is commonly seen in the normal population. While not particularly unusual for medical patients, Dr. Staudenmayer noted that it (Claimant's functionality score) was not normal, adding that if Claimant seems to be "more functionally limited than would be expected given objective medical information, psychological factors could be contributing to [her] perceptions". Based upon the results of Claimant's testing battery, Dr. Staudenmayer concluded that '[s]he does indicate some aspects of somatization and focus on functional complaints and has a strong sense of perseverance, self-reliance, and emotional stability". (Resp's. Exh. V).

12. Dr. Staudenmayer recommended cognitive therapy and self-regulation/relaxation with EMG biofeedback. Claimant adamantly refused any psychological treatment, noting that she was "waiting for the rhyzotomy (sic) that [would] fix [her]". Dr. Staudenmayer then noted that "[Claimant's] resistance to psychological intervention [was] consistent with a belief that her only problem is physical and that a rhyzotomy (sic) will resolve her issues". Dr. Staudenmayer diagnosed an unspecified adjustment disorder and somatic symptom disorder. (Resp's. Exh. V).

13. On June 10, 2020, Claimant was evaluated by Dr. Lakin who liberalized her restrictions by allowing Claimant to lift up to 30 pounds on occasion. During this encounter, Claimant complained to Dr. Lakin that Dr. Sparr pushed very hard on her SI joint "every time" he evaluated her and that he had pushed hard again on June 1, resulting in her legs almost giving out. She complained that she usually had high pain for 3-4 days

after seeing him, and stated that she would not allow him to examine her again. (Resp's. Exh. X).[2]

14. Claimant underwent a radiofrequency ablation (rhizotomy or RFA) on June 18, 2020, which she described as "excruciating." (Resp's. Exh. Y). The ALJ notes that, while Claimant expressed certainty that "she [would] be fully healed," once she underwent rhizotomy, as she now believes will be the case with surgery, the RFA did not resolve her complaints as she predicted. Rather, the medical records support a finding that when Claimant returned to Dr. Lakin on June 24, 2020, she complained that she worse off following the procedure than before.[3] Claimant reported that she had been working with restrictions before her RFA and following this procedure was hardly able to perform any of her duties because of increased pain. She appeared frustrated and restful of Dr. Sparr for "pressing on her low back until she fell down". Claimant's restrictions were upgraded and Dr. Lakin raised concerns regarding the psychosocial aspects of the claim with Claimant again. Claimant indicated that she had no desire to see Dre. Staudenmayer again because he wanted to "delve into her past issues about abuse. According to Claimant, her life was "perfect" before the injury forming the basis for this claim and she did not want to "dredge up" old memories that had no bearing on her pain. Per Claimant, she had dealt with her past abuse memories prior to this injury and would deal with them "fine once her low back pain [was] better resolved. The ALJ finds it clear that Claimant sees no connection between her past abuse and current symptoms. (Resp's. Exhs. Y, Z).

15. Claimant returned to Dr. Sparr on July 8, 2020. As is the case with his other reports, he referenced nothing about Claimant's dramatic pain response or collapsing incidents from SI or facet palpation, or that she mentioned that she was dissatisfied with aspects of his examinations. Claimant reported an "extremely poor" response to the rhizotomy. She complained that it caused bruising on her thighs and back. She reported an increase in pain worse with flexion but better with extension. She reported that the RFA caused her legs to become weak and that she had numbness throughout her legs. Dr. Sparr advised that numbness involving the entire legs "would require compression on multiple nerves within her spine and spinal cord which is not possible after rhizotomy." He characterized these symptoms as "atypical," and he also commented that she had contacted his office earlier without mentioning such symptoms. Dr. Sparr again explained that rhizotomy would in "no way" cause bilateral lower extremity weakness, upon which Claimant corrected herself to report that her legs only felt "diffusely weak". (Resp's. Exh. AA). Dr. Sparr felt it reasonable to obtain a repeat MRI of the lumbar spine to "assure that there is nothing further causing compression and [Claimant's] noted weakness. He also scheduled an EMG of the bilateral lower extremities to "determine if there is any nerve damage of any sort. (Id.).

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[2] Dr. Goldman would later explain that this SI examination response was nonphysiologic. (Hearing Testimony of Dr. Goldman).

[3] Dr. Goldman would subsequently testify that an RFA procedure would not cause a long-term increase in pain or decrease in function. (Hearing Testimony of Dr. Goldman).

16. On July 14, 2020, Claimant again declined to see Dr. Staudenmayer or "any other psychologist to assist us with frustration and working through problems." Claimant indicated her belief that she and Dr. Sparr did not get along and voiced concern about further "interventions and has trepidation about pursuing any further steroid injections due to detrimental effects." She also reported that she was working with restrictions, but clarified her need to squat at work and "demonstrate[d] the ability to do that for times like tying her shoes or picking up her keys." She specifically wanted her ability to squat documented so that she did not get into trouble when squatting occasionally at work. Per Claimant's request, PA Schwartz loosened Claimant's restrictions to allow squatting. (Clmt's Exh. 7, p. 361, 364).

17. Claimant underwent an EMG on August 12, 2020. The results of this study were documented by Dr. Sparr as being "normal" with "no evidence of left or right lumbosacral radiculopathy, left or right sciatic or distal compression neuropathy and no evidence of generalized peripheral neuropathy, leading Dr. Sparr to note that Claimant's reported lower extremity weakness was not supported by the results of the EMG. **(**Resp's. Exh. BB). Dr. Goldman later agreed with Dr. Sparr that Claimant's report of lower extremity weakness caused by her rhizotomy was a nonphysiologic complaint. (Testimony of Dr. Goldman). Upon review of the results of Claimant's EMG study, Dr. Sparr revised his suggestion for a repeat MRI, noting that it was not necessary. (Resp's. Exh. BB, p. 119).

18. Claimant would subsequently claim that the EMG worsened her condition (Resp's. Exh. CC), prompting Dr. Goldman to again testify that such complaints represented non-credible symptom magnification. (Testimony of Dr. Goldman).

19. On September 24, 2020, Dr. Lakin called and spoke to Claimant at length about her use of Gabapentin and other medications. Dr. Lakin found Claimant's response to his question of whether Claimant was benefitting from Gabapentin "very unclear". He tried to assess whether the titrated dose Claimant was taking was helpful only to have her indicate "several times that [it was] not hurting her." The two apparently "went around in circles, without her telling me that she is clearly benefiting." He commented that she was "very concrete in her thinking" and that she declined his repeated suggestion to adjust the dosage down to see if she noticed a benefit from the medication only to have her indicate that she did not want to make any changes "until she sees orthopedic spine surgeon." Dr. Lakin stated that he would be performing an impairment evaluation on October 13, 2020. (Resp's. Exh. EE).

20. On September 30, 2020, Claimant underwent a MRI that references similar findings as the previous study performed 13 months earlier (when she was walking up to 35 miles/week and gardening with no pain, etc.). (Resp's. Exh. FF).

21. On October 8, 2020, Dr. Michael Janssen performed a spinal surgery evaluation. Dr. Janssen believed there to be "vertical instability" and a loss of structural integrity at L5-S1, but also remarked of normal age-related changes with a minimal bulge and no thecal sac compression at L4-L5. He recommended an L4-L5 and L5-S1

discogram. He noted that he was "very particular" about these tests. Consequently, he indicated that the discogram needed to be done by someone he was familiar with or he would not make treatment decisions." (Resp's. Exh. GG). In the meantime, Claimant continued to work modified duty "without issue." (Resp's. Exh. HH).

22. On November 4, 2020, Claimant underwent lumbar discography at L4-L5 and L5-S1 followed by post discography CT of the lumbar spine. Discography revealed a concordant pain response to disc provocation at L4-5. The L5-S1 disc was found to be completely incompetent and repeated attempts at provocation failed to provoke a concordant pain response. Post discography CT scan demonstrated the following findings:

> Trace retrolisthesis L5 on S1. Vertebral body height and alignment otherwise maintained. There is moderate disc height loss L5-S1 and mild disc height loss L4-5. Discogram was performed at L4-5 and L5-S1.
>
> Findings as follows:
>
> L4-5: Modified Dallas grade 3 tear at approximately the 6:00 position.
>
> L5-S1: There is circumferential extension of contrast to the annulus consistent with grade 4 tear.
>
> Soft Tissues: The visualized soft tissues are unremarkable.

(Resp's. Exh. II, JJ).

23. On November 19, 2020, Dr. Janssen recommended reconstruction at L5-S1 for what he considered discogenic symptomatology, loss of structural integrity of the disc and vertical instability. He noted that Claimant was only able to work part-time and that her pain had altered her quality of life and ADLs, in as s much as she "tried to do half marathons with her daughter" but was apparently unable to do so. He stated that she could not take care of all her customers because she had severe axial back pain, despite the fact that the medical records consistently indicated that she was performing her modified but full-time duties "without issue," and had been doing so for many months, since May 2019. Dr. Janssen also remarked that there was no psychological overlay concerns, despite the findings of Dr. Staudenmayer and the other magnification markers documented throughout the case. (Resp's. Exh. KK).

24. The ALJ finds that Dr. Janssen assumed several facts that are inconsistent with voluminous medical record and that he had an inaccurate understanding of the psychiatric indicators and contraindications to surgery, leading him to reach opinions based upon incomplete information.

25. On December 18, 2020, Claimant returned to Dr. Lakin and his NP, at which time she again requested that her restrictions be modified to be less onerous, as she had

done on July 14, 2020. The ALJ finds this to be further evidence that Claimant was able to perform her modified work activities without problems. She was thereafter permitted to lift 10-15 pounds and squat and bend when using "good judgment," with allowances for frequent rest and stretch breaks. (Resp's. Exh. LL).

26. On December 22, 2020, Claimant was provided alternative modified work at the [Third Party Employer redacted] in Pueblo for 40 hours/week at $12.00/hour ($480/week). Claimant's duties included folding and organizing lightweight items under 10-15 pounds with no bending/twisting at the waist and no prolonged standing. The ALJ notes that the duties associated with this job offer were actually less physically demanding than the restrictions she was assigned a few days earlier, which would allow for some bending. Dr. Lakin approved this job offer. Claimant presented to the [Third Party Employer redacted] on December 29, 2020, at which time she agreed, as evidenced by her signature, that she would not perform duties that are outside of her physical limitations . . . " (Resp's. Exh. DDD, p. 260).

27. On January 27, 2021, Claimant underwent an orthopedic examination with surgeon Dr. Brian Reiss at Respondents' request. Dr. Reiss noted that, from a psychological point of view, it was "quite concerning" that Claimant complained of a severe increase in symptoms after her examinations with Dr. Sparr and after her EMG and RFA procedures as evidenced in the admitted medical record. He reviewed the discogram and remarked that, when performing discograms, the "most important information comes from a pain response at the time of injection. According to Dr. Reiss, Dr. Janssen appeared to ignore the fact that Claimant failed to report a significant pain response to provocation at this level during the discogram, when recommending surgery at L5-S1, which he opined is inappropriate. Per Dr. Reiss, Dr. Janssen simply assumed that because there is significant degeneration at and the disc is incompetent at L5-S1, this is Claimant's source of pain, i.e. her pain generator. According to Dr. Reiss, this supposition ignores the results/findings of the discogram and amounts to pure speculation. Dr. Reiss went on to remark that discograms were "notoriously unreliable, but if one is going to proceed with [a] discogram then you cannot simply throw out the result." As stated by Dr. Reiss, Dr. Janssen, did exactly that by suggesting disc replacement at L5-S1 "simply based upon the fact that more degeneration is present at that level, even though the amount of degeneration does not correlate with that level being the pain generator." (Resp's. Exh. NN).

28. Dr. Reiss concluded that a disc replacement procedure was not supported by the Workers' Compensation Medical Treatment Guidelines (MTGs), because the pain generator had not been adequately identified, there was no true instability and the likelihood of surgical intervention providing a positive result was not better than continued non-surgical treatment. A total disc replacement, stated Dr. Reiss, was unlikely to decrease Claimant's pain or increase her function. He also remarked that conservative care had not been appropriately completed. Dr. Reiss ultimately determined that the work injury involved a lumbar strain with pain that was probably being perpetuated by deconditioning and the absence of an appropriate exercise program. Dr. Reiss recommended a physical therapy program focused on core strengthening. Finally, and

contrary to the conclusion of Dr. Janssen, he noted that there was evidence of psychological overlay in the record. (Resp's. Exh. NN).

29. On March 16, 2021, Dr. Lakin remarked that the results of Dr. Reiss' independent medical examination (IME) "made sense from an orthopedic standpoint." During this appointment, Claimant indicated that she was still working but with increased pain by the end of the day. Nonetheless, she did not mention anything about having to work beyond her restrictions while performing tasks at the [Third Party Employer redacted]. Similarly, there is no indication in this report that Claimant informed Dr. Lakin that she could not continue working in her modified position, or that Dr. Lakin questioned her ability to do so; indeed, he maintained her on restrictions substantially similar to those she had been assigned previously. (Resp's. Exh. OO).

30. The day after her March 16, 2021 appointment (March 17, 2021), Claimant left work after two hours because she was "not feeling well." This was documented contemporaneously by the employer. Claimant never returned to [Third Party Employer redacted]. (Resp's. Exh. DDD, pp. 264-265).

31. During the period that Claimant worked modified duty position at the [Third Party Employer redacted] (December 29, 2020 through March 17, 2021), Employer paid her wages pursuant to the modified duty job offer at $12.00 per hour, and the Insurer paid the difference between her modified wages and regular wages as temporary partial disability (TPD). The difference between Claimant's $579.60 AWW for Employer and the $480.00 in wages earned as part of her modified job with the [Third Party Employer redacted] is $99.60 ($66.40 TTD/TPD rate). Respondents have been paying TPD since Claimant's commencement of employment at the [Third Party Employer redacted] in late December, and continue to pay such amounts despite her failure to return to the [Third Party Employer redacted], pending a determination by the ALJ as to their liability for wage loss benefits. (Resp's. Exh. XX).

32. Although she had left the [Third Party Employer redacted] on March 17 and had not returned to work since, Claimant suggested to Dr. Lakin on April 7, 2021 that she was still working with restrictions, with "no issues." She reported that her surgery with Dr. Janssen had been denied, and complained that she was experiencing numbness and tingling in her back down her legs and spasms (although such complaints were rendered unreliable by the previous diagnostic testing), and that PT was not helping. She requested a second surgical opinion with Dr. Bee and indicated that she did not believe she could return to any productive work. Dr. Lakin elected to "place" Claimant off work completely until he could obtain some "definitive answer or until she has some improvement." (Resp's. Exh. PP).

33. In contrast to her April 7, 2021 statements to Dr. Lakin, Claimant reported to her physical therapist on April 20, 2021 that she had pain but had become more functional and was "able to do larger loads of laundry and get less leg cramps." (Resp's. Exh. QQ).

34. On May 19, 2021, Dr. Lakin suggested that Claimant had reached MMI and scheduled her for an impairment rating on June 22; however, Dr. Lakin left the Southern Colorado Clinic resulting in a change of provider to Dr. Thomas Centi. (Resp's. Exh. SS). While Dr. Centi had assumed Claimant's care by June 22, 2021 – after Dr. Lakin left the medical practice – and he did not perform the previously scheduled impairment rating evaluation. (Resp's. Exh. TT).

35. On July 9 and July 12, 2021, Claimant underwent an IME with physiatrist L. Barton Goldman, MD. Following his IME, Dr. Goldman opined that Claimant demonstrated a "very high somatic focus and concrete, linear, somewhat rigid problem solving," with a very "concrete, fix it" and oversimplified understanding of her pain generators. He documented a normal gait pattern without antalgia, and found 4/5 positive Waddell signs during his evaluation.

36. Dr. Goldman reviewed and commented on Claimant's MRI as follows: "The . . . MRI scan is notable for diffuse especially lower lumbar spondylosis and degenerative changes seen in more than 50% of individuals without low back pain over 30. He was impressed by the amount of fatty atrophy present in the core musculature adjacent to the lumbosacral structures which he felt was contributing to Claimant's core weakness and hypermobility on clinical examination. Based upon his observations, Dr. Goldman opined that Claimant's MRI was "consistent with likely multi-factorial pain generators primarily involving the surrounding lumbosacral musculature that generally are not dramatically amenable to specific surgical intervention . . ."

37. Dr. Goldman also reviewed Claimant's CT scan noting that it "implies that there may be some contribution of discogenic pain to a multifactorial chronic low back pain condition primarily due to a muscular or myogenic injury with secondary discogenic and facet pain generators." (Resp's. Exh. UU at p. 227). He went on to opine that this "type of chronic multifactorial biopsychosocial pain presentation generally responds very poorly to more aggressive surgical interventions such as are being contemplated at this time on . . . behalf of [Claimant]." (Id.).

38. Dr. Goldman provided claim-related diagnoses of chronic lumbosacral strain with mild secondary facet dysfunction, possible L5-S1 instability requiring confirmatory standing flexion/extension films. He felt that Claimant was deconditioned and would benefit from a generalized aerobic and core strengthening program and found it significant that she had "no specific clear-cut vocational re-entry goal at this time." (Resp's. Exh. UU). He noted that Claimant's "perception that just about all of her different treatments so far have made her worse in the presence of clear signs of unconscious somatization are additional relative but nevertheless strong contraindications . . . against her benefitting from more aggressive spinal surgery in general.

39. As to the specific disc arthroplasty procedure recommended by Dr. Janssen, Dr. Goldman found that Claimant's work-related condition did not meet the criteria outlined in Rule 17, Exhibit 1, page 106 of the Medical Treatment Guidelines because her pain generators had not been adequately identified and treated, and because she had pain

beyond the L5-S1 level, based on clinical examinations, MRIs and discography results. Furthermore, because her spine pathology was not limited to one level, as required per page 107 of Exhibit 1, and she exhibited symptomatic facet arthrosis, Dr. Goldman opined that disc replacement surgery was contraindicated under Rule 17. According to Dr. Goldman, Claimant's medical records demonstrated that she would have difficulty with the aggressive rehabilitation necessary to further improve her function or stabilize her pain levels following disc arthroplasty surgery. Accordingly, Dr. Goldman agreed with Dr. Reiss' analysis that Claimant was not a good candidate for surgery and that she did not meet Rule 17 criteria.

40. Dr. Goldman also raised concerns for unconscious somatization based upon Claimant's contention that her treatment (rhizotomy) and diagnostic testing (EMG) worsened her symptoms. While he felt that psychiatric issues were complicating Claimant's presentation, which represented a contraindication to aggressive surgery, he did think it appropriate, as noted above, to address Dr. Janssen's suggestion that Claimant had "vertical instability" by completing a series of standing lumbosacral flexion/extension x-rays. In the meantime, Dr. Goldman opined that Claimant could benefit from improved pain management education, counseling, and biofeedback, although she appeared to "not be open nor enthused about additional support and treatment in this regard", which according to Dr. Goldman, presented yet another "relative contraindication" to aggressive surgical intervention." (Resp's. Exh. UU).

41. On September 28, 2021, Claimant underwent the aforementioned flexion/extension x-rays. This imaging revealed "mild degenerative lumbar facet arthropathy" only. Lumbar alignment was normal and there was no evidence of any acute findings, fractures or instability on flexion or extension. (Resp's. Exh. VV). Dr. Centi indicated thereafter that Claimant would be placed at MMI on November 23, 2021. (Id.). As part of his IME, Dr. Goldman also noted that if "gross instability" was not present on Claimant's standing flexion/extension films, Claimant would be "considered at maximum medical improvement. (Resp's. Exh. UU at p. 229).

42. On November 15, 2021, Claimant was evaluated by Dr. Scott Primack. Although he did not have all of Claimant's records for review (he did not reference Dr. Goldman's findings, acknowledged that he did not have the most recent MRI study and remarked that Claimant simply "told me" about the discogram), Dr. Primack came to the same conclusion as explicitly reached by Drs. Goldman and Reiss (and at least implicitly found by Drs. Lakin and Centi): that "people who have multilevel spondylosis are not good candidates for [a disc replacement] procedure." Claimant and Dr. Primack spoke about counseling for "coping skills" and her "sleep-wake cycle", but she, once again, expressed that she did not think counseling was necessary. (Resp's. Exh. EEE).

43. Claimant filed an Application for Hearing on May 25, 2021, endorsing the issues of authorization of the surgery recommended by Dr. Janssen and TTD from March 17, 2021 and continuing. (Resp's. Exh. YY). Respondents filed a response to Claimant's hearing application on June 7, 2021 contending that Claimant did not leave work due to the injury and voluntarily resigned and was therefore, responsible for the termination of her

employment. Respondents also endorsed offsets and overpayments. (Resp's. Exh. ZZ). As noted above, the matter proceeded to hearing on November 4, 2021 and November 24, 2021.

44. At the hearing, Claimant acknowledged that she worked full-time modified duty from May 2019 to December 2020 with the Employer, during which time she was not performing transfers but would occasionally push patients who weighed up to 100 pounds in wheelchairs. Additionally, Claimant testified that she would perform passive range of motion on the residents Assigned to her caseload. She stated that she had no issues performing her job duties over the 19 to 20 months after the injury "as long as [she] stayed within [her] restrictions." As referenced above, Claimant was transferred to a modified duty position at the [Third Party Employer] which she testified required her to bend and reach down into bins to grab items to tag. She claims that this aggravated her low back condition. She characterized her work at the [Third Party Employer] as "repetitive," but also acknowledged that she could take as many breaks as she wanted. She also acknowledged that she agreed not to perform duties that were outside of her limitations. She alleged that she told "Ms. K[Redacted[]" (later clarified to be [Redacted]) about difficulties she was having performing her tasks. According to Claimant, Ms. K [Redacted] responded by indicating that Claimant's tagging job was "all that they had." Claimant testified that she was having significant problems performing ADLs up to the day of the hearing, but acknowledged that she did her own laundry and "some" yardwork, including planting and weeding, and also her own shopping.

45. Ms. K[Redacted] testified as the Assistant Manager of the [Third Party Employer]. She explained the stores' modified duty process. She testified that workers referred to the store for modified duty are told at orientation that they are not to work outside of their physical restrictions. She also testified that she would frequently ask workers referred to the store how they were doing with their assigned duties and that she asked Claimant how she was doing/feeling "all the time." She believed that the store had provided "dozens" of modified duty position to injured workers, and stated that the store could provide work to a variety of injured workers with wide ranging limitations. Ms. K[Redacted] was provided with Claimant's work restrictions in advance of her job placement, and confirmed the correct restrictions before assigning her to a specific position. Ms. K[Redacted] testified that Claimant was initially provided a position in the men's department that she believed was within her abilities, but Claimant complained after a short time – which she recalled was after a day or maybe a few days – that the tasks were too onerous so she was moved, and "never hung another item." According to Ms. K[Redacted], she transitioned Claimant to the break room to prepare lightweight items, such as hats, ties, purses, sunglasses and scarves for resale. She stated that the heaviest item Claimant would lift would probably be a purse, and that Claimant could sit or stand "at her convenience." She explained that the materials to prepare were on a cart at table height, on springboards in yellow bins, so the bins are "always floating right on top", meaning that the position required no bending or twisting. She also testified that the job had no production expectations. Rather, it "would just take you however long it took you" to prepare the items for the sale floor.

46. Ms. K[Redacted] disputed Claimant's assertion that she reported difficulties performing her job duties after her very short stint in the men's department, because as Ms. K[Redacted] testified, she "check[s] on people all the time," and asks how they are doing "all the time, probably every day." Ms. K[Redacted] testified that she saw Claimant "several times a day, all day, every day" and other than in the first day or two when she was in the men's department, she "never had a complaint from [Claimant] …" She also disputed Claimant's contention that she reported that her duties exceeded her restrictions. Instead, Ms. K[Redacted] recalled, that Claimant reported that she was not feeling well on March 17, and that she left after working for two hours, and never returned. Ms. K[Redacted] testified that if Claimant had indicated that she was having difficulty performing her tasks, she would have been assigned less onerous work – which Ms. K[Redacted] testified that the [Third Party Employer Redacted] routinely provides under such circumstances. Ms. K[Redacted] also disputes Claimant's assertion that she stated that there were no other jobs available. Instead, Ms. K[Redacted] testified that the [Third Party Employer redacted] can accommodate a wide variety of restrictions.

47. Dr. Goldman testified at both the November 4 and November 24, 2021 hearings. Dr. Goldman is a Board Certified, Level II Accredited expert in the area of Physical Medicine and Rehabilitation (RM&R) who teaches the accreditation course and helped develop the MTGs.

48. Dr. Goldman described the "dramatically different" presentation Claimant demonstrated in the first three months of the claim when compared to the time she began modified duty at the [Third Party Employer redacted]. According to Dr. Goldman such a difference would most likely be related to a specific physical change, such as a new or exacerbated pain generator, or the result of psychosocial issues. Based upon his examination and records review, Dr. Goldman opined that Claimant's change in presentation was not physiologic. Indeed, Dr. Goldman noted that the objective findings demonstrated no change in the pathology, as per the MRIs, the EMG was normal and the CT showed only common age-related issues. Dr. Goldman also noted that Claimant's response to the facet examination by Dr. Sparr was not physiologic. Rather, he opined that Claimant's response to Dr. Sparr pressing on her SI joints demonstrated symptom magnification which he concluded was also supported by her response to several interventions, including the rhizotomy.[4] Her claim that the EMG caused weakness in her legs was "another sign of somatization", according to Dr. Goldman. He remarked that the psychological evaluation by Dr. Staudenmayer confirmed that Claimant suffered from an adjustment reaction and mistook psychological stress for physical symptoms, but she declined the recommended psychological treatment.

49. As to surgery, Dr. Goldman raised several misconceptions held by Dr. Janssen. First, Dr. Goldman agreed with Dr. Riess that the discogram was not diagnostic. Second, the radiology and examinations confirmed that her problems stemmed from more than one level. Consequently, he opined that the suggested disc replacement surgery

[4] Dr. Goldman acknowledged that a rhizotomy could be painful, but qualified that such would not cause pain or disability beyond a few days, and that Claimant's claim of lower extremity weakness from it was not physiologic

would probably not be successful for that reason. He stated that the record indicated that Claimant would likely not submit to the aggressive rehabilitation that would be necessary to derive any benefit from the surgery, and that Claimant herself indicated that she would not be "enthused" about committing to such a program. He thought without such rehabilitation, the proposed surgery would fail and Claimant could suffer iatrogenic disability, as she had already exhibited based upon her nonphysiologic response to the rhizotomy. Thus, he opined that Claimant would probably not only fail to improve following the recommended surgery, but that she would likely worsen. He testified that while somatization is not an automatic disqualifier for surgery, Claimant's reluctance or refusal to undergo counseling to address it was problematic.

50. Dr. Goldman clarified that the work restrictions provided by Dr. Lakin were reasonable and safe, and would not cause any injury or aggravation. Based upon the evidence presented, the ALJ finds it improbable that Claimant's modified job duties, as described by Ms. K[Redacted] would have aggravated or exacerbated Claimant's condition. Indeed, Dr. Goldman reiterated during his testimony that Claimant's disability at [Third Party Employer redacted] was inconsistent with what she demonstrated in the period just after her injury, in her 19-20 months or employment post-injury with the Respondent-Employer and even with her recent activities since she left [Third Party Employer redacted].

51. The ALJ finds Dr. Goldman's testimony credible and more persuasive, both in establishing that the requested surgery is unlikely to result in any improvement (and could very well do harm), and that Claimant presents with significant psychosocial overlay than the contrary reports of Dr. Janssen and Claimant's testimony.

52. The ALJ does not find Dr. Janssen's surgical opinion to be persuasive. In assessing weight, the ALJ finds that his opinion is outdated, not supported by any other doctor and based on incorrect facts, including that Claimant did not exhibit psychological overlay, and he relied on a non-diagnostic discogram. His recommendation is not consistent with the MTGs. Perhaps most significantly, he based his recommendation on the assumption that Claimant had spinal instability, but subsequent flexion/extension x-rays objectively established this was not correct.

53. The ALJ finds Ms. K[Redacted] credible, and her unambiguous testimony persuasive. The record supports a finding that Claimant was provided work within her restrictions that required no bending, and that the [Third Party Employer redacted] could and would have provided further accommodations if it had been requested. The record also supports a finding that Claimant never requested further accommodation after she was moved from the men's department nor did she complain to any that she was being asked to work beyond her given restrictions. Indeed, one day before Claimant left work early (March 16, 2021) she saw Dr. Lakin whose report from this date of visit is devoid of any indication that Claimant's pain symptoms were worse *because* she was having to work beyond her given restrictions. Given Claimant's propensity to report any increase in her symptoms, even those she believed were caused by her treatment/examinations or diagnostic testing, the ALJ finds it improbable that she would not have reported to Dr.

Lakin that her pain was worsened because she was made to work beyond her restrictions. Simply put, if Claimant was having difficulty performing her modified duty tasks or was experiencing increased pain because she was worked beyond her restrictions, she would have reported it timely.

54. In this case, the ALJ credits the testimony of Ms. K[Redacted] that, when Claimant reported difficulties in the men's department, she was promptly moved. While Claimant asserts that she complained about her work and difficulty performing it, the ALJ looks, as noted above, to the contemporaneous records, which do not support her claims, as she did not contemporaneously report to Dr. Lakin that she was working outside of her restrictions – either on March 16, the day before she left work, or on April 7, the next time she saw him. Ms. K[Redacted] was clear and persuasive in her denials, which are supported by Employer's records that document that Claimant went home on March 17 because she was "not feeling well." Ms. K[Redacted] presents as a witness with no bias, prejudice or interest in the outcome of the proceedings. Accordingly, the ALJ credits Ms. K[Redacted]'s testimony over that of Claimant's, where conflicting.

55. The Medical Treatment Guidelines, specifically WCRP Rule 17, Exhibit 1, guide the principles surrounding the care and treatment of low back pain. Rule 17, Exhibit 1(G) addresses the general clinical and diagnostic indicators that should be considered before surgical intervention concerning the low back, including artificial disc replacement, is undertaken.

56. As noted, artificial lumbar disc replacement is a surgical procedure addressed by the MTGs. Regarding disc replacement surgery WCRP Rule 17, Exhibit 1(G)(11)(a) provides:

> General selection criteria for lumbar disc replacement includes symptomatic *one-level* degenerative disc disease. The patient must also meet fusion surgery criteria[5], and if the patient is not a candidate for fusion, a disc replacement procedure should not be considered. Additionally, the patient should be able to comply with pre-and post-surgery protocol. (Emphasis added).

[5] Rule 17, Exh. 1(G)(4)(d) notes that the diagnostic indication for spinal fusion includes the following: "i, Neural Arch Defect usually with stenosis or instability: Spondylolytic spondylolisthesis, congenital unilateral neural arch hypoplasia. It should be noted that the highest level of success for spinal fusions is when spondylolisthesis grade 2 or higher is present. ii. Segmental Instability: Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability. iii. Primary Mechanical Back Pain/Functional Spinal Unit Failure: Multiple pain generators objectively involving two or more of the following: (a) internal disc disruption (poor success rate if more than one disc involved), (b) painful motion segment, as in annular tears, (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. Because surgical outcomes are less successful when there is neither stenosis nor instability, the requirements for pre-operative indications must be strictly adhered to for this category of patients. iv. Revision surgery for failed previous operation(s) if significant functional gains are anticipated. v. Other diagnoses: Infection, tumor, or deformity of the lumbosacral spine that cause intractable pain, neurological deficit, and/or functional disability.

57. Based upon the evidence presented, Claimant may technically meet the diagnostic criteria for a fusion surgery as she appears to have primary mechanical back pain involving multiple pain generators with objective evidence of internal disc disruption and has a painful motion segment (annular tearing) and facet syndrome. (See Rule 17, Exh. 1(G)(4)(d)(iii)). Nonetheless, the MTGs raise several concerns for proceeding with disc replacement surgery in this case, including the following:

- The evidence presented supports a finding that Claimant has more than one-level of symptomatic degenerative disc disease in the lumbar spine. Indeed, Claimant's imaging (MRI) revealed a "desiccated degenerative bulging disc, osteophyte and loss of disc height at L5-S1 with severe foraminal narrowing, left greater than right" along with a "5 mm central disc protrusion at L4-L5 without significant canal stenosis." Moreover, her discogram revealed annular tearing at both L4-5 and L5-S1 and while she demonstrated concordant pain at L4-5, Claimant's L5-S1 was deemed to be completely incompetent. Accordingly, the ALJ credits Dr. Goldman's testimony to find that Claimant has objective evidence of more than one level of degenerative disc disease in the lumbar spine making her a poor candidate for disc replacement surgery even if she did not exhibit clear signs of somatization.

- The evidence presented supports a finding that not all of Claimant's potential pain generators have been adequately defined and treated. As with any fusion procedure, all pain generators must be adequately defined and treated for those persons for whom disc replacement surgery is being recommended. Here, the evidence supports a finding that Claimant's discogram is probably non-diagnostic in terms of supporting Dr. Janssen's conclusion that a disc replacement procedure is reasonable and necessary at L5-S1. Indeed, repeated attempts at L5-S1 provocation failed to produce a concordant pain response at this segment leading Dr. Reiss to note that Dr. Janssen seemingly ignored this finding and recommend a disc replacement at L5-S1 "simply based upon the fact that more degeneration [was] present at [this] level, even though the amount of degeneration [did] not correlate with that level being the pain generator." While discography may prove useful in evaluating morphological abnormalities of the disc, including annular tearing, the MTGs provide, as opined by Dr. Reiss, that the presence of an annular tear does not necessarily identify the tear as the pain generator. In this case, the evidence presented persuades the ALJ that Claimant has pathology at multiple disc levels along with facet joint arthritis. While it is possible that Claimant's

symptoms could be emanating from the L5-S1 disc, the ALJ credits Dr. Goldman's opinions to find that the cause of Claimant's pain is probably multifactorial. The ALJ is also convinced that there has not been an adequate effort to define and treat Claimant's specific pain generator(s), which the ALJ finds will be difficult to accomplish in light of the unreliable nature of Claimant's subjective reporting given the degree of somatization and psychological overlay she exhibits.

- The evidence presented supports a finding that while a psychosocial evaluation that provided clear signs of unconscious somatization and psychological overlay has been performed, Claimant has refused to address the psychiatric issues/conditions that may be driving or impacting many of her physical complaints. The ALJ credits the opinions of Drs. Staudenmayer and Goldman to find that without the recommended biofeedback and cognitive therapy, Claimant's psychiatric diagnoses pose a significant threat to her post-surgical recovery raising the strong probability that the surgery will fail, which could lead to the development of iatrogenic disability.

58. Based upon the evidence presented, the ALJ is not convinced that Claimant has demonstrated that the requested L5-S1 disc replacement procedure recommended by Dr. Janssen is reasonable and necessary. Indeed, the ALJ credits Dr. Goldman's opinion to find that the evidence demonstrates that "[a]t the very least [Claimant] has multifactorial reasons for her chronic pain that cannot be addressed by a disc arthroplasty in the presence of contraindicated symptomatic facet joint arthritis and more than one level of degenerative disc disease as discussed on pages 106-107 of Rule 17, Exhibit 1." When considered in its totality, the evidence presented persuades the ALJ that the proposed disc replacement surgery does not meet the criteria set forth in the MTG's and that deviation from the guidelines would not be appropriate in this case in light of the evident psychological overlay exhibited by Claimant.

59. Based upon the evidence presented, the ALJ credits the testimony of Ms. K[Redacted] to find that Claimant did not leave work due to her injury, but rather made a volitional decision to no longer appear for modified duty as provided by Employer and approved by Dr. Lakin. Consequently, the ALJ is persuaded that Claimant is responsible for her wage loss and not entitled to wage loss benefits after March 17, 2021.

CONCLUSIONS OF LAW

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

Generally

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

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its entirety, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that while Claimant suffers from pathologic changes in the lumbar spine that are probably causing her pain, the proposed L5-S1 disc replacement surgery does not meet the medical treatment guidelines given the multilevel nature and extent of her disc disease and confounding psychological issues. As found, the opinions of Dr. Goldman and Reiss are credible and more persuasive than the contrary opinions of Dr. Janssen and the testimony of Claimant. Accordingly, Claimant has failed to make a convincing case that the L5-S1 disc replacement procedure is reasonable and necessary.

Medical Benefits- The L5-S1 Disc Replacement Surgery

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

E. The MTG's enumerated at WCRP, Rule 17 are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). WCRP Rule 17-2(A) provides: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Moreover, the Court is not bound by the MTGs in deciding individual cases based on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

F. While the Court is not required to utilize the medical treatment guidelines as the sole basis when deciding whether specific medical treatment is reasonable, necessary or related to an industrial injury or occupational disease, the Guidelines carry substantial weight as accepted guidance in the assessment and treatment of low back pain. Concerning the medical issue presented, the MTG's, specifically WCRP Rule 17, Exhibit 1 (G) provides that in order to qualify for an artificial disc replacement surgery, the patient should exhibit spine pathology limited to one level and have undergone a psychosocial evaluation which addresses confounding issues, including somatization and other clear indications that there may be a translation of psychological distress into physical symptomatology.

G. In this case, Claimant's imaging studies, including the MRI and discogram clearly indicate that she has multi-level degenerative disc disease, annular tearing and facet joint involvement. Moreover, Claimant has refused to address the psychological factors which are probably affecting her interpretation and reporting of pain. The presence of multi-level disc disease coupled with the chronicity of Claimant's low back pain and her failure to address the potential that confounding psychosocial issues are playing a role in her pain and response to treatment make her a poor surgical candidate. Indeed, such factors pose as strong contraindications to proceeding with artificial disc replacement surgery. Because Claimant's pain is probably multifactorial and could be emanating from facet arthritis, myogenic changes, disc disruption or annular tearing, the ALJ questions whether addressing the single L5-S1 spinal segment is going to relieve cure and relieve Claimant's intransigent discomfort. Based upon the evidence presented, the ALJ is not convinced that the results of Claimant's discogram point to L5-S1 being her pain generator. Simply put, the ALJ is not persuaded that all of Claimant's potential pain generators have been adequately defined and treated as required by the MTG's, nor is the ALJ convinced that there is a reasonable probability that Claimant will significantly benefit from the proposed disc replacement surgery given her current physical capacity (core strength/aerobic condition) and her strongly held believe that her only problem is physical in nature.

H. As noted above, the MTG's provide that a psychosocial evaluation, which addresses confounding issues be completed before moving to artificial disc replacement. This is true because there is "some evidence that depression is a more accurate predictor of the development of low back pain than many common MRI findings, such as disc bulges, disc protrusions, Modic endplate changes, disc height loss, annular tears, and facet degeneration, which are common in asymptomatic persons and are not associated with the development of low back pain." (Rule 17, Exh. 1(E)(2)(c)). In this case, the record submitted establishes that Claimant has been treated for reactive depression and has a past history of physical abuse. (Resp's. Exh. V). While Claimant has undergone past psychological treatment, the record demonstrates that treatment to be remote. As noted, Claimant has refused to participate in any therapy to address her evident somatization leading Dr. Goldman to opine that her "understandable desire 'to be fixed' via external interventions (surgery) as compared to rehabilitated and healed (more of an internal and time demanding process) again paradoxically undermines the likelihood that she will benefit from surgical intervention. (Resp's. Exh. UU p. 230).

I. As demonstrated by WCRP 17-5(C) the MTG themselves recognize that deviations from the guidelines are reasonable in individual cases. *Madrid v. TRTNET Group, Inc*., WC 4-851-315-03 (ICAO April 1, 2014). Consequently, evidence of compliance or non-compliance with the assessment protocols of the MTG have not been considered dispositive when determining whether medical treatment is reasonable and necessary. *Madrid v. TRTNET Group, Inc*., *supra*. The ALJ may weigh evidence of compliance or non-compliance with the MTGs and assign such evidence an appropriate weight considering the totality of the evidence. *See Adame v. SSC Berthoud Operating*

Co., LLC., WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). Here, the ALJ has "[considered] the medical treatment guidelines adopted under § 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the MTGs and as found above, the ALJ concludes that while Claimant's current condition is directly related to her industrial injury, she does not meet the surgical indications to proceed with artificial disc replacement, nor has she presented sufficient evidence that would substantiate that a deviation from the MTGs is warranted in this case. Indeed, the evidence presented strongly supports a reasonable inference that given the multitude of contradictions to the recommended procedure, Claimant would not likely benefit from the surgery which raises the real potential for the development of iatrogenic disability. Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that she is a candidate for artificial disc replacement surgery or that the procedure is otherwise reasonably necessary. Accordingly, her request for authorization to proceed with surgery must be denied and dismissed.

Claimant's Wage Loss & Termination for Cause

J. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding her continued entitlement to lost wage benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo.App. 2000).

K. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In this case, Claimant contends that she left her modified duty job because of increased symptoms related to her having to work beyond

her given restrictions. Respondents contend that Claimant voluntarily quit her job, and as such, committed a volitional act barring her entitlement to wage loss benefits after March 17, 2021.

L. Even if Claimant voluntarily quit her job, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (ICAO, November 3, 2003), held that a claimant's voluntary resignation is not dispositive of the issue of whether the claimant was responsible for the termination of employment. The *Blair* Court held that the pertinent issue is the reason claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO, April 24, 2002). According to *Blair,* "if the claimant was compelled to resign from . . . employment such that it can be said the termination was a necessary and a natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination." Here Claimant argues that she left her modified duty position because of her injury. As noted, Claimant contends that she experienced increased symptoms as a consequence of being made to work beyond the restrictions imposed on her due to her injury. Accordingly, she asserts that she is not responsible for her wage loss. The ALJ is not convinced.

M. In this case, Claimant worked for the Respondent-Employer for about 20 months, through late December 2020, after which she began transitional employment at [Third Party Employer redacted]. She was provided a Rule 6-compliant work offer that was approved by her authorized treating provider (ATP), Dr. Lakin. She commenced employment in a position consistent with those limitations (and also consistent with her work restrictions over the 20 months prior), which restrictions Dr. Goldman clarified were reasonable, safe and unlikely to cause aggravation. She completed paperwork explicitly agreeing that she would not work outside of these restrictions, and acknowledged that she was directed by her supervisor, Ms. K[Redacted], to not do so.

N. Based upon the evidence presented that ALJ concludes that Claimant's job duties in January to March 2021 were to prepare lightweight items that were within her lifting capacity and that her position required no bending or twisting. Indeed the credible/convincing testimony of Ms. K[Redacted] persuades the ALJ that Claimant was provided a table at which she could sit and stand as needed to complete her modified duty tasks and that the bins from which she picked items from were on spring-loaded carts that maintained the items at table-height. Thus, no bending or twisting was necessary. Claimant insists that she had to bend to retrieve items, and, thus, that she was assigned work that was beyond her restrictions. However, in crediting Ms. K[Redacted]'s contrary testimony, the ALJ considers the surrounding evidence. Most notably, Claimant did not contemporaneously indicate that she was being worked beyond her restrictions. While Claimant testified that several other employers witnessed the problems she was having at work, she presented no independent verification from Jan, Wendy, Jerry, Roxanne or Chole that she was being made to work beyond her restrictions. Moreover, the day before she left work early, Claimant was evaluated by Dr. Lakin who maintained her on the same restrictions. The medical report from this date of visit is devoid of any indication that

Claimant was having increased symptoms because she was asked to work beyond her restrictions nor did she report such an allegation to Dr. Lakin on April 7. Given the frankness with which Claimant has reported the alleged cause of increased symptoms in this case, the ALJ agrees with Respondents that the absence of documentation in the medical record to support Claimant's allegations bolsters a reasonable conclusion that no such complaints were made either on March 16, 2021 (one day before Claimant left work early allegedly because she was assigned work that was beyond her restrictions causing increased pain) or April 7, 2021 after she left work. As found, the ALJ credits the testimony of Ms. K[Redacted] and the contemporaneous notation in the employment records to conclude that Claimant left work early on March 17, 2021 because she was feeling ill not because she was having increased pain from performing work outside of her restrictions.

O. In concluding that Claimant is responsible for her wage loss, the ALJ is convinced that Ms. K[Redacted] would have been provided different tasks if she indicated that she needed it. Indeed, Ms. K[Redacted] had previously done so, after Claimant indicated that her initial position with the store over the first day or few days was causing her increased symptoms, even though that position was within her restrictions and was explicitly approved by Dr. Lakin. The ALJ also finds it notable that at the time Claimant left the [Third Party Employer redacted], she had worked her prior position and then the transitional work position for over 19 months. The evidence presented supports a conclusion that that the activities Claimant was performing in 2021 at [Third Party Employer redacted] were less physically demanding than those duties Claimant performed prior to starting at [Third Party Employer redacted], which makes her claim that these limited activities were aggravating her symptoms incredible and unconvincing. Indeed, just a few weeks after the initial injury, Claimant was walking 3-5 miles/day, was performing physical yardwork "all weekend" and was able to walk through a grocery store and lift items for two hours. The intervening medical records document no new objective injury or aggravation or any change in pathology that would explain how or why Claimant would become more disabled. Claimant thereafter engaged *for months* in activities that were more physical than those she described and Ms. K[Redacted] confirmed she was performing at the [Third Party Employer redacted]. The ALJ also notes Claimant's admission after she left work she was lifting loads of wet clothes – an activity beyond what was required at [Third Party Employer redacted], and her admission of current-day ADLs, such as weeding. Based upon the evidence presented, the ALJ is convinced that Claimant probably did not leave work because of the industrial injury[6]. Rather, the ALJ is convinced that Claimant simply abandoned her modified duty job. Because her termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for her job separation. Accordingly, her wage loss following March 17, 2021

[6] Respondents' suggestion that Claimant alleged increased symptoms as a pre-text to leaving the [Third Party Employer redacted] because she felt aggrieved that the request for surgery was denied is probable and consistent with Dr. Staudenmayer's findings concerning somatization. The ALJ concludes it likely that Claimant is indirectly venting unrecognized psychological distress through physical complaints for purposes of obtaining some emotional relief. This well-documented psychological overlay makes her claims of subjective worsening unreliable.

is not attributable to her on the job injury. *Blair v. Art C. Klein Construction Inc., supra.; Longmont Toyota, Inc.*, *supra*.

ORDER

It is therefore ordered that:

1. Claimant's request for additional medical treatment in the form of a L5-S1 artificial disc replacement is denied and dismissed.

2. Respondents have proven, by a preponderance of the evidence, that Claimant is responsible for the termination of her employment. Accordingly, her wage loss after March 17, 2021 is not attributable to her on the job injury. Respondents may terminate payment of temporary partial disability (TPD) benefits as of March 17, 2021 and take credit for all amounts of TPD paid after March 17, 2021.

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

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

DATED: January 21, 2022

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the reverse total shoulder arthroplasty performed by Dr. John Papilion on March 31, 2021 was reasonably necessary and related to the admitted March 2, 2020 work related injury.

FINDINGS OF FACT

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

1. Claimant was a sixty eight year old commercial delivery truck driver for Employer at the time of the hearing who drove a Maxim ten speed tractor trailer. He had worked for Employer for approximately eight years and continued to be employed by Employer. The last day worked was July 9, 2020. He worked full time as a truck driver, which involved delivering lumber and other materials as both a local driver and a long haul driver, including to Wyoming and Nebraska, though the bulk of the driving was locally. He had from one delivery up to ten per day. He would drive same the tractor generally. He was not required to unload the materials. Claimant would work from approximately 5:00 a.m. up to ten to twelve hours a day, five days a week.

2. Upon arriving at work Claimant would perform a pre-trip examination of the tractor and the trailers before using either to make sure they were both safe to be on the road and drive, entering it into the on board electronic computer. He would also do a post trip upon returning to the yard. They involved multiple check lists. Claimant would drive two different types of trailers. The flatbed and a curtain-side trailer. The curtain trailer had rubber leather-like sides that would have to be pulled back and to the side so that they would protect the merchandize or materials from exposure. The curtains weighted approximately 150 to 200 lbs. and would slide on metal bars at the top. They were 45 to 50 foot long and approximately eight foot tall. Sometimes the curtains were stiff and hard to open or close due to poor maintenance. They curtains would get hung up on the slide, so Claimant would have to jerk the curtain to make them open or close. It was very heavy and very awkward. They had no handle but had two straps at the bottom, which he would pull one in each hand, bracing himself when doing it. The straps were approximately two to three feet apart.

3. On March 2, 2020, during the last delivery, Claimant had to open the curtain for the forklift to get to the materials to unload the truck. As he was pulling the curtain open, he grabbed the straps and pulled at about chest height, when he felt a tear and ripping sensation in his right shoulder, as well as a lot of pain. He was able to complete his delivery and reported the injury to his supervisor when he returned to the Employer yard.

4. On March 3, 2020 Claimant sought medical attention because of the pain. He was having difficulty raising his arm and was in a lot of pain. He took over the counter medication to help.

5. He was attended by Jonathan Joslyn, PA-C at Concentra on March 3, 2020 and reported that Claimant felt a rip in his right shoulder and upper arm, was having difficulty with sleeping at night, was now hard to move the arm above the shoulder level and any use was exacerbating his shoulder pain. He provided a history of pulling a curtain side trailer curtain that got caught pulling right arm, injuring his right shoulder, reporting constant pain. On physical exam Claimant had tenderness in the lateral shoulder and in the posterior shoulder and though he had full range of motion, it was with pain. He was diagnosed with a right shoulder strain, provided with medications and ordered physical therapy. Mr. Joslyn stated that the mechanism of injury appeared to be consistent with the mechanism of injury and returned Claimant to modified duty. Dr. Amanda Cava approved the report. Dr. Cava also completed a Physician's Report of Workers' Compensation Injury on March 6, 2020, continuing the same restrictions.

6. On March 5, 2020 physical therapist Darwin Abrams documented right shoulder pain with weakness, moderate tenderness in the infraspinatus muscle and tender points over the infraspinatus..

7. Dr. Theodore Villavicencio of Concentra evaluated Claimant on March 7, 2020, who documented the same history and continued medical restrictions. On exam he found tenderness in the lateral shoulder and in the posterior shoulder, full range of motion with pain, forward flexion with pain, abduction with pain, external rotation with pain and pain in the lateral shoulder.

8. Therapist Joshua Strough also documented tenderness over the infraspinatus and some soreness and achiness on March 12, 2020. He noted that Claimant had been given work restrictions by the treating medical provider which limited his participation in one or more essential job functions, only achieving up to fifty percent of his physical therapy goal. Claimant reported that he had some decrease in symptoms with therapy which included massage therapy, reeducation, therapeutic exercises and instruction with a TheraBand.

9. Claimant was evaluated by PA-C Lisa Grimaldi on March 13, 2020 who noted Claimant had tenderness in the lateral shoulder and in the posterior shoulder, with abnormal flexion at 105 degrees with pain, abduction of 95 degrees with pain, external rotation with pain and pain in the lateral shoulder. Claimant reported that he was 40% better since starting PT, but he still had a difficult time moving or lifting his arm above his shoulder.

10. Dr. Kenneth Birge documented on March 20, 2020 that Claimant was continuing to improve, and had more movement, attributing it to the therapy he was receiving. However, he documented that Claimant had abnormal flexion, extension, abduction and adduction of the right shoulder. The notes do not indicate whether this is passive or active range of motion. Dr. Birge stated that Claimant was only fifty percent

towards his goals at this point, which was also reported by therapist Strough on March 26, 2020.

11. On March 27, 2020 Dr. Grimaldi stated that he had made good strides with physical therapy in reaching a full range of motion with pain at the extremes of motion. Again, this does not specify whether it was passive or active range of motion. She did report mild to moderate pain depending on position of the right shoulder. While she did release Claimant to full duty, she also prescribed pain medication on that day to be taken three to four times a day.

12. Therapist Natasha Shkrobor reported on March 27, 2020 Claimant was sore after the prior day's physical therapy and stated that Claimant had only reached 50% of his therapy goal. Claimant continued with therapy with Mr. Strough on April 2, 2020. Claimant continued to report aching in his shoulder, which Claimant was still very concerned about, though he felt stronger following therapy. Mr. Strogh continued to recommend continued therapy. On April 3, 2020 Claimant continued to state he was doing well but continued to have achiness during the day.

13. Claimant reported having to fasten straps over materials and was feeling soreness in the right shoulder on April 10, 2020. Despite that, he was discharged from physical therapy.

14. On April 14, 2020 Mr. Joslyn, the physician assistant, reported that Claimant continued to have constant pain in his right shoulder but that therapy was helping. Claimant continued to work but only on flat bed trailers and was concerned about returning to work using curtain trailers. He was still taking ibuprofen and using gel, which were helpful. While Claimant was able to perform the work and be functional, he continued to have achiness in the shoulder and was "not at end of healing." Dr. Cava reviewed the chart and agreed that Claimant was making progress.

15. On April 28, 2020 Mr. Joslyn reported that Claimant had improvement overall but was still feeling limited with pulling straps with a crowbar, which he used to do easily one handed. Claimant reported that now he was having difficulty performing the strap work even with both hands, was working almost full duty but had not tried a curtain truck yet. He reported constant ache in the right shoulder with a pain score of 5/10 level and on exam Mr. Joslyn found tenderness in the deltoid and in the lateral shoulder. Mr. Joslyn continued medications and stated that Claimant was progressing somewhat slower than expected, had pain with exertion and would consider an MRI or injection if Claimant did not show further improvement by the next visit.

16. Dr. Jeffrey Peterson reevaluated Claimant on May 12, 2020 for follow-up of the right shoulder strain. He noted Claimant was working but had deep aching pain during the day and especially at night which was disconcerting. Dr. Peterson discussed the mechanism of injury where he was closing a curtain, met resistance, and immediately had a sharp/searing pain in shoulder. This had not abated. He noted he was right handed and must switch to left hand use regularly due to the constant right shoulder pain. On exam, Dr. Peterson found abduction/adduction pain along the supraspinatus track as well

as the interface between the anterior and middle deltoid body. The rotator cuff evaluation showed external rotation pain with slight limitation but no gross deficits to ROM evaluation of the shoulder girdle. He noted that pain was constant and sharp. Dr. Peterson ordered an MRI of the right shoulder and returned Claimant to modified activities.

17. On May 19, 2020 Dr. Eduardo Seda of Health Images read the Claimant's MRI of the right shoulder, which revealed a full thickness tear of the infraspinatus and supraspinatus of 19 mm (less than 2 cm). It showed a bicep tendon tear, AC arthrosis and no significant muscle atrophy.

18. On May 22, 2020 Dr. Peterson stated that Claimant was awaiting a specialist evaluation. At that time he assessed a traumatic tear of the supraspinatus and infraspinatus tendons of the right shoulder.

19. On May 28, 2020 Claimant had his first visit with Dr. John Papilion, an orthopedic specialist, who documented that Claimant was pulling a curtain that caught, and he felt a tearing sensation in his right anterolateral shoulder. He reported that Claimant had constant ache as well as significant weakness lifting away from the body and overhead, and that it bothered him at night. Claimant reported some improvement with physical therapy but continued to have symptoms. He also documented Claimant's prior history of a bicep injury approximately 20 years prior, which resulted in a popeyed deformity. On exam, Dr. Papilion found that Claimant had a markedly positive drop arm test with significant weakness in the supra and infraspinatus. He reviewed the MRI films, which revealed a full-thickness tear of the supraspinatus with retraction to the mid humerus. There was no muscular atrophy or fatty infiltration indicative of a chronic tear and only minimal degenerative changes in the AC joint. Following discussion with Claimant he recommended proceeding with arthroscopic surgery including subacromial decompression, debridement of the labrum and biceps stump and rotator cuff repair. Dr. Papilion provided further limited work status.

20. Dr. Peterson reevaluated Claimant on June 9, 2020, stating Claimant was awaiting rotator cuff surgery. On July 6, 2020 Dr. Peterson documented Claimant's surgery was scheduled for July 13, 2020.

21. Claimant proceeded with the arthroscopic surgery of the massive rotator cuff tear of the right shoulder on July 13, 2020. Dr. Papilion noted that he performed an exam under anesthesia, including video arthroscopy, arthroscopic debridement of the biceps stump, superior labrum, and rotator cuff, an arthroscopic subacromial decompression wit release of coracoacromial ligament, and arthroscopic repair of the RCT, supraspinatus and infraspinatus. He noted in the operative report that the massive rotator cuff tear was of a large 5 cm tear that was retracted to the mid humeral head but was able to mobilize by dissecting all the way back to the scapular spine. He stated that the tissue quality was good and was able to achieve primary repair, did not require a graft augmentation, but due to the massive extent of the tear, the procedure took twice as long as expected.

22. Dr. Papilion reported on July 23, 2020 that Claimant was recovering post-surgery though was still in an immobilizer and was having difficulty sleeping but that his pain was under control. He noted that Claimant had had a large full thickness rotator cuff tear. He recommended passive range of motion therapy and cautioned Claimant against lifting and no use of the right arm.

23. Claimant had multiple sessions of physical therapy, all of which indicated that Claimant was progressing in therapy as anticipated with complaints of pain.

24. On August 20, 2020 Dr. Papilion stated also that he was to progress to more active therapy, but continued with the restriction of no use of the right arm.

25. Claimant returned to Dr. Peterson on September 4, 2020 for examination. He noted that there appeared to be supraspinatus atrophy at this point but no AC joint hypertrophy or distal clavicle or midshaft clavicle deformity, nor superior migration of the proximal portion of the clavicle, AC joint step-off, dislocation, ecchymosis, effusion, erythema, skin blanching, skin tenting, scapular winging or swelling. He found limited range of motion in all planes without pain and noted that Claimant would have significant difficulties with the physical requirements of his Job. Claimant continued with physical therapy.

26. On October 10, 2020 Dr. Papilion stated that Claimant continued to show some improvement post-surgery. He recommended continuing physical therapy, topical medications and lifted restrictions to light work, return to commercial driving with no overhead.

27. The October 13, 2020 therapy notes showed that Claimant's progress was slower than expected, with standing exercises bringing to light aberrant motion patterns that were addressed with verbal and tactile cues. Weight and resistance were introduced with gravity and tolerated well to fatigue. AROM improved in gravity minimized position. The therapist indicated that Claimant was tolerating the therapy well though overall progress was slower than expected.

28. Dr. Papilion examined Claimant on November 5, 2020 and stated that Claimant had persistent weakness in the supraspinatus with mildly positive drop-arm test with weakness in the infraspinatus and external rotation lag. He was concerned that there might be a recurrent tear or a residual tear. He ordered a follow up MRI to evaluate and discussed with Claimant the possibility of a reverse shoulder arthroplasty.

29. On November 7, 2020 Dr. Eduardo Seda read the Claimant's new MRI findings as re-tear of the interval rotator cuff repair at the supraspinatus without suture anchor distraction and moderate residual tendinosis in the subscapularis and infraspinatus.

30. Claimant was attended by Christian Updike, M.D. at Concentra on November 9, 2020 and found joint pain, muscle pain, muscle weakness and night pain. He stated that this patient was new to him and that the MRI was not yet available. He discussed that probability of re-tear of the right rotator cuff and counselled him on smoking

cessation. On exam Claimant had "POSITIVE can test, unable to ABDUCT above shoulder."

31. On November 12, 2020 Dr. Papilion advised Dr. Updike that the MRI "as expected reveals a large recurrent tear with retraction to the mid humeral head. There is early atrophy in the supraspinatus muscle. The subscapularis is intact. There is proximal migration of the humeral head consistent with early cuff arthropathy." On exam there was a markedly positive drop-arm test and significant weakness in the supra and infraspinatus. Dr. Papilion recommended a reverse shoulder arthroplasty.

32. Respondents sent Claimant's medical records for a record review by Dr. William Ciccone II, an orthopedic consultant who completed a report on November 23, 2020. Dr. Ciccone opined that Claimant had suffered a minor sprain/strain of the right shoulder and was at maximum medical improvement by April 28, 2020 as he had achieve his physical therapy goals, had full range of motion and the shoulder was only painful upon exertion. Dr. Ciccone was also under the mistaken belief that Claimant had returned to full duty without limitations. He conjectured that since Claimant had a prior bicep injury, there was history of prior shoulder injury. He stated that based on the operative report one could make an argument that since the RTC was stiff, the damage to the rotator cuff tendon was not an acute, but a chronic condition. He opined that the rotator cuff pathology was preexisting and not acute or caused by the work-related incident of March 2, 2020. Dr. Ciccone is not credible in this matter.

33. On December 3, 2020 Dr. Papilion appealed the denial of surgery stating as follows:

> Al though, there was a 2-month delay in getting an MRI. Once this MRI was performed, it revealed a full-thickness tear about 2 cm with retraction to the acromial edge. There was no evidence for muscular atrophy and this is all consistent with an acute full-thickness tear in the rotator cuff. This is even admitted by Dr. Ciccone in his review.
>
> In addition, Dr. Ciccone opines that [Claimant] is a. candidate for reverse shoulder arthroplasty due to the failed nature of his rotator cuff tear with evidence for now muscular atrophy and further retraction with proximal migration, all consistent with rotator cuff arthropathy.
>
> On exam today, wounds are all well healed. There are abnormal contours in the biceps, which are chronic. He can flex and abduct only to 70 degrees. Markedly positive drop-arm test. Significant weakness in the supra and infraspinatus with an external rotation lag of about 20 degrees. There is pain with attempted lifting.
>
> It is my opinion and clear in the medical records that [Claimant] sustained a significant injury in the work-related incident of 03/02/2020. This is evidenced by an MRI 2 months after the injury, which showed an acute large tear in the rotator cuff without evidence for chronicity. He underwent arthroscopy and rotator cuff repair, which has gone on to fail. I continue to recommend a reverse total shoulder arthroplasty as definitive treatment in this 67-year-old male with rotator cuff arthropathy.
>
> I respectfully request that you reconsider surgical authorization.

34. Dr. Ciccone authored a second report on December 18, 2020 disputing treaters' assessment of the work-related nature of the injury based, not on imaging, but on the clinical findings of the physician assistant and therapist indicating full or near full range of motion in the days following the injury, which he opined were not consistent with an acute tear but a chronic tear. He stated that the reverser total shoulder arthroplasty was not related to the work related incident. Again, Dr. Ciccone is not found persuasive.

35. Dr. Updike continued to follow up on December 30, 2020 noting that Dr. Papilion continued to recommend right total reverse arthropathy. He discussed workers' compensation process of denial of surgery. He was also advised to keep any upcoming appointments with Concentra, was returned to modified duty with no commercial driving. stated that the work-related mechanism of injury was consistent with the objective findings, and was referred to a second orthopedic opinion. This ALJ infers that the Concentra medical team agreed on the causation analysis that Claimant's RCT was related to the March 2, 2020 event.

36. Claimant returned to consult Dr. Papilion on January 5, 2021 with regard to the right shoulder. He noted that he recommended a total reverse arthroplasty, which had been denied and appealed without success. He documented Claimant continued to have weakness and loss of motion, and had been unable to return to work as a long haul truck driver. On functional testing on the right Claimant had a positive drop-arm test, positive empty can test and positive Jobe test.[1] He also had a positive Hawkins-Kennedy impingement test, (R) and positive Neer impingement test, (R). Dr. Papilion stated Claimant:

> .. has a massive recurrent rotator cuff tear in his right shoulder. He has failed conservative treatment. This is not felt to be a repairable rotator cuff. He has significant symptoms of weakness loss of motion. I believe he is an excellent candidate for reverse shoulder arthroplasty. This has been denied by his Worker's Comp. insurance company. He has a hearing pending. He is not able to work. We will proceed with putting this through his private health insurance and schedule for reverse shoulder arthroplasty. The risks and benefits of operative versus nonoperative treatment were discussed

37. On January 20, 2021 Claimant was seen by orthopedic surgeon, John Schwappach, who reviewed the records, including those from Cencentra, Dr. Updike and Dr. Papilion, both of whom continued to recommend a reverse total shoulder arthroplasty, and the MRI results. He noted that the November 7, 2020 images showed a re-torn rotator cuff repair at the supraspinatus tendon in a midsubstance tear without suture anchor distraction. There was moderate residual tendinosis in the subscapularis and infraspinatus. The biceps tendon had torn from the anchor and there was stable AC joint arthritis. On physical exam Claimant demonstrated an inability to actively abduct his right arm past 90 degrees. He had weakness in right shoulder internal rotation. Dr. Schwappach diagnosed traumatic re-tear of the supraspinatus tendon of his right shoulder. He further stated as follows:

[1] Tests to determine tendon and rotator cuff pathology.

> After discussing with Claimant the risks and benefits of both operative and nonoperative treatment, his current level of function and various ways he has tried to adapt, it becomes clear to me that he indicates for a reverse total shoulder arthroplasty of the right arm. This would be directly related to his failed rotator cuff repair, which was exquisitely done by Dr. Papilion. As such, this should be covered under workers ' compensation system. I believe that he reaches all of the State of Colorado Guidelines for reverse total shoulder and the same should be offered to him.

38. Multiple treating provider records continued to show recommendations for the right total shoulder arthroplasty despite denial and delay due to litigation. Claimant's restrictions were kept in place, continued to follow up and provide ongoing medications.

39. Claimant proceeded with the right shoulder arthroplasty on March 31, 2021 by Dr. Papilion. The operative report stated that the diagnosis was a massive recurrent rotator cuff tear with rotator cuff arthropathy of the right shoulder.

40. On April 7, 2021 Dr. Updike stated that Claimant was not at maximum medical improvement, continued to be unable to work, and that his objective findings were consistent with history of work-related mechanism of injury. On April 28, 2021 Dr. Updike reported that Claimant was status post-surgery, reported no new concerns, pain was better, performing physical therapy at Dr. Papilion's office, mostly passive and wearing a sling.

41. A last Supplemental Report authorized by Dr. Ciccone was issued on May 12, 2021. He opined that the presence of a tangent sign on the MRI of May 19, 2020 were confirmatory that Claimant had preexisting pathology as a positive "tangent sign" is a predictor of chronic irreparable rotator cuff tear, which would not be present if the tear had been acute. Dr. Ciccone further stated that "While I would agree that in a 67-year-old with a chronic rotator cuff tear that failed arthroscopic repair is a candidate for reverse arthroplasty, I do not believe that the potential need for the procedure is causally related to a work injury."

42. Dr. Cava took over care again as of May 27, 2021 and continued the prior care providers' recommended course of physical therapy, restrictions and stated that Claimant's objective findings were consistent with history of work-related mechanism of injury. This continued through at least October 4, 2021, when Dr. Cava stated that she did not anticipate Claimant reaching MMI for another three months approximately.

43. Claimant testified that, while therapy did help significantly in getting him stronger, the weakness did not go away when he was originally returned to full duty at the end of March, 2020. By the end of the day he would continue to feel weak and had a hard time raising his arms, especially when he had to throw the straps over the flat bed trailers and tie them down. Also, he stated that the doctors and therapists had no problems lifting his arm, but when he did it he could reach a certain point and then he could raise it no farther. And while he had a full release, he did not return to work with curtain trailers, only flatbed trailers as he would not have been able to open and close the curtains, so he was limited to local driving only, not long haul driving. Claimant assured that since the March 2, 2020 date of injury, he has not had one pain free day or recovered

his strength, neither has he returned to doing activities with his family in the same manner including sporting get-togethers and yardwork with his wife. Claimant is credible.

44. Dr. Papilion testified at hearing that over the last thirty one years he has evaluated thousands of patients with shoulder pathology, including acute injuries, acute on chronic as well as degenerative conditions. He has noted a variety of patient complaints in a wide range of reports with regard to strength, weakness and motion, from anywhere from completely debilitating small tears to full range of motion patients with large tears. Dr. Papilion testified consistent with his reports above regarding Claimant's weakness and drop arm tests, which were also consistent with a full thickness tear of the supraspinatus tendon.

45. He reviewed the diagnostic films himself, noting that the surrounding structures to the tear on the axial and coronal views, did not show atrophy, also called fatty infiltration, justifying his recommendation for the a arthroscopic repair of the rotator cuff. While he stated that the supraspinatus muscle was not attached and was not a normal muscle, neither was there any chronic rotator cuff tear, but an acute tear amenable to repair, as arthroscopic procedures are the first line treatment for a 2 cm tear.

46. However, Dr. Papilion confirmed that when he performed the July 13, 2020 arthroscopic procedure, he found that the tendon tear was actually 5 cm in length instead of the 2 cm tear he was expecting based on the MRI films. He also examined the area for arthritis and atrophy and found none, nor any pathology that would denote a chronic condition. Dr. Papilion opined that since Claimant progressed in physical therapy and returned to work, that it was possible that the initial acute tear caused by the March 2, 2020 incident grew from the time of the injury to the time of the MRI, and certainly from the time of the MRI to the time of the surgery.

47. Dr. Papillion explain that a reverse total shoulder procedure is a salvage procedure because it replaces the ball and socket with metal and plastic, putting the ball where the socket was and the socket where the ball normally resides, placing the majority of the function on the deltoid muscle to activate the movement of the arm. Dr. Papilion explained that it was not uncommon to have a failed arthroscopic repair. It happens and that is when one considers the more drastic total reverse arthroplasty, such as in Claimant's case. Dr. Papilion opined that it was nothing that Claimant did in the interim between the first surgery and the November 7, 2020 MRI. Re-tears just happen this way that the tissue is not strong enough and re-tears in approximately 50% of cases. During the March 31, 2020 procedure, Dr. Papillion now found atrophy as the muscle that had not been functioning for a long time. He found the suture knots there, the tear massive and was now retracted almost over to the glenoid rim, and probably had no chance of revision of rotator cuff re-tear.

48. He also explained that he thought the positive tangent sign that Dr. Ciccone referenced was present in the first MRI. But considering Claimant's exam, history, verbal interview, medical records, Dr. Papilion made a causation analysis based on the whole picture, not just the MRI, which is only one of the tools that needed to be considered. And while Claimant had a positive tangent sign, it in and of itself was not a complete predictor

of atrophy in this case as many individuals have a different anatomical composition and atrophy simply means “smaller than it used to be because it is not being used,” and Claimant had not been using the muscle due to the tear.

49. Dr. Papilion stated as follows:

> [Claimant] has done this work [commercial driver and deliveries] for 40 plus years. He's thrown those curtains on a daily basis. He could have had some rotator cuff pathology, but the fact is that he was fully functional and didn't have any symptoms, never sought medical care, performed his full duty, and he had an episode; a documented injury that he reported, and he had changes in his exam, changes in his symptoms. That all supports an acute injury, whether or not there was some underlying chronicity…. In this case, I don't think that was the effect, because I don't think this was a minor injury. I think it was a substantial injury.

50. Lastly, Dr. Papilion stated that the medical records following the work related incident are reflective of a Claimant that had conservative care in accordance with the Guidelines and the standard of care, probably had some bleeding of the tendon upon tearing but with anti-inflammatories, modified work and limiting overhead activities, exercise, mobilization, the inflammation abated and Claimant was able to achieve better or even full range of motion, none of which is uncommon for an individual with a rotator cuff tear. Dr. Papilion completely disagreed with Dr. Ciccone’s opinion that Claimant had returned to baseline by April 28, 2020 as he continued to have difficult with doing activities overhead and a substantial portion of his job, such as using curtain trailers, he was not back to his pre injury status, had not had a full trial back to full work, where he was using his shoulder to pull the curtains. Dr. Papilion opined that Claimant had clearly had a mechanism of injury consistent with an acute tear of the rotator cuff on March 2, 2020. He continued to benefit from the total reverse arthroplasty, though it was not a spectacular result, he continued to improve and was not at maximum medical improvement at the time of the hearing. Dr. Papilion is credible.

51. Dr. Ciccone testified during a deposition on November 23, 2020 post-hearing. He testified consistent with his three medical records review reports. Dr. Ciccone’s opinions that the July 13, 2020 and the March 31, 2021 surgeries were not related to the March 2, 2020 event are not credible. Neither is his interpretation of the diagnostic testing or testimony regarding preexisting atrophy.

52. Dr. Papilion’s opinion that Claimant suffered from a specific incident that caused the right rotator cuff full thickness tear on March 2, 2020 is credible.

53. The arthroscopy surgery performed on July 13, 2020 by Dr. Papilion to treat Claimant’s supraspinatus full thickness tear was reasonably necessary and related based on the circumstances and information both available and known at the time.

54. Dr. Papilion’s opinion that the March 31, 2021 right shoulder total reverse arthroplasty was reasonably necessary and related to the March 2, 2020 accident is persuasive and credible.

55. Claimant proved that the right shoulder total reverse arthroplasty was reasonably necessary and related to the March 2, 2020 incident in order to cure and relieve Claimant from the effects of the compensable injury.

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Medical Benefits:

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See*

City of Boulder v. Streeb, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant alleged that surgery recommended and performed by Dr. Papilion for the right total shoulder arthroplasty was reasonably necessary and related to the work injury of March 2, 2020. Respondents argue that while it may be reasonably necessary it is not related to the March 2, 2020 injury as they alleged the injury involved only a minor strain. Respondents further argue that neither the arthroscopic surgery performed on July 13, 2020 nor the total shoulder arthroplasty performed on March 31, 2021 was related the accident of March 2, 2020 but were performed for the underlying preexisting or degenerative chronic condition.

However, a preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting

condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

As found here, Claimant was a sixty eight year old commercial delivery driver of a large tractor trailer performing heavy tasks such as tying down construction materials on flatbeds and opening and closing heavy side curtains on trailers for approximately eight years for Employer and many year before that. As further found, Claimant did not have any problems performing any of the jobs he was assigned prior to the March 2, 2020 work related injury. Whether, the rotator cuff pathology started as a small tear on March 2, 2020 and became increasingly worse over the subsequent months or Claimant had an asymptomatic underlying condition that became symptomatic and was aggravated when he attempted to pull the side curtains of the trailer is not a question that can be determined easily because there was no evidence of symptoms or medical records prior to March 2, 2020. What is clear, and is so found, is that Claimant is credible and did not have problems before the incident when he was pulling on the straps, felt a tear in his shoulder and started having pain symptoms in his right shoulder and had none before this time. What is also clear to this ALJ is that Claimant is a stoic gentleman that probably does not complain of pain easily or readily. Claimant is found credible.

The medical records as a whole also support Claimant's testimony. While Respondents' expert attempted to reason out the findings of the first month's initial examinations, loss of range of motion, findings on MRI, Dr. Papilion is vastly more persuasive and credible than the contrary opinions of Dr. Ciccone. Both Dr. Seda and Dr. Papilion interpreted the MRI film of May 19, 2020 as clearly showing a full thickness tear of the supraspinatus tendon of approximately 2 cm and no muscle atrophy. During the July 13, 2020 arthroscopy Dr. Papilion found a 5 cm supraspinatus full thickness tear, which he was not expecting based on the MRI films and did not detect any atrophy. Dr. Papilion, in fact, stated that the surgery took approximately twice what it was supposed to because of the massive tear but that he was able to mobilize the tendon nonetheless during surgery. While, in retrospect, had Dr. Papilion known about the massive tear he may have elected to perform the total reverse shoulder arthroplasty surgery instead of the arthroscopy initially, but it did not lessen the Claimant's need for the total reverse shoulder surgery. The subsequent November 7, 2020 MRI findings as read by Dr. Seda, Dr. Schwappach and Dr. Papilion clarified the need for the surgery because the Claimant had a retorn supraspinatus tendon which caused continuing and unremitting symptoms as documented in the Concentra records as well as by Dr. Papilion and Dr. Schwappach. Dr. Papilion was persuasive and credible. He looked at the whole picture, the clinical findings on exam, the films, and review of the records as well as the history provided by Claimant, Claimant's longevity on the job and the type of work he performed. Claimant has shown by a preponderance of the evidence that the right total reverse shoulder arthroplasty was reasonably necessary and related to the March 2, 2020 work related accident.

ORDER

IT IS THEREFORE ORDERED:

1. The right shoulder total reverse arthroplasty surgery performed by Dr., John Papilion on March 31, 2021 was reasonable, necessary and related to the admitted March 2, 2020 injury.

2. Respondents shall pay for that reverse arthroplasty surgery procedure and related expenses incurred by Claimant and his authorized treating providers.

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

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

DATED this 21st day of January, 2022.

Digital Signature

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on or about December 19, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left knee, including a left total knee replacement, is reasonable, necessary, and related to the work injury.

FINDINGS OF FACT

1. The claimant has worked for the employer since September 2007. The claimant's current position is Operator 3. The claimant's job duties include operating a road grader and other equipment, digging culverts, replacing signs, and general road maintenance.

2. The claimant asserts that on or about December 19, 2020, he suffered a left knee injury at work. The claimant also provided testimony regarding an incident in November 2020[1]. The claimant testified that in mid-November 2020, he was getting down from the back of a service truck when he felt a pop in his left knee. The claimant also testified that this felt like a "sprain" and the pain went away. The claimant did not report the November incident to the employer.

3. On December 19, 2020, the claimant was shoveling snow during his shift. While shoveling, he slipped on the ice and caught himself with the snow shovel. During this slip, the claimant felt a pop and pain in his left knee. The claimant testified that this incident was different from the one in November and he reported this incident to his supervisors. He was then instructed to seek medical treatment for his knee.

4. The claimant's authorized treating provider (ATP) for this claim is Dr. Albert Krueger. The claimant was first seen by Dr. Krueger on December 28, 2020. The claimant reported that he injured his left knee when he slipped on ice and twisted his knee. On that date, Dr. Krueger opined that the claimant suffered a dislocation of the left patella. He recommenced the quadricep strengthening exercises and over-the-counter pain medication.

[1] The November incident is not at issue in this case. However, the ALJ includes a summary of the claimant's testimony regarding the November incident for clarification of the record.

5. On January 26, 2021, the claimant returned to Dr. Krueger. At that time, the claimant reported continued left knee pain. Dr. Krueger referred the claimant to Dr. Kevin Borchard for an orthopedic consultation.

6. The claimant was first seen by Dr. Borchard on January 29, 2021. On that date, the claimant reported that he injured his left knee when he slipped and twisted the knee. On exam, Dr. Borchard noted effusion, crepitus, and pain. Dr. Borchard opined that the claimant suffered an acute injury on top of chronic degenerative changes in the knee. On that date, Dr. Borchard administered a corticosteroid injection to the claimant's left knee.

7. The claimant testified that the injection provided more than four weeks of pain relief. However the pain returned and the claimant requested an additional injection from Dr. Bourchard.

8. On March 16, 2021, the claimant returned to Dr. Borchard. At that time, the claimant reported that his left knee pain was primarily along the lateral joint line. Dr. Borchard noted effusion, range of motion limited to 120 degrees, and lateral joint line tenderness. Dr. Borchard recommended that the claimant undergo a magnetic resonance image (MRI) of his left knee.

9. On March 23, 2021, the claimant underwent an MRI of his left knee. The MRI showed patellofemoral grade 4 chondromalacia with subjacent marrow edema and a cyst; a small joint effusion; and a radial tear at the medial meniscus posterior horn root junction.

10. On April 6, 2021, the claimant returned to Dr. Borchard. On that date, Dr. Borchard discussed the MRI findings and identified the claimant's left knee diagnoses as medial and lateral meniscus tears and patellofemoral osteoarthritis. Dr. Borchard recommended a left total knee arthroplasty.

11. During this same time period, Dr. Borchard was also providing care for the claimant's right knee. The right knee is not part of this claim. Dr. Borchard has recommended that the claimant also undergo a right total knee arthroplasty, outside of the workers' compensation system.

12. At the request of the respondents, on June 15, 2021, the claimant attended an independent medical examination (IME) with Dr. Timothy O'Brien. In connection with the IME, Dr. O'Brien reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his June 28, 2021 IME report, Dr. O'Brien opined that the December 19, 2020 incident was "a very minor, self-healing, self-limited knee strain or sprain". Dr. O'Brien further opined that the claimant was already a candidate for a left knee replacement prior to his minor December 19, 2020 injury. In support of these opinions, Dr. O'Brien noted that the claimant's left knee MRI is normal for his age.

13. On September 30, 2021, Dr. Borchard authored a letter in which he confirmed that the left knee MRI showed a lateral meniscus tear and a medial meniscus tear. Dr. Borchard opined that these tears were acute and caused by the twisting injury when the claimant slipped on ice. Dr. Borchard further opined that, given the condition of the claimant's left knee, a total knee replacement is the most reliable surgery to address the claimant's pain complaints from the meniscus tears.

14. On October 19, 2021, Dr. Kruger authored a letter in which he opined that when the claimant slipped on ice and twisted his left knee, that incident triggered the need for left knee surgery.

15. Dr. O'Brien's deposition testimony was consistent with his written report. Dr. O'Brien testified that the claimant suffered a minor left knee strain/sprain that had resolved. Dr. O'Brien further testified that the recommended knee replacement surgery is intended to address the arthritis in the claimant's left knee. Dr. O'Brien also testified that there are traumatic events that can accelerate an arthritic condition. The type of traumatic event would either be a high energy injury or an injury involving planting the foot and pivoting. It is Dr. O'Brien's opinion that the claimant's mechanism of injury does not fall into either of these categories.

16. The claimant testified that prior to the November and December 2020 incidents, he had no left knee issues and had not sought treatment for his left knee. The claimant has undergone prior treatment for his right knee, including injections and surgery.

17. The ALJ credits the claimant's testimony regarding the nature and onset of his left knee symptoms. The ALJ also credits the medical records and the opinion of Drs. Borchard and Kruger over the contrary opinions of Dr. O'Brien. The ALJ specifically credits Dr. Borchar's opinion that the claimant suffered an acute injury on top of chronic degenerative changes. The ALJ finds that when the claimant slipped on ice on December 19, 2020 and twisted his left knee, the pre-existing condition in his left knee was aggravated and accelerated, resulting in pain symptoms and the need for medical treatment. Therefore, the ALJ finds that the claimant has successfully demonstrated that it is more likely than not that he suffered an injury to his left knee while at work on December 19, 2020.

18. The ALJ further credits the medical records and the opinion of Drs. Borchard and Kruger over the contrary opinions of Dr. O'Brien. The ALJ finds that the claimant has demonstrated that it is more likely than not that treatment of the claimant's left knee is reasonable, necessary, and related to the work injury. Furthermore, the ALJ credits the opinions of Dr. Borchard and finds that a total left knee replacement is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on December 19, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant's pre-existing degenerative left knee condition was aggravated and accelerated by his slip on December 19, 2020. As found, the claimant's testimony, the medical records, and the opinions of Drs. Bouchard and Krueger are credible and persuasive.

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

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that treatment of the claimant's left knee, including a total left knee replacement, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the opinions of Dr. Bouchard are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant suffered a compensable injury to his left knee on December 19, 2020.

2. The respondents shall pay for treatment of the claimant's left knee, including the recommended left total knee replacement, pursuant to the Colorado Medical Fee Schedule.

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

Dated this 24th day of January 2022.

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

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above

address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence Respondents violated W.C.R.P. Rule 5-5(C)(1) for failure to timely file an Amended General Admission of Liability following receipt of Administrative Law Judge Cannici's June 2, 2021, Findings of Fact, Conclusions of Law, and Order.

II. Whether Respondents have shown by a preponderance of the evidence, that that the violation was cured within 20 days of the claimant's Application for Hearing pursuant to section 8-43-304(4), C.R.S.

III. Whether Claimant has shown by clear and convincing evidence that Respondents knew, or reasonably should have known, that they were in violation.

IV. Whether Claimant proved by clear and convincing evidence that Respondents knew, or reasonably should have known, they were in violation, and what is the applicable penalty period and amount.

PROCEDURAL HISTORY

Administrative Law Judge Peter J. Cannici issued, Findings of Fact, Conclusions of Law, and Order on June 4, 2021 holding Respondents failed to overcome the opinions of Division Examiner, Dr. Martin Kalevik. He determined that Claimant was not at MMI and required additional treatment for her admitted work related injuries of August 21, 2019.

Claimant filed an Application for Hearing on September 20, 2021listing the issues of penalties for Respondents' alleged failure to file a General Admission of Liability within thirty (30) days of Judge Cannici's June 2, 2021 Order per Rule 5-5(C)(1), requesting penalties pursuant to Sections 8-43-304, C.R.S and 8-43-305, C.R.S.

Respondents filed a Response to Application for Hearing on October 11, 2021 on issue of penalties.

The parties indicated that they attended a separate hearing on November 17, 2021 before Administrative Law Judge Steven R. Kabler and were awaiting an order on the issue of change of physician. The parties disputed that this ALJ should either await a decision in that matter or should review the order, if any, was issued in that matter.

Claimant also brought up a preliminary matter regarding unanswered discovery sent to Respondents' on September 30, 2021 and why Respondents failed to provide responses. Claimant noticed the failure to respond two days prior to hearing. Claimant

moved to extend the time to commence the hearing based on the failure to provide responses to discovery. Respondents' objected to the motion stating that Claimant failed to identify the failure to respond in connection with this hearing as Claimant had multiple claims and had had multiple hearing in connection with this particular claim, which also included multiple responses to discovery. Respondents stated that, had this been brought up in a timely manner, that Respondents would have been able to provide the requested responses. Respondents argued that pursuant to C.R.C.P. Rule 37(a) Claimant was required to file a motion to compel or set it for a prehearing in a timely manner, which did not take place. Further, Respondents state that the questions that Claimant submitted included requests for any testimony of witnesses, but they are not calling any witness, a request for exhibits, all of which are included in Claimant's Exhibit packet, questions that fall under Attorney-Client privilege, as well as requests for admission, which they dispute are appropriate under the Workers' Compensation Rules of Procedure. Claimant read into the record the types of questions that were specifically tailored to the issues set for hearing. This ALJ Considered the arguments of the parties, determined that there was insufficient basis for an extension and denied Claimant's motion for extension of time.

Respondents agreed that they received ALJ Cannici's Findings of Fact, Conclusions of Law and Order, and that the General Admission of Liability was not filed until September 27, 2021, well beyond 30 days after the order was issued.

FINDINGS OF FACT

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

1. Claimant was injured in the course and scope of her employment with Employer on August 21, 2019.

2. She was placed at maximum medical improvement (MMI) on November 18, 2019 by Dr. Kathryn Bird at Concentra, the authorized treating physician (ATP).

3. Claimant challenged that decision by seeking a Division of Workers' Compensation Independent Medical Examination (DIME). Dr. Martin Kalevik was assigned as the DIME physician and conducted an examination, issuing a report dated August 27, 2020. Dr. Kalevik determined Claimant was not at MMI and required further medical care.

4. Respondents challenged the decision and ALJ Cannici found on June 4, 2021 Respondents had failed to overcome the determination of the DIME physician that Claimant was not yet at MMI. Respondents did not appeal the decision.

5. On July 1, 2021 Claimant requested Respondents schedule a follow up appointment with the ATP so that Claimant may resume care.

6. Claimant stated that she attempted to contact the ATP for medical care and was declined an appointment multiple times. She stated that the delay in care was a hardship in seeking medical care from an ATP. She stated that she was advised that her claim was closed and could not be provided an appointment.

7. Neither party provided the ATP with a copy of the DIME report issued by Dr. Kalevik to inform the ATP that further medical care was necessary in this matter.

8. Claimant testified that the insurance adjuster scheduled her for a September 7, 2021, demand appointment with Dr. Bird, but that the appointment date and time was sent to her by text messaging. This ALJ infers from the testimony and from counsel's statements that either the adjuster scheduled it or requested that the provider schedule the appointment after providing authorization.

9. Claimant attended the demand appointment on September 7, 2021.[1]

10. Claimant also attended an appointment with her primary care physician to address her work injuries on September 7, 2021. Following the September 7, 2021, demand appointment, Claimant failed to seek additional treatment from Concentra.

11. After September 7, 2021, Claimant sought treatment exclusively from her primary care provider New West Physicians and did not follow up with Dr. Bird or Concentra.

12. Claimant continued to work and lost no time from work.

13. On September 27, 2021 Respondents filed a General Admission of Liability for medical benefits only, as Claimant had no lost time. This was eighty seven days after a thirty day period the Order was issued, if there was a deadline.

14. Based on the facts presented in this case, the ALJ finds that Claimant has failed to show that Respondents were required to file a General Admission of Liability as ALJ Cannici determined that Claimant was not at maximum medical improvement and did not terminate or reduce, increase or change benefits being paid to Claimant in this matter.

15. Also found is that Respondents cured any potential claim for penalty by filing the General Admission of Liability within 20 days of the Application for Hearing.

16. Finally, it is found that the steps taken by Respondents in scheduling the September 7, 2021 follow up appointment with Dr. Bird were objectively reasonable. Respondents' conduct was rationally grounded in law and fact and in accordance with the order issued by ALJ Cannici.

[1] Neither party submitted medical records or other documents to dispute this statement, and a demand letter was not introduced into evidence.

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Violation of W.C.R.P. Rule 5-5(C)(1)

Claimant argues that Respondents violated W.C.R.P. Rule 5-5(C)(1) as ALJ Cannici issued a final order on June 2, 2021 finding Respondents had failed to overcome the DIME physician's finding that Claimant was not at MMI and required further care.

W.C.R.P. Rule 5-5(1)(C) states as follows

> (C) Upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation on or prior to the next scheduled date of payment, regardless of the reason for the termination or reduction. An admission shall be filed within 30 days of any resumption or increase of benefits.
>
> (1) Following any order (except for orders which only involve disfigurement) becoming final which alters or awards benefits, an admission consistent with the order shall be timely filed.

W.C.R.P. Rule 5-5(C)(1) requires a new admission to be filed "upon termination or reduction in the amount of compensation." Those circumstances were not present here as Claimant continued to work and lost no time from work so no indemnity payments were due. Rule 5-5(C)(1) requires the filing of an admission after an order "which alters or award benefits" being paid under the WC Act.

The plain reading of the rule, including the phrase 'being paid' leads to the conclusion that no admission was required under the circumstances presented here. See *Miller v. Recob & Associates*, ICAO, WC, 5-001-904-02 (September 17, 2018). Even if Claimant argued the Order increased the amount of benefits being paid (since none were being paid as Claimant continued to work) and therefore an admission was required, no authority was provided in which a Colorado Court held that W.C.R.P. Rule 5-5(C) and 5-5(C)(1) requires an admission to be filed by the insurer or employer after action was taken which fully complied with the order issued by an Administrative Law Judge. Indeed, such an interpretation would require an employer or insurer to file an admission after every order. Claimant failed to show that Respondents were required to file an admission in this matter by an certain deadline.

C. Penalties

Under § 8-43-304(1), C.R.S. (2021), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004)

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty

under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with a rule. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo.App.2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]. *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The also ALJ has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, the ALJ was not persuaded there was a violation of the rules cited by Claimant. Stated another way, Claimant did not prove these rules mandated the filing of an admission in this case. The ALJ also considered the argument that the case of *Edward Flake v. JE Dunn Construction Co.,* W.C. 4-997-403-03 (ICAO September 19, 2017) provided a basis for penalties to be imposed in the case. That case was factually distinct in that Respondents initially provided medical benefits to Claimant then filed a Final Admission of Liability after being placed at MMI without impairment but no DIME was requested.

Even if Respondents were required to file an admission, Respondents acted reasonably in scheduling a follow up with Dr. Bird for September 7, 2021, which Claimant attended. The fact that Dr. Bird failed to understand the nature of the follow up appointment because neither party provided Dr. Bird with information that was critical,

including ALJ Cannici's order or the DIME report issued by Dr. Kalevik, does not detract from the reasonable steps taken by Respondents in this matter. Claimant had the same opportunity to provide the critical documentation to Dr. Bird as Respondents. Lastly, Claimant failed to follow up with Dr. Bird or Concentra after the September 7, 2021 appointment. Since there is no requirement to file a General Admission of Liability pursuant to W.C.R.P. Rule 5-5(C)(1), there is not circumstances that would require an allocation for a penalty.

Therefore, it is found and concluded that Claimant failed to prove that Respondents acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo.App. 1999). Claimant failed to prove by a preponderance of the evidence that a penalty is due. Therefore, Claimant's claim for penalties are denied and dismissed and all other issues set for this hearing are moot.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's requests for penalties for violation of W.C.R.P. Rule 5-5(C)(1) pursuant to Sections 8-43-304 and 305, C.R.S. are denied and dismissed.

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

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

DATED this 24th day of January, 2022.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-118-981-003 and 5-135-641-002

ISSUES

I. Consistent with the views expressed by the ICAO, whether Claimant established by a preponderance of the evidence that he sustained permanent impairment to his cervical spine – and if so – the extent of his impairment.

PROCEDURAL HISTORY

In W.C. 5-118-981, Claimant sustained a work injury on September 7, 2019. The claim was at first denied and Claimant, through counsel, filed an application for hearing dated July 13, 2020, on various issues including, but not limited to, compensability. Respondents provided medical treatment and Claimant was placed at MMI by an authorized treating physician, Dr. Julie Parsons. Before the parties proceeded to hearing on the compensability dispute, Respondents requested a Division IME. Dr. James Regan was selected and confirmed as the DIME physician. Respondents subsequently filed a Final Admission of Liability (no permanent impairment) on October 14, 2020. The Final Admission of Liability was filed before the Division IME took place.

In W.C. 5-135-641, Claimant sustained a work injury on October 21, 2019. Respondents initially denied the claim and Claimant, through counsel, filed an application for hearing dated August 24, 2020, on various issues including, but not limited to, compensability. Again, respondents provided some medical treatment. On October 14, 2020, respondents filed a Final Admission of Liability (no permanent impairment). Claimant objected and requested a Division IME.

Pursuant to various prehearing orders, the claims were consolidated for purposes of the DIME and for the hearing. Therefore, the DIME physician addressed both claims and both claims were heard at the March 26, 2021, hearing.

This ALJ issued an order on May 15, 2021, that denied Claimant permanent partial disability benefits for his cervical and lumbar spine. Claimant only appealed that portion of the order that denied him permanent partial disability benefits for his cervical spine. The ICAO reviewed the May 15, 2021, order regarding the denial of benefits for Claimant's cervical spine. The ICAO set aside the appealed portion of the ALJ's order and remanded the matter for additional findings. The ICAO directed the ALJ to determine whether Claimant established, by a preponderance of the evidence, that he suffered permanent partial disability due to his cervical spine injury. Therefore, this order will only address Claimant's claim for permanent partial disability benefits regarding his cervical spine. Claimant's claim for permanent partial disability benefits for his lumbar spine, which was denied and not appealed, will therefore not be addressed in this order.

In light of the direction provided by the ICAO, the ALJ has reviewed and reweighed the evidence related to Claimant's injury to his cervical spine. In light of such

review and reweighing of the evidence, the ALJ is issuing new findings of fact and conclusions of law for Claimant's cervical spine.

FINDINGS OF FACT

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

1. On September 7, 2019, Claimant was helping lift heavy equipment – a bucket of water - into the back of a truck which caused him to develop neck pain. (Claimant's Exhibit 6, p. 236)[1] (Respondents' Exhibit G, pp. 175B)

2. On September 12, 2019, Claimant was seen at Advanced Urgent Care by Katie Krueger, PA-C. His safety supervisor was present to provide translation. Claimant, through his supervisor, related that his injury occurred on September 7, 2019, when he was helping carry heavy equipment into a truck and he felt sudden pain in his neck and could not move his head from side to side. He also said that his neck pain continued and was described as shooting pain down into his back with numbness in his fingertips bilaterally. He also complained of symptoms of "pins and needles" and a pain level of 6/10. Claimant further complained that his upper back and shoulders ached. PA Krueger noted that Claimant's neck was stiff and had decreased range of motion. It was also noted that Claimant could not move his head from side to side and when moving his head to the left, he described his back pain increasing to 8/10. Lastly, Claimant denied any prior neck problems. PA Krueger's physical exam documented neck tenderness and pain with motion. Cervical X-rays were ordered and over the counter medication was prescribed. Claimant was instructed to apply heat and ice and to perform gentle stretching/ROM exercises. He was returned to full duty work but was advised to be self-limiting and work as tolerated. Ms. Krueger specifically diagnosed Claimant's neck with (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of cervical muscle of neck. (Claimant's Exhibit 13, pp. 827 - 828; p. 830)

3. On September 19, 2019, Claimant returned to Advanced Urgent Care and was again seen by Katie Krueger, PA-C. He reported that his neck pain continued but felt a little better. He also reported that he had been doing home exercises. On the other hand, turning his neck aggravated his neck and caused shooting pain. His range of motion had increased but remained limited when he turned his head to the left. He continued with "needles and tingling" in his fingers in the morning and sometimes up his left arm during the day. The physical exam showed tenderness of the trapezius and limited range of motion with lateral tilt and rotation. Claimant reported pain with left lateral tilt and rotation. Medical massage for his neck was ordered with continued over the counter medication. He was again returned to full duty work but was advised to self-limit as tolerated. PA Krueger continued to diagnose Claimant with a neck injury as a (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of cervical muscle of neck. (Claimant's Exhibit 13, pp. 833 - 837)

[1] Respondents ultimately admitted liability for the September 7, 2019, claim on October 14, 2020.

4. On October 2, 2019, Claimant was seen at Advanced Urgent Care by Julie Parsons, M.D., for his neck strain. Claimant again reported that his neck was feeling a little better but turning his neck caused shooting pain. The physical exam revealed neck pain with motion and a negative Spurling's maneuver. Physical therapy was ordered and Claimant was returned to full duty. Dr. Parsons reaffirmed Claimant's specific diagnoses of (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 850 - 853)

5. On October 21, 2019, Claimant returned to Advanced Urgent Care and was seen by Katherine Lindsey, NP, for a new injury. According to the medical records, Claimant had fallen that day getting off a truck ladder and rolled his left ankle, landing on his back, and bumping his head very lightly. His chief complaint was left ankle pain, but he also complained of worsening back pain – which he said was from a prior injury. He could not bear any weight on his left ankle. He was prescribed crutches for his ankle and was restricted with limited weightbearing. (Claimant's Exhibit 13, p. 859)

6. On October 23, 2019, Claimant returned to Advanced Urgent Care and saw Dr. Parsons for his neck and new ankle injury. In the WC164 form, she placed Claimant at maximum medical improvement for his October 21, 2019, ankle injury. (Claimant's Exhibit 13, p. 878) As set forth in a second WC164 form, she did not place Claimant at MMI for his September 7, 2019, neck injury. (Claimant's Exhibit 13, p. 874 and 878) His neck was feeling better with massage therapy. The medical notes show that Claimant remained with neck pain with motion. He was returned to full duty as tolerated. Dr. Parsons again diagnosed Claimant's neck injury as (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 871 - 874, p. 924)

7. On November 5, 2019, Claimant's Medical Massage of the Rockies notes state his neck felt better for three days after his last massage. The records indicate Claimant complained of neck pain and stiffness and that he continued to experience numbness and tingling in his hands. The records also say he was experiencing headaches with pain on the right side from his neck to his temple and dizziness. Under objective findings, the therapist noted hypertonicity in Claimant's trapezius and scalene muscles. (Claimant's Exhibit 13, p. 879)

8. On November 7, 2019, Claimant returned to Medical Massage of the Rockies. His complaints of neck pain and stiffness continued. He reported that his neck felt better until that morning. He also reported that his neck was more painful on the left than the right. Numbness, tingling in his hands and dizziness continued. His headaches had improved. It was also noted that the hypertonicity in his trapezius and scalene muscles continued. (Claimant's Exhibit 13, p. 880)

9. On November 11, 2019, Claimant was seen again at Medical Massage of the Rockies. The records state Claimant's neck pain and stiffness continued, but that the last massage improved his symptoms for a couple of days. Claimant still complained that the left side of his neck remained more painful than the right. The

physical examination still documented continued hypertonicity in Claimant's trapezius and scalene muscles. (Claimant's Exhibit 13, p. 881)

10. On November 12, 2019, Claimant returned to Dr. Parson's for additional treatment. It was again noted that his neck pain was improving with medical massage therapy. Claimant was, however, experiencing headaches and had full range of motion but pain with motion. Dr. Parsons continued her diagnoses of Claimant's neck injury as (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 884 - 886)

11. On November 22, 2019, an MRI of Claimant's cervical spine was performed which showed at C6-7 a central disc protrusion with annular tear, moderate spinal stenosis and mild bilateral neural foraminal stenosis. (Claimant's Exhibit 13, pp. 922 – 923)

12. On November 23, 2019, Claimant returned for medical massage. Again, his neck pain had improved for a few days after the massage but the numbness and tingling in his hands continued. The therapist documented that the "insurance called and wants me to NOT work on the neck" anymore. (Claimant's Exhibit 13, p. 924)

13. On November 27, 2019, Claimant returned for follow up with Dr. Parsons for his neck pain. Claimant reported he had been let go from his job. He also stated that his neck felt better with massage, but that the numbness and tingling in his fingers continued as well as his headaches. Consistent with the massage therapy records, Claimant stated that the massage therapy had helped. On physical exam, Dr. Parsons reported decreased range of motion with pain in his neck and limited turning left to right. To the diagnosis of (1) neck strain, (2) neck pain and (3) cervical muscle spasm, Dr. Parsons added (4) spinal stenosis in the cervical region and (5) cervical radiculopathy. Based on the new diagnosis, which included cervical radiculopathy, she prescribed Claimant Prednisone. And based on the new diagnosis, Dr. Parsons referred Claimant to Ascent Medical Consultants for his cervical radiculopathy. (Claimant's Exhibit 13, pp. 927 - 928, 936)

14. On December 17, 2019, Claimant was seen by Dr. Eric Shoemaker at Ascent Medical Consultants. Dr. Shoemaker noted that Claimant's cervical symptoms began on September 7, 2019, while helping a worker lift a case of gallon jugs of liquid. He noted that Claimant reported that his neck pain symptoms were severe. Claimant also stated that prior to his September 7, 2019, injury, he did not have neck symptoms. It was also noted that Claimant's neck pain was located at the cervical thoracic junction radiating into the interscapular region and down his left upper extremity. It was also noted that Claimant's pain in his lateral deltoid and arm extended to his proximal radial forearm and included constant numbness and tingling involving the second and fourth digits. Claimant also complained of nausea, dizziness, and headaches, particularly when lying down. (Claimant's Exhibit 13, p. 939)

15. On that date, Dr. Shoemaker personally reviewed the cervical MRI, noting its low-quality imaging. He noted at the C6-7 level a shallow broad-based posterior

protrusion eccentric to the right. He also noted that assessment of the foramen was not possible due to the low-quality imaging. He stated that the MRI report described at C6-7 a central disc protrusion with annular tear, moderate spinal stenosis, but no abnormal cord signal. He also stated that the MRI report noted minimal diffuse bulge at C5-6 with mild bilateral foraminal stenosis and that there were similar findings at C4-5, but yet the remaining levels were unremarkable. Dr. Shoemaker also performed a physical examination. He noted that Claimant's cervical range of motion was moderately decreased in all planes with a positive right arm Spurling's maneuver indicating cervical radiculopathy from disc compression. Dr. Shoemaker recommended a left paramedian C7-T1 interlaminar epidural steroid injection and noted Claimant was taking gabapentin before work but should continue with the medication before bed instead. Dr. Shoemaker's specific diagnosis for Claimant's neck condition was left C7 radiculitis secondary to a C6-7 disc protrusion causing some canal stenosis and potentially some foraminal stenosis. (Claimant's Exhibit K, pp. 939 - 943)

16. On December 18, 2019, Claimant returned to Dr. Parsons. She recorded that Claimant's neck had limited extension and side to side movement but negative Spurling's maneuver. She assigned 30-pound restrictions. Dr. Parsons diagnosed (1) neck strain, (2) neck pain and (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, pp. 947 - 950)

17. On January 6, 2020, Claimant returned to Dr. Shoemaker for a left paramedian C7-T1 interlaminar epidural injection under fluoroscopy guidance and radiological images for his arm and neck pain. (Claimant's Exhibit 13, pp. 968 - 970)

18. On January 21, 2020, Claimant returned to Dr. Shoemaker. For a week after the injection Claimant stated that he had received 50% improvement overall with almost complete relief of his upper extremity symptoms; however, by the date of this January 21, 2020, visit, he was back at baseline with 0% sustained improvement from the injection. Dr. Shoemaker recommended bilateral upper extremity EMGs and advised Claimant to not drive while taking gabapentin and to only take it at night. (Claimant's Exhibit 13 pp. 1040 - 1043)

19. On January 28, 2020, Claimant returned to Dr. Parsons for additional treatment. He reported that his chief complaint was neck pain and that his numbness, tingling, and headaches continued. Claimant reported that he was working at a new job. A bilateral upper extremity EMG was pending. She returned Claimant to full duty. Dr. Parsons retained her specific diagnoses for Claimant's neck as (1) neck strain, (2) neck pain and (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, pp. 1055 - 1058)

20. On February 3, 2020, Respondents asked for a medical record review by Scott Primack, D.O. about Dr. Shoemaker's request for bilateral upper extremity EMGs. Dr. Primack found the request reasonable. (Claimant's Exhibit 13, pp. 1068 - 1069)

21. On February 15th and 16th of 2020, surveillance video was obtained of Claimant. (Respondents' Exhibit DD, via hyperlinks in the investigative report.) The video shows Claimant walking in a normal manner. Claimant was not walking in a guarded manner as described by Dr. Primack in his May 20, 2020, report. The video also shows Claimant moving his neck with no problems. (Respondents' Exhibit DD and K, p. 218)

22. On February 20, 2020, Claimant returned to Dr. Shoemaker. His EMGs documented moderate bilateral carpal tunnel symptoms, right greater than left but given that his upper extremity symptoms were worse on the left, Dr. Shoemaker suspected that Claimant's left upper extremity symptoms were related to Claimant's specific diagnosis of left C7 radiculitis secondary to left C6-7 disc protrusion causing some canal stenosis and potentially some foraminal stenosis. Dr. Shoemaker noted that Claimant's injury had occurred while doing heavy lifting, and to a reasonable degree of medical certainty Claimant's specific diagnosis of C7 radiculitis secondary to a C6-7 disc protrusion resulted from his work injury. He again instructed Claimant not to drive or operate heavy machinery or work at unprotected heights while taking gabapentin and to take it at night. (Claimant's Exhibit 13, p.1072 - 1074)

23. On February 24, 2020, Claimant returned to Dr. Parsons. His chief complaint was neck pain. She noted the cortisone injections had temporarily helped and that his range of motion had improved. She returned Claimant to full duty and prescribed gabapentin. Dr. Parsons again retained her specific diagnoses for Claimant neck of (1) neck strain, (2) neck pain, (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, p. 1083 - 1086)

24. On March 17, 2020, Claimant returned to Dr. Shoemaker for a follow up evaluation. Claimant's chief complaint is listed as neck pain and Dr. Shoemaker noted Claimant's primary pain at this point is his neck with radiation into the left arm and shoulder. Due to Claimant's persistent radicular symptoms, Dr. Shoemaker recommended a left C7-T1 interlaminar ESI for diagnostic and potentially therapeutic benefit. He continued Claimant on gabapentin 300 mg 2 tablets before bedtime. (Claimant's Exhibit K, p.1165 - 1168)

25. On May 18, 2020, Claimant returned to Dr. Shoemaker. Again, his chief complaint was neck pain. Claimant reported that he had not seen Dr. Parsons since March because of COVID. His symptoms were the same as his last visit on March 17, 2020. His current pain level was a 6/10. His worst pain level in the last few weeks was a 7/10 and his best was 5/10. Claimant found gabapentin useful to manage his pain. He had to limit activities and was working less due to pain. His work was slower. The gabapentin made him drowsy. The cervical epidural steroid injection had been denied and was waiting for a Rule 16 IME review and hoped to be able to move forward with the injection. (Claimant's Exhibit K, pp. 1186 - 1188)

26. On May 20, 2020, Dr. Primack performed an independent medical examination regarding Claimant's neck and back. On physical examination of Claimant's neck, Dr. Primack noted Claimant had full cervical range of motion except with right lateral side bending. He also noted that Claimant walked in a very guarded and slow manner. Dr. Primack stated:

> On today's clinical examination, he does ambulate in a very guarded manner. He has a slowed gait cycle. He has difficulty going into heel strike and toe off bilaterally because of pain. I asked him if that "is how he normally walks." He states that he does not move that fast.

Based on his examination of Claimant's cervical spine and review of the surveillance video, Dr. Primack concluded that there were no clinical findings to support Claimant's claim of ongoing neck problems. Dr. Primack found "no problems whatsoever" regarding Claimant's cervical spine and did not indicate Claimant had any impairment regarding his cervical spine. (Respondents' Exhibit K, pp. 213-221.)

27. The description by Dr. Primack of Claimant's limited ability to move and walk is in stark contrast to the February 2020 surveillance video. The surveillance video of Claimant shows him moving his neck freely and without any limitation. The surveillance video also shows Claimant walking without any problems. (Respondents' Exhibit DD, via hyperlinks in report.)

28. On May 27, 2020, Claimant returned to Advanced Urgent Care after a three-month gap due to COVID and was seen by Laura Lunn McDonough, PA. He reported he made good progress during that time but had plateaued. She returned him to work without restrictions because Claimant believed that he could self-modify as needed. Ms. McDonough planned for Claimant to do full duty without taking gabapentin. (Claimant's Exhibit 13, pp.1200 -1205)

29. On June 16, 2020, Dr. Shoemaker issued a report in which he concluded that Claimant reached MMI for his neck injury on January 6, 2020 and assessed Claimant's impairment. In assessing Claimant's impairment, Dr. Shoemaker considered Dr. Primack's report in which Dr. Primack concluded Claimant did not have any cervical impairment based on his examination and the surveillance video. Dr. Shoemaker disagreed with Dr. Primack's conclusion. In support of his conclusion, Dr. Shoemaker stated that "consistent with Dr. Primack's clinical evaluation the patient has persistent rigidity with range of motion restrictions." But, Dr. Primack did not find decreased cervical range of motion in all planes, Dr. Primack only noted decreased range of motion consisting of "right lateral side bending." On the other hand, Dr. Shoemaker noted – and rated – cervical decreased range of motion in i) flexion, ii) extension, iii) right lateral flexion, iv) left lateral flexion, v) right rotation, and vi) left rotation.

30. Based on the AMA Guides, page 80, table 53.II.B, Dr. Shoemaker assigned Claimant a 4% whole person impairment. He assessed range of motion based on

bubble inclinometers in multiple planes and attached the impairment rating worksheets to his report. Using figure 81 cervical range of motion, page 82, he measured a maximum cervical flexion angle of 22 degrees. Based on table 55, page 88, that measurement translated to a 4% whole person rating. He measured a maximum cervical extension angle of 14 degrees. Based on table 55, page 88, that measurement translated to a 4% whole person rating. He measured a maximum cervical right lateral flexion angle of 20 degrees. Based on table 56, page 90, translated into a 2% whole person rating. He measured a left lateral flexion angle of 16 degrees. Based on table 56, page 90, this translated into a 2% whole person impairment. Dr. Shoemaker measured maximum cervical right rotation angle of 28 degrees was measured. Based on table 57, page 90, this results in a 3% whole person impairment. Maximum cervical left rotation angle of 25 degrees was measured. Based on Table 57, page 90, this gave Claimant a 3% whole person impairment. The range of motion impairments add up to 18% whole person impairment and combined with the Table 54 impairment due to specific disorder resulted in Claimant being provided a 21% whole person impairment. (Claimant's Exhibit 13, pp. 1221 - 1224)

31. When Dr. Shoemaker determined Claimant's impairment on June 16, 2020, Claimant did have more than 6 months of documented pain and rigidity of his cervical spine.

32. However, despite Dr. Primack mentioning the inconsistencies in his examination – and the surveillance video – Dr. Shoemaker did not sufficiently address the inconsistencies in Claimant's range of motion and did not ask to review the surveillance video – and did not review the surveillance video - before providing Claimant an impairment rating for his cervical spine. In other words, the record on which Dr. Shoemaker relied contains inconsistencies regarding Claimant's range of motion and the ALJ finds that Dr. Shoemaker did not adequately address those issues.

33. On September 11, 2020, Dr. Primack issued another report related to his review of the surveillance video. Dr. Primack concluded that the surveillance video showed Claimant moving his cervical spine from side to side. He also noted that Claimant could flex forward at the head without difficulty and that he showed adequate rotation. He also concluded that Claimant did not demonstrate any cervical impairment. Dr. Primack stated:

> I appreciate your need for my analysis of the Oscar Lopez surveillance videos. The first video is almost 60 minutes and the second video are 7 minutes. The first video is from 2/15/2020. Throughout the video, Mr. Lopez was able to ambulate without difficulty and move his cervical spine from side-to-side.
>
> He is able to flex forward at the head without difficulty. He was able to ascend and descend stairs without difficulty. He was able to ambulate with a bag at the level of his right shoulder. At 5:47pm he

> was able to check his truck out with a helmet on his head. At 6:20, he was able to demonstrate adequate rotation.
>
> On, 2/16/2020, he was able to walk without difficulty. He could also use his phone. With phone use there was side bending. Given the mechanism of injuries, the clinical examination, a review of the extensive medical records, and the surveillance videos, there is no evidence of any cervical spine or foot/ankle impairment. The patient does not demonstrate any restrictions or impairment whatsoever.

In the end, Dr. Primack credibly and persuasively concluded Claimant did not demonstrate any impairment or range of motion deficits or restrictions regarding his cervical spine in the surveillance video.

(Respondents' Exhibit K, p. 231)

34. The ALJ finds that the Table 53.II.B 4% impairment rating provided by Dr. Shoemaker is consistent with the AMA Guides and supported by the underlying medical records of Claimant's treating providers, but the range of motion deficits that were rated by Drs. Shoemaker and Regan are not supported by Dr. Primack's assessment and the surveillance video.

35. On October 14, 2020, Respondents filed a Final Admission of Liability for the September 7, 2019, work injury involving Claimant's neck. (Respondents' Exhibits, p. 133.) In support of their admission, Respondents attached the October 23, 2020, reports from Dr. Parsons. The detailed medical report from October 23, 2020, arguably places Claimant at MMI for all conditions, including his neck. (Respondents' Exhibit F, pp. 140-143) However, the October 23, 2020, WC164 form shows Claimant is only being placed at MMI for his October 21, 2019, ankle injury. (Respondents' Exhibit F, p. 144)

36. On December 4, 2020, James Regan, M.D. performed a DIME evaluation. He also considered Dr. Primack's opinion that Claimant had no problems whatsoever with his neck. Without reviewing the surveillance video – or asking to review it - Dr. Regan rejected Dr. Primack's opinion and assigned an impairment rating. Dr. Regan provided Claimant an impairment rating. Based on the AMA Guides, page 80, table 53.II.B, Dr. Regan assigned a 4% whole person impairment. He also assessed range of motion on attached impairment rating worksheets to his report. Using figure 81 cervical range of motion, page 82, he measured a maximum cervical flexion angle of 15 degrees translated to a 4% whole person impairment. Maximum cervical extension angle was 20 degrees which translated to a 4% whole person impairment. Maximum cervical right lateral flexion angle was 20 degrees which translated to 2% whole person impairment. Left lateral flexion angle was 15 degrees which translated to a 2% whole person impairment. Maximum cervical right rotation angle was 30 degrees which translated to a 3% whole person impairment. Maximum cervical left rotation angle was of 35 degrees which translated to 2% whole person impairment. These range of motion impairments add up to 17% whole

person impairment and combine with the Table 54 impairment due to specific disorder to give 20% whole person impairment. (Claimant's Exhibit 1, pp. 1 - 15).

37. Claimant called Dr. Regan to testify at hearing. Ultimately, Dr. Regan retracted his opinion regarding Claimant's impairment rating. At hearing, he concluded that based on the date Claimant was placed at MMI by Dr. Shoemaker, Claimant did not have pain and rigidity, with or without muscle spasm, for 6 months or more, and that an impairment rating was not appropriate under the AMA Guides. Thus, he ultimately concluded that Claimant's impairment rating for his cervical spine was 0%.

38. Respondents called Dr. Scott Primack to testify at hearing. Dr. Primack opined that the cervical injury never happened. He concluded that Dr. Shoemaker's treatment for the cervical spine was based on history and one "can't really treat someone for a neck problem when a neck problem never happened." To Dr. Primack, Claimant's problem with credibility and inconsistency was "most disturbing" and resulted in him not providing Claimant a rating for his cervical spine. (Tr.: p.61, l. 23 through p. 62, l. 6) The ALJ finds Dr. Primack's opinions to be credible and persuasive regarding Claimant's lack of credibility and inconsistencies.

39. Dr. Primack disagreed with any cervical impairment rating because in his opinion Claimant was malingering and consciously misrepresenting his physical capacity. He could not cite from the record any other doctor who agreed with his opinion of malingering and admitted that Dr. Regan did not note evidence of malingering or symptom exaggeration. Dr. Regan testified that "candidly," he did not see any malingering during his DIME examination. He considered Claimant had given an earnest effort and was honest. That said, Dr. Regan did not review the surveillance video or ask to review the surveillance video. (Tr.: p. 140, ll. 2 – 6) Alternatively, Dr. Primack disagreed with Claimant's cervical rating because it was significantly high when comparing the Claimant's level of functioning and referenced his job. (Tr.: p. 85, l. 17 – 23) (Tr.: p. 86, l. 15 through p, 87, l. 2) (Tr.: p. 88, l. 22 through p. 89, l. 10)

40. Claimant's counsel asked Dr. Regan about the significant rating for a cervical spine considering Claimant's supposed level of function at work. Dr. Regan answered that many of his patients are in pain but work because they have to feed their families so just because there is performance does not mean there is no pain. He believed that Claimant had the pain he described but did not have the financial leverage to not work. (Tr.: p. 143, l. l21 through p. 144, l. 8) Asked whether he had adopted Dr. Shoemaker's range of motion measurements, Dr. Regan testified his cervical rating was independent of Dr. Shoemaker's. (Tr.: p. 178, l. 21) Asked how he documented rigidity as required for permanent impairment, Dr. Regan testified that his range of motion is synonymous to rigidity and that Claimant definitely had pain and rigidity for a year and a half between his injury and his range of motion measurements on December 4, 2020. (Tr.: p. 198, ll. 12 – 16; p. 200, l. 18 – p. 201, l. 1)

41. Based on the medical records, Claimant did have documented cervical pain and rigidity for more than 6 months.

42. Based on Claimant's presentation to Dr. Primack - compared to his presentation in the surveillance video – the ALJ does not find Claimant credible as it relates to the extent of his cervical impairment based on any decrease in range of motion due to his work accident. The ALJ finds that Claimant has misrepresented his range of motion deficits. As a result, the ALJ does not find the cervical range of motion measurements obtained by Drs. Shoemaker and Regan to be a true and accurate representation of Claimant's medical impairment that was caused by the work accident.

43. The ALJ finds the difference between Claimant's presentation to Dr. Primack, the range of motion deficits measured by Drs. Shoemaker and Regan and his appearance in the surveillance video to be in stark contrast. It is as if the person Drs. Primack, Shoemaker, and Regan evaluated is different from the person in the video. Moreover, Claimant chose not to testify at the hearing. He therefore did not attempt to explain the stark difference regarding his range of motion as measured by Drs. Shoemaker and Regan and that contained in the video and observed by Dr. Primack. As a result, the ALJ finds that Claimant did not dispute the stark discrepancy between Claimant's presentation to Drs. Primack, Shoemaker, and Regan and his appearance during the surveillance video.

44. The AMA Guides state that in order to provide an impairment rating, the underlying medical record must support the conclusion that there is impairment, and that the impairment is permanent. The AMA Guides provide the following instructions:

> Before formal evaluation is carried out under the Guides, an analysis of the history and course of the medical condition, including the findings on previous examinations, the treatment and responses to treatment, and the impact of the condition on life activities, must support a conclusion that an impairment is permanent and stabilized.
>
> This information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the requirements of the Guides. Once this task is accomplished, the evaluator's findings may be compared with the clinical information already available about the individual. If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the Guides to determine the percentage of impairment
>
> If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until

> communication between the involved physicians or further clinical investigation resolves the disparity.

See AMA Guides, Section 1.2, Structure and Use of the Guides, pg. 3.

45. In this case, Dr. Primack's records and the surveillance video do not support the conclusion that Claimant has permanent impairment based on range of motion – as rated by Drs. Shoemaker and Regan. Moreover, neither Drs. Shoemaker nor Regan communicated with Dr. Primack in any way, or asked to see the surveillance video, to resolve the disparity regarding Claimant's cervical range of motion observed between the doctors and on the surveillance video.

46. As a result, the ALJ does not find the ultimate opinions of Drs. Shoemaker or Regan regarding the impairment rating provided for Claimant's decreased range of motion to be persuasive since their opinions are based on Claimant's presentation – which the ALJ does not find credible. It is self-evident that an opinion based on false information is unreliable and not persuasive.

47. The ALJ has reviewed and reweighed the evidence related to Claimant's cervical spine injury. The ALJ does not find Claimant's representations and presentation regarding his decreased range of motion involving his cervical spine at the time it was measured to be credible. As a result, the ALJ is not crediting the impairment rating associated with Claimant's decreased range of motion based on the opinions of Dr. Primack and the surveillance video.

48. On the other hand, the ALJ does find Claimant's statements to his medical providers about the cause of his cervical spine injury on September 7, 2019, and the duration of some stiffness – rigidity – to be credible. For example, Claimant alleges that before September 7, 2019, he did not have a preexisting neck condition that required medical treatment. A review of the medical records supports such a contention. Second, after his injury, Claimant underwent an MRI that demonstrated a herniated disc. Moreover, Dr. Shoemaker concluded that Claimant's radicular symptoms were consistent with the MRI findings. Third, there was no credible and persuasive evidence that Claimant suffered from a herniated cervical disc before the lifting incident on September 7, 2019, and that it required medical treatment.

49. The ALJ has also considered the fact that the record is not entirely consistent about what Claimant was lifting when he hurt his neck and when his pain developed. The ALJ, however, finds that the essence of Claimant's description is similar. He was lifting something on September 7, 2019, and developed neck pain.

50. The ALJ is mindful that some of these new findings about Claimant's cervical spine are contrary to the ALJ's prior findings. However, after further review, analysis, and reflection, the ALJ believes that Claimant's credibility issues surrounding his back injury and cervical range of motion overly obscured the ALJ's evaluation of the evidence regarding the circumstances surrounding Claimant's cervical spine injury. In other words, the ALJ finds that in this case, the Claimant's credibility is not an all or nothing proposition. Thus, while the ALJ did not credit all of Claimant's

statements to his medical providers regarding his back injury, and the extent of his impairment/disability regarding his back and neck, the ALJ does credit his initial statements to his medical providers regarding the cause of his September 7, 2019, neck injury.

51. After reviewing and reweighing the evidence, the ALJ credits the opinions of Dr. Primack over the opinions of Drs. Shoemaker and Regan as for that portion of the rating Drs. Shoemaker and Regan provided for Claimant's decreased range of motion.

52. The ALJ only credits that portion of Dr. Shoemaker's opinion that found Claimant's September 7, 2019, work related cervical injury resulted in a 4% whole person impairment rating under Table 53.II.B

53. Based on the evidence presented, the ALJ finds that Claimant's neck injury was caused by the September 7, 2019, work accident and not the October 21, 2019, work accident.

54. Claimant's cervical injury has several specific diagnoses: (1) neck strain, (2) neck pain, (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy.

55. Claimant's cervical injury has objective pathology; namely, the November 22, 2019, cervical MRI which shows at the C6-7 level a shallow broad-based posterior protrusion eccentric to the right, with annular tear, moderate spinal stenosis believed by Dr. Shoemaker to be the cause of Claimant's neck pain and left upper arm symptoms.

56. The medical evidence credited by the ALJ establishes Claimant's cervical injury resulted in an intervertebral disc or other soft tissue lesion, unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity which warrants a 4% rating under Table 53.II.B of the AMA Guides. But the ALJ further finds that Claimant did not suffer range of motion impairment under the AMA Guides based on the opinions of Dr. Primack and the surveillance video.

57. As a result, the ALJ finds that Claimant's September 7, 2019, work injury resulted in a 4% whole person impairment rating pursuant to 53.II.B of the AMA Guides.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally;

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

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

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

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

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not

mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

Where an ALJ determines that a DIME physician changed his opinion concerning MMI or impairment, the party seeking to overcome that new opinion bears the burden of proof by clear and convincing evidence. *Dazzio,* W.C. No. 4-660-149 (ICAO June 30, 2008); *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (ICAO November 5, 2004).

If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002)

I. Consistent with the views expressed by the ICAO, whether Claimant established by a preponderance of the evidence that he sustained permanent impairment to his cervical spine – and if so – the extent of his impairment.

In this case, the ICAO concluded that Dr. Regan's ultimate opinion – that Claimant did not have any cervical impairment based on Claimant being placed at MMI within 6 months of his injury - was legally incorrect and it was therefore overcome by clear and convincing evidence. Thus, the ALJ was directed to determine Claimant's cervical impairment rating, based on the preponderance of the evidence.

As found, on May 20, 2020, Dr. Primack performed an independent medical examination regarding Claimant's neck and back. On physical examination of Claimant's neck, Dr. Primack noted Claimant had full cervical range of motion except with right lateral side bending. Dr. Primack also noted that Claimant walked in a very guarded and slow manner.

As further found, on September 11, 2020, Dr. Primack issued another report related to his review of the surveillance video. Dr. Primack concluded that the surveillance video showed Claimant moving his cervical spine from side to side. He also noted that Claimant could flex forward at the head without difficulty and that he showed adequate rotation. He also concluded that Claimant did not demonstrate any cervical impairment.

Based on Dr. Primack's examination of Claimant's cervical spine and review of the February 2020 surveillance video, Dr. Primack credibly and persuasively concluded

that there were no clinical findings to support Claimant's claim of ongoing neck problems and any decreased range of motion. Dr. Primack found "no problems whatsoever" regarding Claimant's cervical spine and did not indicate Claimant had any impairment regarding his cervical spine.

As found, the description by Dr. Primack of Claimant's inability to move and walk freely, and the cervical range of motion deficits measured by Drs. Shoemaker and Regan, are in stark contrast to the February 2020 surveillance video. The surveillance video of Claimant shows him moving his neck freely and without limitation. The surveillance video also shows Claimant walking without any problems. The surveillance video does not show Claimant having the degree of impairment he exhibited when evaluated by Dr. Primack or when his cervical range of motion was measured by Dr. Shoemaker and Regan.

As a result, the ALJ does not find the range of motion measurements obtained by Drs. Shoemaker and Regan to be reliable and persuasive since their opinions are based on Claimant's misrepresentation of his cervical spine range of motion. It is self-evident that an opinion based on false information is unreliable and not persuasive. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a 4% whole person impairment of his cervical spine pursuant to Table 53.II.B. of the AMA Guides due to his September 7, 2019, work injury. The ALJ further finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered additional impairment based on any range of motion deficits.

ORDER

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

1. Due to his September 7, 2019, work injury, Claimant suffered a 4% whole person impairment rating of his cervical spine.
2. Respondents shall pay Claimant permanent partial disability benefits based on a 4% whole person impairment rating.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 27, 2022.

/s/ Glen Goldman

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

ISSUES

- Did Claimant prove that an L4-5 fusion surgery recommended by Dr. Castro is causally related to his December 19, 2018 industrial injury?

FINDINGS OF FACT

1. Claimant worked in Employer's furniture department for approximately six weeks in November and December 2018. He suffered an admitted low back injury on December 19, 2018 while processing furniture donations.

2. Claimant had a history of low back pain related to osteoarthritis before the work injury. He sought treatment for back pain at Salud Family Medicine on March 25, 2014. Claimant attributed the pain to a fall in December 2013. Physical examination showed reduced range of motion and paraspinal tenderness to palpation. Claimant was given a Toradol injection and a prescription for Tramadol. On May 27, 2014, Claimant reported the Tramadol was not helping his pain and worried he was taking "too much" of it. The provider diagnosed generalized osteoarthritis and changed the prescription to Vicodin. Claimant returned three days later asking for a different pain medication because the Vicodin was not helping. Claimant described pain "everywhere," and cited his back as one of the "worst" areas. His pain medication was changed to MS Contin. At his next appointment on June 19, 2014, Claimant reported, "everything is getting worse." He was subsequently diagnosed with a chronic pain disorder and referred to a pain management specialist. In August 2014, he was diagnosed with peripheral neuropathy, presumably related to his longstanding diabetes, and prescribed gabapentin. On October 2, 2014, Claimant stated his pain was no better but he could not afford a pain clinic. The gabapentin dosage was increased. At his appointment on November 4, 2014, he reported ongoing pain in multiple areas, including his back. His doctor emphasized the need to get in with a pain clinic because "pt's OA [is] worsening." Over the next several months, he continued to receive Vicodin and gabapentin for pain while looking for to a pain clinic that would accept Medicaid. On February 6, 2015, Claimant's pain was 8-9/10 and he needed his Vicodin refilled because he could not get in with the pain clinic until the end of the month.

3. Claimant returned to Salud on December 16, 2015 for acute head and neck pain after being assaulted and kicked in the head four days earlier. He was diagnosed with a concussion, and later reported memory loss because of the assault. He also testified to ongoing memory problems at hearing. The next three Salud appointments were focused solely on his acute neck and head injuries. Claimant's last documented appointment was on February 1, 2016. He was referred for a repeat cervical CT because of continuing neck pain.

4. Although Claimant has numerous chronic medical issues, there are no records for any condition (including his diabetes) from February 2016 until the work accident.

5. Claimant testified, in the year before his work injury he had "small" pains in his back, but not as bad as the day after his work injury, with numbness and tingling in his feet.

6. On December 19, 2018, Claimant was putting unsellable donated furniture into a large trash compactor. While lifting a sofa into the dumpster, Claimant felt a "pull" in his low back. He "didn't think much about it at the time," and worked the remainder of his shift. He did not report an injury or request medical attention.

7. Claimant awoke the next morning with severe low back pain, and numbness and tingling in his feet. He went to work, but had to rest on a couch after his legs "gave out." He reported the injury to his supervisor and was referred for treatment.

8. Claimant saw Dr. Julie Parsons at Advanced Urgent Care on December 20, 2018. He denied any previous back injury. Physical examination showed limited ROM, right leg weakness, and limited tandem gait. X-rays showed only degenerative changes in the lumbar spine. Dr. Parsons diagnosed a low back strain and lumbar radiculopathy.

9. Dr. Parsons referred Claimant to Dr. Roberta Anderson-Oeser, a physiatrist. At his initial appointment on January 28, 2019, Dr. Anderson-Oeser noted Claimant lifted a couch and felt a "crack" in his low back and immediate sharp pain.[1] The next day he had difficulty getting out of bed and fell in the shower because of numbness in his legs. Claimant denied any prior low back issues. Physical examination showed palpable muscle spasms in the lower lumbar paraspinals. Straight leg raising was positive bilaterally. Sensation was decreased in an S1 distribution bilaterally and leg strength was reduced to 4-5/5 throughout both legs. Dr. Anderson-Oeser diagnosed a lumbar strain, muscle spasms, and lumbar radiculopathy. She ordered an MRI to evaluate a possible L5-S1 disc lesion or nerve root compression. Dr. Anderson-Oeser noted she would prescribe no pain medication because Claimant was an active marijuana user. Claimant stated the marijuana was helpful to manage his "chronic pain."

10. lumbar MRI was completed on February 21, 2019. There were no acute findings, and the radiologist described the observed pathology as "degenerative." The most significant findings were at L4-5, with grade I spondylolisthesis, a diffuse disc bulge, ligamentum flavum thickening, and bilateral facet arthropathy causing moderate bilateral neural foraminal narrowing, worse on the left. Lesser degenerative changes were noted at other levels. No herniated disc, central stenosis or nerve root compression was identified.

11. Dr. Anderson-Oeser oversaw conservative care over the next year, including massage therapy, osteopathic manipulation, acupuncture, facet injections, and

[1] At hearing, Claimant agreed the history documented by Dr. Anderson-Oeser was incorrect, as he did not experience a "crack" in his back; he simply felt a pull.

lumbar epidural steroid injections. Claimant received no appreciable benefit from any of the treatment, and his condition continued to deteriorate. Eventually, Dr. Anderson-Oeser referred Claimant to Dr. Bryan Castro, an orthopedic surgeon.

12. Claimant saw Dr. Castro on February 26, 2020. Dr. Castro noted some of Claimant's apparent clinical abnormalities were effort-dependent and improved with coaching. Dr. Castro found 4/5 weakness throughout the lower extremities, "which is a nonphysiologic exam as he is able to walk without neurologic deficits." Dr. Castro reviewed x-rays and the MRI, which highlighted "degenerative spondylolisthesis" at L4-5 and some facet joint "gapping" consistent with instability. Dr. Castro stated, "This is a degenerative process. I do not see any acute fracture, dislocation, or herniations." He recommended an updated MRI and an EMG. Regarding causation, he opined,

> He does not have acute radiculopathy. While he may need surgical intervention, I think it is somewhat debatable whether this is causally related to the accident in question as there are certainly pre-existing degenerative changes here, but as he reports he did not have the symptoms before and he did have them afterwards, than someone could assume it was related to the accident in question.

13. A new lumbar MRI was obtained on March 6, 2020. At L4-5, it showed grade I anterolisthesis, disc protrusion, ligamentum flavum hypertrophy, and facet arthropathy encroachment on both neural foramina. There was fluid in the facet joints. There was contact with and some compression of the L4 nerve roots, worse on the right.

14. EMG testing performed on May 6, 2020 was normal, with no evidence of lumbar radiculopathy.

15. Claimant returned to Dr. Castro on June 19, 2020. Dr. Castro noted the L4-5 spondylolisthesis did not appear grossly unstable based on flexion-extension x-rays. He recommended "a simple decompression" surgery at L4-5.

16. Dr. Castro reevaluated Claimant on December 9, 2020. Updated x-rays showed increased instability. As a result, Dr. Castro changed the recommendation from a decompression to a fusion.

17. Dr. Michael Janssen reviewed the surgery request for Insurer on December 14, 2020. He opined none of the pathology on the MRI was caused, accelerated, or exacerbated by the work accident. Dr. Janssen concluded,

> After reviewing all this information, and I reviewed both MRI scans in detail (02/21/2019 and 03/06/2020), it is my professional opinion this patient has a long-standing age-related degenerative spondylolisthesis secondary to facet arthropathy, facet erosion, and incompetence of the disc at his age. This is not a work-related, underlying condition, and despite the fact the patient may have had some myofascial back pain, the anatomical condition that is being recommended for surgery is clearly not occupation-related.

18. Claimant had a third lumbar MRI on December 22, 2020. It confirmed progression of the underlying degenerative changes at L4-5, including worsening of the central stenosis, ligamentum flavum hypertrophy, and facet arthropathy.

19. On January 28, 2021, Dr. Castro responded to an inquiry from Claimant's counsel regarding causation. He circled "yes" to a question asking whether the surgery was related to the work accident. He offered no analysis or explanation to support his opinions beyond that already stated in his February 26, 2020 report.

20. On February 2, 2021, Dr. Anderson-Oeser responded to a similar inquiry and opined the surgery was related to "an aggravation of a pre-existing condition caused by the injury." On August 16, 2021, Dr. Anderson-Oeser elaborated on her causation opinion, stating that because Claimant had "no prior history of low back pain preceding his work injury," and had no pain associated with the pre-existing degenerative changes before the injury, the work accident caused a "permanent aggravation" of his pre-existing condition.

21. Claimant saw Dr. Michael Rauzzino for an IME on April 19, 2021 at Respondents' request. Claimant again denied any prior low back issues. Dr. Rauzzino agreed an L4-5 fusion is reasonable, but opined it is not related to the work accident. He explained the initial post-injury imaging showed no acute structural changes to Claimant's lumbar spine that could be attributed to the injury, and the follow-up MRIs showed progression over time consistent with the natural and expected course of degenerative lumbar spine disease.

22. After completing his IME report, Dr. Rauzzino received and reviewed the medical records from Salud, which solidified his opinion that the proposed L4-5 fusion is not related to the work accident. The records show a pre-existing, severe, chronic pain syndrome affecting multiple areas including Claimant's low back. Dr. Rauzzino opined the low back symptoms documented in the Salud records would not be expected to resolve completely. He conceded that patients can have asymptomatic osteoarthritis, but explained that once it becomes symptomatic, it rarely resolves and suddenly reappears several years later. He was not persuaded the gap in Claimant's treatment records meant his multiple health problems resolved. Instead, he believed it more likely Claimant did not pursue medical care for financial and insurance reasons, and may have simply turned to marijuana to modulate his pain. Dr. Rauzzino clarified that the imaging showed only degenerative arthritic conditions, most severe at the L4-5 level, progressing on each successive MRI. He concluded,

> [L]ifting couches could have caused his back to hurt some, but the lifting of the couches is not what caused him to progress over the course of the next year to the point where Dr. Castro recommended surgery. That was due to the degenerative changes, and that would have occurred whether he lifted [ ] couches or not.

23. Dr. Rauzzino's causation opinions are credible and persuasive.

24. Claimant failed to prove the proposed L4-5 fusion surgery is causally related to the December 2018 work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove the L4-5 fusion is causally related to his industrial injury. The argument that Claimant was "asymptomatic" before the work accident is not persuasive. Claimant had severe degenerative spine disease, which developed over many years. He has suffered from chronic pain since at least 2014, severe enough to warrant prescriptions for Tramadol, Vicodin, MS Contin, and gabapentin, and referral to a pain specialist. During that time, Claimant identified his low back as one of his "worst" areas. The fact that there are no treatment records (for any condition) between February 2016 and December 2018 does not prove his back was symptom-free. As Dr. Rauzzino recognized, absence of evidence is not necessarily evidence of absence. Given the documented history and objective pathology, it is unlikely Claimant's back pain ever resolved. It is more likely he stopped pursuing treatment

because of financial reasons and because he found marijuana a more effective pain reliever than conventional medical options.la Claimant's repeated denials of prior back issues, coupled with his admitted memory loss from a head injury, substantially diminish his credibility. His lack of candor regarding his preinjury medical condition also undermines the causation opinions provided by his treating physicians. Dr. Anderson-Oeser's assessment is based on the faulty premise that Claimant had "no prior history of low back pain preceding the injury." Dr. Castro had a similar misunderstanding, and even with that same bad information, Dr. Castro was equivocal regarding causation ("someone could assume it was related to the accident").

Dr. Rauzzino and Dr. Janssen persuasively explained that the proposed surgery is not intended to treat any pathology or condition caused by the work accident. Claimant probably suffered a soft tissue injury while moving the couch, as evidenced by his reported back pain, palpable spasm in the paraspinal muscles, and tenderness to palpation around the lumbar spine. But there was no acute injury to the discs, facet joints, vertebra, or any other spinal structure. The accident did not cause or worsen the pre-existing spondylolisthesis. Dr. Rauzzino and Dr. Janssen are persuasive that none of the pathology on the post-injury MRI was caused, accelerated, or aggravated by the injury. Although the injury may have temporarily elicited pain from the underlying osteoarthritis, it did not accelerate or otherwise change the natural trajectory of the degenerative process.

Claimant appropriately received conservative interventions for his myofascial injury. He was not a candidate for a lumbar fusion immediately after the accident, because he had no identifiable nerve root compression and no spinal instability. In June 2020, Dr. Castro opined there was no gross instability and recommended only a "simple decompression." By December 2020 (two years after the accident), updated x-rays and MRI showed further progression of the spondylolisthesis and associated instability. As a result, Dr. Castro determined a decompression would no longer suffice, and instead recommended a fusion to address the increased instability. The progressive worsening of Claimant's degenerative lumbar spine disease over two years cannot reasonably be attributed to the work accident. The ALJ agrees with Dr. Rauzzino that Claimant probably would have required a fusion at this time irrespective of the work accident.

ORDER

It is therefore ordered that:

1. Claimant's request for an L4-5 fusion surgery is denied and dismissed.

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

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

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

DATED: January 27, 2022

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a "one-time" maintenance medical evaluation as reasonably necessary and related to his June 18, 1992 work injury.

II. Whether Claimant established, by a preponderance of the evidence, that Respondents lost the right of selection of the authorized provider, and Claimant has the right to change physicians to a physician of his choosing.

PROCEDURAL HISTORY

This matter previously proceeded to hearing before ALJ Barbra Henk on May 24, 1995. On June 6, 1995, ALJ Henk issued Findings of Fact, Conclusions of Law, and Order. (Exhibit D) In summary, ALJ Henk entered a general order keeping medical benefits open, but "[w]ill not attempt to limit or specify the type of future care Claimant may obtain. Respondents are protected by the ordinary requirements that the care be reasonable, necessary, related to the injury and in compliance with the fee schedule." (Exhibit G, pp. 12-13)

This matter then proceeded to hearing before ALJ Patrick Spencer on April 15, 2021 by way of stipulated facts and exhibits. The issue for determination at the April 15, 2021 hearing was whether the claim was closed to maintenance medical benefits such that a reopening would be necessary before Claimant could pursue additional evaluations and treatment. The parties stipulated that if the claim was determined to be open for maintenance medical benefits, then Respondent-Insurer would authorize a one-time evaluation with Claimant's authorized treating provider (ATP) Michael Dallenbach to determine what, if any additional injury-related treatment was reasonably needed. ALJ Spencer determined that Claimant's claim for medical benefits after MMI remained open, and ordered, per the parties' stipulation, the Insurer to cover a one-time evaluation with Dr. Michael Dallenbach. (Exhibit C) Neither party appealed ALJ Spencer's April 15, 2021 order.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Sollender, the ALJ enters the following findings of fact:

Background and Claimant's Testimony

1. Claimant suffered an admitted industrial injury to his right wrist on June 18, 1992.

2. Claimant was placed at maximum medical improvement (MMI) by Dr. Daniel Olson on July 27, 1993 with an apportioned upper extremity impairment rating. (Exhibit G, p. 82)

3. Respondents filed a Final Admission of Liability on September 12, 1994.

4. On May 24, 1995, the parties proceeded to hearing before ALJ Henk on the sole issue of Claimant's entitlement to medical benefits after MMI. ALJ Henk awarded a general order of maintenance medical benefits for Claimant. (Exhibit D)

5. Claimant stopped working for the Employer in 1997. He then began working for the Colorado Department of Human Services (CDHS) as a maintenance supervisor later in 1997. Claimant worked full time and full duty with no restrictions.

6. In October 2011, Claimant was diagnosed with right wrist pain associated with Kienbock's disease and underwent surgery to include a right wrist denervation procedure. Respondents authorized and paid for this treatment.

7. Following his surgery, Claimant came under the care of Dr. Michael Dallenbach who diagnosed Claimant with "Advanced Kienbock's disease stage IIIB to IV. Dr. Dallenbach placed Claimant at MMI on January 23, 2012 documenting the following with respect to maintenance medical care:

> Because of his advanced Kienbock's disease, which will within a reasonable degree of medical probability continue to advance, [Claimant] will require future medical as well as surgical intervention with further treatment being dependent upon his level of pain, function, and underlying pathology.

8. Following his placement at MMI, Claimant returned to his position at the CDHS full time, full duty with no restrictions. He continued working his defined position until he retired on August 1, 2020. Claimant testified that he suffered no injuries to the right wrist/arm while working for the Department of Corrections between his January 23, 2012 MMI date and August 1, 2020, when he retired. As noted, Claimant worked in a supervisory capacity but did have the occasion to change light bulbs/ballast and work on other maintenance projects, including both electrical and plumbing jobs. According to Claimant, he would use a variety of hand tools to complete his work tasks, including screw drivers, wire strippers, cordless drills and flashlights.

9. According to Claimant, his wrist pain gradually worsened after retiring from the CDHS. Around October of 2020, his right wrist pain progressed to the point where he wanted to return to his ATP (Dr. Dallenbach) for further evaluation. Claimant requested that Respondent authorize an evaluation with Dr. Dallenbach. Respondents refused on the basis that the claim was closed. Claimant then filed an Application for Hearing seeking a determination of whether the claim was closed as to maintenance medical treatment.

10. As noted above, the parties proceeded to hearing with ALJ Spencer on April 15, 2021. By order issued May 26, 2021, ALJ Spencer determined the claim was open for maintenance care per the previous order issued by ALJ Henk on June 6, 1995. (Exhibit C, pp. 7-8) ALJ Spencer then ordered Respondents authorize a one-time evaluation with Dr. Dallenbach. (Id. at p. 9)

11. On May 27, 2021, Claimant's counsel's office, through Andy Lotrich, emailed Respondents' counsel noting that Dr. Dallenbach had retired and no longer practicing medicine. (Exhibit E, p. 16) As part of the May 27, 2021 email, Mr. Lotrich noted that Claimant had been treated previously by Dr. Karl Larsen[1]. Mr. Lotrich asked if Respondents would be "amenable" having Dr. Larsen replace Dr. Dallenbach for purposes of the evaluation. (Id.)

12. Approximately 30 minutes after Mr. Lotrich sent his email, Respondents' counsel responded as follows: "Since Dr. Dallenbach was the primary ATP in this matter and is no longer available to treat your client for non-medical reasons, my clients designate Concentra Outlook Blvd. 4112 Outlook Blvd., Suite 325, Pueblo, CO 81008, as your client's new primary ATP. (Exhibit E, p. 16)

13. Respondents' email response went on to indicate: "At this time, my clients are still considering the FFCLO and have not determined whether they will appeal or authorize a one-time evaluation with Concentra. I will let you know how they decide to proceed." claimant's new primary authorized treating provider. (Exhibit E, p. 16)

14. Claimant's counsel's office then requested Respondents consider a designation to Dr. Castrejon prompting Respondents, through counsel to answer as follows: "No. Concentra is on BBU, Inc.'s designated provider list. It not subject to negotiation, since Dallenbach is unavailable for non-medical reasons then my clients have the obligation to designate a new primary ATP for your client." (Exhibit E, p. 15)

15. Despite the indication that they would advise Claimant whether they would appeal ALJ Spencer's order or authorize the one-time evaluation with Concentra, the evidence presented persuades the ALJ that Respondents neither appealed ALJ Spencer's May 26, 2021 order nor did they authorize the evaluation with Concentra. Rather, the evidence presented establishes that Respondents requested that Claimant attend an Independent Medical Examination ("IME") with Dr. Jonathan Sollender. Consistent with the request, Dr. Sollender completed the IME on July 26, 2021.

16. As part of his IME, Dr. Sollender obtained a history from Claimant. He also reviewed medical records and completed a physical examination. He then authored the report contained at Respondents' Exhibit F. During the IME, Claimant reported "symptom aggravation" (Exhibit F, p. 20) occurring "about 8 months" prior to the IME, i.e. around October/November 2020 – shortly after he retired. Claimant

[1] Dr. Dallenbach referred Claimant to Dr. Larsen for evaluation and treatment during the course of the claim. (Exhibit F, p. 17-18) Accordingly, the ALJ finds that by virtue of the referral, Dr. Larsen is an authorized treating physician in this case.

reported that his wrist pain never ended after his 2011 surgery but was so "negligible" at that time that he was "only aware of soreness after heavy or repetitive use, suggesting that by October/November 2020 his pain was worsening with time. Indeed, Claimant reported that at the time of the July 26, 2021 IME he had wrist pain at night which, in contrast to his daytime pain, could not be ignored. (Exhibit F, p. 18)

17. Claimant also reported to Dr. Sollender that he tried to "see a workers' compensation doctor but [had] not been able to obtain a referral." (Exhibit F, p. 18)

18. Claimant testified that since retiring on August 1, 2020, he did small projects, including things that he had put off while he was working, around his home. Claimant testified that he remodeled a bathroom, converted his carport into a garage and took out a sliding glass door and replaced it with a walk-in door.

19. As part of his IME report, Dr. Sollender documented that Claimant engaged in 'hand intensive hobbies." He documented that Claimant reported that he built a garage at his home, and replaced a sliding glass door. Dr. Sollender observed that Claimant had several bruises on his left hand and forearm, which Claimant reported had occurred while replacing the sliding glass door. (Exhibit F, p. 18) According to Dr. Sollender, Claimant reported that he was doing more physically than he did when he was working. (Id.)

20. Dr. Sollender concluded that Claimant had "significantly" increased the use of his hands in a manner that was "inconsistent" with his prior level of employment. He characterized Claimant as a "full laborer with home projects of building a garage, replacing doors, etc." (Exhibit F, p. 21). He concluded that the "forceful" tasks associated with being a laborer caused Claimant to "experience an aggravation, exacerbation and acceleration" of his underlying Kienbock's disease due to non-work-related causes. Simply put, Dr. Sollender concluded that "if [Claimant] had not engaged in this (sic) heavy labor tasks, which [were] inconsistent with his prior employment, he would not be symptomatic." Accordingly, Dr. Sollender deemed the "chain of causation" to be broken prompting his opinion that Claimant's need for further evaluation and treatment (if necessary) was unrelated to his original injury or the treatment thereof. (Exhibit F, p. 21)

21. Dr. Sollender stated in his report that he could not determine whether Claimant's Kienbock's disease in the right wrist was any more advanced than it was in 2011-2012, when he was last treated. (Exhibit F, p. 21) Nevertheless, he found from Claimant's historical statement that his condition was stable until he retired.

22. As noted, Dr. Sollender testified by deposition on October 12, 2021. Dr. Sollender reiterated his opinion that Claimant's current pain/symptoms were unrelated to his 1992 industrial injury. In support of his opinion, Dr. Sollender testified:

> In essence, [Claimant] was doing fine from the surgery done by Dr. Larson (sic) in 2011. He did so well that he was able to continue his regular job without restrictions and adapted to his new wrist, if you will.
>
> He retired in July 2020. At that time of retirement, his wrist was doing fine. He said he had no problems with the wrist.
>
> In my estimation, any further challenges to his wrist condition after the date of retirement would not be due to a work condition but due to any exacerbating factors. Specifically, he said that he was doing far more work with his hands in retirement than he ever did in his eight years since he was placed at MMI in 2012. That included building a garage at his home, doing woodwork, putting in sliding glass doors.
>
> Basically, doing the intensity and acuity of work that he was not expected to be doing in his job.
>
> So to me, without any occupational factors in play, the exacerbation of his complaints were due to nonwork events.

(Sollender Depo. Tr. p. 14, ll. 15-17)

23. Dr. Sollender also testified that but for Claimant's retirement he would not have built a garage and would not be in pain because "he clearly was not in pain the day before he retired." (Sollender Depo. Tr. p. 16, ll. 11-20) While Dr. Sollender attributed Claimant's symptoms to non-work-related activities, he testified that he did not ask Claimant about what tools he was using, nor did he ask Claimant about his time commitment to these activities. (Sollender Depo Tr. p. 15, ll. 20-25, p. 33, ll. 22-25, p. 34, ll. 1-17)

24. During cross-examination, Dr. Sollender conceded that trauma can cause Kienbock's disease, that Kienbock's disease can progress and worsen over time and that it can be a life-long problem. (Sollender Depo. Tr. p. 21, ll. 8-21) He also admitted that Claimant never told him that his wrist was pain-free following his October 27, 2011 surgery. (Id. at p. 23, ll. 18-21) He also agreed that the type of post retirement activities Claimant was doing would not cause Kienbock's disease but "[could] certainly aggravate [it] if it was already present but stable." (Sollender Depo Tr. p. 25, ll. 3-5) Based upon his testimony, the ALJ finds that Dr. Sollender believes that Claimant's Kienbock's disease was stable until he retired and began working more aggressively with his hands/wrists building a garage and setting doors which caused his underlying condition to become increasingly symptomatic.

25. While Dr. Sollender conceded that an MRI is the best way to determine if there has been a progression of Claimant's Kienbock's disease, he testified that his

opinions concerning Claimant's present need for maintenance treatment were not dependent on completing an MRI, because he did not believe that Claimant's current pain is related to his industrial injury. Based upon his testimony, Dr. Sollender believes the question presented is one of causation, specifically whether Claimant's pain complaints are related to his original industrial injury or conversely to non-occupational factors which aggravated his underlying Kienbock's disease giving rise to his increased symptoms. Because he determined that Claimant's pain complaints were caused by non-work-related activities, which broke the "chain of causation" between Claimant's original injury and his current symptoms, Dr. Sollender opined that an MRI was unnecessary and the lack of one posed no impediment in his ability to opine that Claimant's pain is not causally related to his industrial injury. (Sollender Depo Tr. p. 32, ll. 4-20)

CONCLUSIONS OF LAW

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

Generally

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

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

Claimant's Entitlement to Maintenance Medical Care

C. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present

condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity). When the respondents challenge a claimant's request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits by a preponderance of the evidence. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonableness, necessity or relatedness of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). The evidence presented persuades the ALJ that, consistent with the May 26, 2021 order of ALJ Spencer, the claim remains open for post MMI maintenance treatment. Moreover, the content of ALJ Spencer's May 26, 2021 order convinces the undersigned that ALJ Spencer directed Respondents to "cover a one-time evaluation" as part of the maintenance treatment with Dr. Dallenbach. Neither party appealed the order of ALJ Spencer. Consequently, ALJ Spencer's order is final. Despite the final nature of ALJ Spencer's order, Respondents have yet to comply with ALJ Spencer's mandate by authorizing a one time appointment with an ATP in this case. While the evaluation could not be scheduled with Dr. Dallenbach, the evidence presented persuades the ALJ that Respondents designated a new ATP (Concentra) forthwith but failed to set an appointment with the new ATP so as to comply with ALJ Spencer's May 26, 2021 order.

F. The evidence presented also convinces the ALJ that Claimant suggested alternatives to Dr. Dallenbach in order to satisfy the directive for completion of a one-time evaluation. Claimant's suggestions were answered with a hard "No" and that the issue was not open for discussion/negotiation. Despite standing firm on the designation of Concentra as the newly designated ATP in this case, the evidence presented strongly supports a conclusion that Respondents did not schedule Claimant for an appointment to complete the evaluation ordered by ALJ Spencer. Instead, Respondents requested that Claimant attend an independent medical examination with Dr. Sollender. Armed with Dr. Sollender's opinions Respondents now contend (in contrast to their prior agreement to authorize an evaluation if the claim were determined to be open for maintenance care) that Claimant's need for a one-time evaluation is unrelated to his 1992 industrial injury. The ALJ is not convinced.

G. The ALJ credits Claimant's testimony to find/conclude that substantial evidence supports a conclusion that the passage of time and the lack of maintenance treatment in any form has resulted in a deterioration of Claimant's condition. Dr. Sollender's opinion that Claimant's symptoms can be explained as an aggravation of a pre-existing condition due to his engagement in activities involving the use of his hands and wrists post retirement is unconvincing. During his deposition, Dr. Sollender acknowledged his limited understanding of the activities Claimant actually performed and the tools he used to complete those activities. Indeed, on cross-examination Dr. Sollender admitted that he did not know how many days the Claimant worked on home improvement activities. Similarly he acknowledged he did not ask Claimant how many hours per day he engaged in such activity or how many breaks he took or what kind of tools he used. Based upon the evidence presented, the ALJ is not persuaded that Dr. Sollender sufficiently advised himself on the activities Claimant was actually performing when forming his causation opinions. While the ALJ acknowledges that Dr. Sollender is a respected surgeon, the incomplete nature of the information he gathered from Claimant highlights the fact that his causation opinion appears speculative and based simply on his unsupported conclusion that Claimant's use of his hands/wrists in activities post retirement activities was sufficient to aggravate Claimant's Kienbock's disease and sever the causal connection to the 1992 work injury. Based upon the evidence presented, the ALJ finds it equally probable that Claimant's current symptoms are causally related to the natural and probable progression of his Kienbock's disease, which became symptomatic because of his 1992 work injury. Nonetheless, Claimant's condition continues to deteriorate. Given the content of ALJ Spencer's May 26, 2021 order and the testimony regarding the progressive nature of Kienbock's disease, the ALJ is convinced that the parties probably recognized the dilemma in determining whether Claimant required additional maintenance treatment. Indeed, the record contains ample evidence that Respondents agreed to authorize a "one-time" evaluation to determine Claimant's maintenance treatment needs.

H. Without completion of the previously agreed upon one-time evaluation, the ALJ is convinced that Claimant's condition will likely deteriorate further resulting in worsening pain and greater functional decline. Accordingly, the ALJ concludes that

Claimant has proven, by a preponderance of the evidence, that the requested one-time evaluation constitutes reasonable and necessary maintenance treatment related to his 1992 industrial injury. As noted, respondents retain the right to dispute whether any treatment recommendation following the one-time evaluation is reasonable, necessary and related to Claimant's 1992 industrial injury. *Hanna v. Print Expediters Inc., supra.*

Authorized Provider and Right of Selection

I. Authorization to provide medical treatment refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

J. C.R.S. § 8-43-404(5)(a) contemplates that respondents will designate a physician who is willing to provide treatment without regard to non-medical issues, including such concerns as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Scoggins v. Air Serv,* W. C. No. 4-642757- (ICAO, Mar 31, 2006). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). If the physician selected by the respondent refuses to treat the claimant for non-medical reasons and the respondent fails to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *See Ruybal v. University Health Sciences Center, supra; Teledyne Water Pic v. Industrial Claim Appeals Office, supra; Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (Nov. 4, 1996); *Ragan v Dominion Services, Inc.,* W.C. No. 4-127-475 (Sept. 3, 1993).

K. The fact that an authorized treating provider stops providing treatment for non-medical reasons does not automatically authorize a claimant to change physicians. Rather, the Act affords employers the right to select a new physician in the event that an authorized provider refuses to provide treatment or discharges an injured worker from care for non-medical reasons. *C.R.S. § 8-43-404(10) (b).* Failure to do so entitles a claimant to select the physician who attends to his/her injuries. In this case, the evidence presented persuades the ALJ that Claimant initially sought authorization to return to Dr. Dallenbach around October 2020. Respondents denied authorization for the medical evaluation. The parties then proceeded to hearing with ALJ Spencer in April 2021. In ALJ Spencer's Order of May 26, 2021, he ordered that Claimant should be permitted an evaluation with Dr. Dallenbach. Assuming *arguendo* that Respondents

effectively lost the right of selection when they initially declined authorization of an evaluation with Dr. Dallenbach in October 2020, Dr. Dallenbach was re-established as the authorized treating provider based upon ALJ Spencer's Order of May 26, 2021.

L. The parties were unaware that Dr. Dallenbach had retired and was no longer practicing medicine until Claimant's counsel's office attempted to schedule Claimant for an evaluation on May 27, 2021. Upon learning that Dr. Dallenbach was unable/unwilling to provide treatment to Claimant, Respondents, through counsel of record, immediately designated Concentra Outlook Boulevard as Claimant's new authorized treating physician. Based upon the evidence presented, the ALJ is not convinced that Respondents actions in designating Concentra lay outside the aforementioned statute or that they lost the right of selection in this case. The ALJ finds/concludes that Claimant's authorized treating provider is Concentra Outlook Boulevard.

ORDER

It is therefore ordered that:

1. Insurer shall cover a one-time evaluation, as maintenance care, with an authorized treating provider, to include Concentra, to determine what, if any, additional medical treatment Claimant may require to cure and relieve him of the effects of his industrial injury. Respondents retain the right to challenge any treatment recommendation of the grounds that it is not reasonable, necessary or related to Claimant's 1992 wrist injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

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

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

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

DATED: January 27, 2022

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered whole person impairment to his left shoulder?

- Claimant requests PPD based 9% whole person rating assigned by Dr. McLaughlin.

- The parties agreed to reserve issues relating to unpaid or unreimbursed medical expenses.

FINDINGS OF FACT

1. Claimant worked for Employer as a journeyman lineman, maintaining electrical lines throughout the Western Slope. He injured his left shoulder on July 29, 2020 while using an 8-foot "hot stick" to move a heavy power line.

2. Claimant initially saw Dr. Robert McLaughlin at SCL Health in Grand Junction on July 30, 2020. Dr. McLaughlin diagnosed a left AC joint injury.

3. In August 2020, Claimant moved back to Arkansas, where his family lives.

4. Claimant underwent a left shoulder MRI on August 24, 2020. It showed mild AC joint arthropathy and mild reactive edema involving the distal clavicle. There were no rotator cuff or labral tears.

5. Respondents filed a Notice of Contest on August 31, 2020.

6. Claimant was referred to an orthopedic surgeon, Dr. John Harp. On October 1, 2020, Dr. Harp performed a left shoulder arthroscopic subacromial decompression, distal clavicle excision, and extensive debridement.

7. Claimant saw Dr. Gary Zuehlsdorff on January 4, 2021 for an IME at his counsel's request. Dr. Zuehlsdorff noted Claimant's left shoulder pain extended into his left trapezius muscle, but not his neck. Claimant explained he was back to work at full duty, but the work increased the symptoms in his left shoulder.

8. Dr. Allison Fall performed an IME for Respondents on April 7, 2021. Dr. Fall agreed Claimant suffered a compensable injury to his left shoulder. She noted the injury caused sleep disturbance and made driving with the left arm difficult. She further noted his left shoulder symptoms increased with physical work. Examination showed reduced shoulder range of motion and AC joint crepitus. He was tender to palpation over the lateral supraspinatus and described referred paresthesias to the left arm with palpation of the upper trapezius. Cervical range of motion was unrestricted but left lateral bending elicited

shoulder paresthesias. Dr. Fall also observed decreased scapulothoracic stability with poor movement patterns and myofascial symptoms. She opined Claimant was approaching MMI, pending additional PT and follow up with his surgeon for a possible injection.

9. Respondents filed a General Admission of Liability on June 25, 2021.

10. Because his providers in Arkansas were not Level II accredited, Claimant returned to Dr. McLaughlin in on July 30, 2021 for an evaluation of MMI and impairment. Dr. McLaughlin noted Claimant had "returned to full duty and is doing well, although still with symptoms." He was working as a lineman in Texas. His left shoulder was still "sore" and felt "a little weak" in certain positions. Examination showed some residual crepitus and reduced range of motion. Strength was good and impingement testing was negative. Claimant's cervical spine was nontender. Dr. McLaughlin opined Claimant was at MMI as of July 31, 2021. He assigned a 15% upper extremity rating based on the distal clavicle resection and ROM loss. The 15% scheduled rating converts to 9% whole person. Dr. McLaughlin recommended post-MMI maintenance care including TheraBand exercises to target the ongoing scapulothoracic dyskinesis, up to 6 PT sessions, and follow up with his orthopedic surgeon for possible injections or other interventions if he did not continue to improve.

11. Respondents filed a Final Admission of Liability on August 16, 2021, admitting for Dr. McLaughlin's 15% scheduled rating and for medical benefits after MMI.

12. Dr. John Raschbacher performed a records-review for Respondents on December 9, 2021. He opined there was "no medical basis" to convert the admitted scheduled rating to its whole person equivalent. He saw no evidence that the injury affected any structures "proximal" or "medial" to the left shoulder. He opined, "there is simply no basis, other than secondary gain, for conversion to a whole person impairment." He noted Claimant was released with no restrictions but opined that if whole person conversion were deemed appropriate, his restrictions should be revisited with an eye toward possible disqualification from his career as a lineman.

13. Dr. Raschbacher testified at hearing consistent with his report. He opined the "shoulder" is not confined to the glenohumeral joint, but also includes the sternoclavicular joint, acromioclavicular joint, and scapulothoracic articulation. Dr. Raschbacher considers the shoulder to be "part of the arm," so in his view, any symptoms or functional impairment affecting the broadly-defined "shoulder" represent purely scheduled impairments.

14. Claimant credibly and persuasively testified his left shoulder remains symptomatic. He experiences pain into his left trapezius and scapulothoracic region with activity and movements, including but not limited to reaching away from his body and working overhead. Claimant further testified he has pain and functional loss and to his left trapezius, and scapulothoracic region while working out. He described intermittent sleep disturbance and difficulty driving long distances with his left arm.

15. Dr. Raschbacher's opinions regarding whole person impairment are neither credible nor persuasive.

16. Claimant proved by a preponderance of the evidence he suffered functional impairment to his left shoulder not listed on the schedule of disabilities.

CONCLUSIONS OF LAW

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

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g*., *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgery performed by Dr. Harp was directed to anatomical structures

proximal to the "arm," including a subacromial decompression, distal clavicle resection, and rotator cuff debridement. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008) ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"); *see also Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). More important, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the scapula and trapezius. This pain affects his ability to engage in various activities, including overhead reaching. Multiple providers noted AC joint crepitus. Dr. Zuehlsdorff documented left trapezius pain with activity, and Dr. Fall objectively observed scapulothoracic dysfunction. Dr. Raschbacher's arguments regarding whole person conversion mirror those he made in *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). In that case, he advocated a similarly expansive view of what constitutes the "shoulder," and by extension what impairments remain on the schedule. The ALJ in *Newton* rejected those arguments and was upheld by the ICAO. The Panel's analysis in *Newton* is persuasive. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. McLaughlin provided a 15% scheduled rating, which converts to 9% whole person. Neither party requested a DIME, so Dr. McLaughlin's rating is binding under § 8-42-107.2(b). Claimant is entitled to PPD benefits based on Dr. McLaughlin's 9% whole person rating.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on Dr. McLaughlin's 9% whole person rating. Insurer may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

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

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

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

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

DATED: January 31, 2022

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

ISSUES

1. Whether Claimant overcame the Division Independent Medical Examination (DIME) opinion of John Hughes, M.D. regarding Maximum Medical Improvement (MMI) by clear and convincing evidence.

2. If Claimant has overcome the DIME as to MMI, whether Claimant has established by a preponderance of the evidence entitlement to reasonable, necessary and related medical treatment.

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to a higher Average Weekly Wage (AWW) than $754.59 as admitted in the Final Admission of Liability (FAL).

FINDINGS OF FACT

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

1. Claimant is a 55 year-old male who worked for employer. Employer hired Claimant to work as a "Milker."

2. Claimant speaks Spanish and testified that he cannot read, understand, or speak English. (Tr: 40:22-41:2)

3. On October 7, 2018, Claimant suffered an admitted industrial injury. (Tr. 41:3-4). Claimant and three fellow employees were using a large iron metal bar to try to unjam a gate. Claimant testified that the bar was approximately five and a half feet long, and weighed about 80 pounds. (Tr. 43:13-25) The bar released from the gate and hit Claimant on the right side of his forehead causing him to fall backwards to the ground. Claimant testified that he hit the back of his head when he fell, and he lost consciousness. (Tr. 47:7-19).

4. Claimant's co-workers took him to the Emergency Room (ER) at Platte Valley Medical Center approximately an hour later. Claimant testified that there was no translator with him in the ER, and the physician did not speak Spanish. (Tr. 76:12-17). The medical records make no reference to a translator, but contain documents in Spanish, including instructions regarding Claimant's head injury. (Ex. D). Claimant testified that he could sort of follow what the doctor was saying. (Tr. 76:15-17).

5. According to the medical records, Claimant told the ER physician that he sustained a blow to the front of his head from a metal bar and he had a headache and neck pain. Claimant denied loss of consciousness, vision change, nausea and vomiting. (Ex. D).

6. Claimant testified, on direct examination, that he does not remember if he told anyone in the ER that he lost consciousness. He just remembered "telling the doctor how the incident happened." (Tr. 49:18-50:1). On cross examination, however, Claimant testified that he reported loss of consciousness while in the ER. (Tr. 78:19-22).

7. In light of the inconsistencies in Claimant's testimony, and the ER records, the ALJ finds that Claimant did not tell anyone in the ER that he lost consciousness.

8. Claimant had a CT of his head and his back while in the ER. The impression of the head CT was "[n]o intracranial hemorrhage. Right frontal scalp swelling." Claimant received a normal Glasgow Coma Scale rating, indicating normal neurological function. Claimant's final diagnosis at discharge was a scalp hematoma. (Ex. D).

9. Authorized Treating Provider (ATP) Julie Parsons, M.D. saw Claimant on October 15, 2018, about a week after the accident. According to the medical records, Claimant told Dr. Parsons a metal bar hit him in the right eye, he subsequently fell on his back, hit the back of his head, and lost consciousness for a minute or so. Claimant reported no loss of hearing, no vision change, no nausea, and no dizziness. He reported muscle aches, but no swelling. Dr. Parsons reviewed Claimant's CT reports from the ER. In addition to a contusion to the face, Dr. Parsons diagnosed Claimant with a neck sprain and a low back strain. Claimant had no restrictions and returned to full duty work. (Ex. E)

10. Claimant saw Dr. Parsons again on October 24, 2018. His chief complaints were back and neck pain. He again reported no loss of hearing, no vision change, no nausea, and no dizziness. Dr. Parsons referred Claimant to physical therapy for his lower back strain. The physical therapy did not improve Claimant's lower back pain, so Dr. Parson's ordered an MRI of the lumbar spine. (Ex. E). The MRI revealed a left far lateral disc herniation at the L3-L4, a shallow posterior central disc herniation at L5-S1, and a disc bulge at L4 to L5 with a right central annular perforation. (Ex. I)

11. On January 3, 2019, Dr. Parsons referred Claimant to Roberta Anderson-Oeser, M.D. for a physical medicine and rehabilitation consultation. Dr. Anderson-Oeser examined Claimant on February 13, 2019, and his chief complaint was low back pain and right lower extremity pain and paresthesia. He did report having headaches. Dr. Anderson-Oeser diagnosed Claimant with a low back strain, low back pain, lumbar radiculopathy, and muscle spasms. She recommended epidural steroid injections, and an EMG/Nerve Conduction Study. (Ex. F).

12. In addition to Drs. Parsons and Anderson-Oeser, Claimant sought medical treatment from psychologist Jesus Sanchez, Ph.D. (Ex. 11), psychiatrist Gary Gutterman, M.D. (Ex. 7), surgeon Brian Castro, M.D. (Ex. G,) and otolaryngologist Alan Lipkin, M.D. (Ex. 9,13,16).

13. On August 6, 2019, Claimant told Dr. Parsons he was experiencing headaches accompanied with nausea and vomiting. Claimant was vague regarding the onset of the intermittent vomiting, but thought it began in May. Dr. Parsons instructed him to follow up with his primary care physician for the headaches and nausea/vomiting. Dr. Parsons explained that these symptoms were not consistent with a concussion this late after the injury, especially with a normal CT of the brain. Dr. Parsons transferred Claimant's care to Dr. Anderson-Oeser. (Ex. E.)

14. Claimant testified he reported his symptoms of dizziness and headaches at his first visit with Dr. Parsons. (Tr. 80:19-24). The ALJ does not find this testimony credible as it is not supported by the medical record. The ALJ finds that Claimant did not report his symptoms of headaches and dizziness to Dr. Parsons until August 2019, 10 months after he first began treating with her.

15. On August 22, 2019, Claimant told Dr. Anderson-Oeser that he was experiencing nausea, vomiting, headaches and neck pain. Claimant felt his medication was causing the dizziness and headaches. (Ex. F). The ALJ finds that Claimant did not report his symptoms of vomiting and nausea to Dr. Anderson-Oeser until August 2019, seven months after he first began treating with her.

16. On October 17, 2019, approximately a year after the incident, Claimant was referred to Dr. Castro for a surgical consultation regarding his lumbar spine. Dr. Castro opined that there was no indication for surgical intervention as there was no neural impingement, no disc herniation, and his straight leg raise was negative. Dr. Castro recommended that Claimant stop walking with a cane, and walk and stretch on a daily basis. (Ex. G).

17. Claimant continued to treat with Dr. Anderson-Oeser. On November 18, 2019, Claimant reported no improvement in his symptoms despite injection therapy and conservative care. (Ex. F).

18. On May 12, 2020, Claimant saw Dr. Anderson-Oeser and reported that in addition to his ongoing headaches and dizziness, he was having tinnitus and increased hearing loss. Dr. Anderson-Oeser referred Claimant to Alan Lipkin, M.D., an otolaryngologist, for an evaluation. (Ex. F)

19. On June 11, 2020, Claimant met with Dr. Lipkin. In his notes, Dr. Lipkin says Claimant "is referred by Dr. Anderson-Oeser WC for evaluation of tinnitus, hearing loss, dizziness that occurred as a result of a work-related injury that occurred 10/07/2019." (Ex. H.) Dr. Lipkin did not make an independent determination that Claimant's symptoms were causally related to his industrial injury. Further, Dr. Lipkin routinely noted the date of injury as 2019, not 2018. Claimant was still using a walking cane, despite Dr. Castro's recommendation to the contrary. Claimant reported no issues with driving or basic self-care. Claimant's audiogram showed "bilateral high frequency sensorineural loss, possibly pre-existing." (Ex. H).

20. On October 29, 2020, Dr. Lipkin diagnosed Claimant with the following: sensorineural hearing loss in both ears, tinnitus of the right ear, Benign Paroxysmal Positional Vertigo (BPPV) left ear. (Ex. H).

21. Dr. Lipkin was deposed on August 11, 2021. Dr. Lipkin testified he is not an expert regarding traumatic brain injuries (TBIs). (Ex. M at 11:25-12:5). He did not have Claimant's prior medical records before initiating care on June 11, 2020. (*Id.* at 30:9-17). Dr. Lipkin testified that symptoms of BPPV typically occur within weeks of a head injury or acute injury, but can also occur spontaneously with an unknown cause. (*Id*. at 31:2-32:3 and 33:14-19). Dr. Lipkin testified that at his March 22, 2021 visit with Claimant, he did not think that Claimant was suffering from ongoing BPPV and Claimant was experiencing less-specific unsteadiness. (*Id.* at 36:2-11).

22. In preparation for a 24-Month DIME, pursuant to §8-42-107(8)(b), C.R.S., Respondents retained Mark Paz, M.D., to conduct an Independent Medical Examination (IME).

23. On December 8, 2020, Claimant saw Dr. Paz for his IME. An independent Spanish-English interpreter was present at the exam. Claimant told Dr. Paz he is able to drive and perform activities of daily living. Claimant indicated he used the cane for relief of right-sided low back pain. (Ex. I).

24. Dr. Paz opined that Claimant sustained a right forehead contusion as a result of the October 7, 2018, incident. He concluded that it was not medically probable that Claimant has lumbar radiculopathy as a claim-related diagnosis. Dr. Paz further opined that Claimant has nonorganic low back pain. Dr. Paz opined that the Claimant's lumbar degenerative disc disease was not aggravated or accelerated by the October 7, 2018, incident. Claimant exhibited non-physiologic responses during physical examination and Claimant's medical records document a non-diagnostic and non-therapeutic response to injections to the low back. Based on these physical findings and reports, Dr. Paz opined that Claimant's bilateral lower extremity symptoms lack organic etiology and physiologic correlation, the onset of these symptoms occurred eight months prior to the IME and lack a temporal relationship to the October 7, 2018, incident. Furthermore, Dr. Paz opined that Claimant's symptoms of dizziness and vertigo are not causally related to the October 7, 2018, incident. Dr. Paz pointed out that there was no recurring documentation of symptoms of dizziness or a diagnosis of vertigo through May 8, 2019. No temporal relationship was established between the symptoms of dizziness and the date of injury. Dr. Paz opined that the Claimant reached MMI on November 9, 2020. (Ex. I).

25. Respondents requested a 24-Month DIME. John Hughes, M.D. was confirmed as the DIME physician. Dr. Hughes was asked to evaluate Claimant for a TBI that he may have sustained on October 7, 2018. (Ex. J.) Claimant did not object to the limited scope of the DIME nor did he seek a prehearing conference to amend the DIME application pursuant to WCRP Rule 11.

26. Dr. Hughes performed the DIME on April 27, 2021. He agreed with Dr. Paz and placed Claimant at MMI as of November 9, 2020. Dr. Hughes opined that Claimant did

not sustain a TBI, and he did not believe the assignment of a permanent impairment rating was appropriate. (Ex. J).

27. Dr. Hughes made the following diagnoses of Claimant: 1) Work related closed head injuries sustained October 7, 2018, with multiple injury components; 2) Scalp contusion, resolved; 3) Cervical spine/sprain, resolved; 4) Lumbar spine pain, refractory to nonsurgical care with non-identification of the lumbar spine regional pain generator to date; 5) BPPV, probably secondary to the closed head injury with current vague symptoms and incomplete documentation, not supporting assignment of a permanent impairment rating; 6) Adjustment disorder with depressed mood, quiescent on medications monitored by Dr. Gutterman. (Ex. J).

28. Dr. Hughes noted in his DIME report that he did not have all of Dr. Lipkin's medical records. There is no evidence that Claimant made any attempt to provide Dr. Hughes with any missing records per WCRP Rule11-4(B).

29. At the hearing, Dr. Paz credibly testified that based on medical literature and Claimant's presentation in the ER, Claimant did not sustain a TBI. (Tr. 105 ¶ 9-23. Specifically, no neurological deficits were observed on physical examination. *Id*. Dr. Paz credibly testified that in the ER Claimant was observed to have a normal Glasgow Coma Scale, which is a test that assesses neurological function or dysfunction. (Tr. at 107 ¶ 15-25). Claimant had a score of 15, which is the highest score possible, and indicates the highest neurological function.

30. Dr. Paz credibly testified that after a head injury or a TBI, and based on medical literature, the interval between head trauma with loss of consciousness and development of symptoms is equal to or less than four weeks. Dr. Paz testified that the Medical Treatment Guidelines do not address the onset of post TBI symptoms, so he relied on the most applicable medical literature in forming his opinion. (Tr. 108:10-25). Claimant reported symptoms of dizziness ten months after the October 7, 2018, incident.

31. Dr. Paz credibly testified that Claimant's hearing loss and tinnitus were unrelated to the October 7, 2018, incident based on their latent development in relation to the injury and documentation in medical records. (Tr. 110: 8-25). Dr. Paz further testified that only 15 percent of cases of BPPV are associated with a closed head injury. (Tr. 112:1-25). As such, Dr. Paz opines that Claimant's BPPV is unrelated to the October 7, 2018, incident, no further treatment is indicated, and a permanent impairment rating is not appropriate. (Tr. at 113:1-25).

32. Dr. Anderson-Oeser was deposed on October 15, 2021. Dr. Anderson-Oeser testified that Claimant had all of the symptoms of a TBI (nausea, dizziness and headaches). (Ex. N at 14:21-15:5). She testified that Claimant is not at MMI for TBI because he has not had vestibular rehabilitation and neuropsychological testing. (*Id.* at 19:3-17). Dr. Anderson-Oeser testified that neuropsychological testing should occur within three to six months of the injury. (*Id.* at 19:23-20:10). Claimant's injury occurred over three years ago.

33. Dr. Anderson-Oeser testified that Dr. Hughes' DIME opinion was in error because he did not have all of the medical records, but she did not know what medical records Dr. Hughes' was missing. (*Id.* at 26:8-27:14 and 32:1-33:8). She testified that Dr. Hughes erred by not having Claimant obtain vestibular therapy before reaching his conclusion that Claimant did not suffer a TBI. (*Id.* at 28:8-21). Dr. Anderson-Oeser also testified that it was "difficult'" to determine if Claimant had a TBI without neuropsychological testing because Claimant's injury was "mild". (*Id*. at 28:1-7).

34. Dr. Anderson-Oeser testified that symptoms such as nausea, dizziness, vomiting, headaches and confusion are indications of a TBI, and are present right after the injury. (Tr. 33:22-34:11).

35. Claimant did not report symptoms of nausea, dizziness, vomiting, or confusion right after the injury. Claimant did not report these symptoms until approximately ten months after his injury. The ALJ infers that Claimant did not begin experiencing these symptoms before August 2019.

36. The ALJ finds that Dr. Anderson-Oeser's testimony is credible, but it is not persuasive. Dr. Anderson-Oeser has a difference of medical opinion from Dr. Hughes and Dr. Paz.

37. The ALJ finds that Claimant did not suffer a TBI, Claimant's date of MMI is November 9, 2020, Claimant has no permanent impairment and medical maintenance is not necessary.

38. Claimant credibly testified that he "made about $1,440 per two week period" and he earned productivity bonuses of approximately $300, seven times a year. (Tr. 42:14-21). According to Claimant's wage records, he earned $37,729.77 from October 17, 2017 through October 2, 2018. (Ex. L). The records include multiple entries of $323.23, which the ALJ infers represents bonuses earned by Claimant. The ALJ finds that Claimant's AWW is $754.59 ($37,729.77 divided by 50 weeks).

CONCLUSIONS OF LAW

Generally

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

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

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

DIME Physician's Findings

The party seeking to overcome the DIME physician's opinion bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Hughes, determined that Claimant suffered a head injury, but not a TBI. (Findings of Fact ¶¶ 26-27). He also determined that Claimant reached MMI on November 9, 2020. (Id. at ¶ 26). These findings were consistent with those of Dr. Paz, who completed an IME on December 8, 2020. (*Id.* at ¶¶ 23-24). Dr. Hughes indicated that that Claimant's BPPV may be secondary to the October 7, 2018 injury, but he opined that Claimant's symptoms were vague and the documentation he had did not support assignment of a permanent impairment rating. (Id. at ¶ 27). Dr. Hughes opined that maintenance medical care was not indicated despite the clinical diagnosis of BPPV. *Id.* Dr. Hughes' opinion must be overcome by clear and convincing evidence.

Dr. Oeser-Anderson opined that Dr. Hughes was incorrect and that Claimant suffered a mild TBI, and was not at MMI because he needs vestibular therapy and neuropsychological testing. (*Id.* at ¶ 32). MMI is defined as the point in time when any medically determinable physical or mental impairment as a result of an injury has become stable, and when no further treatment is reasonably expected to improve the situation. § 8-40-201(11.5), C.R.S. Dr. Oeser-Anderson offered an opinion with respect to what treatment she believes Claimant needs, which differs from the opinions of Dr. Hughes and Dr. Paz. There is no clear and convincing evidence, however, that Dr. Hughes' opinions are incorrect.

Dr. Anderson-Oeser also opined that Dr. Hughes' opinions were incorrect because he did not have all of the medical records, even though she did not know what records he was missing. (*Id.* at ¶ 33). Nevertheless, Claimant did not introduce any evidence to indicate that Dr. Hughes would have reached a different opinion had he had additional records. Claimant did not introduce sufficient evidence to meet his burden of proof to overcome Dr. Hughes' findings regarding MMI and the assignment of no permanent impairment rating.

AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although average weekly wage generally is determined from the employee's wage at the time of injury, § 8-42-102(2), C.R.S. (1992 Cum.Supp.), if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage. Section 8-42-102(3), C.R.S. (1992 Cum.Supp.); see *Williams Brothers, Inc. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The ALJ finds that Claimant's AWW is $754.59. (Findings of Fact ¶ 38). This figures includes Claimant's wages and bonus.

ORDER

It is therefore ordered that:

1. Claimant failed overcome the opinion of DIME physician regarding MMI by clear and convincing evidence. Claimant's date of MMI is November 9, 2020, with no permanent impairment ratings and no recommendation of maintenance medical care.

2. Claimant is not entitled to additional medical benefits.

3. Claimant's AWW is $754.59 as admitted in the July 2021 FAL.

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

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

DATED: January 31, 2022

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501	
In the Matter of the Workers' Compensation Claim of: [Redacted] Claimant, vs. [Redacted] Employer, and **UNINSURED,** Insurer, Respondent Employer. And regarding **DELTA COUNTY MEMORIAL HOSPITAL,** Medical Provider, Respondent Hospital	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-065-586-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND

On October 9, 2019, a hearing in this matter was held in Grand Junction, Colorado before Administrative Law Judge Cassandra M. Sidanycz. The claimant was present and represented by [Redacted], Esq. The respondent hospital was represented by J[Redacted], Esq. [Redacted, herinafter **JB**] Billing Manager for the hospital; and [Redacted, hereinafter **LB**], Business Office Manager for the hospital, testified at the hearing. The respondent employer did not appear or otherwise participate in the hearing.

The hearing was digitally recorded from 8:30 a.m. to 11:12 a.m. The claimant's exhibits 1 through 7 were admitted into evidence. The respondent hospital's exhibits A through H were admitted into evidence.

On October 30, 2019, the ALJ issued Findings of Fact, Conclusions of Law, and Order. Delta County Memorial Hospital timely appealed to the Industrial Claim Appeals Office (the ICAO). The ICAO issued an Order of Remand on March 13, 2020 instructing the ALJ to issue a new order. Pursuant to the Order of Remand, on May 28, 2020, the ALJ issued Findings of Fact, Conclusion of Law, and Order on Remand.

The May 28, 2020 order was timely appealed to the ICAO. On August 21, 2020, the ICAO issued an order limiting the number of days for penalties to eight. Thereafter, the ICAO's order was appealed to the Colorado Court of Appeals. On June 17, 2021, the Court of Appeals affirmed, in part, and set aside in part, the ICAO order. The matter was then remanded to the ICAO, and ultimately remanded to the ALJ by the ICAO on

January 24, 2022. The ALJ issues this order pursuant to the January 24, 2022 remand order.

In this order, [Claimant redacted] will be referred to as "the claimant"; [Employer redacted] will be referred to as "the respondent employer" or "the employer"; and Delta County Memorial Hospital will be referred to as "the respondent hospital" or "the hospital".

Also in this order, "the ALJ" refers to the Administrative Law Judge; "C.R.S." refers to Colorado Revised Statutes (2017); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

- Whether the respondent hospital was properly joined as a party to this proceeding.

- Whether the language included in the claimant's Application for Hearing pled the issue of penalties with sufficient specificity.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent hospital pursuant to Sections 8-43-304 and 8-43-305, C.R.S., for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. The claimant has requested penalties for the period of June 13, 2019 up to and including October 9, 2019.

FINDINGS OF FACT

1. On July 22, 2017, the claimant suffered an injury while working as a tow truck driver. The injury occurred while the claimant was loading an F250 pickup truck onto her assigned tow truck. To do so, the claimant was lying on the ground attaching the safety chains. At that time, the winch on the tow truck released and caused the truck to roll back. The claimant was underneath the truck when this occurred and one of the tires of the pickup truck rolled onto the claimant's right arm. The claimant was able to remove her arm from under the tire. However, the truck rolled a second time and the tire rolled onto the claimant's chest. The claimant was able to extract herself from out from under the truck and called for help. Bystanders assisted the claimant in calling the respondent employer and emergency services.

2. The claimant initially received medical treatment at Valley View Hospital (VVH) in Glenwood Springs, Colorado. That initial treatment included six days in ICU at VVH. At the time of the accident, the claimant lived in New Castle, Colorado. Subsequently, the claimant moved to Hotchkiss, Colorado. After her move, the claimant transferred medical treatment for her injury to Delta County Memorial Hospital, the respondent hospital in the current case.

3. On September 11, 2018, the undersigned ALJ held a hearing on the issues of: 1) whether the claimant was an employee of the respondent employer; 2) whether she suffered a compensable injury; 3) whether the claimant's medical treatment was reasonable, necessary, and related to that injury; 4) whether the claimant's medical treatment was authorized; 5) whether the claimant was entitled to temporary total disability (TTD) benefits; and 6) whether penalties were to be assessed for the respondent employer's failure to obtain and maintain workers' compensation insurance.

4. On October 11, 2018, the ALJ entered Findings of Fact, Conclusions of Law, and Order (FFCLO) in which the respondent employer was found to have been the employer of the claimant at the time of the July 22, 2017 injury. In addition, the ALJ ordered that the employer was responsible for the payment of medical treatment related to the claimant's work injury. That treatment included treatment the claimant received from Delta County Memorial Hospital.

5. At hearing, the claimant testified that she provided the respondent hospital a copy of the ALJ's FFCLO. The claimant has also provided copies of the FFCLO to collection agencies attempting to collect on behalf of the hospital. However, the claimant has continued to receive bills from the hospital for medical treatment related to her work injury.

6. The claimant also testified that the respondent employer has not paid any amount related to her work injury, as ordered by the ALJ. The claimant testified that to her knowledge the respondent employer has not made any payment to any of her medical providers.

7. On April 10, 2019, the claimant's attorney authored a letter in which he informed the hospital that they were to collect from the respondent employer. In that letter counsel referenced Section 8-42-101(4), C.R.S. which states:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

8. In addition, the April 10, 2019 letter notified the hospital that they could be subject to penalties pursuant to Sections 8-43-304 and 8-43-305, C.R.S.

9. Ms. JB[Redacted] is the hospital's Billing Manager for physician billing. Ms. JB[Redacted] explained that the hospital has two billing departments. Those departments are physician billing and facility billing. Ms. JB[Redacted] testified that she first became aware of issues surrounding the claimant's bills on May 7, 2019. At that time, Ms. JB[Redacted] received the April 10, 2019 letter from the claimant's counsel and a copy of the FFCLO. Based upon her understanding of the FFCLO, Ms. JB[Redacted] instructed her staff to send the claimant's bills to the Division of Workers' Compensation (DOWC).

10. At the hearing, the hospital provided a copy of a communication from the DOWC in response to the hospital's attempts to bill the DOWC. In that communication the DOWC confirmed that the employer did not send any payment to the DOWC; nor did the employer post a bond. In a later communication from the DOWC, it was clarified that even if monies had been paid by the employer to the DOWC, those funds would ultimately be distributed to the claimant and not to any specific medical provider.

11. On June 13, 2019, counsel for the hospital responded to the April 10, 2019 letter from the claimant's counsel. In that reply, the hospital reiterated the information obtained from the DOWC. In that same response, the hospital took the position that "[the hospital's] only recourse is to resume collection from [the claimant]."

12.Ms. B[Redacted] testified that physician billing has not sent a bill to the claimant since May 7, 2019. A bill was sent to the claimant on that date, which was the same date Ms. JB[Redacted] learned of the ALJ's FFCLO. Ms. JB[Redacted] credibly testified that the May 7, 2019 bill was generated automatically within the billing system. Records entered into evidence at hearing indicate that the physician billing department has not billed the claimant since May 7, 2019.

13.Ms. JB[Redacted] also testified that amounts are owed for the claimant's medical treatment. However, Ms. JB[Redacted] is "holding" those bills as it is unclear to her where to send the billing. Based upon the information submitted via testimony and evidence, it does not appear to the ALJ that the hospital has sent any billing directly to the employer.

14.Ms. LB[Redacted] is the hospital's Business Office Manager. She and her staff handle facility billing. Ms. LB[Redacted] testified that she first learned that the claimant has an order regarding her medical bills in July 2019. Ms. LB[Redacted] also testified that bills are sent to collections through an automated system.

15. Records entered into evidence show that the respondent hospital sent bills directly to the claimant on June 18, 2019; July 2, 2019; July 8, 2019; July 18, 2019; July 31, 2019; August 7, 2019; August 13, 2019; and September 12, 2019.

16. Records entered into evidence indicate that some of the claimant's bills from the facility billing department have been turned over to collections. Specifically, on September 20, 2019, A-1 Collections began attempts to collect on two bills, one in the amount of $977.00 and the other in the amount of $547.00.

17. On June 18, 2019, the claimant filed an Application for Hearing (AFH) for penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. That application was rejected by the Office of Administrative Courts (OAC) because the case caption listed the hospital as the employer and did not correctly identify the respondent employer.

18. On June 19, 2019, the claimant filed a second AFH endorsing the same penalty issues. This AFH was also rejected by the OAC because the hospital and the respondent employer were identified together as "employer". The staff with the OAC instructed the claimant's counsel to caption the case as identified by the DOWC (ie. the claimant vs. the uninsured respondent employer).

19. On June 20, 2019, the claimant filed a third AFH for penalties for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. This application was processed by the OAC as the claimant and employer were properly identified on the case caption. In the June 20, 2019 AFH, "Penalties" was marked as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

20. All of the AFHs filed by the claimant were provided to the respondent hospital. In addition, the hospital was provided notice of the October 9, 2019 hearing.

21. The respondent hospital argues that the claimant has received other medical treatment from their facilities that is unrelated to the claimant's work injury. However, neither party presented evidence clarifying this "other" and allegedly unrelated treatment.

22. The respondent hospital further argues that if they are unable to collect from the claimant and are unable to collect from the DOWC, they are left without recourse. The ALJ is not persuaded by this assertion. The ALJ finds no impediment to the respondent hospital simply collecting from the respondent employer. As indicated by communications entered into evidence, the employer has apparently attempted to file for bankruptcy and the claimant is a creditor.

23. The ALJ credits the claimant's testimony and the evidence entered into evidence and finds that the claimant has demonstrated that the respondent hospital has continued to bill the claimant after receiving notice of the FFCLO. The ALJ finds that on June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019, the respondent hospital sent bills to the claimant. In addition, the ALJ finds two additional instances of the respondent hospital attempting to collect from the claimant when two bills were forwarded to collections on September 20, 2019. The ALJ also finds that the claimant has demonstrated that it is more likely than not that the respondent employer violated the language of Section 8-42-101(4), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

4. The respondent hospital first argues that they were not properly joined in this case, and therefore a claim for penalties cannot be asserted against them. The ALJ disagrees. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that:

> Any employer or insurer, or any officer or agent of either, or any employee, **or any other person** who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty. . . or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles . . . shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge. . .(*emphasis added*).

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

5. As one of the claimant's authorized medical providers, the ALJ concludes that the respondent hospital is a subject to the provisions of the Act. Therefore, the hospital can be found to be in violation or in compliance with the Act.

6. The ALJ concludes that the claimant correctly captioned this case as the claimant vs the respondent employer and regarding the respondent hospital. The language of Section 8-43-304, C.R.S. does not require that penalties be asserted against a "party" to the claim. Furthermore, the hospital's reliance on two Industrial Claim Appeals Office (ICAO) orders[1] is unfounded. Neither of those cases are determined on the issue of "joining" a party to a claim. Nor do those cases speak to the procedural process for assessing penalties against a non-party medical provider. The ALJ concludes that the respondent hospital was properly notified of their involvement in the claimant's claim as a medical provider and the claimant's allegations of a statutory violation.

7. The respondent hospital has also argued that the claimant did not meet the specificity requirement in filing the Application for Hearing (AFH) requesting penalties. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015).

8. The purposes of the specificity requirement are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO, Apr. 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (ICAP, Dec. 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015). *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (ICAO, Apr. 2, 2007). Of course, the statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO Apr. 28, 2004).

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[1] *Davis v. Cub Foods*, (WC 3-990-098; ICAO 11/20/93) and *Gutierrez v. Startek USA*, (WC 4-842-550-05; ICAO 8/29/14).

9. As found, the claimant's AFH marked "Penalties" as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

10. The ALJ has considered the specific facts of this case and finds that the claimant has met the specificity requirement in the inclusion of the above language in her AFH. The claimant identified that penalties were sought against the respondent hospital. The claimant also quoted the section of the Act that the hospital is alleged to have violated. The ALJ finds that the hospital was sufficiently notified of the issues to be addressed at hearing.

11. With regard to the issue before the ALJ, the ALJ notes that prior to the assessment of any penalties, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Section 8-43-305, C.R.S. provides that each day is a separate offense. Therefore, penalties may be assessed of up to $1,000.00 per day.

12. Section 8-42-101(4), C.R.S. provides: "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider **shall under no circumstances** seek to recover such costs or fees from the employee (*emphasis added*)." The ALJ reads the legislature's use of the language "shall" and "under no circumstances" to clearly state the intent that a medical provider shall cease all collection against a claimant once there has been an admission of liability or a final order.

13. In this case, the claimant seeks penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. for continuing to seek payment from the claimant for medical treatment. The claimant has requested penalties from June 13, 2019 up to and including the date of hearing, October 9, 2019.

14. The respondent hospital points to language found in Section 8-43-304(4), C.R.S. and argues that the claimant's burden of proof is clear and convincing evidence. The ALJ disagrees with this assertion. Section 8-43-304(4), C.R.S. addresses what is to occur if penalties are alleged, but the violation has been cured. Then, and only then, does the burden of proof increase from a preponderance of the evidence to clear and convincing evidence. Here, there has been no cure of the hospital's violation as they continue to seek payment from the claimant. Therefore, Section 8-43-304(4), C.R.S. is not applicable in the current case.

15. As found, the respondent hospital has continued to bill the claimant for medical treatment related to her work injury. In addition, the hospital's facility billing department has turned the claimant's balances over to collections. As found, these continued attempts to collect from the claimant constitute a violation of the clear language of Section 8-42-101(4), C.R.S. The respondent hospital was notified that they were to no longer pursue collection against the claimant. Nevertheless, they continue to seek payment from the claimant, despite the notification that the respondent employer is responsible for payment of the claimant's work related medical expenses.

16. The hospital has argued that there are certain bills at their facilities that may not be part of the treatment of the claimant's work related injury. While that may be the case, the ALJ finds no persuasive evidence on the record to indicate that the hospital has attempted to clarify any non-work related treatment. It is the position of this ALJ that is the responsibility of the medical provider to correctly categorize the claimant's medical treatment as work related and non-work related. The hospital's practice of billing the claimant for any and all treatment, despite the clear language of Section 8-42-101(4), C.R.S., further demonstrates the hospital's clear disregard of the Act.

17. In the Remand Order dated March 13, 2020, ICAO specifically stated "the penalties in this matter may only be imposed for the days on which the billing actually occurred". Therefore, the ALJ concludes that the respondent hospital billed the claimant eight times between June 13, 2019 through and including October 9, 2019; (June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019). In addition, two bills were sent to collections on September 20, 2019, resulting in two additional instances of the respondent hospital attempting to collect from the claimant.

18. Based upon all of the foregoing, the ALJ concludes that penalties are appropriate in this matter. Given the statutory violation, the ALJ orders the respondent hospital to pay to the claimant penalties of $750.00 per day for the 10 total billing instances that occurred during the period of June 13, 2019 through and including October 9, 2019. This results in total penalties of $7,500.00 ($750.00 per day for 10 separate instances). No portion of this total shall be apportioned to the uninsured employer fund.

ORDER

It is therefore ordered that the respondent hospital shall pay the claimant penalties totalling $7,500.00, for ten days as noted above.[2]

Dated this 3rd day of February 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the attached **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND** by U.S. Mail, or by e-mail addressed as follows:

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Date: 3rd February 2022

Court Clerk

[2] See also the Court of Appeals June 27, 2021 Order, and the ICAO January 24, 2022 Remand Order.

ISSUES

The hearing in this matter was set on the endorsed issues of permanent partial disability (PPD) benefits and medical benefits after MMI. The parties made several concessions and agreements at hearing and in their post-hearing briefs that narrowed the issues considerably:

- Respondent is not challenging the 3% upper extremity rating assigned by Dr. McCranie for Claimant's left shoulder, which is identical to the rating assigned by the DIME. However, Respondent does not agree the scheduled rating should be "converted" to whole person.

- Respondent does not dispute the 5% lower extremity rating assigned by Dr. McCranie for Claimant's left hip. Claimant agrees he suffered only scheduled impairment to the left hip and agrees Dr. McCranie's rating is most consistent with the evidence.

- Claimant conceded there is insufficient evidence to prove permanent impairment to his right hip.

- The parties agreed to reserve issues related to medical benefits after MMI.

The issues remaining for determination are:

- Did Respondent overcome the DIME's cervical rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence the 3% left shoulder extremity rating should be "converted" to the 2% whole person equivalent?

- Did Claimant prove by a preponderance of the evidence he suffered whole person impairment to his right shoulder?

- If Claimant proved whole person impairment to his right shoulder, did Respondent overcome the DIME's 2% whole person rating by clear and convincing evidence?

- If Claimant failed to prove whole person impairment to his right shoulder, did he prove a 4% scheduled impairment by a preponderance of the evidence?

FINDINGS OF FACT

1. Claimant is a sergeant with Employer's police department. He has worked for the department for 19 years.

2. Claimant suffered admitted injuries on July 10, 2020 during a work-related motor vehicle accident while apprehending a suspect in a stolen vehicle.

3. Claimant received authorized treatment at Employer's occupational medicine clinic. At his initial visit with PA-C Paula Homberger on July 14, 2020, he reported pain in his neck, left shoulder/upper back, hips, and back. Examination of his neck showed bilateral paraspinal tenderness and diminished range of motion. Both shoulders were tender to palpation, worse on the left. There was anterior hip tenderness bilaterally. Ms. Homberger diagnosed a cervical strain, thoracic strain, bilateral shoulder strains, and bilateral hip strains/contusions. She ordered MRIs of the left shoulder and right hip. Claimant was placed on light duty and referred for PT, chiropractic treatment, and massage therapy.

4. The left shoulder MRI showed mild rotator cuff tendinosis with no tear. It also showed evidence of a prior remodeled injury of the anterior inferior glenoid chondral labral complex, with some capsular thickening but no edema to suggest acute re-injury.

5. The right hip MRI showed a chronic mild subcortical cystic change in the anterior superior margins of the acetabulum, but no evidence of a labral tear or other internal derangement.

6. Claimant steadily improved over the next few months, as reflected in the treatment records and pain diagrams he completed. His neck remained his biggest complaint, and he was eventually referred for a cervical MRI. The MRI showed mild to moderate degenerative changes at C5-6 and C6-7 but no acute pathology.

7. On August 18, 2020, Claimant reported his hips were mostly better but continued to be stiff and achy in the morning. There is no mention of any shoulder symptoms in the report or on Claimant's pain diagram. Claimant felt ready to return to full duty. He was again referred for chiropractic treatment.

8. On August 24, 2020, Claimant's chiropractor, Dr. Loparco, documented 2/10 pain in the hips and 1/10 pain in the shoulders. Tenderness and muscle spasms were observed in multiple areas, including the neck, shoulder, hip, and thoracic spine.

9. Claimant followed with Ms. Homberger on August 28, 2020. His primary complaint remained his neck and he was continuing to improve. Claimant marked only his neck on the pain diagram but told Ms. Homberger his hips still felt stiff and achy in the morning. He had returned to full duty work.

10. The pain diagram from Claimant's next appointment on October 8, 2020 reflects 1/10 neck pain with intermittent left hand numbness. There are no markings on the shoulders or hips, although Claimant reported "feeling the same" as his previous appointment. He had been attending chiropractic treatment three times per week and still had two sessions left. Ms. Homberger stated the bilateral shoulder and hip strains had "resolved."

11. Claimant was evaluated by Dr. Nicholas Kurz on February 16, 2021. He had finished his course of chiropractic treatment and was not using any pain medication. Claimant was working full duty without difficulty and denied any issues with activities of daily living. His pain diagram noted 4-5/10 neck pain "all the time," with numbness and tingling in his left arm. Even though there is no evidence of any pre-injury neck issues or treatment, Dr. Kurz opined Claimant's neck had returned to "baseline," and any ongoing symptoms were unrelated to the work accident. The remainder of Claimant's injuries were listed as "resolved." Dr. Kurz put Claimant was at MMI with no impairment and no restrictions.

12. Respondent filed a Final Admission of Liability (FAL) based on Dr. Kurz' report. Claimant timely objected to the FAL and requested a DIME.

13. Dr. Thomas Higginbotham performed the DIME on May 31, 2021. Claimant told Dr. Higginbotham his injuries had improved but he continued to have symptoms, particularly with respect to his neck. Claimant completed a pain diagram on which he identified pain in his neck, posterior shoulders, and hips. Claimant had pursued additional chiropractic treatment after MMI under his health insurance, with a $50 per visit co-pay. Claimant stated his neck pain worsened with increased physical activity but "he doesn't allow [it] to limit him." The physical examination was straightforward with no pain behaviors to suggest exaggeration. Dr. Higginbotham noted tenderness and tautness to palpation of the cervical anterior muscles, cervical paraspinal muscles, suboccipitals, and thoracic paraspinals. Cervical range of motion was mildly reduced in all planes. There was minimal palpatory shoulder tenderness and no evidence of impingement, but shoulder range of motion was slightly reduced bilaterally. Dr. Higginbotham credibly testified the reduced shoulder range of motion was probably related to scapulothoracic soft tissue dysfunction "including the rotator cuff muscles that are attached about the scapula onto the shoulder."

14. Dr. Higginbotham provided the following impairment ratings:

Cervical spine: 13% whole person
Right shoulder: 4% upper extremity / 2% whole person
Left shoulder: 3% upper extremity / 2% whole person
Right hip: 11% lower extremity / 4% whole person
Left hip: 6% lower extremity / 2% whole person

15. Dr. Higginbotham opined the clinical findings at the DIME were consistent with ongoing "strain patterns" from the work injuries. When questioned about pain diagrams and records from other providers that do not show ongoing symptoms in the shoulders or hips, Dr. Higginbotham explained such symptoms "have a tendency to recur. Strain patterns tend to be kind of quiescent and then can be present."

16. Dr. Kathy McCranie performed an IME for Respondent on December 9, 2021. Claimant reported ongoing injury-related symptoms in his neck, left shoulder, and left hip. Claimant denied any symptoms in the right shoulder or right hip. Physical examination showed tenderness to palpation of the left cervical paraspinals, bilateral

upper trapezius, bilateral levator scapulae, and bilateral supraspinatus muscles. Dr. McCranie agreed with Dr. Higginbotham that a cervical spine rating was warranted, and calculated a rating of 9%. She assigned a 3% upper extremity / 2% whole person rating for the left shoulder, and a 5% extremity rating for the left hip. Her rationale for rating the left shoulder and hip was: "the left shoulder MRI scan did not show any acute findings, but there was mild tendinosis, and on today's examination, mild impingement signs were indicative of persistent shoulder impairment. In the left hip, MRI scan findings do not show any acute injury. However, his examination was indicative of persistent hip pain and discomfort."

17. Dr. McCranie disagreed with Dr. Higginbotham that Claimant suffered any permanent impairment of the right shoulder or right hip. She acknowledged Claimant complained to Dr. Higginbotham of mild tenderness in his right shoulder but argued that "tenderness" is subjective and insufficient to support a permanent impairment. She also noted that Claimant told her the right shoulder and hip pain had resolved by the time of her IME. She conceded that Dr. Higginbotham's ratings contain no technical errors with respect to the range of motion measurements.

18. Dr. McCranie opined that Claimant's left shoulder and left hip ratings, which are not challenged by Respondent, reflect purely scheduled impairments, and should not converted to whole person. She opined the injury to Claimant's shoulders is distal to the glenohumeral joint and does not impact the torso/body. She also pointed to the cervical rating which she believes accounts for any proximal symptoms or limitations. Dr. McCranie opined Claimant's hip injuries were limited to the hips without any pain going into the back or the trunk. Lastly, Dr. McCranie cited Claimant's continued stellar performance in a highly physically demanding job as further proof that his shoulder and hip impairment ratings should be scheduled ratings and not whole person.

19. Dr. Higginbotham's opinions regarding Claimant's shoulder and neck impairment are credible and more persuasive that the contrary opinions offered by Dr. McCranie.

20. Respondent failed to overcome Dr. Higginbotham's 13% whole person cervical rating by clear and convincing evidence.

21. Claimant proved he suffered functional impairment to his shoulders not listed on the schedule.

22. Respondent failed to overcome Dr. Higginbotham's 2% whole person right shoulder rating by clear and convincing evidence.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

The parties have raised several interrelated issues regarding permanent impairment. The DIME provided multiple impairment ratings, one of which is clearly a whole person impairment (cervical) but the remainder of which may be whole person or

scheduled impairments (shoulders and hips). Claimant believes he suffered whole person impairment to his shoulders but agrees he has only scheduled impairment to the left hip.[1] Respondent agrees Claimant has impairment of the left shoulder but believe it is a scheduled impairment.

As postured, the issues create split burdens of proof. Additionally, there are preliminary questions regarding which of the DIME's findings are entitled to presumptive weight, and which findings are evaluated based on a preponderance of the evidence.

There is no dispute that Respondent must overcome the DIME's cervical rating by clear and convincing evidence. Regarding the shoulders, the initial consideration is whether they constitute scheduled or whole person impairments. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof which attends a DIME rating applies only if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (ICAO August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

In light of the foregoing principles, the ALJ has allocated the burdens of proof in the following manner: (1) Respondents must overcome the DIME's cervical rating by clear and convincing evidence; (2) Claimant must prove by a preponderance of the evidence he sustained whole person impairment to either or both shoulder; (3) if Claimant has whole person impairment to his shoulder(s), Respondents must overcome the DIME rating by clear and convincing evidence; (4) if Respondents overcome the DIME whole person rating, the proper rating is a factual question based on a preponderance of the evidence; (5) on the other hand, if Claimant does not have a whole person impairment, then Claimant must prove the proper shoulder rating(s) by a preponderance of the evidence.

B. Respondent did not overcome the cervical rating

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear

[1] The right hip is moot because Claimant concedes there is insufficient evidence to support a right hip rating. Likewise, the left hip requires no discussion, because Claimant accepts the 5% scheduled lower extremity rating advocated by Respondent.

and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Respondent filed to overcome the DIME's cervical rating by clear and convincing evidence. Dr. McCranie conceded there were no technical errors in Dr. Higginbotham's measurements or deviations from the rating protocols under the *AMA Guides*. The differences between Dr. Higginbotham and Dr. McCranie's cervical ROM measurements probably reflect reasonable day-to-day variability, coupled with potential interval improvement in the six months between the DIME and Dr. McCranie's IME. But the DIME does not err merely by using valid measurements obtained during his evaluation, notwithstanding the possibility the claimant may improve in the future.

C. Claimant proved whole person impairment to his shoulders

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

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person

impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

If the claimant has ratable impairment of the cervical spine and also seeks a whole person rating for the shoulder, the functional impairment used to "convert" the shoulder rating must be distinct from the cervical impairment. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Steinhauser v. Azco, Inc*., W.C. No. 4-808-991-02 (January 11, 2012).

Claimant proved he suffered whole person impairment to his shoulders not captured by the cervical spine rating. Dr. Higginbotham persuasively explained the reduced shoulder range of motion was related to dysfunction in the scapulothoracic area and rotator cuff muscles attached to the scapula. Those structures are part of Claimant's torso and not part of his "arm." They are also distinct from the anatomical structures covered by the cervical rating. Accordingly, Claimant is entitled to a 2% whole person rating for the left shoulder, as calculated by Dr. Higginbotham and Dr. McCranie. Additionally, Respondent must overcome Dr. Higginbotham's 2% right shoulder rating by clear and convincing evidence.

D. Respondent failed to overcome the DIME's right shoulder rating

As found, Respondent failed to overcome the DIME's right shoulder rating by clear and convincing evidence. Claimant suffered a documented soft tissue injury to this right shoulder. Although his symptoms improved significantly, he continued to experience intermittent symptoms, particularly with activity. Dr. Higginbotham concluded the right shoulder pain Claimant reported at the DIME was consistent with waxing and waning "strain patterns" from the accident. His physical examination showed dysfunction in the scapulothoracic area and rotator cuff muscles attached to the scapula, which caused measurable range of motion loss. These ROM deficits were correctly translated into a small impairment rating.

The mere fact that Claimant's right shoulder may have improved by the time of Dr. McCranie's IME six months after the DIME does not invalidate Dr. Higginbotham's rating. Permanent impairment is to be determined at the time of MMI. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998) ("MMI serves to demarcate when a disability becomes permanent"); *Golden Animal Hospital v. Horton*, 897 P.2d 833 (Colo. 1995). As a practical matter, a DIME will necessarily occur some months after MMI, and the examiner can only evaluate the claimant in real time. But the concordance between the claimant's condition at the time of MMI and findings at subsequent examinations becomes increasingly attenuated with the passage of time. Section 8-40-201(11.5) provides that the possibility of improvement resulting from the passage of time shall not affect a determination of MMI. It necessarily follows that improvement with time does not negate a claimant's impairment rating.

The argument that Claimant does not qualify for a right shoulder rating because there is no objective evidence of pathology such as an MRI is unpersuasive. Dr. McCranie assigned a left hip rating based solely on Claimant's subjective clinical presentation despite acknowledging the MRI showed no acute pathology. Specifically, Dr. McCranie relied on the fact that Claimant merely reported "some pain" with hip rotation. If such minimal clinical findings were sufficient to warrant a left hip rating, it is unclear why Dr. Higginbotham would be precluded from citing examination findings of scapulothoracic and rotator cuff muscle dysfunction affecting range of motion to support a right shoulder rating.

At most, Dr. McCranie's opinions represent a "mere difference of medical opinion" with Dr. Higginbotham, and do not rise to the level of clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's 13% whole person cervical rating is denied and dismissed.

2. Respondent's request to overcome the DIME's 2% whole person right shoulder rating is denied and dismissed.

3. Respondent shall pay Claimant PPD benefits based on a 13% whole person cervical rating, a 2% whole person left shoulder rating, a 2% whole person right shoulder rating, and a 5% scheduled left hip rating.

4. Respondent may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

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

6. Claimant's claim for permanent impairment of the right hip is denied and dismissed.

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

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

statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 3, 2022

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the Final Admission of Liability (FAL) filed by the respondents on December 7, 2020, is invalid because the FAL relies on an invalid impairment rating.

FINDINGS OF FACT

1. This claim has a lengthy procedural history. As the issue before the ALJ is narrow, the ALJ does not recite the claimant's entire medical history in this order. The claimant suffered an injury at work on January 22, 2020. The respondents have admitted liability for the injury.

2. The claimant's authorized treating provider (ATP) for this claim has been with Centura Centers for Occupational Medicine (CCOM) in Durango, Colorado. Throughout much of his treatment, the claimant was seen at CCOM by Dr. Adam Owens. The claimant was also seen at CCOM by Kelly MacLaurin, PA-C.

3. On October 14, 2020, the claimant was seen by PA MacLaurin. On that date, PA MacLaurin opined that the claimant had reached maximum medical improvement (MMI). PA MacLaurin performed a physical examination in which she noted that the claimant had reached MMI for neurology, neuropsychology, and Spine Colorado.

4. On that same date, a WC164 form was completed indicating that the claimant had reached MMI and an impairment rating was pending review by a doctor. The WC164 form of that date is co-signed by PA MacLaurin and Dr. Thomas Centi. Dr. Centi is the Medical Director of CCOM.

5. PA MacLaurin testified that when she saw the claimant on October 14, 2020, the claimant reported that he had completed all his treatment and was released from the specialists. PA MacLaurin credibly testified that based on her review it appeared that the claimant had plateaued, the claimant's remaining treatment could be performed under maintenance care, and there was an indication from the neuropsychologist that the condition was not work-related. It was for these reasons that PA MacLaurin placed the claimant at MMI on October 14, 2020, and referred the claimant to a physician within CCOM for an impairment rating.

6. On October 19, 2020, the claimant was seen by Dr. Owens. The claimant testified that he presented for an appointment with CCOM sometime in October and demanded to see Dr. Owens.

7. In the October 19, 2020 medical record, Dr. Owens noted that the claimant was at MMI and "has been tentatively arranged to have impairment rating with a different CCOM Dr. [i]n the near future." On exam, Dr. Owens noted: that the claimant was in no acute distress; was alert to person, place, and time. For HEENT[1] findings, Dr. Owens recorded "[n]ormocephalic and atraumatic, extraocular movements intact, patent nares". Finally, Dr. Owens noted that he "encouraged the patient to follow through with the plan that has been arranged by my medical director at CCOM."

8. A WC164 form dated October 19, 2020, is signed by Dr. Owens and PA MacLaurin. That WC164 form states that the claimant reached MMI on October 14, 2020, the claimant was released to full duty, but was not cleared for DOT driving. That same document indicates that an impairment rating was pending review by a doctor.

9. Sometime after his October 19, 2020 examination of the claimant, Dr. Owens left the CCOM practice.

10. Dr. Centi was employed by CCOM throughout 2020 as the Medical Director and he was PA MacLaurin's supervising physician. Dr. Centi is a Level II accredited physician. Dr. Centi testified that he primarily practiced medicine at the Colorado Springs, Colorado and Pueblo, Colorado CCOM locations in 2020. Occasionally, Dr. Centi would travel to the Durango CCOM location to treat patients.

11. At the time that Dr. Owens' resignation, CCOM prohibited air travel because of COVID-19 concerns. As a result, Dr. Centi could not travel to Durango to perform an in-person impairment rating for the claimant. In addition, CCOM did not have the capability to conduct virtual health visits at that time.

12. Dr. Centi testified that Dr. Owens should have performed the claimants impairment rating, but Dr. Owens did not. As Dr. Owens had resigned from CCOM before performing an impairment rating evaluation for the claimant, Dr. Centi was the next in line to complete the impairment rating. Due to the moratorium on air travel, and that there were no other Level II accredited physicians at the Durango CCOM, Dr. Centi performed a record review impairment rating for the claimant on November 27, 2020.

13. Based upon the medical records, Dr. Centi authored a report in which he noted that the claimant reached MMI on October 19, 2020. He also assigned a zero percent impairment rating for the claimant. Dr. Centi based his opinion, in part, on the neuropsychological examination that found that the claimant had a mild cognitive impairment, which was mostly related to sleep apnea and not the traumatic brain injury.

14. On December 7, 2020, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Centi's November 27, 2020, report.

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[1] Head, eyes, ears, nose, and throat.

15. On January 6, 2021, the claimant filed an Objection to the FAL. On January 13, 2021, the claimant filed a Notice and Proposal with an Application for a Division Sponsored Independent Medical Examination (DIME).

16. On January 25, 2021, the parties attended a pre-hearing conference with PALJ Elsa Martinez Tenreiro. At that time, the issue before the PALJ was the respondents' motion to strike the claimant's Notice and Proposal. PALJ Martinez Tenreiro noted that the claimant filed the Notice and Proposal late, and granted the motion. As a result, the claimant's Notice and Proposal was stuck.

17. At that same pre-hearing, the claimant asserted that the FAL was invalid. PALJ Martinez Tenreiro declined to make any rulings on that issue, as it had not been noticed for that pre-hearing conference.

18. On April 15, 2021, the claimant filed an Application for Hearing (AFH). The issues endorsed in that AFH were: medical benefits; reasonably necessary; average weekly wage; temporary total disability benefits; permanent partial disability benefits; and permanent total disability benefits. On May 12, 2021, the respondents filed a response to the claimant's AFH.

19. On June 10, 2021, Dr. Owens authored a report in which he opined that the claimant had reached MMI on October 19, 2020. Although this report indicates a "date of evaluation" of October 19, 2020, Dr. Owens did not author the report until June 10, 2021. In his June 10, 2021 report, Dr. Owens assessed a whole person permanent impairment rating of 20 percent. Dr. Owens testified that this would have been his assessment if he had prepared the report following his October 19, 2020 evaluation of the claimant.

20. On June 29, 2021, the parties attended a pre-hearing conference with PALJ John Sandberg. In his order, PALJ Sandberg noted that the issue before the merits ALJ is to determine whether the FAL is valid.

21. The sole issue before the ALJ is whether Dr. Centi's report was invalid, thus making the FAL filed by the respondents invalid. The ALJ is not persuaded that Dr. Centi's report is "invalid". Although relying upon prior medical records may not be "best practice" for completing such a report, the ALJ finds no requirement in the statute, the WCRP, or case law that requires Dr. Centi to physically examine the claimant, particularly since he determined that the claimant had a permanent impairment rating of zero percent. Here, it is clear to the ALJ that Dr. Centi adopted the examination findings of PA MacLaurin on October 14, 2020. The ALJ further notes that on October 19, 2020, Dr. Owens indicated that the claimant was released to full duty, (although not cleared for DOT driving), and that an impairment rating was pending review by a Level II provider.

22. The ALJ credits the medical records and the testimony of Dr. Centi and PA MacLaurin over the conflicting testimony of Dr. Owens and the claimant. Although it was not ideal, Dr. Centi performed a record review impairment rating because there was no Level II accredited physician at the Durango CCOM that could perform an impairment rating for the claimant.

23. For all of the forgoing reasons, the ALJ concludes that the impairment rating assessed by Dr. Centi is valid. Therefore, the FAL filed by the respondents is likewise valid.

CONCLUSIONS OF LAW

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

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

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

4. An authorized treating physician (ATP) shall make a determination as to when the injured worker reaches maximum medical improvement (MMI). Section 8-42-107(8)(b)(I), C.R.S. If either party disputes the ATPs determination of whether the injured worker has or has not reached MMI, they must pursue the DIME process. Section 8-42-107(8)(b)(II), C.R.S.

5. When an ATP who is not Level II accredited determines that an injured worker has reached MMI, the ATP shall determine if the injured worker sustained any permanent impairment and shall refer the injured worker to a Level II accredited physician for a medical impairment rating. Section 8-42-107(8)(b.5)(II), C.R.S. If either party disputes the impairment rating, the parties must pursue the DIME process. Section 8-42-107(8)(c), C.R.S.

6. The Workers' Compensation Act does not require in-person examinations for an ATP to determine permanent medical impairment. In fact, the Act specifically permits record review impairment ratings for injured workers that are not Colorado state residents at MMI. Section 8-42-107(8)(b.5)(I)(A), C.R.S.

7. Workers' Compensation Rules of Procedure (WCRP), Rule 16-2(B) states that an Authorized Treating Provider (ATP) is any of the following: (1) the treating physician designated by the employer and selected by the injured worker; (2) a healthcare provider to whom an ATP refers the injured worker for treatment, consultation, or impairment rating; (3) a physician selected by the injured worker when the injured worker has the right to select a provider; (4) a physician authorized by the employer when the employer has the right or obligation to make such an authorization; (5) a healthcare provider determined by the Director or an administrative law judge to be an ATP; or (6) a provider who is designated by the agreement of the injured worker and the payer.

8. Section 8-43-404(5)(a)(I)(A), C.R.S. specifically provides that a "corporate medical provider" may be included on the designated list of medical providers for an injured worker to select from when choosing an authorized treating provider. The designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician." *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). Whether a referral has been made is a question of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997).

9. CCOM is a corporate medical provider as discussed in Section 8-43-404(5)(a)(I)(A), C.R.S. As the medical director of CCOM, Dr. Centi would be included in the umbrella of the corporate medical provider designation of ATP. Dr. Centi was the supervising physician for PA MacLaurin. In addition, Dr. Centi would be considered an ATP within the chain of referrals.

10. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the December 7, 2020 FAL is invalid. As found, the ALJ is not persuaded that the impairment rating performed by Dr. Centi was invalid. As found, the medical records, and the testimony of Dr. Centi and PA MacLaurin are credible and persuasive.

ORDER

It is therefore ordered that the December 7, 2020 Final Admission of Liability is valid.

Dated this 3rd day of February 2021.

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

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

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

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

Note: This FFCL was served on February 3, 2022 and it is inferred that the ALJ's date was a clerical error.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-103-723-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 24, April 12, July 28, and November 1, 2021, in Denver, Colorado. The hearing was recorded by Google Meets recorded (reference: Google Meets, February 24, beginning at 1:30 PM, and ending at 4:30 PM; April 12, beginning at 1:30 PM, and ending at 2:30 PM; July 28, beginning at 8:30 AM, and ending at 9:30 AM; and, November 1, beginning at 8:30 AM, and ending at 9:00 AM).

The Claimant was present in person, virtually, and self-represented at all sessions of the hearing. Respondents were represented by [Redacted] Esq., at all sessions of the hearing.

Hereinafter [Redacted]shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits A, C-E, G-2-G-4 and H-M (erroneously marked by capital letters instead of Arabic numbers) were admitted into evidence, without objection. Respondents' Exhibits A-S were admitted into evidence, without objection. No stipulations were submitted.

The evidentiary deposition of Kathleen D'Angelo, M.D., taken on May 14, 2021, and lodged with the Office of Administrative Courts (OAC) on May 20, 2021.

At the conclusion of the hearing, the ALJ ordered post hearing briefs; Respondents' brief was filed on November 22, 2021. Claimant's brief was filed on December 14, 2021. No timely reply brief was filed and the matter was deemed ready for decision on December 20, 2021.

ISSUES

Although the parties designated other issues, the ALJ determined that the only issue to be determined by this decision concerns Claimant's request to reopen her claim. The ALJ earnestly advised the Claimant that if her claim was re-opened, she should seek the assistance of counsel. As herein below found and concluded, her claim is re-opened.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Respondents filed a Final Admission of Liability (FAL), mailed on June 21, 2021, admitting for a date of maximum medical improvement (MMI) of May 16, 2019, a little over two months from the date of injury, which was March 11, 2019; for aggregate temporary total and partial disability benefits of $1,623.63, from March 12, 2019 through April 17, 2019; for aggregate medical benefits of $1,427.55; and, for zero permanent disability benefits, pursuant to the opinion of Nazia Javed, M.D. , authorized treating physician (ATP). There was no admission concerning disfigurement benefits

The Injuries

2. The Claimant worked as a waitress for the Employer on March 11, 2019 when she sustained admitted injuries after tripping over a rack of glasses while delivering food to a customer. *Resp. Ex. A*. The Claimant received treatment for her injuries through May 16, 2019. *Resp. Ex. C.*

3. The Claimant was 25 years-old as of the date of the last session of the hearing. In addition to working as a waitress for the Employer herein, the Claimant

worked driving Ubers, as a model, while at the same time attending nursing school at the C.U. Health Sciences Center, where she ultimately graduated as an R.N. (Registered Nurse), near the top of her class.

Medical Course—Nazia Javed, M.D.

4. The Claimant went to UC Health on March 11, 2019, where she complained of **left lower extremity pain, and a facial contusion**. *Resp. Ex. H,* p. 43. Claimant followed up at UC Health with Karen Elmquist, P.A. ((Physician's Assistant) on March 18, 2019 for complaints of chronic rhinosinusitis. *Id.* at 53-54.

5. The Claimant began treatment with occupational medicine doctor,,Nazia Javed, M.D., on March 18, 2019. Dr. Javed noted right sided jaw pain and swelling in her left leg. *Resp. Ex. I,* p. 56-58. Dr. Javed referred the Claimant to physical therapy (PT), and released her to light duty work. In their brief, Respondents make a point that Claimant did not mention left leg problems and IME (Independent Medical Examiner), Dr. D'Angelo pins part of her opinion on this absence of subsequent articulation of left leg problems.

6. The Claimant followed up with Dr. Javed on April 17, 2019, and did not mention any ongoing pain in her left leg, according to Dr. Javed, and indicated that her back and shoulder symptoms had improved due to PT *Resp. Ex. I,* p. 61-62. Claimant "state[d] she feels better, no pains in left leg, contusion has healed well. Her back and shoulder muscles are better also." *Id.* Dr. Javed noted that Claimant's contusion had healed well. *Id.*

7. The Claimant only had three visits with doctor, Dr. Javed of Aviation & Occupational Medicine. Claimant requested to be seen by an Orthopedic specialist but was refused a referral by Dr. Javed. The Claimant was given referral for 2 months of physical therapy (PT) as a solution to her pains . Dr Javed failed to refer the Claimant an MRI (magnetic resonance imaging) or any other other diagnostics. Claimant's young age and lack of experience managing her medical issue through a work compensation provider required her to follow Dr. Javed's treatment plan. The Claimant was dissatisfied with Dr. Javed's care.

8. On April 17, 2019, the Claimant attended PT and was evaluated by Christine Hill, D.P.T. PT Hill noted that the Claimant had made progress and discharged her from therapy. *Resp. Ex. K.*

9. *The* Claimant returned to Dr. Javed on May 16, 2019. *Resp. Ex.* I, p. 64-65. According to Dr. Javed, the Claimant said that she had no pain in her left leg and that her contusion had healed well. *Id.* According to Dr. Javed, the Claimant told Dr. Javed that her back and shoulder muscles were pain free, and that she no longer had right sided jaw pain. *Id.* Claimant told Dr. Javed that she saw her personal dentist, who

indicated that her jaw was normal. *Id.* Physical examination of the back, neck, right shoulder, and left leg was normal, according to Dr. Javed. *Id.* Dr. Javed stated the opinion that Claimant was at MMI as of May 16, 2019 with no permanent impairment and released her from care to full duty. *Id.*

The Claimant

10. According to the Claimant, she received poor treatment for her injuries. Sustaining physical injuries while being in the middle of her most important exams did not give her much room to seek help concerning her injuries.

11. Respondents made a mutual mistake of material fact by not taking into account in filing the FAL her income from Uber, Lyft and her modeling jobs Instead of doing so, Respondents claimed an overpayment based on her "admitted AWW, which was based only her wages from the Employer and not her other pay from other, multiple employments. This omission amounts to a mutual mistae of material fact upon which the FAL was based.

12. Given the Claimant's financial and academic obligations, she went back to work as a part time waitress, with discomfort and pain in order to survive and provide for herself.

13. During the COVID-19 quarantine, Claimant was able to attend her school online and was paid unemployment (UI) at the same time. Claimant had more time to care for her injuries and her physical condition. Claimants attempted to contact the insurance carrier for help but was repeatedly dismissed by different agents who refused to look into Claimant's case and medical situation.

14. The Claimant had a right shoulder MRI and x-rays on April 1, 2020, and was diagnosed with supraspinatus tendinosis. Her medical findings indicate chronic shoulder pain and left leg swelling with discolored scar. Claimant mouth is still injured and in needs for teeth alignment. Respondents' IME, Dr. D'Angelo summarily dismisses these findings.

15. According to the Respondents, all of Claimant's medical exams are "insignificant," as opined by IME Dr. D'Angelo. The Claimant was working as a bedside nurse for the past year at The Center at Lincoln. Claimant's work as a nurse often required her to perform physically exerting tasks, such as patients repositioning and standing on her feet for extended periods. Claimant was becoming tired and exhausted having to fight off feelings pain and discomfort while trying her best to care for her patients. Claimant's medical condition forced her to quit her job as a rehab nurse and seek a job with a light physical workload. Claimant now works at a COVID- 19 testing facility. The injuries Claimant sustained during her work accident are preventing her from having the full capacity of working in physically demanding nursing environment,

such as the Intensive Care Unit (Claimant's original aspiration as a nurse). The FAL concerning no permanent impairment was based on a mutual mistake of material fact regarding permanent disability. The ALJ infers and finds that there was a "rush to judgment/closure regarding permanent impairment. (the FAL was filed a little over two months from the date of injuries).

16. The Claimant continues to work as model yet is limited due her permanent left leg scar and difficulty wearing high heels, which she had not experienced prior to the admitted injuries. The ALJ infers and finds that Claimant's chances of booking future modeling job that require exposed legs are very slim. Respondents, by ignoring "bodily disfigurement" in the FAL, made a mutual mistake of material fact.

17. Respondents argue that Claimant's claim closed pursuant to the Final on July 21, 2019, by virtue of the fact that there was no timely objection thereto. The aggregate evidence, however, supports the fact that the FAL was based on a mutual mistake of material fact concerning disfigurement and aggregate wages from multiple employments.

18. After Dr. Javed placed the Claimant at MMI on May 16, 2019 (barely two months after the date of injuries), the Claimant saw her primary care physician, Dr. Vanlandingham, for other medical reasons. She then saw Dr. McCabe on June 3, 2019 for a physical examination to be cleared to drive for Uber. *Resp. Ex. M*, p. 90. Dr. McCabe's report noted that Claimant was healthy overall with no known medical conditions causing problems, and that **she felt** fit to drive. *Id. Id.* Dr. McCabe did not deal with the issues of multiple employments, AWW, or bodily disfigurement.

19. The Claimant returned to Karen Elmquist, P.A, (Physician's Assistant) on July 25, 2019 for a referral to dermatology. *Id.* at 91. Claimant followed up with P.A. Elmquist on November 12, 2019 for a blood work referral for nursing school, but unrelated to her work injuries. complaints. *Id.* at 93. Claimant saw P.A. Elmquist again on January 27, 2020 for a sore throat and cough, *Id.* at 95. Respondents argue that because P.A. Elmquist did not deal with Claimant's admitted work injuries, this absence is evidence that the FAL resolved all issues in the Claimant's claim. The aggregate evidence belies this assertion.

The Employer

20. [Redacted, hereinafter Mr. O], the owner of Employer, testified that Claimant returned to
work for Employer at the end of April 2019 and continued working until March 16, 2020 when Employer furloughed 90% of its employees due to the Covid-19 pandemic. *Hrg. Aud. 2, 12:53-14:46.* Claimant's pleadings indicate she believes the reason for her termination from Employer was because of Covid 19. *CL. Ex. A*, p. 3. Claimant applied for and received unemployment benefits after she was laid off *Hrg. Aud. 1*, 2:06:15;

Resp. Ex. S. O[Redacted]'s testimony sheds **no** light, to refute the Claimant's testimony that she worked with pain.

21. The Claimant was laid off by Employer due to the Covid 19 pandemic on March 16, 2020, and on March 17, 2020 she contacted the Insurer about reopening her claim. *Hrg. Aud. 1*, 2:02:15-2:02:35. After she was furloughed by the Employer due to the Covid-19 pandemic, she presented to her physician with symptoms of her work injury. The ALJ infers and finds that there is nothing unreasonable about the Claimant's presentation concerning symptoms of the work injuries, given the fact that her layoff greatly reduced her means of support, whereas she had been working with pain.

Kathleen D'Angelo, M.D.

22. The Claimant had a right shoulder MRI and x-ray on April 1, 2020, and was diagnosed with mild supraspinatus tendinosis. Her rotator cuff appeared intact, and the right shoulder x-ray was unremarkable. *Resp. Ex. F*, p. 31-32; 34. Dr. D'Angelo opined that mild supraspinatus tendinosis is not an acute, traumatic finding, but is more likely the result of her mild lateral downsloping of the acromion. *Resp. Ex. N*, p. 131. Claimant also had an x-ray of her left tibia/fibula done on April 1, 2020 which was unremarkable. *Rep. Ex. F*, p. 33. There was a finding of a small, 6x4 benign exostosis off the proximal medial tibial metaphysis, which is benign and of no clinical significance, according to Dr. D'Angelo. *Id.*; *D'Angelo Depo. 22.* According to Dr. D'Angelo, Claimant's tibial issue is pre-existing. Prior to her work injury, Claimant had x-rays taken of her knees on March 26, 2018 which showed a small osseous excrescence from the cortex of the left proximal medial tibia. *Resp. Ex. F*, p. 30. According to Dr. D'Angelo, all of Claimant's conditions are insignificant, her condition has not changed since two months after the admitted injuries and, ultimately, Claimant's present condition is not work-related. The ALJ finds Dr. D'Angelo's. ultimate opinion as lacking in credibility because it vis refuted by the aggregate evidence concerning after-effects of the Claimant's admitted injuries.

Dental

23. The Claimant alleges that her teeth were knocked out of place in the accident, and has submitted photographs which she believes show mal-aligned teeth. *Cl. Ex. G.* Claimant, however, was already a patient at Risas Dental, and consulted with Risas Dental for a comprehensive evaluation in 2018. *Resp. Ex. G.* She followed up with Risas Dental on May 15, 2019 and discussed with her dentist that she was interested in braces because her left teeth were slowly moving inward. *Id.* Claimant had a wisdom tooth removed on May 20, 2019. *Id.* at 37-38. The dental note does not mention the work-injury. *Resp. Ex. G.* Claimant pursued this treatment through her personal insurance. *Resp. Ex. G.* There is probable cause to believe that the matter would properly be resolved by an expert opinion concerning causal relatedness or lack

thereof. The fact that the FAL did not consider this proposition amounts to a mutual mistake of material fact at the time of the FAL.

After the Admitted Injuries

24. The Claimant booked modeling jobs on three occasions, on September 14, 2020, September 15, 2020, and October 1, 2020. *Id.* Claimant was able to pursue a nursing degree and graduate *cum laude* after her injury, and is currently working full time as a R.N. *Hrg. Aud. 1,* 53:52-54:31; 2:01:00-2:01:35; *CL. Ex. H.* After graduation, Claimant also worked as a nurse at the Center at Lincoln in 2020. *Resp. Ex. P.* Claimant testified that she is currently earning more overall wages than she did while working for Employer because the wages for a R.N. are higher than for a waitress. *Id.* Claimant began working as a R.N. in August of 2020. *Id.*

Dr. D'Angelo Continued

25. Dr. D'Angelo, M.D. performed her IME of Claimant on September 21, 2020. *Resp. Ex. N.* At the IME appointment, Claimant told Dr. D'Angelo that her symptoms had been ongoing "pretty much since the injury." *Id.* at 103. Although Dr. D'Angelo was of the opinion that the Claimant self-limited with range of motion (ROM). *Id.* at 109. Dr. D'Angelo stated the categorical opinion that none of the Claimant's current complaints were claim-related, and that Claimant remained at MMI for this claim without the need for reopening. *Id.* at 110. Dr. D'Angelo offered no persuasive reason concerning to what the Claimant's current symptoms are related. The aggregate evidence does not permit an inference that the Claimant's current symptoms are related to an alternative non-work related cause. Moreover, Dr. D'Angelo implies that the Claimant is "OK.". Whereupon, Dr. D'Angelo implies that the Claimant's current symptoms must be related to unknown congenital pre-existing conditions or other undisclosed causes. The ALJ rejects Dr. D'Angelo's inferences in this regard. Dr. The ALJ rejects this premise as not supported by the totality of the evidence. Indeed, the ALJ finds the Claimant to be credible in her disagreement with Dr. D'Angelo's minimization of the Claimant's injuries.

26. The ALJ infers and finds that Dr. D'Angelo apparently relied heavily on the absence of medical notations concerning no complaints of pain to her right shoulder, left leg, jaw, neck, and upper back when visiting some physicians from May 2019 through March 2020-- between her injuries and the fact that that Claimant continued working during this period. *Id.* at 131. Dr. D"Angelo fails to address the fact that the Claimant worked with pain, or Dr. D"Angelo implies that the Claimant actually fabricated working with pain.

27. Dr. D'Angelo rendered a "catch-all" opinion that there is a lack of **objective findings** to substantiate Claimant's complaints, and that Claimant had

withdrawal with very minimal touch to her skin around the right shoulder. *Id.* Dr. D'Angelo noted no problem when Claimant moved her right arm while lifting paperwork or personal items, which shows, according to Dr. D"Angelo, that Claimant is self-limiting her range of motion. *Id.* This observation does not deal with whether or not the Claimant had a problem lifting a full carton of milk heavy food trays or lifting patients, for example. According to Dr. D'Angelo, the Claimant is not a reliable historian. The ALJ infers and finds that this observation is in and of itself, unwarranted and subjective, based on the fact that the Claimant presented as an articulate, credible witness in her testimony—in the manner of an individual who graduated *cum laude,* as a.R.N. from the UC Health Sciences Center,

28. According to Dr. D"Angelo, the Claimant requires no work restrictions and suffers from no permanent impairment. *Id.* at 132. Dr. D"Angelo's opinions, insofar as they may support the proposition that a re-opening is not warranted, evade the issues concerning mutual mistake of material fact. In fact, the ALJ finds Dr. D"Angelo's opinions in this regard lacking in credibility.

29. According to Dr. D'Angelo, there is no objective evidence supporting Claimant's ongoing complaints. *Id.* at 32. Dr. D'Angelo testified that Claimant's work-related condition has not deteriorated or worsened, that Claimant's work-related diagnoses had resolved as of the date of MMI, and that Claimant has no further diagnosis attributable or causally related to the work-injury. *Id.* at 31; 32. Dr. D'Angelo testified that it is medically improbable that Claimant's current condition is causally related to her work injury because she was allegedly pain free for many months following MMI (inferred from medical records reviewed by Dr. D'Angelo), and there is nothing to medically support a causal relationship between Claimant's current complaints and the work injury, according to Dr. D'Angelo. *Id. at 54.* The ALJ does **not** find this opinion to be credible in light of the totality of the evidence.

30. In support of her opinion that Claimant was at MMI and nothing has changed since then, Dr. D'Angelo testified that she had not seen any physician opinions stating that Claimant was not at MMI, or that Claimant was unable to work. *Id.* at 26. This non-medical opinion borders on taking on an adversarial tone and is not persuasive, and detracts from Dr. D'Angelo's overall credibility.. Further, Dr. DAngelo does not persuasively address the issue of AWW, based on multiple employments, permanent scarring of the leg and how it will affect the Claimant's modeling career.

31. Because of Claimant's disagreement with some of the lack of medical notations (noted by Dr. D"Angelo), Respondents argue that the Claimant is not credible. The ALJ infers and finds that this argument does not significantly undercut the core of the Claimant's testimony. Claimant testified that since the injury occurred, she is still suffering from shoulder and leg pain, and facial swelling. *Hrg. Aud 1*, 48:40-49:25. Claimant testified that she requested an MRI from Dr. Javed during the course of her treatment in the workers' compensation claim, but that Dr. Javed recommended PT

instead. *Id.* The ALJ infers and finds that Dr. D'Angelo attempted to justify a rush to closure, without adequate tests. According to the Claimant, she still suffers from all of the injuries she sustained while working. *Id.* Claimant testified that during the course of her workers' compensation treatment, she was not offered an injection or an MRI, and that she believes she needed these treatments to bring her to MMI during the course of her workers' compensation treatment. *Hrg. Aud. 53:20-53:42.* In light of the fact that the Claimant is a R.N,, having graduated from nursing school *cum laude,* the ALJ finds the Claimant's testimony in this regard more credible that Dr. D'Angelo's summary dismissal of the Claimant's present condition. The Claimant believes that her complaints "could have been solved" if the ATP, Dr. Javed, would have sent the Claimant to have an MRI during her treatment. *Id.* This fact supports the idea, that evidence of "what could have been is warranted because Claimant's testimony supports the fact that there was a mutual mistake of material fact at the time the FAL was filed.

32. Respondents place their arguments on the allegation that placement at MMI was appropriate and nothing further is warranted. Respondents do not persuasively deal with the issue of mutual mistake of material facts involving AWW based on multiple employments and bodily disfigurement as of the filing of the FAL.

Ultimate Findings

33. The ALJ finds the Claimant to be a credible witness. Further, the ALJ finds the overall opinions of Dr. D'Angelo as lacking credibility in some respects, *e.g.,* in not persuasively addressing the issues of AWW based on multiple employments, bodily disfigurement and its effects on Claimant's modeling career.

34. The ALJ infers and finds the credible testimony of the Claimant concerning her present condition is more credible than Dr. D'Angelo's ultimate opinions minimizing Claimant's present condition.

35. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that there was a mutual mistake of material facts, concerning AWW based on multiple employments and bodily disfigurement. Therefore, a re-opening of the Claimant's claim is warranted.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations,

determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research or facts); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant was a credible witness. Further, as found, the overall opinions of Dr. D'Angelo were lacking credibility in some respects, *e.g.,* in not persuasively addressing the issues of AWW based on multiple employments, bodily disfigurement and its effects on Claimant's modeling career.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they should be

upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ makes a rational choice in determining that the credible testimony of the Claimant concerning her present condition is more credible than Dr. D'Angelo's ultimate opinions minimizing Claimant's present condition.

Multiple Employments

c. Where an injured worker has arranged **multiple** employments to earn a living, and the injury in part precludes some work , a fair computation of the true AWW should encompass all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant is entitled to hearing concerning the financial effects of her injuries on her multiple employments—as opposed to Respondents mistakenly admitting an AWW based on the solitary employment on the admitted date of injuries.

Re-Opening

d. Under section 8-43-303(1), C.R.S., a case may be re-opened after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). It is well established that if an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the injured worker. The additional injury is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Endorsement of "petition to reopen" on an application for hearing or response to application for hearing sufficiently raises the issue for consideration. *See Cooper v. Indus. Claim Appeals Office,* 109 P.3d 1056 (Colo. App. 2005). The Court of Appeals held that a mutual mistake of fact concerning the

claimant's condition was made at the time the DIME placed the claimant at MMI was a n appropriate ground for re-opening. *See Berg. V. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). As found, there was a mutual mistake of material fact, concerning AWW based on multiple employment and bodily disfigurement at the time the FAL was filed. Therefore, a re-opening of the Claimant's claim is warranted.

e. There is no restriction as to the number of times a case may be re-opened and when based upon new or different evidence no such limitation may be imposed by the courts, that being a matter for legislative expression. *Graden Coal Co. v. Ytoarralde,* 137 Colo. 527, 328 P.2d 105 (1958).

f. Mistake of fact at the time an FAL is filed is an appropriate ground for re-opening a claim, if the criteria for reopening are met. *See City and County of Denver v. Indus. Claim Appeals Office,* (2021COA146, December 2, 2021). As found, there was a mutual mistake of material fact at the time of the filing of the FAL, thus, warranting a re-opening thereof.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits and/or re-opening. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, there was a mutual mistake of material fact at the time of the filing of the FAL, thus, warranting a re-opening of the Claimant's claim.

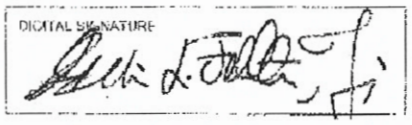
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 5-103-723-001 is hereby re-opened as to all issues..

B. Any and all issues not determined herein are reserved for future decision.

DATED this 7th day of February 2022.



EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

WC 5-103-723-001

OAC CERTIFICATE OF SERVICE

I hereby certify that on **February 7, 2022** a true and correct copy of the foregoing Order was served upon the following parties by email, to the addresses on file with the OAC, who shall provide copies to all other parties pursuant to OAC 16-G.

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/s/ Mary C.
Clerk - OAC

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-137-923-001

ISSUES

I. Whether the left rotator cuff surgery recommended by Claimant's treating surgeon, Dr. Michael Hewitt, is reasonable and necessary and causally related to the industrial injury.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work injury on April 26, 2020, to her left upper extremity while working as a Registered Nurse ("RN") for Respondents.
2. On April 28, 2020, Claimant was working in her capacity as registered nurse for respondent employer, when she tripped over an oxygen tube and fell landing on her left shoulder. Before this date, Claimant credibly testified that she had no prior injuries and active treatment of the left shoulder.
3. On the date of injury, Claimant reported to Swedish Emergency room with severe shoulder pain. An x-ray of the left shoulder revealed an acute non-displaced fracture of the left humeral neck and head extending along the base of the greater tuberosity. (C Ex. 15, BS 46A).
4. Claimant was seen by a P.A. at Concentra on April 28, 2021; at which visit, she was noted to have significant bruising. Claimant advised that she could not move her shoulder without pain and was having trouble sleeping. (C.Ex. 12, BS 001-004). Claimant was then seen by Dr. Villavicencio on May 1, 2020. On this date, Dr. Villavicencio recorded that claimant's range of motion remained very limited with significant pain in the day and causing sleep issues at night. The doctor provided Claimant with work restrictions on this day. (C. Ex. 12, BS 005-007).
5. Claimant testified that she was given light duty work and suffered a partial wage loss from April 28, 2020, through May 23, 2020. Thereafter, she was completely off work for about three (3) months, from May 24, 2020, through August 17, 2020. During this time, Claimant was attending physical therapy, massage therapy and was taking prescribed medications.
6. Claimant's employment as a registered nurse, requires her to, among other tasks, be able to transfer patients from bed to the wheelchair, or vis-versa, and/or lift patients off the floor, lift up to fifty (50) pounds, and perform CPR, which requires the administration of fifty (50) pounds of pressure. After returning to work, although Dr. Villavicencio had not provided continuing restrictions, Claimant credibly testified that she has continued to have trouble completing all of the integral functions of her job as a registered nurse. She has been unable to use her left arm to complete lifting tasks and could not perform the compression portion of the CPR skill, as she could

not compress the fifty pounds of pressure required to perform this skill. As a result, she has had to request and receive help from her co-workers.

7. On October 28, 2020, Dr. Villavicencio placed Claimant at MMI and assigned an impairment rating. (C.Ex. 12, BS 34-39). Claimant testified credibly that although she had been placed at MMI, she continued to experience pain and loss of function of her left shoulder and continued to have difficulty sleeping. As such, she was sent for an evaluation with Dr. Scott Primack, who evaluated Claimant on December 16, 2020. Dr. Primack concluded that Claimant's examination was consistent with a rotator cuff tear; and hence, he recommended an MRI scan. (C. Ex. 14).

8. Claimant underwent the left shoulder MRI scan on March 3, 2021, which scan evidenced: small partial-thickness tearing of the supraspinatus and infraspinatus tendons and small partial-thickness delaminating tear within the superior third of the subscapularis tendon. (C. Ex. 15, BS 45-46).

9. Upon review of the MRI scan, Dr. Villavicencio referred Claimant to Dr. Michael Hewitt, Orthopedic surgeon, who examined her on April 5, 2021. On this date, Dr. Hewitt reviewed the MRI scan and noted Claimant's continuing symptoms of pain with lifting and intermittent night pain and catching sensation in her shoulder. After reviewing the MRI, he diagnosed a Type 2 SLAP tear. Due to Claimant's continued objective findings, lack of improvement with conservative care and the evidence on MRI scan, Claimant and Dr. Hewitt agreed that surgery in the nature of a rotator cuff repair was the next best option. (C. Ex. 12, BS 18-19).

10. Claimant resigned her employment with Respondent-Employer in January 2021 and has worked for several other employers since as a registered nurse. Claimant testified credibly that she has suffered no new injuries to her shoulder since the original work-related injury in April 2020. Claimant also testified that she had to travel back to Chicago on multiple occasions, to attend to her ailing mother during the summer of 2021. During this time, Claimant testified that she and Dr. Hewitt agreed to pursue a more conservative route and attempt a subacromial injection before proceeding with surgery. This injection took place on September 16, 2021; but unfortunately, provided no relief. As a result, on October 25, 2021, Dr. Hewitt recommend proceeding with surgery. (C. Ex. 12. BS 002-003). On November 2, 2021, Dr. Hewitt requested authority to proceed with an arthroscopic repair rotator cuff of left shoulder with subacromial decompression. (C. Ex. 13, BS 42). This request was denied by Respondents, who secured a record review to support their denial from Dr. William Ciccone dated November 2, 2021.

11. In reviewing Dr. Ciccone's report, it becomes clear that he was unaware that Claimant was off work for a three-month time period after the injury, and that after Claimant was released to work full duty, that she has continued having lifting difficulties. Since he did not examine Claimant or interview her, he is unaware that since returning to work, she continues to experience difficulty with her left shoulder, so much so, that she needs to request help from co-workers to continue to work, and that she avoids the use of her left shoulder. Further, Dr. Ciccone does not refer to a review of the report written by Dr. Scott Primack, who recommended the MRI scan back in December 2020. Dr. Ciccone does, however, reference that Dr. Hewitt

noted, in a May 18, 2020, report that Claimant has a previous history of left shoulder pain. But, despite such a reference, there is a lack of credible and persuasive evidence that Claimant required, or was undergoing, treatment for her rotator cuff before the work accident. In the end, Dr. Ciccone disagreed with both authorized treating physicians, Drs. Hewitt and Villavicencio, and instead concluded that the findings on MRI are age related and not related to the industrial injury. Thus, he concludes that surgery is not causally related to the industrial injury. (R.Ex. A).

12. Upon review of Dr. Ciccone's report, both Drs. Hewitt and Villavicencio, continue to recommend surgery and find same to be, not only reasonable and necessary; but also, causally related to the industrial shoulder injury. In Dr. Hewitt's rebuttal report of December 8, 2021, he notes Claimant's continued lost range of motion and pain with objective findings and the existence of a positive impingement sign. On the other hand, Dr. Ciccone performed no physical examination. Therefore, he has no first-hand knowledge of a positive impingement sign, nor any detected lost range of motion, nor the existence of persistent weakness, as referenced by and found by Dr. Hewitt, the ATP. In his report, Dr. Hewitt notes that he strongly disagrees with Dr. Ciccone's opinions and finds his surgery recommendation to be not only reasonable and necessary; but also, causally related. (C.Ex. 13, BS 40). In his report of December 15, 2021, Dr. Villavicencio notes review of Dr. Ciccone's IME report, and yet, he continues to concur with Dr. Hewitt's recommendation for surgery.) (C. Ex. 12, BS 1).

13. The ALJ finds the opinions of the two treating physicians, to be more credible and persuasive than those of Dr. Ciccone. The opinions offered by Drs. Hewitt and Villavicencio are consistent with the underlying medical records and Claimant's testimony. The ALJ finds that Dr. Hewitt's recommendation is supported by his objective findings, and the fact that conservative care has failed. Surgery is the next most reasonable medical option to assist Ms. Remillard in regaining function in her injured left shoulder.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether the left rotator cuff surgery recommended by Claimant's treating surgeon, Dr. Michael Hewitt, is reasonable and necessary and causally related to the industrial injury.

Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not addressed every piece of evidence that might lead

to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970);* § 8-41-301(1)(c), C.R.S. 2013.

As found, the credible evidence in this case demonstrates that Claimant has met her burden of establishing, by a preponderance of the evidence, that the April 26, 2020, work injury proximately caused the need for the recommended left shoulder rotator cuff surgery as requested by her treating surgeon, Dr. Hewitt, and her treating physician, Dr. Villavicencio. The persuasive evidence establishes that the surgery recommended by Dr. Hewitt is not only reasonable and necessary; but also causally related to the April 26, 2020, work related injury. As found, with respect to this determination, the ALJ credits the testimony of the treating surgeon and physician, over that of Respondents' hired medical record review expert, who failed to examine Claimant. The ALJ also finds that the medical reports and credible testimony of Claimant outline continuing persistent pain and functional impairment with failed conservative treatment, leading to and supporting Dr. Hewitt's recommendation for surgery. Thus, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence the shoulder surgery is reasonably necessary and causally related to her industrial injury.

ORDER

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

1. Respondents shall authorize and pay, pursuant to the Colorado Workers' Compensation medical benefits fee schedule, for the rotator cuff surgery and all expenses associated therewith as recommended by Dr. Hewitt.

2. Issues not expressly decided herein are reserved to the parties for future determination.

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

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

DATED: February 8, 2022.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-093-482-006

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties for failure to timely pay temporary total disability (TTD) benefits.

2. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties for conducting surveillance and for sending a Rule 16 letter.

FINDINGS OF FACT

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

1. Claimant suffered an industrial injury on November 23, 2018, and has been receiving TTD benefits since December 13, 2018. (Ex. E). Claimant testified that as of the date of the hearing he had been receiving TTD checks for three years and 15 days. (Tr. 29:17). Respondents issued TTD checks approximately every two weeks between December 13, 2018 and September 22, 2021. (Ex. E).

2. Claimant credibly testified that during this three year span, there were five times when his TTD check did not arrive and had to be reissued, and there were two times when his TTD check was issued or mailed late.

3. Claimant testified that he never received the TTD check that should have been issued around December 13, 2018. He further testified that Respondents reissued a replacement check on January 25, 2019. (Tr. 21:19). In his discovery responses, Claimant stated that this TTD check was reissued on January 10, 2019. (Ex. 1, p 124). According to Respondents' payment log, Respondents placed a "stop payment" on the December 13, 2018 check, and reissued the check on January 10, 2019. (Ex. F). The ALJ finds that Respondents reissued the December 13, 2018 check on January 10, 2019.

4. Claimant testified he did not receive his January 2, 2019 TTD check. After learning of this, Respondents placed a "stop payment" on the January 2, 2019 check and reissued the check on January 17, 2019. (Tr. 21:20-21 and Ex. F).

5. Claimant testified he should have received his TTD check on August 28, 2019, but did not. After learning of this, Respondents placed a "stop payment" on the August 28, 2019 check, and reissued the check on October 17, 2019. (Tr. 21:25-22:2 and Ex. F).

6. Claimant testified he did not receive his TTD check that should have been issued on January 29, 2020. Claimant testified he moved residences on January 25, 2020, and

notified Respondents' counsel of his new address. (Tr. 22:2-9). After learning Claimant had not received his TTD check, Respondents placed a "stop payment" on the January 29, 2020 check and reissued the check on March 16, 2020. (Ex. F).

7. Claimant testified he did not receive his September 23, 2020 TTD check. After learning of this, Respondents placed a "stop payment" on the September 23, 2020 check and reissued the check on October 28, 2020. (Tr. 22:13-16 and Ex. F).

8. Claimant testified that he did not receive his April 9, 2021 TTD check. (Tr. 22:17-23: 13) (Ex. 1, p. 124). Respondents issued the check on April 19, 2021. (Ex. F). The ALJ finds that while this check was issued late, this delay was not unreasonable.

9. Claimant testified that his July 14 or 15, 2021 TTD check was mailed five days late. (Tr. 24:24-25:2). Respondent issued Claimant a TTD check on July 19, 2021. (Ex. F). The ALJ finds that while this check was issued late, this delay was not unreasonable.

10. Claimant had the option to have his TTD payments processed via direct deposit. Claimant testified that the process did not work, so he did not utilize it. (Tr. 36:19-7). In an April 8, 2020 email, Claimant told his counsel, with respect to direct deposit, "[t]oo much difficulty, and I just don't trust the insurer. I prefer mailing my checks. If they continue to not mail my checks we can always request another hearing." (Ex. I at 57).

11. Between January 2020 and June 2021, Claimant moved three times. He moved on January 25 or 29, 2020, April 1, 2020, and June 11, 2021. (Tr. 22:2-24: 9) Claimant testified he had four different addresses during the life of the claim, all outlined in his answers to discovery. (Tr. 37:22). According to Claimant's discovery responses, his four addresses were:

a. 10115 W. Dartmouth Place, #202, Lakewood 80227
b. 10115 W. Dartmouth Avenue, #F-301, Lakewood 80227
c. 7355 W. Kentucky Drive Apt F, Lakewood 80226; and
d. 7395 W. Ohio Ave #107, Lakewood 80226

(Ex. A at 124).

12. There was significant confusion related to Claimant's move and change of address in January 2020. On cross-examination, Claimant retracted his testimony that he lived at **10115** W. Dartmouth Avenue, #F-301, Lakewood 80227, and testified that the correct address was **10075** W. Dartmouth Avenue, #F-301, Lakewood 80227. (Tr. 43:19-44:16).

13. On January 23, 2020, Claimant emailed his attorney stating he would be moving to 10075 W. Dartmouth Ave. #F-**103**, Lakewood, CO **80027,** on January 25, 2020. (Ex. I at 52).

14. On February 10, 2020, Claimant emailed his attorney stating that he was moving to 10075 W. Dartmouth Ave. #F-**301**, Lakewood, CO **80227**. (Ex. 1 at 110).

15. On February 18, 2020, Respondents issued Claimant's TTD check and sent it to 10075 W. Dartmouth Ave. #F-103, Lakewood, CO 80027. (Ex. G at 31)

16. Two days later, on February 20, 2020, Claimant's counsel asked Respondents to send Claimant's TTD checks to 10075 W. Dartmouth Ave. #F-103, Lakewood, CO 80027 (Ex. 1 at 111).

17. On March 11, 2020, after another correction of the address and request for reissuance, Respondents placed a "stop payment" on the TTD check for January 18, 2020 through January 31, 2020, and reissued it. (Ex. G at 33).

18. Claimant testified his attorney followed up with Respondents' counsel regarding the status of Claimant's TTD checks on multiple occasions, including March 4, 5, 10, 11, 13 and 18 of 2020. (T 26:11-27:11). He further testified that his attorney notified Respondents of his move and the checks were still late. (T 25:17-19).

19. The ALJ finds that Claimant's move in January 2020, and the multiple mistakes made by Claimant and his counsel with respect to the correct address, contributed to the difficulties in receiving his TTD check for the period of January 18, 2020 through January 31, 2020.

20. On October 12, 2020, Claimant notified his counsel at the time, that his September 24, 2020 TTD was two weeks late, and she reached out to Respondents' counsel. (Ex. 1 at 66-67). On October 13, 2020, after the initial inquiry into TTD payments, Respondents' counsel responded noting that the checks issued on September 23, 2020 and October 7, 2020 had not yet been cashed, and asked Claimant's counsel what action they would like, whether that includes a stop pay and reissue, and also to confirm the correct mailing address since counsel previously requested the TTD payments go to their law office. (Ex. 1 at 65). With respect to the September 23, 2020 TTD check, Claimant's counsel initially asked for the status of two checks, but withdrew one request after the check arrived, asking for the other check to be reissued. (T 34:22-25).

21. Claimant has been represented by five different attorneys during the life of his claim. (Tr. 31:17-18).

22. According to Respondents' payment log, the December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks were all issued timely. Payment was stopped on each of these checks, and the TTD checks were reissued after Respondents learned that Claimant did not receive his check and they had confirmation that the check had not cleared. (Ex. F at 19).

23. The ALJ finds that over the two and a half years from December 2018 to July 2021, five of Claimant's TTD checks never arrived, but Respondents reissued the checks once they were made aware that Claimant had not received the check, and they had

confirmation that the check had not cleared. During this time period, Claimant received one TTD check five days late, and Respondents issued one ten days late.

24. The ALJ finds that Respondents timely issued Claimant's December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks. The ALJ further finds that the time it took for Respondents to reissue these checks was reasonable.

25. The ALJ finds that Claimant's address changes and the incorrect address information being forwarded to counsel contributed to the difficulties in timely receiving his TTD checks.

26. The ALJ finds that Respondents timely cured the issues related to TTD checks that Claimant did not receive.

27. Claimant did not provide any evidence regarding the surveillance video or the Rule 16 letter that he alleged were a basis for penalties.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict

by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Penalties for Late TTD Benefits

Claimant is seeking penalties for seven TTD payments that he received late between December 13, 2018 and September 22, 2021. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer's act or inaction constitutes a violation of the Act, a rule, or an order, and any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003). There is, however, no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Section 8-42-105(2)(a), C.R.S. provides, in relevant part, that "the first installment of compensation shall be paid no later than the date that liability for the claim is admitted by the insurance carrier." Section 8-43-304(4), C.R.S. gives respondents the opportunity to cure alleged violations within twenty (20) days of the mailing of an application for hearing asserting penalties. The statute states that if the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation. Clear and convincing evidence is evidence that is stronger than a preponderance and is unmistakable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980).

The ALJ finds Claimant failed to meet his burden that Respondents violated the Act or that any such violation was objectively unreasonable under the clear and convincing standard that applies. Claimant has failed to establish that Respondents violated the Act because two checks arrived late, and five had to be reissued. The December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks were all issued timely. (Findings of Fact ¶ 24). The evidence shows that each of these checks was issued timely and in compliance with the Act. *Id.* Once Respondents learned that Claimant never received these checks, they were placed on stop pay and reissued.

The date of reissuance for these checks also does not constitute a violation of the Act. *Id.* The ALJ recognizes there are practical issues involved in cancelling a check and

reissuing. Respondents communicated with Claimant and tried to resolve any stop pay/reissue issues timely. The ALJ further finds that the time it took for Respondents to reissue these checks was reasonable. *Id.* Claimant received the seven TTD checks at issue. Claimant has failed to prove by a preponderance of the evidence that Respondents violated the ACT and that penalties should be awarded.

Even if Claimant had established a violation of the Act, he failed to establish by clear and convincing evidence that Respondents' violation was objectively unreasonable. The ALJ recognizes the multiple moving parts with Claimant having five separate counsel and at least four separate personal mailing addresses. The ALJ finds that Claimant's address changes and the incorrect address information being forwarded to counsel contributed to the difficulties in timely receiving his TTD checks, particularly his January 29, 2020 TTD check. (*Id.* at ¶¶ 21 and 25). As for the other checks dated December 13, 2018, January 2, 2019, and August 28, 2019, Claimant failed to establish that the reissuance date was unreasonable, failing to provide evidence of any knowledge by Respondents of a violation or unreasonable action in reissuing the check to ensure it was paid. The ALJ finds that there is no evidence that Respondents actions were objectively unreasonable, given the duration of this claim, the multiple relocations and multiple change of counsel.

Claimant did not introduce any testimony on the issues of surveillance and the Rule 16 letter at hearing. (*Id.* at ¶ 27). There are no ripe issues in regards surveillance or the Rule 16 letter for which relief can be granted.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties related to late TTD payments is denied.

2. Claimant's request for penalties related to late surveillance is denied.

3. Claimant's request for penalties related to a Rule 16 letter is denied.

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

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

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 8, 2022

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

ISSUES

- Whether [Dependent Claimant, Redacted] established, by a preponderance of the evidence, that she and [Deceased Claimant, Redacted] were in a common law marriage at the time of his passing.

- If so, whether [Dependent Claimant] should be classified as a partially dependent beneficiary or a wholly dependent beneficiary.

STIPULATIONS

- The parties agreed that at the time of his death, [Deceased Claimant, redacted] had an average weekly wage (AWW) of $2,537.93.

- The parties also stipulated that [Minor Dependent, Redacted] is a wholly dependent beneficiary and entitled to receive workers' compensation death benefits.

FINDINGS OF FACT

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

1. [Deceased Claimant, redacted] passed away on May 13, 2021. At the time of his passing he had one natural born minor child, [Minor Dependent] (DOB: 4/26/10), from his relationship with Claimant. *Ex. G,* p. 18. He also had three adult children; [Redacted, hereinafter BH] (DOB: 1/2/98), [Redacted, hereinafter AH] (DOB: 8/19/95), and [Redacted, hereinafter VH] (DOB: 10/17/93), from a previous relationship, none of whom are not entitled to recover death benefits based upon their ages. *See Ex. F; see also*, C.R.S. §§ 8-41-501; 8-41-502. At the time of his passing, [Deceased Claimant, redacted] was in a relationship with Claimant. They lived together in South Fork, CO, with [Redacted minor dependent], [Redacted, hereinafter LG] (DOB: 2/6/09), and [Redacted, hereinafter DS] (DOB: 9/13/01). *See Ex. H.* LG[Redacted] and DS[Redacted] are Claimant's children from prior relationships. [Deceased Claimant, redacted] had not legally adopted LG[Redacted] or DS[Redacted] at the time of his passing. Consequently, they are not entitled to recover death benefits under the Workers' Compensation Act. *See* C.R.S. §§ 8-41-501; 8-41-502.

2. Claimant testified her romantic relationship with [Deceased Claimant] began August 3, 2001. They lived together without marrying for six years until they formally married on August 3, 2007, in Winnemucca, Nevada. *Ex. I.* Approximately one year later, Claimant and [Deceased Claimant] separated for roughly two years. Neither Claimant nor [Deceased Claimant] filed for divorce during this two-year period. However, they agreed to date other people.

3. Claimant began a relationship with [Redacted, hereinafter Mr. G] a couple months after her separation from [Deceased Claimant, redacted], moved in with Mr. G[Redacted] in Battle Mountain, NV, and lived with him for approximately 1 ½ years. During this time, Claimant gave birth to their child, LG[Redacted], on February 6, 2009. Claimant testified she left Mr. G[Redacted] in August 2009 and moved in with relatives in Elko, Nevada. Nonetheless, Claimant continued to see Mr. G[Redacted] while simultaneously rekindling her relationship with [Deceased Claimant, redacted]. [Redacted dependent, minor] was conceived during this period. As noted, she was born April 26, 2010.

4. Claimant testified [Deceased Claimant, redacted] did not know [Redacted, dependent minor] was his child initially. She testified she originally listed Mr. G[Redacted] as [Redacted dependent minor]'s father on the birth certificate, but she would later correct the birth certificate to reflect that [Redacted dependent minor]'s father was [Deceased Claimant, redacted] after a paternity test revealed him to be [Dependent minor]'s father. She also changed [Dependent minor]'s last name to [Deceased Claimant]'s. Submitted into evidence were two paternity tests, one for LG[Redacted] dated March 2, 2010, which confirmed [Deceased Claimant, redacted] was not LG[Redacted]'s biological father, and one for [Dependent minor] dated July 6, 2010, which determined he was [Dependent minor]'s father. *Ex. E, see also, Ex. G.* Claimant confirmed on cross-examination the paternity tests were done pursuant to court proceedings in which she and the State of Nevada were listed as obligees and [Deceased Claimant, redacted] as an obligor. She testified [Deceased Claimant, redacted] initiated the actions, as that was the only mechanism to have the testing completed in order to determine paternity for the two children. She testified that she still lists [Dependent minor]'s last name as Mr. G[Redacted]'s on tax returns, because she has been unable to change her last name with the Social Security Administration (SSA). *See Ex. N*, p. 79.

5. She testified Mr. G[Redacted] is currently obligated to pay $389 in monthly child support for LG[Redacted], which he pays "once in a while." She testified she "does not pay attention to" to the frequency of Mr. G[Redacted]'s child support payments but did acknowledge that there is a back due child support lien in excess of $17,000.00.

6. Claimant testified that after NH[Dependent minor] was born and her paternity established, she terminated her relationship with Mr. G[Redacted]. She and the children (DG[Redacted], LG[Redacted] and NH[Dependent minor]) then moved back in with [Deceased Claimant, redacted] in late 2010 or early 2011. Claimant, [Deceased Claimant, redacted] and the children lived in Elko, Nevada until June 2014, when they moved to South Fork, Colorado and rented a home. According to Claimant, the lease to this house was solely in [Deceased Claimant, redacted] name. Claimant testified she separated from [Deceased Claimant, redacted] again shortly after Christmas 2015. She moved into her own apartment with the children, and [Deceased Claimant, redacted] remained in the aforementioned rental home.

7. Claimant filed for divorce in May 2016. *See Ex. J.* The decree dissolving the marriage was signed October 13, 2016. *Id.* The decree notes, "The name change request is not detrimental to any person." Thus, Claimant was granted a legal restoration of her prior name, [Claimant name, redacted]. *Id.*, p. 22. Claimant professed ignorance regarding restoration of her maiden name and testified that she has used [Deceased Claimant, redacted] name as her legal last name since her divorce was finalized. Although ordered as part of the decree, [Deceased Claimant, redacted] failed to file a QDRO (Qualified Domestic Relations Order) concerning his retirement account. Consequently, Claimant's status regarding entitlement to any portion of [Deceased Claimant, redacted]'s retirement account at the time of the divorce is unknown. Based upon the evidence presented, it is also unknown whether [Deceased Claimant, redacted] identified Claimant as his spouse for purposes of qualifying her for entitlement to his retirement funds or life insurance benefits in the event of his premature death.

8. Claimant testified that during the pendency of their separation from May 2016 - October 2016, neither she nor [Deceased Claimant, redacted] told the kids they were divorcing. According to Claimant, because [Deceased Claimant, redacted]'s work required extensive travel away from home for weeks to months at a time, the children did not inquire as to his absence. Claimant testified that she and [Deceased Claimant, redacted] "did not take the divorce seriously." Rather, she testified that they started seeing each other approximately one month later in November 2016. According to Claimant, she and [Deceased Claimant, redacted] maintained separate residences but that he stayed at her apartment when he was in town. This arrangement continued until March 2018. At that time, [Deceased Claimant, redacted] bought a home located at 264 Pinon Circle in South Fork. Claimant and the children then moved back in with him. Claimant, the children and [Deceased Claimant, redacted] lived together at the 264 Pinon Circle address through his passing and she has continued her residence there since his death.

9. Claimant testified that when [Deceased Claimant, redacted]purchased the home at 264 Pinon Circle, he did so in his name only. Claimant testified this was done because she had bad credit at the time. On cross-examination, Claimant confirmed that the home was refinanced in September 2019, more than a year after they moved into together, again in [Deceased Claimant, redacted]'s name only. *Ex. L*, p. 37. She also testified that the property tax account was in his name at the time of his death. Throughout the time they lived together, Claimant and [Deceased Claimant, redacted] owned no real property jointly.

10. Utilities to the home at 264 Pinon Circle and other family expenses were largely in their names individually, not jointly. Claimant testified the water bill was paid once yearly in [Deceased Claimant, redacted]'s name. The electric bill was also solely in [Deceased Claimant, redacted]'s name, as were the cell phones used by those in the household. Moreover, the satellite TV bill was in his name. *Ex. L*, pp. 40, 42-43. Claimant agreed that she and [Deceased Claimant, redacted] owned separate vehicles titled in their names individually, and they had no jointly titled vehicles. The only

expenses held jointly were a car insurance policy and a propane account. *Id.,* pp. 39, 41-43.

11. Claimant testified she and [Deceased Claimant, redacted] each had three credit cards in their names individually. *See Id.,* pp. 46-51. She testified they each had individual checking accounts rather than joint checking/savings accounts. She testified that she had electronic access to [Deceased Claimant, redacted] checking account and she used that access to pay household bills from his account. She also conceded on cross-examination that neither she nor [Deceased Claimant, redacted] ever executed a will or other estate plan nor did they ever execute any powers of attorney (POA) to act on the behalf of the other at any time.

12. Claimant and [Deceased Claimant, redacted] filed separate tax returns in recent years. Their respective 2019 and 2020 tax returns were admitted into evidence as *Exhibits M & N.* Claimant testified that she personally completed each of their tax returns using computer-based software. On cross-examination, she was asked why they each filed as Head of Household, which is a filing status that requires the filer not be married.[1] She professed ignorance of the significance of filing both returns as Head of Household testifying that [Deceased Claimant, redacted] told her to file the taxes in that manner when they completed their returns in 2017. She testified she was unaware that couples who are common law married could file joint returns. Claimant testified that before 2017 and when they were married, H&R Block prepared their taxes. She could not recall whether they filed as married or head of household, at points stating she thought it was both. [Deceased Claimant, redacted] earned $104,354 in wages in the taxable year 2020. *Ex. M,* p. 52. Claimant earned $45,665.00 in wages in the taxable year 2020. *Ex. N*, p. 79.

13. Claimant's 2020 wages extend through August 15, 2020. She quit her job as a working manager at Mountain Pizza and Tap Room (Mountain Pizza) around August 15, 2020 due to what the ALJ finds was the requirement that she work substantial overtime hours to assure that the restaurant was properly staffed.[2] During cross-examination, Claimant agreed she was on track to earn about $75,000.00 - $80,000.00 for the year before she quit. It is uncontroverted that Claimant was unemployed between August 15, 2020 and February 7, 2021, when she returned to work cleaning vacation homes for her friend, Joyce Ann Reed. Claimant testified she worked as little as 4 hours per week, or as much as 20 hours per week during the busy period of Spring Break. As noted, wage records were ordered from Ms. Reed and reflect that Claimant earned $585.00 in February 2021, $742.50 in March 2021, and $587.50 in April 2021, prior to [Deceased Claimant, redacted]' passing in May 2021.

[1] U.S. Department of the Treasury. Internal Revenue Service. (2020) *Publication 501: Dependents, Standard Deduction, and Filing Information* (Cat. No. 15000U). Retrieved from https://www.irs.gov/publications/p501#en_US_2020_publink1000220775.

[2] Claimant testified that she would have to pick employees up from the Community Corrections Center in Alamosa, shuttle them to their shift in South Fork, and then drive them back to Alamosa after their shift, a distance of 192 miles roundtrip per day worked. According, to Claimant [Deceased Claimant, redacted] implored her to quit for sake of the children.

Exhibit O. When asked why she returned to work cleaning houses, Claimant testified she wanted to help and not "leave them hanging," referring to her employer. On re-direct, she clarified she was looking for work at the time Ms. Reed was looking for help. She testified the money she earned in this time went to household expenses.

14. Claimant testified neither she nor [Deceased Claimant, redacted] wore wedding rings, either while officially married or during any period following their divorce. According to Claimant, she was not a jewelry person, and the "promise ring" [Deceased Claimant, redacted] gave her was too small. She never attempted to have it re-sized. She also testified that [Deceased Claimant, redacted]' occupation as a driller precluded his wearing of a ring.

15. Claimant testified that even after their divorce, she and [Deceased Claimant, redacted]would introduce themselves to people as husband and wife when meeting new people, and also when going to events for the kids such as sporting activities or parent/teacher conferences. On cross-examination, she was pressed about whether or not at the kids' events they introduced themselves as husband and wife or just as the parents of the children, and she changed her testimony to admit the latter was the case.

16. On cross-examination, Claimant testified she and [Deceased Claimant, redacted] never talked about formally marrying again after their divorce and reconciliation. She admitted that they had no agreement to be married or later become married in any capacity. She was asked about what was different in the scenarios of 2008 versus 2016, where the first separation extended over a couple of years but without them being divorced, compared to 2016 where they got divorced after a shorter separation. She testified that she just needed a break from [Deceased Claimant, redacted] in 2008 but in 2016, they were fighting frequently which lead to their divorce. She testified that after their divorce and subsequent reconciliation, their relationship was better due to agreements they made as to how to best work through their differences. According to Claimant, the relationship between she and [Deceased Claimant, redacted] was "perfect" after their divorce so she saw no reason for the two to remarry.

17. Ms. Joyce Ann Reed testified at hearing. She testified that she became acquainted with Claimant and [Deceased Claimant, redacted] in approximately 2015 through the church they all attended. She testified generally that she saw them at church and at least on one occasion she and her husband took [Deceased Claimant, redacted] and the children ice fishing. However, she testified that she never went to their home, never went out to eat with them, never took trips with them, or engaged in other activities with them. Importantly, she testified that she had no actual knowledge of whether Claimant and [Deceased Claimant, redacted] considered themselves a married couple.

18. Ms. Reed also testified that Claimant has worked for her cleaning the vacation rental properties she manages. According to Ms. Reed, Claimant began work for her in 2016 and continued her employment until she started working at Mountain

Pizza. Per Ms. Reed, Claimant then started working for her again at some point after she stopped working at the pizzeria. As noted, *Exhibit O* are the records Ms. Reed produced reflecting Claimant's wages for 2021.

19. Claimant also called Rose Tullos to testify at hearing. Ms. Tullos testified that she is a neighbor of Claimant. She testified that when Claimant and [Deceased Claimant, redacted] moved into the neighborhood her recollection was that "maybe" one of them introduced the other as husband or wife when they first met, but she did not recall specifically. She testified they would visit each other's homes, attended BBQs together, and went out to dinner with each other on a couple occasions. She testified she had no actual knowledge of whether Claimant and [Deceased Claimant, redacted] were married. Rather, she testified she assumed they were married based upon interactions with the family. She admitted on cross-examination, that she would assume generally that any couple raising children while living under one roof and using the same last name were probably married.

CONCLUSIONS OF LAW

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

Generally

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

Death Benefits

B. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1)(a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1)(c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate."

C. Section 8-42-115(1)(b), C.R.S., states: "(1) In case death proximately results from the injury, the benefits shall be in the amount and to the persons following: . . . (b) If there are wholly dependent persons at the time of death, the payment shall be

in accordance with the provisions of § 8-42-114." If there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. § 8-42-119, C.R.S.

D. There are no precise statutory definitions of what constitutes a wholly dependent person verses a partially dependent person or how such classes of dependents must be determined financially. Partial dependents are simply noted by statute to be entitled to receive "only that portion of the benefits provided for those wholly dependent which the average amount of the wages regularly contributed by the deceased to such partial dependents at and for a reasonable time immediately prior to the injury bore to the total income of the dependents during the same time." *Id.*

E. In this case, Claimant contends that at the time of Mr. [Deceased Claimant, redacted]'s death she was wholly dependent on his income. In support of her contention Claimant points out that, [Deceased Claimant, redacted]' average weekly wage was "greater in a single week than [her] gross compensation for the preceding 3 months." According to Claimant, the entire household lived on [Deceased Claimant, redacted] wages while her financial contribution to the household was less than 1% at the time of his death. Because dependency is fixed as of the date of injury (death), Claimant contends that she, in addition to NH[Dependent minor], as his dependent child, was wholly dependent on [Deceased Claimant, redacted] at the time of his death.

F. Assuming that Claimant is considered to be [Deceased Claimant, redacted]' common law spouse, Respondents contend that she should be classified as a partial dependent based upon her earnings in the months leading up to [Deceased Claimant, redacted] untimely death. As provided for by statute, if there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. C.R.S. § 8-42-119. Therefore, if Claimant was only partially dependent on [Deceased Claimant, redacted]' income at the time of his death, Respondents argue that she would be unable to recover any benefits during NH[Dependent minor]'s period of entitlement as a stipulated wholly dependent child.

G. In this case, Respondents note that the Act does not define how much income a person must earn from other sources, to be dependent upon a worker who suffers a fatal accident, in order to be classified as a partially verses a wholly dependent individual. According to Respondents, the guidance provided by the Act revolves around the discussion of distribution of benefits amongst partially dependent individuals, stated to be the "average amount of the wages regularly contributed by the deceased to such partial dependents at and for a reasonable time immediately prior to the injury bore to the total income of the dependents during the same time." C.R.S. § 8-42-119. In essence, Respondents contend that if an alleged dependent receives income from other sources and not wholly from the deceased worker, than those dependents must be paid out in a proportion similar to the proportion of support provided by the deceased worker in life. With this guidance as the closest definition to what constitutes a partially dependent individual, Respondents argue that an individual who receives some income from sources other than the income provided by the deceased would, by definition, be a

partial dependent. Within this context, Respondents assert that Claimant should be considered a partially dependent individual at best.

H. In support of their contention, Respondents note that in the months preceding [Deceased Claimant, redacted]' passing, Claimant had returned to work cleaning houses, which reasonably would have continued into the foreseeable future even absent the present circumstances necessitating her return to work. While her average monthly earnings ($638.33) for the three-month period extending from February – April 2021 were not "excessive" in comparison to [Deceased Claimant, redacted]' wages, Respondent's contend that Claimant's wages[3] were not insignificant and must be accounted for when determining her level of dependency. Respondents argue further that the case for Claimant being considered partially dependent only is strengthened if the period for receipt of income stretches back into 2020 when she was working as general manager at Mountain Pizza. In that employment, Claimant agreed she was on track to earn about $75,000 - $80,000 before she quit. Regardless of when the analysis is applied, Respondents contend that Claimant's receipt of income from her own employment renders her a partially dependent beneficiary only. Accordingly, Respondents assert that NH[Dependent minor] is the sole wholly dependent beneficiary entitled to receive death benefits in this case. Per Respondents, because Claimant is a partially dependent only, she is not entitled to recover any death benefits until NH[Dependent minor]'s period of entitlement ends, and only then if she is unmarried.

I. While Respondents raise questions regarding Claimant's dependency status based upon her earnings in the months leading up to [Deceased Claimant, redacted] passing, the evidence presented persuades the ALJ that Claimant's employment and receipt of wages by itself is insufficient to overcome the presumption of dependency for a widowed spouse. Rather, there must be proof that [Deceased Claimant, redacted] provided no support to Claimant. *Clarke v. Clarke*, 95 Colo. 409, 36 P.2d 461 (1934); See also, *Diamond Industries, Division of Medford Corp. v. Claimant in Death of Crouse*, 589 P.2d 1383 (Colo.App. 1978)(rejecting the argument that widowed spouse was only entitled to 43% of the death benefits because the deceased contributed only 43% of the income earn by the couple). Even where the decedent provides no support to the spouse, the need for support may be sufficient to prove dependency. *Tilley v. Bill's Sinclair*, 524 P.2d 314 (Colo.App. 1974). Because dependency is fixed at the time of death, the ALJ finds Respondents' suggestion that Claimant was not dependent because of wages she earned in 2020, before [Deceased Claimant, redacted] death, is at odds with the Act and unpersuasive. Here, the evidence presented supports a conclusion that Claimant was dependent on [Deceased Claimant, redacted]' income despite the wages she earned cleaning houses at the time of his passing. Indeed, the ALJ finds/concludes that Claimant's aggregate earnings ($1,915.00) over the three months preceding [Deceased Claimant, redacted] death, which as noted, is less than a single week of [Deceased Claimant, redacted] stipulated earnings ($2,537.93), strongly supports a conclusion that she was dependent on his income. Nonetheless, the question of whether Claimant was in a common law marriage

[3] Excluding child support payments from Mr. G[Redacted] when made periodically, which was a source of income to Claimant and LG[Redacted] that presumably benefited the household.

with [Deceased Claimant, redacted] at the time of his death must be answered before any award of death benefits can be issued to her in this case.

Common Law Marriage

J. Colorado has long recognized common law marriages. See *Taylor v. Taylor*, 50 P. 1049 (Colo.App. 1897). Since 1987, the pivotal case in Colorado outlining the requirements for establishing a common law marriage has been *People v. Lucero*, 747 P.2d 660 (Colo.1987). In *Lucero*, the Colorado Supreme Court stated that a common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. In doing so, it focused on cohabitation of the parties and their reputation in the community as the two primary factors to evaluate an intention to be married, although any evidence manifesting such an intention to establish a marriage could fulfill the burden of proof. *See Id.* at p. 665.

K. Recently the Colorado Supreme Court revisited the standard and refined the test to emphasize the parties' mutual agreement to enter into a marital relationship in the context of a trio of opinions issued on January 11, 2021. The primary case setting forth the Court's new standard was *Hogsett v. Neale*, 478 P.3d 713 (Colo. 2021). It elaborated on the new standard and need to review the totality of the circumstances in the case of *In re Estate of Yudkin*, 478 P.3d 732 (Colo. 2021).[4] In *Hogsett*, the Court modified the applicable test to acknowledge modern norms, which rendered the more traditional indicia of marriage no longer exclusive to marital relationships, i.e. those recognized by *Lucero* as typically indicative of a marital relationship because that indicia is often present in non-marital relationships currently. The new test established by *Hogsett*, while retaining elements from *Lucero*, is essentially that a common law marriage is "established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, manifested by conduct reflecting that agreement." *Hogsett*, 478 P.3d at 715. The *Hogsett* court elaborated that marriage represents "a deeply personal commitment to another human being . . . and the decision whether and whom to marry is among life's momentous acts of self-definition." *Id.* at p. 719, citing *Goodrige v. Dep't of Pub. Health*, 798 N.E.2d at 954-55 (2003). The core inquiry under this standard is whether the parties intended to enter into a truly marital relationship involving a committed, intimate relationship of mutual support and obligation. *Id.* at p. 715. The necessity to show an agreement to marry is absolute in this standard, although the Court retained the elements of *Lucero* that such an agreement could be inferred from the parties' conduct assessed within the context of the overall relationship. *Id.*

L. The *Hogsett* Court further elucidated factors which a Court should examine when necessary to infer an agreement to marry, including instances of shared financial responsibility such as leases, joint bills, filing joint tax returns, evidence of

[4] The third case, *In re Marriage of LaFleur and Pyfer*, 479 P.3d 869 (Colo. 2021), largely focused on the issue of whether same sex couples could prove the existence of a common law entered into prior to same sex marriages before Colorado legally recognized same sex marriages.

estate planning including wills, symbols of commitment (rings), the couples references to each other, and also the more traditional factors such as cohabitation, having children together, and use of surnames. *Id.* at pp. 722-725. However, it also noted the more important factors emphasized by *Lucero*, namely cohabitation, using each other's surnames, and having children together, were less decisive in modern times given the frequency with which those factors may be present in couples who both considered themselves married and not. *Id.* at pp. 722-723. The Supreme Court emphasized these points further in the *Yudkin* case, noting the purpose of a court's examination is to discover the intent of the parties to be married, not "test the couple's agreement to marry against an outdated marital ideal." *Yudkin*, 478 P.3d at 718.

M. In this case, the evidence establishes that Claimant and [Deceased Claimant, redacted] were in a long term personal relationship with a level of commitment that at one time resulted in a formal marriage. Nonetheless, their relationship deteriorated and they divorced. Moreover, the ALJ agrees with Respondents that the course of their relationship following their divorce up to and at the time of [Deceased Claimant, redacted]' passing did not mirror the "momentous act of self-definition" the Colorado Supreme Court contemplated when deciding to refine the doctrine of common law marriage. The core query of *Hogsett* is to identify the existence of an intent to be married. Here, Claimant testified that after their divorce she and [Deceased Claimant, redacted] had no plans on becoming formally married again, they did not discuss it, and it otherwise was not manifested in any express agreement. Absent that express agreement, the ALJ may try to infer an agreement from the overall circumstances presented. While the ALJ is able to infer from the evidence the two appeared to care for each other and NH[Dependent minor]'s interests, there is insufficient evidence for the ALJ conclude that those factors rose to an intent to become married again subsequent to their formal divorce.

N. The on again – off again nature of Claimant and [Deceased Claimant, redacted]' relationship does not reflect a series of events for the last several years from which agreement to marry can be inferred. Indeed, during the course of their formal marriage, Claimant and [Deceased Claimant, redacted] separated and Claimant then entered into another long-term relationship with Mr. G[Redacted], moving in with him and conceiving his child, LG[Redacted], all while still being formally married to [Deceased Claimant, redacted]. Claimant and [Deceased Claimant, redacted]' only joint child was conceived in this period while Claimant was in multiple intimate relationships at the same time.

O. Moreover, after the reconciliation from their first separation, Claimant and [Deceased Claimant, redacted] divorced, choosing to sever the marital commitment they made to each other. Claimant testified that they simply did not think much of the divorce, which she characterized as being done almost impulsively. While her characterization of the divorce may have been meant to minimize the significance of it, in doing so she also demonstrated, at least her view (if not her and [Deceased Claimant, redacted]' combined) that whether to become or remain married was less than the "momentous act(s) of self-definition," as the *Hogsett* Court discussed. That

lack of commitment to the institution of marriage mirrors the events of years earlier when they separated and Claimant entered into her long-term relationship with Mr. G[Redacted]. The course of their relationship has not been demonstrated to have been one of complete commitment even when formally married.

P. As found, Claimant testified that she and [Deceased Claimant, redacted]' relationship was "perfect" when he passed away in terms of them not fighting as often as they previously had, but that does not equate under the principles announced in *Hogsett* to constitute a marriage. As the *Yudkin* Court noted, it is the ALJ's role to discover the intent of the parties to be married, rather than apply a vague test as to whether at the time of [Deceased Claimant, redacted]' passing a traditional picture of a happy home was sufficient to apply an outdated ideal of marriage. It certainly cannot be said they were common law married after their formal divorce when they were voluntarily living apart and simply dating. While their resumption of cohabitation with the children could constitute some indicia of a marital relationship, the Court in *Hogsett* was quick to note that this holdover factor from *Lucero* is no longer reliable to demarcate a boundary between marital and non-marital unions because many unmarried couples live and have children together. The evidence presented as a whole provides scant proof that Claimant and [Deceased Claimant, redacted] transitioned back into a marital relationship after moving in together in 2018. Indeed, the evidence presented persuades the ALJ that neither Claimant nor [Deceased Claimant, redacted] considered the legal ramifications of their prior divorce and indicate in any form a desire to re-establish a relationship, which carried the attributes of a legally binding relationship. They never executed any estate planning documents. They filed separate tax returns in a manner that required the parties not be married. The entirety of both their assets were owned individually, in the form of bank accounts, credits cards, and vehicles.[5] Even the home in which they lived was owned individually by [Deceased Claimant, redacted]. From every aspect in which Claimant and [Deceased Claimant, redacted] had set up their lives, there was no sign of an intent to enter into the legal institution of marriage. See *Sara Ortega v. Blue Star Holding Company*, W.C. No. 4-661-263-02 (ICAO, April 17, 2018). This fact is even more striking in light of their prior formal marriage and the presumed understanding the two had about the role of the legal process in a marriage, regardless of the extent of their sophistication concerning legal issues. Absent the presentation of additional indicia of an intent to enter into a true marital relationship, the ALJ concludes Claimant has failed to establish that she was common law married to [Deceased Claimant, redacted] at the time of his passing.

Q. Perhaps by habit and history from their prior formal marriage (e.g. use of the [Deceased Claimant, redacted]'s surname and referring to each other as spouses, although the evidence of the latter presented at hearing was minimal), Claimant may have felt as if she was married in the context of a social institution, but there is no persuasive evidence that she and [Deceased Claimant, redacted] agreed to enter into the *legal* institution of marriage. *See Hogsett*, 478 P.3d at 715 (stating common law

[5] As noted, the identity of any person entitled to [Deceased Claimant, redacted] retirement funds and/or life insurance is unknown.

marriage is "established by the *mutual* consent or *agreement* of the couple to enter the legal and social institution of marriage.")(Emphasis added).

R. As noted, the only peripheral evidence of a marital relationship presented besides Claimant's own testimony was the testimony of Ms. Tullo stating she perhaps recalled Claimant or [Deceased Claimant, redacted] introducing each other as spouses on one occasion, which the ALJ concludes is a fact somewhat counterproductive to Claimant's case when that single occasion is weighed against Ms. Tullo's testimony about the frequency with which the families spent time together. Ms. Tullo otherwise admitted her assumption that Claimant and [Deceased Claimant, redacted] were married was based upon the outdated societal norms the Supreme Court has steered the common law marriage standard away from; i.e. cohabitation, raising kids, and use of a common surname. In this case, Claimant's use of a common surname must also be viewed in light of the context of the parties' entire relationship. The two had formally divorced, but Claimant by her own testimony was not aware her name had been formally changed as part of the divorce and she continued to use the [Deceased Claimant, redacted]'s name even after they were divorced and living apart. Her use of the [Deceased Claimant, redacted]'s name was therefore ongoing due solely to her misunderstanding that the divorce had not affected the status of her legal name.

S. Based upon the principles announced in Hogsett and Yudkin, the ALJ finds/concludes that there is insufficient evidence to prove the existence of a common law marriage in this case. Indeed, based upon Claimant's testimony that the two never talked about remarrying following their divorce, the ALJ finds a lack of evidence to support a conclusion that she and [Deceased Claimant, redacted] consented or expressed a mutual agreement to enter into the social and legal institution of marriage. Moreover, there is insufficient indicia to infer such an agreement to the extent required by the Supreme Court under the aforementioned cases. Because Claimant has failed to prove the existence of a common law marriage, her claim for death benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for death benefits is denied and dismissed.

2. NH[Redacted, Dependent minor] is the sole wholly dependent person entitled to recover death benefits under the Act in this case. Respondents shall pay such benefits to NH[Dependent minor] from the date of [Deceased Claimant, redacted]'s passing until said benefits can be terminated by operation of law.

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

DATED: February 10, 2022

/s/ Richard M. Lamphere_____

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

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

ISSUES

The issues set for determination included:

- Did Respondents prove by a preponderance of the evidence that Claimant sustained an injury as a result of an intervening event that occurred at Lapels Cleaners, on or around October 14, 2010, sufficient to sever the causal relationship between her present symptoms and her July 29, 2005 injury at Craig Hospital?

- Are further medical maintenance benefits provided by Michael Gesquiere, M.D. reasonable, necessary, or related to the July 29, 2005 work injury?

- Did Respondents prove, by a preponderance of the evidence, that the affirmative defense of statute of limitations against a reopening of an award for indemnity benefits is applicable?

- Is Claimant is entitled to TTD benefits from December 31, 2010 to ongoing and TPD benefits from April 30, 2010 to February 4, 201?

- Is Claimant entitled to a higher average weekly wage ("AWW")?

- Is Claimant entitled to penalties?

PROCEDURAL HISTORY

This case had an extensive procedural history before the record was closed. There were two hearings in 2016 for which counsel for Claimant sought a continuance, which was opposed by Respondents. After the June 30, 2017 hearing was completed, the case was set for a full day hearing on September 13, 2017, which was continued at Claimant's request. The parties then agreed to complete the testimony by deposition. The AWW issue was added by Order, dated August 29, 2019.

The record then remained open for the completion of Dr. Gesquiere's deposition. A dispute arose concerning the completion of the deposition, as well as payment for the transcript. This dispute was resolved by the January 31, 2018 Order.

The case was then held in abeyance pursuant to the agreement of the parties and the Order issued by the undersigned ALJ on November 7, 2019. This Order was issued to allow the parties to participate in a settlement conference.

In January 2020, a status update was requested by the undersigned and ultimately the parties advised the Court an Order was requested. Hearing transcripts

were subsequently lodged with the Court. After a delay, Volumes I, II and III of the transcripts of Dr. Gesquiere's deposition (taken on three separate days) were lodged with the Court on June 15, 2020.

The undersigned issued a Summary Order on March 26, 2021. Claimant requested a full order on March 30, 2021. An Amended proposed Order was filed on behalf of Respondents. This Order follows.

STIPULATIONS

The parties reached the following Stipulations:

1. The issue of penalties endorsed by Claimant in her February 29, 2016 Response to Application for Hearing ("RAH") was resolved pursuant to the parties' August 26, 2016 Joint Stipulation.

2. The parties agreed that Dr. Michael Gesquiere is an Authorized Treating Physician ("ATP") per the parties' July 30, 2015 Joint Stipulation.

3. The parties agreed to payment/repayment of the third deposition of Dr. Gesquiere (which occurred on June 6, 2018) in accordance with the parties' September 21, 2017 Joint Stipulation and January 31, 2018 Order.

The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant worked as a rehabilitation technician at Employer.

2. There was no evidence in the record which showed that Claimant suffered an injury to or required treatment for her cervical spine before 2005. There was no evidence Claimant had physical restrictions before her work injury. Claimant treated for headaches in 1997, but there was no evidence in the record that she required treatment for headaches in the five years before the work injury.

3. On July 29, 2005, Claimant suffered an admitted industrial injury while working for Employer. She was assisting a patient into a wheelchair when the patient became agitated and grabbed her neck. Claimant testified the patient hung onto her neck for several minutes.

4. Claimant sustained an injury to her neck and shoulder. Claimant testified she felt neck pain and developed a headache as a result of this injury.

5. Claimant initially received conservative treatment from ATP-s designated by Employer for her injury, including Hugh Macaulay, M.D. In the initial evaluation on July 29, 2005, Dr. Macaulay diagnosed a cervical strain and headaches, secondary to

the strain. Claimant received treatment recommended by Dr. Macaulay, which included medications and physical therapy ("PT").

6. Claimant's report of symptoms increased over time and Dr. Macaulay referred her for EMG testing, which took place on September 6, 2005 with David Reinhard, M.D. The EMG performed on this date did not show evidence of cervical radiculopathy or brachial plexopathy. The EMG showed mild to moderate median neuropathy (carpal tunnel syndrome) at the right wrist, which Dr. Reinhard opined was not work-related.

7. On December 15, 2005, Claimant was evaluated by Joel L Cohen, Ph.D. for the emotional sequalae from her work-related injury. Claimant was described as pleasant, but quite distressed frustrated by the persistent nature of her pain. Dr. Cohen's psychological diagnoses included both adjustment reaction with mixed emotional features, as well as a diagnosis of psychological factors affecting physical condition. He recommended six to eight sessions of psychotherapy. Claimant began psychotherapy, seeing Dr. Cohen in follow-up on December 28, 2005, January 4, 12, 2006, with some gradual improvement noted. The ALJ found the need for psychotherapy was directly related to the work injury

8. Claimant returned to Dr. Macaulay on January 25, 2006, with complaints of worsening headaches and neck pain with no aggravating factors, including work. Dr. Macaulay noted that Claimant underwent an MRI which showed a mild disc bulge at C5-6 on the right with possible nerve impingement. Claimant denied radicular symptoms. Dr. Macaulay's assessment was: cervical strain. Dr. Macaulay noted that the trigger point injections performed by Christopher Lafontano, D.O. (in August 2005)[1] were not overly beneficial and referred Claimant for a second opinion with Scott Primack, M.D.

9. Claimant was evaluated by Dr. Primack on January 27, 2006. Claimant reported symptoms of ongoing neck pain and radiating symptoms going into the right upper extremity. Dr. Primack's diagnoses were: cervical spine/right upper extremity-EMG/NCV was essentially unremarkable, but the cervical MRI indicated some effacement of the exiting right C6 nerve root. Claimant had been through rehabilitation and trigger point injections. Dr. Primack recommended a right C6 epidural steroid injection (ESI). The ALJ concluded this treatment was recommended because of Claimant's symptoms and the objective evidence of effacement present on the MRI.[2]

10. Claimant underwent the epidural steroid injection on February 2, 2006 which was administered by Floyd Ring, M.D. Dr. Ring noted that Claimant had no true radicular components associated with the cervical spine but had numbness and tingling into the fourth and fifth digits, as well as somewhat in the third. Claimant reported

[1] Dr. LaFontano's assessment was: somatic dysfunction of the cervical, thoracic and ribs; myalgia; cervicalgia and muscle spasm. Claimant's Exhibit 15, p. 356.

[2] Exhibit 15, p. 391.

decreased neck pain and headaches during a follow-up visit with Dr. Macaulay on February 7, 2006.

11. Claimant returned to Dr. Cohen on February 9, 16, March 2, 2006 and was making progress with regard to reducing her stress level and depression. The ALJ noted these records documented a direct connection between Claimant's emotional issues and the work injury.

12. Claimant underwent another ESI performed by Dr. Ring on March 28, 2006, for complaints of C7 distribution right arm paresthesias. She said she experienced some relief in the arm, but intensified pain in the neck.[3]

13. In the April 11, 2006 evaluation, Dr. Macaulay found that the right upper extremity dermatomes appeared appropriately innervated. Claimant continued to experience neck and upper extremity symptoms. In his report dated May 5, 2005, Dr. Macaulay diagnosed Claimant with cervical spine strain; right upper extremity parasthesias; C5-6 disk protrusion. Dr. Macaulay then referred Claimant to Andrew Daily, M.D.

14. In the neurosurgical consultation performed by Dr. Dailey on May 17, 2006, he noted Claimant had developed left upper extremity paresthesias after the injury. An MRI performed on this date showed straightening and a reversal of the cervical curvature centered at C5-6. There was a C5-6 disc bulge just touching the cord. Dr. Daily subsequently recommended a cervical discectomy at C5-6 for progressive complaints and significant degeneration. The ALJ determined Claimant required this treatment of her neck, headaches and both upper extremities as a result of the July 29, 2005 work injury.

15. On June 12, 2006, Claimant was evaluated by Stephen Johnson, M.D. [neurosurgeon]. Dr. Johnson noted that Claimant had an ESI at C4-5 with Dr. Ring that helped her headache symptoms. Dr. Johnson stated that Claimant also had a C7 injection that did not significantly help her symptoms. Dr. Johnson found Claimant initially had left wrist weakness, with mild discomfort on neck extension and finger extension on the left. Further testing was within normal limits. Dr. Johnson agreed with Dr. Dailey that Claimant was symptomatic, at least in part, from the disc disease at C5-6 and that she would benefit from the proposed discectomy and fusion at C5-6.

16. Claimant saw Dr. Cohen at regular intervals for the first six months of 2006. In the report following the session on June 16, 2020, Dr. Cohen noted that although Claimant was distressed, her situation was more stable than when he originally met with her. Claimant reported difficulties with depression that were tied to her physical symptoms. Dr. Cohen recommended that Claimant's psychotherapy continue after the surgery.

[3] Exhibit 15, pp. 225-227.

17. On June 20, 2006, Claimant underwent an anterior cervical discectomy and allograft fusion at C5-6. The surgery was performed by Dr. Dailey, who opined conservative treatment measures had failed and surgery was required.

18. Following the surgery, Claimant returned to Dr. Macaulay. Claimant initially reported that her left arm pain was gone at the time of the June 26, 2006 evaluation. By the next day, however, she told Dr. Macaulay that she was having fairly significant discomfort in her left upper extremity, but that it was somewhat less than prior to her surgery.

19. Claimant complained of neck pain and bilateral shoulder soreness in the follow-up evaluation on July 29, 2006 appointment with Dr. Macaulay. At that time, Claimant denied radicular symptoms, but had hypersensitivity in the medial aspect of the bilateral forearms. On examination, Dr. Macaulay noted Claimant had 5/5 strength in the bilateral upper extremities. Claimant was referred for PT and prescribed medications. In the evaluation on August 11, 2005, Dr. Macaulay found parasthetic sensation extending into the C6 distribution bilaterally. Dr. Macaulay noted that Claimant had 5/5 strength from a motor standpoint with relatively normal range of motion in the hands, elbows, and shoulders.

20. In the August 17, 2006 evaluation with Dr. Macaulay, Claimant complained of neck pain with headache. Dr. Macaulay noted that Claimant had full range of motion ("ROM") in the cervical spine with some decreased active ROM with rotation. Claimant said her right upper extremity felt different, which was reproduced with brachial plexus stretch, especially in the median distribution. On August 25, 2006, Dr. Macaulay indicated that his examination of films showed good stability of the cervical spine with an intact fusion. Claimant continued to have work restrictions and was unable to drive.

21. On October 23, 2006, Claimant underwent additional diagnostic testing for neurological issues with Dr. Reinhard. Claimant had symmetric muscle reflexes in the upper extremities, with no focal motor deficits. Dr. Reinhard found it was a normal EMG/NCS of the upper extremities that showed no electrodiagnostic evidence of cervical radiculopathy, brachial plexopathy, polyneuropathy, or peripheral mononeuropathy.[4] The study showed mild neuropathy at the right wrist, which Dr. Reinhard said was unrelated.

22. After the surgery, Claimant was also saw Dr. Cohen for psychotherapy. The notes from her appointment on October 25, 2006 reflected Claimant's report that her right arm had improved, but she had increased left arm complaints. Claimant continued to receive psychotherapy for depression which was tied to pain complaints.

23. Claimant was re-evaluated by Dr. Macaulay on November 6, 2006, with her chief complains listed as: cervical spine strain; right upper extremity paresthesias;

[4] Exhibit 15, p. 410.

C5-6 protrusions; ACDF, C5-6, 6/20/06. On examination, Claimant had full neck ROM, with myofascial tension found in the upper trapezius musculature, paracervical and parathoracic muscles. Reproduction of symptoms with brachial plexus stretching in the left upper extremity was present in the radial, median and ulnar distributions.

24. On January 26, 2007, Dr. Macaulay determined Claimant was at MMI. Claimant had pin in the cervical spine, as well as right and left upper extremities. At that evaluation, Claimant's diagnoses included: cervical spine strain; right upper extremity paresthesias; C5-6 disc protrusion; anterior cervical discectomy and fusion, C5-6. Claimant was assigned a 24% whole person impairment, which included a medical impairment for the cervical spine, as well as loss of range of motion. The ALJ concluded the diagnosis of right upper extremity paresthesias was evidence of an injury to this area of Claimant's body.

25. Respondents filed a Final Admission of Liability ("FAL") on or about February 1, 2007. The FAL admitted for Dr. Macaulay's permanent medical impairment rating, as well as admitting for medical maintenance benefits after MMI that were related, reasonable and necessary. The FAL reflected payment of temporary total disability ("TTD") benefits through August 14, 2006 and temporary partial disability ("TPD") benefits paid through September 4, 2006. Permanent partial disability ("PPD") benefits based upon the medical impairment rating were to be paid through June 24, 2009.

26. Claimant returned to work for Employer in 2007 and performed duties other than those when she was injured. Claimant left this employment as of January 26, 2007.[5] The ALJ concluded this was unrelated to the work injury.

27. The ALJ found that the medical records admitted at hearing documented right upper extremity pain, neck pain and paresthesias for which Claimant required treatment after the July 29, 2005 work injury. Those symptoms were reported by Claimant after Dr. Macaluay determined she was at MMI. Claimant also suffered from depression and required treatment after the July 29, 2005 work injury. Claimant also reported headaches to her treating physicians, which continued after she was found to be at MMI.

28. After she was found to be at MMI, Claimant testified she had headaches, neck pain, right shoulder pain, right thoracic pain from the shoulder blade to the spine, as well as muscle spasms.[6] Claimant was credible when describing these symptoms.

29. Claimant continued to treat with Dr. Cohen in 2007 and the records reflected regular psychotherapy visits. Dr. Cohen noted Claimant required treatment for

[5] Hearing Transcript Vol II, pp. 60:1-5.

[6] Hearing Transcript Vol II, pp. 68:1-14.

depression related to symptoms in the notes dated May 16, October 22, November 5, 2007 and January 7, 2008.

30. Claimant returned to Dr. Macaulay on April 25, 2008 and reported 10/10 pain localized in the neck, head, and shoulders. Dr. Macaulay noted myofascial tension throughout the upper extremities and especially the paracervical musculature, limited ROM with active and passive testing, subjective complaints of decreased sensation to light touch in bilateral upper extremities, what right worse than left. Dr. Macaulay prescribed dilaudid and stated that Claimant was to go to the emergency room if her symptoms worsened. On April 28, 2008, Claimant had continued complaints of bilateral upper extremity numbness. Dr. Macaulay recommended a repeat MRI of the cervical spine with gadolinium and bilateral upper extremity EMG/NCVs.

31. On May 2, 2008, a repeat cervical MRI showed minor disc bulging at C6-7, causing mild left-sided foraminal narrowing. This was objective evidence which documented the condition of Claimant's spine, including a potential pain generator.

32. On May 14, 2008, Claimant presented at the Emergency Department at Swedish Medical Center (southwest) ["Swedish"] for headache symptoms. She was treated with a course of Morphine and Zofran. Claimant also treated for headaches at the ED at Swedish on January 21, 2010 and September 13, 2010. She was also treated for chronic back and neck pain at Swedish on September 27, 2010, January 24, 2011 and August 6, 2011. Claimant treated for headaches and chronic upper extremity pain on July 1, 2013. The ALJ found this hospital treatment was causally related to the July 29, 2005 work injury.

33. James Ogsbury, III, M.D. evaluated Claimant on May 21, 2008 and characterized the disc protrusion as "significant" in his May 21, 2008 report and diagnosed status post ACDFP C5/6; persistent cervical nerve root irritation syndrome with axial pain and headache predominant and non-radicular right, greater than leg arm pain and numbness. Dr. Ogsbury noted Claimant's symptom complex had not resolved since the surgery.[7] The ALJ credited this opinion.

34. Claimant treated with Antony Euser, D.O. from 2009 through March 10, 2015. Dr. Euser initially evaluated Claimant on November 5, 2009, at which time he said he was awaiting her full chart. Claimant was noted to be on maintenance care. Dr. Euser evaluated Claimant on November 25, 2009, January 25, February 4 and March 4, 2010.

35. When Dr. Euser evaluated Claimant on March 4, 2010, she was noted to be working under restrictions and Dr. Euser's assessment was: cervical spine fusion and he monitored/refilled Claimant's prescriptions. Claimant was found to be not at MMI. This was before Claimant began working at Lapel's Cleaners. The ALJ found

[7] Exhibit 15, p. 841.

Claimant's worsening symptoms, as well as the fact she was no longer at MMI was related to her original work injury.

36. Dr. Euser saw Claimant at regular intervals, including an evaluation on April 8, 2010. As part of these evaluations, Dr. Euser monitored her symptoms and prescribed medications. In the evaluation on April 8, 2010, Claimant's headaches were noted to have continued and a CT scan was recommended. David Solsberg, M.D. noted the CT scan noted no intracranial abnormality. Dr. Euser's assessment was: cervical spine fusion; headache and hypothyroidism. The ALJ found that Dr. Euser ordered the CT scan because of symptoms related to the July 29, 2005 work injury.

37. Dr. Euser examined Claimant on May 6, June 3, July 8, August 5, September 16 and October 13, 2010. In the June 3, 2010 report, he noted Claimant was experiencing more pain, as her job had changed. Claimant did not identify a discrete injury or trauma related to this employment, nor did Dr. Euser conclude this was a new injury. These records reflected the continued need to treat cervical symtoms.

38. Claimant worked for approximately 14-15 months at Gold Label Cleaners from approximately November 2008-August 2010. Claimant also worked for a period answering telephones at home. No employment or wage records were admitted related to this employment.

39. Dr. Euser completed a medical necessity form for Insurer on October 13, 2010, in which he opined Claimant's depression was secondary to the July 29, 2005 work injury. Dr. Euser noted Claimant had experienced a severe increase in headaches, neck pain and right shoulder/trapezius pain, as well as increased numbness in the right arm. This record was evidence that Claimant's symptoms were related to the July 29, 2005 work injury.

40. Claimant began work at Lapel's Cleaners on approximately April 20, 2010. Claimant's payroll records from April 30-December 31, 2010 from Lapel's Dry Cleaners were admitted into evidence.[8] Claimant testified that the job was supposed to be easier, but she performed the job of a presser. Claimant testified she did not reinjure herself while working at Lapel's. Claimant left this employment in January 2011 and did not work after that time.[9] Claimant advised her healthcare providers that she did not think this was a separate injury. The medical records during this period of time did not contain direct references to an increase in symptoms related to the Lapel's employment

41. Dr. Euser continued to treat Claimant and evaluated her on November 18, 2010, January 6 & 25, February 10, March 3, April 7 & 28, May 5, June 2, July 7, August 4, September 1, November 3, 2011. During these appointments, Dr. Euser

[8] Exhibit 16.

[9] This was confirmed by the July 26, 2012 SSA Decision-Exhibit 17.

concluded Claimant was no longer at MMI as a result of increased pain symptoms. However, Claimant's treatment was identified as "maintenance" in these records. The ALJ inferred that this treatment was required to maintain MMI and prevent the deterioration of Claimant's condition.

42. For purposes of the statute of limitations on re-opening indemnity benefits, the deadline for requesting TDD/TPD benefits was June 24, 2011.

43. There was no evidence in the record that Claimant filed an Application for Hearing ("AFH") on or before June 24, 2011 in which she requested indemnity benefits.

44. On November 29, 2011, Claimant filed a Petition to Reopen for worsening of condition. An AFH (Expedited) was filed concurrently that same day.[10] Respondents filed a Response to the AFH (Expedited) on December 2, 2011. No hearing took place on this AFH.

45. An AFH (Expedited) was filed by Claimant on February 6, 2012 and Respondents' RAH was filed on February 8, 2012.[11]

46. On February 29, 2012, Claimant underwent an independent medical examination with Brian Reiss, M.D., at the request of Respondents. At that time, Claimant noted the headaches were most bothersome to her and she was also experiencing neck pain. Claimant stated her right upper extremity felt abnormal/dead and she also experienced scapular pain when she reached above her head, along with spasms. Claimant had constant numbness to her anterior arm, dorsal forearm and dorsum of her hand (presumably on the right side), as she denied left upper extremity complaints. Dr. Reese noted Claimant's neck rotation was limited to the right.

47. Dr. Reiss stated Claimant's current diagnoses were chronic back pain and chronic headaches, intermittent falling. Dr. Reiss said the first of these diagnoses were be causally related to a work injury, but he did not believe September 1, 2011 fall was related to the work injury. Dr. Reiss said Claimant remained at MMI. Dr. Reiss indicated it was not clear why or if her falling was related to the cervical spine injury. There was no evidence of cord injury or cord compression or myelopathy and her cervical discectomy and fusion or solid. Dr. Reiss opined it would be highly unusual to associate a problem with falling with a well-healed one level neck surgery.

48. Dr. Reiss noted treatment for her ongoing chronic neck pain and headaches was problematic. He suggested consideration of reevaluation with the rehabilitation for physician and possibly some PT, as well as modifications of medication. The medications that were reasonably related to retreatment for work injury included Lexapro, gabapentin, Cymbalta, bystolic and metaxalone. The ALJ inferred

[10] Exhibits 5 and 6.

[11] Exhibits 8 and 9, respectively.

that Dr. Reiss was not questioning that Claimant continued to require to treatment and medications, but rather was recommending an evaluation to determine the type and duration of said treatment.

49. A hearing took place on July 6, 2012, after which time ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order on July 30, 2012. As part of this Order, Judge Felter concluded Claimant proved a worsening of condition and relied upon the testimony of Dr. Euser, whom he found credible. ALJ Felter found Respondents did not timely raise the statute of limitations defense to the Petition to Reopen and, therefore, waived this defense.

50. The instant case was reopened by ALJ Felter's Order, pursuant § 8-43-303(1), C.R.S. The reopening was as to medical benefits only and all other issues were reserved. A timely appeal was filed and on January 17, 2013, the Industrial Claim Appeals Office dismissed an appeal as interlocutory.[12] Pursuant to ALJ Felter's Order, Claimant was entitled to medical benefits. The medical records admitted at hearing reflected these were provided by Dr. Euser in this timeframe.

51. Even though the issue of indemnity benefits was reserved by virtue of ALJ Felter's Order, Claimant did not request those benefits before June 24, 2011, nor was an AFH filed requesting TTD or TPD benefits in 2012 or 2013.

52. Dr. Euser also evaluated Claimant on January 10, February 9 & 17, March 1, April 12, May 7 & 10, July 6, August 17, September 14, October 12 & 24, November 9, December 7, 2012. During this time, Dr. Euser continued to prescribe medications and also made referrals for Claimant. All of these appointments were described by Dr. Euser as "maintenance". The ALJ inferred Dr. Euser was of the opinion that the treatment he provided to Claimant was reasonable and necessary, as well as related to the work injury.

53. Claimant returned to Dr. Euser on January 4, 25, 29, March 1, April 19, May 28, 24, June 29, 2013.[13] A CT of the head and cervical spine was ordered by Dr. Euser, which was found to be within normal limits.

54. Dr. Euser evaluated Claimant on August 2 & 30, October 4, November 1, 4, December 6 & 14, 2013, January 3, March 7, June 2 & 20, July 11, September 5, 2014. Dr. Euser's assessment included headache; pain in joint in shoulder region; pain in thoracic spine; unspecified hypothyroidism; unspecified back disorders. Dr. Euser's records during this period of time reflected a reference to the July 29, 2005 work injury and the ALJ inferred Dr. Euser concluded the treatment required because of the injury.

[12] Exhibit 12.

[13] Hearing Transcript Vol II, pp. 58:10-12; 59:9-10.

55. The ALJ concluded from Dr. Euser's treatment records that the treatment he rendered was related to the work injury Claimant sustained while working for Employer. The ALJ incorporated by reference ALJ Felter's conclusions regarding Dr. Euser's credibility when the issue of re-opening was adjudicated. Further, based upon Dr. Euser's treatment records and his deposition testimony, the ALJ concluded Claimant's July 29, 2005 work-related injury was the cause for her need for treatment.

56. Claimant filed a Worker's Claim for Compensation against Lapel's Dry Cleaners on March 11, 2013.[14] The Claimant represented that the body parts affected included her neck, headaches, and bilateral upper extremities. Claimant listed the injury as an occupational disease with a date of injury as December 31, 2010.

57. There was no evidence in the record that a hearing was held in this case or that it was adjudicated.

58. Dr. Euser referred Claimant to Dr. Gesquiere and Claimant began treating with Dr. Gesquiere November 13, 2014. Claimant saw Dr. Gesquiere on multiple occasions from November 2014 to 2017.

59. When Claimant was evaluated on November 13, 2014 by Dr. Gesquiere, she complained of chronic right shoulder, neck and right upper extremity, headaches and migraine type pain. On examination, Claimant had significant tenderness over the right except for the talus muscle and the occipital nerve, along with tenderness over the cervical paraspinal right trapezius and rhomboid muscle. Decreased ROM was noted in the cervical spine.

60. Dr. Gesquiere's diagnoses were: chronic pain syndrome with opioid tolerance independence-patient is on multimodal therapy; cervical post laminectomy syndrome; cervical radiculopathy; right carpal tunnel syndrome; migraine headache versus occipital neuralgia. Dr. Gesquiere administered a greater occipital nerve block end right and recommended an MRI of the cervical spine.

61. Claimant underwent an EMG with Levi Miller, M.D. on February 11, 2015. The impression was abnormal and showed chronic denervation and evidence of severe right-sided carpal tunnel. Dr. Levi indicated that the study was essentially unchanged from the July 26, 2012 EMG.[15]

62. On May 25, 2015, Claimant returned to Peak Anesthesia after a repeat C6 ESI and indicated that she had more than 75% relief of pain and a significant decrease in headaches. RHE T at 252. Trigger point injections did not help. Claimant complained of ongoing neck and shoulder pain.

[14] Exhibit V.

[15] Exhibit 15 pp. 422-423.

63. Respondents filed an AFH on January 15, 2016. The AFH requested a hearing on the issues of medical benefits (authorized provider; reasonably necessary), as well as causation and independent intervening injury. Respondents also raised the statute of limitations defense.

64. Claimant filed her RAH on February 29, 2016 and requested a hearing on the medical benefits issues, as well as TTD benefits from December 31, 2010 and ongoing and TPD benefits from April 30, 2010 to February 4, 2011, as well as penalties.[16]

65. Claimant did not request reopening of the claim vis a vis indemnity benefits within six years of the date of injury or two years after the last payment of indemnity benefits was due.

66. The February 29, 2016 RAH filed by Claimant requested an Order reopening the claim with regard to indemnity benefits. The ALJ found Claimant's request for TTD benefits is time-barred.

67. Claimant continued to see Dr. Gesquiere in 2017. The records documented symptoms of cervical and upper extremity pain. The ALJ found the treatment provided by Dr. Gesquiere was to maintain MMI.

68. On May 19, 2017, Claimant underwent a repeat MRI of the cervical spine, upon referral by Dr. Kent Schreiber.[17] The MRI showed new canal stenosis at C3-4 and C4-5, upon comparison with the prior MRI from December 9, 2014. *Id*. The MRI showed mild to moderate foraminal narrowing at C6-7, which was unchanged from the previous MRI.

69. On June 20, 2017, Claimant was evaluated by Dr. Gesquiere for headaches, neck pain, right shoulder and right upper extremity pain. Dr. Gesquiere characterized this as evaluation and continued treatment of ongoing pain symptoms. Dr. Gesquiere noted Claimant had decreased cervical ROM, with significant trigger point bilaterally, worse on the right side. DTR biceps and brachial radialis appeared near symmetical, with the right biceps diminished.

70. Dr. Gesquiere's assessment was: chronic pain syndrome; brachial neuritis or radiculitis NOS; spinal stenosis and cervical region; post laminectomy syndrome, cervical region. After reviewing Claimant's MRI, Dr. Gesquiere referred Claimant to Dr. Mobley for further evaluation of the previous fusion and adjacent segment to see if pain symptoms could be resolved with revision and extension of her cervical fusion as a treatment option. Dr. Gesquiere also recommended Botox treatment. The ALJ inferred Claimant's continued symptoms related to her original injury and fusion surgery. This was borne out by the medical records related to Dr. Gesquiere's treatment.

[16] Claimant's RAH was initially stricken, but reinstated by the Order dated July 27, 2016.

[17] Exhibit U.

71. Claimant requires continuing treatment for her chronic pain which arose out of her July 29, 2005 work injury.

72. Claimant did not prove she was entitled to a higher AWW.

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

CONCLUSIONS OF LAW

General

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

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

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

Statute of Limitations-TTD/TPD

An ALJ has broad discretion to reopen an award under certain circumstances. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). However, a petition to reopen a claim is subject to time limitations. *In Re Eichstedt*, WC 4-528-268 (ICAO, Dec. 22, 2010). A petition must be filed within six years of the date of injury pursuant to §8-43-303(1), C.R.S. *See Thye v. Vermeer Sales and Serv.,* 662 P.2d 188, 190 (Colo. App. 1983).

Furthermore, a Petition to Reopen is barred unless filed within two years of the last payment of benefits or compensation pursuant to § 8-43-303(2), C.R.S. on the ground of fraud, overpayment, error, mistake or change in condition. *Calvert v. Industrial Claim Appeals Office,* 155 P.3d 474, 476-77 (Colo. App. 2006). As found, Claimant did

not request TTD/TPD benefits until after the status of limitations had run. (Findings of Fact 42-43, 51). Claimant did not provide evidence to support an argument that the statute of limitations was tolled. Therefore, the claim for reopening to recover said benefits was time-barred. The ALJ determined there was no legal authority to extend the time in which Claimant could seek indemnity benefits.

***Grover* Medical Benefits**

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once Claimant establishes the probable need for future medical treatment she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chili's Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

As a starting point, the evidence showed Claimant suffered an admitted injury on July 29, 2005 in which she injured her neck and develop symptoms which included upper extremity pain and headaches. Claimant's treatment course was both lengthy and substantial, including a cervical fusion. As determined in Findings of Fact 5–15, Claimant required treatment for symptoms that involved neck pain, upper extremity pain and headaches. Claimant also required psychotherapy, as she had symptoms of depression related to her physical injury. The ALJ concluded these were related to the 2005 injury.

Following the surgery, Claimant required extensive treatment for the cervical spine and upper extremity, as well as for headaches. (Findings of Fact 18–24). The claim was in reopened by the order issued by ALJ Felter and pursuant to said order, claimant was entitled to medical benefits. (Findings of Fact 50–51). Claimant continue to treat with Dr. Euser, who provided active treatment, as well as monitoring Claimant's medications. (Findings of Fact 52–55.) The ALJ concluded that the treatment provided by Dr. Euser was reasonable and necessary, as well as related to the July 29, 2005 injury. Claimant's treatment was then transferred to Dr. Gesquiere, who has provided treatment to the present.

The ALJ concluded Claimant met her burden of proof and showed she was entitled to maintenance medical benefits. The ALJ found it was more probable than not that Claimant's need for treatment to maintain MMI was related to the July 29, 2005 injury. This was based upon the evidence in the form of the records of the physicians (Drs. Euser and Dr. Gesquiere) who provided maintenance medical treatment to Claimant. These ATP-s treated Claimant over a period of years and they conducted

multiple evaluations, as well as documenting Claimant's symptoms. The ALJ credited the opinions of those treating physicians over the various physicians Respondents retained to perform independent medical examinations over the years, which included Dr. Ridings, Dr. Fall, Dr. Reiss and Dr. Rauzzino.

When coming to this conclusion, that ALJ considered Respondents' argument that Claimant developed new symptoms of her time and that the diagnostic testing remained unchanged over the last few years. Based on the totality of the evidence, the ALJ found Claimant consistently reported symptoms that were referable to the cervical spine, which included headaches. (Findings of Fact 52-54, 70-71). Claimant also require treatment for upper extremity symptoms that the ALJ determined was related to the injury. Accordingly, Claimant met her burden of proof and she is entitled to continued maintenance treatment to maintain her condition (and MMI) and to prevent the deterioration of her condition.

Intervening Cause

Respondents contended Claimant's employment (for different employers) and injury at a subsequent employer (Lapel's) constituted an intervening case, which served to cut-off their liability for medical benefits. Respondents had the burden of proof on this issue. On the question of intervening injury, the ALJ determined Respondents did not meet their burden of proof. An intervening injury may sever the causal connection between the injury and Claimant's temporary disability if Claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (Colo.1970).

The ALJ concluded there was insufficient evidence to find that Claimant's work at Lapel's Cleaners was an intervening cause in this case, at least with regard to medical benefits. (Finding of Fact 41). Although her symptoms fluctuated and there were some occasional increased symptoms after her short tenure at that employer, it was more probable than not that Claimant continued to require maintenance treatment because of the original injury. The ALJ concluded Claimant consistently reported cervical symptoms and required treatment for those symptoms. The ALJ found this need for treatment was the result of the original injury. As determined in Findings of Fact 37, 42, 52-55, the medical records related to the treatment rendered by Dr. Euser and Dr. Gesquiere supported this conclusion. Claimant's testimony also supported this conclusion.

AWW

§ 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to

determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages to based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bar, the ALJ determined Claimant did not prove she was entitled to a higher AWW. First, the ALJ concluded that any claim for TTD/TPD benefits was time-barred. Therefore, the request for a higher AWW was moot. Second, Claimant did not establish that she would be entitled to a higher AWW because of a wage loss and lost earning capacity that was tied to the injury. As found, Claimant left the employment with Employer for reasons not related to the subject injury. (Finding of Fact 26). She had other employment following the injury and there was insufficient evidence in the record to establish that Claimant was entitled to a higher AWW, based upon a loss of earning capacity or wage loss. Claimant did not adduce evidence to make such a showing and therefore the claim for a higher AWW fails.

ORDER

IT IS HEREBY ORDERED:

1. Claimant proved she was entitled to *Grover* medical benefits to maintain MMI.

2. Respondents shall provide maintenance medical treatments to Claimant, pursuant to the Colorado Workers' Compensation Fee Schedule, as recommended by Dr. Gesquiere and his referrals.

3. Claimant's claim for TTD/TPD benefits is denied and dismissed.

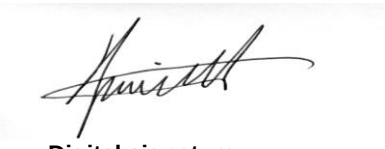
4. Claimant's claim for a higher AWW is denied and dismissed.

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

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

DATED: February 10, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable occupational disease involving her neck?

- The parties stipulated to an average weekly wage (AWW) of $2,000.

- The parties stipulated that, if the claim is compensable, Claimant is entitled to TTD benefits from December 16, 2019 to January 17, 2020, at the maximum rate of $948.15. The parties stipulated Claimant is also entitled to TPD benefits but agreed to reserve the specific amount(s).

FINDINGS OF FACT

1. Claimant has been a dental hygienist since 1994. She has worked for Employer since 2013.

2. Claimant's work entailed cleaning patients' teeth and other tasks associated with oral hygiene. In performing her duties, Claimant is required to maintain relatively static neck postures for extended periods. She typically sits on the right side of patients and holds her head tilted to the right while accessing patients' mouths.

3. Claimant has a documented history of neck pain since at least 2004. She received chiropractic treatment from Dr. Randy Knoche in 2004 and 2005 for primarily right-sided neck pain and headaches. There is no indication of significant symptoms radiating into the upper extremities.

4. Claimant's neck symptoms improved, and she had no treatment for neck pain from May 2005 until August 2009. She saw Dr. Knoche on August 31, 2009 with complaints of neck pain, headaches "off and on," and right thumb pain for approximately five weeks. Dr. Knoche's records note "Px" in the thumb. The meaning of this notation is not entirely clear but based on other references in Dr. Knoche's records, "Px" probably means "pain." She had a few chiropractic sessions and her neck symptoms improved from "constant" to "intermittent."

5. Claimant sought no further treatment for neck pain until after a motor vehicle accident on November 19, 2013. Claimant's vehicle was "T-boned" on the driver's side. She suffered injuries, including a "whiplash" injury to her neck.

6. Claimant saw her PCP, Dr. Alexios Constantinides, on November 20, 2013. Dr. Constantinides diagnosed cervical and thoracic strains from the MVA. He performed osteopathic manipulation and prescribed NSAIDs.

7. On November 26, 2013, Dr. Constantinides documented neck pain with rotation but no radicular symptoms.

8. Dr. Constantinides performed OMT several times over the next few weeks. Examination findings such as spasm and tenderness to palpation remained consistent with cervical and thoracic soft tissue injuries and myofascial dysfunction. Claimant repeatedly denied any radicular symptoms.

9. On March 13, 2014, Dr. Constantinides documented Claimant was gradually improving with PT and massage therapy although her neck and upper back were fatigued at the end of the workday.

10. On June 12, 2014, Claimant reported her neck was doing better, but she had recently developed numbness and tingling in her right pinkie. She was "unsure if MVA related," and noted the finger symptoms were particularly prominent "while scaling teeth at work."

11. At her June 26, 2014 appointment, Claimant reported "both hands falling asleep."

12. On August 28, 2014, Claimant stated her neck continued to improve but she was still having numbness in her hands, worse on the right, and worse at night. Dr. Constantinides referred Claimant for an EMG "to discern cervical radic[ulopathy] vs. CTS vs. other."

13. Claimant saw Dr. Griffis for electrodiagnostic testing on September 17, 2014. Her chief complaint was numbness and tingling in the 4th and 5th fingers of both hands. She also reported neck pain since the MVA. Tinel's was positive at the elbows bilaterally. The electrodiagnostic testing showed no evidence of carpal tunnel syndrome, cubital tunnel syndrome, or cervical radiculopathy. Dr. Griffis diagnosed mild ulnar neuritis at the elbows, but ordered a cervical MRI to rule out a cervical disc herniation or nerve root impingement.

14. The MRI was completed on September 26, 2014. It showed a disc protrusion at C5-6 that narrowed the left lateral recess, contacting and slightly deforming the cord. There was no cord signal abnormality to suggest edema or myelomalacia. The MRI also showed a mild/moderate posterior bulge at C6-7. There was no foraminal stenosis or impingement at any level.

15. After reviewing the MRI, Dr. Griffis diagnosed ulnar neuritis and a chronic cervical strain. He instructed Claimant on home stretching exercises and released her from care.

16. At an appointment on January 9, 2015, Claimant told Dr. Constantinides her neck pain and hand numbness were improving with massage therapy. Her work schedule had recently increased to four day per week, and she noted increased symptoms by the end of the work week.

17. On February 20, 2015, Dr. Constantinides documented Claimant was working four days per week seeing six patients per day, which was aggravating her neck and upper back symptoms. Her pain also increased with nonwork activities such as house cleaning and yard work.

18. There are no further treatment records until a follow-up appointment with Dr. Constantinides on February 16, 2017. The primary focus of the visit was a respiratory infection and low back pain. However, Claimant also reported "some mild neck pain without recent trauma or radicular symptoms."

19. On March 30, 2018, Claimant returned with complaints of right hand weakness and reduced dexterity. The symptoms seemed to worsen after recent right-sided breast surgery. Physical examination was normal, including a negative Spurling's test. Dr. Constantinides ordered a repeat EMG.

20. Claimant reported the symptoms to Employer and stated she thought the condition was caused by "twenty-six years of being a dental hygienist" and holding her neck in awkward and fixed positions. Employer did not file an Employer's First Report, refer Claimant to a physician, or take any other action. Eventually she retained counsel who filed a claim for her.

21. Claimant saw Dr. Dale Cassidy, an orthopedic surgeon, on May 18, 2018 with complaints of pain, numbness, tingling, and weakness in the right hand. Her symptoms were primarily in the 4th and 5th fingers. The symptoms worsened while performing her work as a dental hygienist. She told Dr. Cassidy about her history of neck pain but denied any radiation from the neck down to her hand. Examination of the right arm showed normal strength and sensation except some paresthesias involving the right 4th and 5th fingers and the dorsal ulnar aspect of the right hand. Tinel's was positive medially over the right ulnar nerve. He noted "no evidence of cervical pathology and her Spurling's test and neck range of motion was generally unremarkable." Dr. Cassidy diagnosed mild lateral epicondylitis and right cubital tunnel syndrome. He gave Claimant a splint to wear at night.

22. Follow up visits with Dr. Cassidy on June 11, July 16, and July 25, 2018, showed some improvement with use of the wrist splint.

23. Claimant returned to Dr. Cassidy on October 15, 2018 with worsening symptoms in her hand and arm, including weakness. Examination of the right elbow showed no tenderness and full range of motion. Provocative testing for carpal and cubital tunnel was negative, and the recent EMG had showed no evidence of peripheral compression. Dr. Cassidy noted Claimant's symptoms were progressing down to her hand with weakness and paresthesias. He wrote "[g]iven her unusual symptoms as well as shoulder and neck pain I would recommend a scan of her cervical spine as well as brachial plexus."

24. A cervical MRI on October 27, 2018 showed C5-6 intervertebral disc height loss with a posterior disc osteophyte complex. There was moderate right neural foraminal

stenosis primarily caused by uncovertebral hypertrophy. There was no left-side stenosis. A brachial plexus MRI performed the same day was normal.

25. Claimant followed up with Dr. Cassidy on November 20, 2018 to review the MRI findings. She had some tenderness over the right lateral epicondyle but no clinical signs of cubital tunnel syndrome. Dr. Cassidy released Claimant to follow up "as needed" for her elbow and referred her to the "spine team" for evaluation of her neck.

26. Claimant saw Dr. Paul Stanton, a spine surgeon, on December 13, 2018. Her biggest complaint was ongoing right upper extremity weakness. She indicated the arm symptoms were worse when performing her job as a dental hygienist. She found relief with "resting her head." Physical examination showed mild weakness with wrist extension and biceps on the right. Dr. Stanton ordered x-rays which showed advanced disc space collapse at C5-6. He also reviewed the October 2018 MRI. Dr. Stanton opined Claimant "will eventually need to have this reconstructed," but was not enthusiastic about the prospect of surgery. He recommended a cervical ESI at C5-6.

27. Claimant saw Dr. Scott Ross, an interventional pain management specialist, on January 21, 2019. She described "rather notable right-sided neck pain and paresthesias that are in a C6 distribution." She explained the paresthesias were initially in the third to fifth digits of the right hand, but that had resolved and been replaced with weakness and paresthesias in the first and second fingers of the right hand. She described feeling clumsy and loss of dexterity.

28. The records January 21, 2019 show Claimant seen Dr. Ross "approximately seven years ago" for cervical injections. The prior records are not in evidence but Claimant only recalled seeing Dr. Ross after the MVA. She testified he performed "injections" but did not remember exactly what was done. On her intake form, Claimant stated her neck pain started "17 years ago" but the upper extremity weakness started in approximately April 2018. When asked about the cause of the problems, she marked "work injury" and "auto accident."

29. On March 20, 2019, Claimant was evaluated by David Whatmore, physician's assistant for Dr. Chad Prusmack. Mr. Whatmore noted, "since [the MVA] she has had a lot of pain on the right side of the neck, significantly worsening headaches and his started noticing some weakness developing into the right hand particularly with her grip strength." Examination showed mild weakness in the right bicep and triceps and limited cervical range of motion. Mr. Whatmore recommended a C5-6 ESI to further delineate the pain generator.

30. Dr. Ross performed a right C5-6 transforaminal ESI on April 22, 2019. She had a good diagnostic response with approximately three weeks of relief.

31. Claimant followed up with Mr. Whatmore on May 14, 2019. He opined she was a candidate for a disc replacement or a C5-6 fusion.

32. Another cervical MRI was done on November 6, 2019. It showed central and right lateral protrusions and osteophytes at C5-6, causing moderate right foraminal narrowing.

33. Mr. Whatmore reevaluated Claimant on December 9, 2019. After consulting with Dr. Prusmack, he recommended a C5-6 disc replacement.

34. Dr. Prusmack performed an anterior cervical discectomy with C5-6 artificial disc replacement on December 17, 2019.

35. Claimant responded well to the surgery and recover quickly. On March 2, 2020, she reported resolution of her neck pain and radicular symptoms. Dr. Prusmack lifted her restrictions and allowed her to return to work.

36. On April 22, 2020, Mr. Whatmore had a discussion with Claimant about the etiology of her neck symptoms. He noted she had only occasional neck pain before the MVA, and had a "marked escalation of symptoms as a result of her motor vehicle collision." Mr. Whatmore opined the need for surgery was caused by the MVA.

37. Dr. Douglas Scott performed an IME for Respondents on November 9, 2021. Dr. Scott noted Claimant's history of neck pain since at least 2004. He opined the imaging studies showed longstanding, progressive and chronic cervical spondylosis with intravertebral disc narrowing and stenosis at C5-6, "the level most often injured and cervical neck whiplash injury." He also cited Mr. Whatmore's opinion the neck surgery was necessitated by the MVA. Dr. Scott concluded the C5-6 pathology was related to the 2013 MVA "which caused a 'whiplash' which required subsequent chiropractic treatment, physical therapy, pain management, and possible cervical neck injections." He opined the need for surgery was due to the natural progression of the MVA, without regard to Claimant's work activities.

38. On July 6, 2021, Dr. Prusmack wrote a letter in response to an inquiry from Claimant's counsel regarding causation of the surgery. He opined Claimant's work as a dental hygienist exacerbated her prior neck issues and was the root cause of her need for surgery. He noted she was put at MMI for the MVA in February 2015 and released with no impairment or restrictions. There was no suggestion that she needed any surgery at that time. Over the next several years she developed progressive neck pain, arm pain and weakness that was reported to be "worse with work as a dental hygienist." He noted Claimant "was constantly in awkward, bent neck and static postures." He cited literature showing high rates of neck problems among dental hygienist and dentists because of the neck postures peculiar to their profession. Dr. Prusmack concluded that the 2013 MVA may have contributed to Claimant's neck issues, but it was her work which exacerbated these issues and ultimately required surgery in 2019.

39. Dr. Prusmack testified via deposition to elaborate on the opinions expressed in his report. He opined the pathology that led to surgery was related to both the MVA and Claimant's work, but her work contributed the "majority" of causation. Dr. Prusmack opined the MVA probably weakened the structures in Claimant's cervical spine and made

them more susceptible to injury from the prolonged static neck postures associated with her work. Dr. Prusmack pointed to the "accelerated and significant" worsening of MRI findings between 2014 and 2019, which was more than he would expect from a purely natural progression. He emphasized that the pathology at C5-6 was primarily on the right side of Claimant's spine, which correlated with years of maintaining static neck posture with her head tilted to the right. Claimant's body "counterbalanced" the work-related "asymmetries [and] poor recruitment patterns" by building osteophytes and remodeling the discs. This led to progressive right-sided foraminal stenosis and ultimately necessitated the surgery.

40. Dr. Prusmack's causation opinions are credible and more persuasive than contrary opinions in the record.

41. Aside from a few understandable memory lapses regarding details of her medical history, Claimant's testimony was credible and persuasive.

42. Claimant proved she suffered an occupational disease to her cervical spine as a direct and proximate result of her work for Employer.

43. Claimant has a surgical scar on the front of her neck approximately 2 inches long and approximately ¼ inch wide. The scar is irregularly shaped, partially raised, partially indented, and discolored compared to the surrounding skin. The ALJ finds Claimant should be awarded $2,000 for disfigurement.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

A pre-existing condition does not disqualify a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms during or after work activity does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

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

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

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

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

As found, Claimant proved she suffered an occupational disease involving her cervical spine proximately caused by her work as a dental hygienist. Dr. Prusmack's analysis and conclusions are persuasive. The correlation between Claimant's primarily right-sided spinal pathology and her typical posture with her head tilted to the right is compelling. Dr. Prusmack is probably correct that the MVA set the stage, but Claimant's work ultimately pushed her over the edge to the point she required surgery. In that regard, Claimant's work aggravated, accelerated, and combined with her pre-existing condition to produce a need for treatment and disability. There is no persuasive evidence to suggest Claimant maintains static or awkward neck postures outside of work at a level remotely comparable to her exposure at work.

B. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to her anterior neck because of the work injury. The ALJ concludes Claimant should be awarded $2,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's claim for an occupational disease on April 1, 2018 is compensable.

2. Insurer shall pay Claimant TTD benefits at the rate of $948.15 from December 19, 2019 to January 17, 2020.

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

4. Insurer shall pay Claimant $2,000 for disfigurement.

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

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

DATED: February 16, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-276-001/002/003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2021.

II. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical benefits to cure or relieve the effects of his industrial injuries.

III. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to a one-time change of physician to Dr. Kareem Sobky at Presbyterian St. Luke.

IV. If compensable, what is Claimant's average weekly wage.

V. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from October 23, 2020 through the date of maximum medical improvement.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to penalties for alleged violations of Section 8-43-203, C.R.S. and W.C.R.P. Rule 5-2 for Respondents' alleged failure to admit or deny the claim in a timely manner or if Respondents have cured any potential penalties pursuant to Section 8-43-304(4), C.R.S.

PROCEDURAL HISTORY

This matter was previously scheduled for Hearing for May 11, 2021 and came before Administrative Law Judge Edwin L. Felter, Jr. The parties submitted their exhibits at that time. Claimant stated that he did not have time to review Respondents' exhibits as they were provided electronically and he was unable to access them. Respondents stated that a hard copy of the exhibit packet had been left on Claimant's porch, but Claimant stated that he had not receive it. The parties disclose that PALJ Susan Phillips combined all issues listed on the multiple Applications for Hearing into one hearing.

There are two regular Applications for Hearing. One was filed by Claimant's prior counsel on December 23, 2020 which lists issues of compensability, medical benefits, average weekly wage ($1,191.71), temporary disability benefits and requests authorization of care under Dr. Carlos Glass, psychologist, pursuant to Dr. Corson's referral. The second one was filed by Claimant on December 23, 2020, which includes the additional issue of penalties for failure to admit or deny the claim, was accompanied by a Concentra Work Activity Status Report dated December 8, 2020 and a letter from

the Division dated December 15, 2020, stating that they had not received a timely admission or denial. The third is an Applications for Expedited Hearing—One-Time Change of Authorized Treating Physician dated January 11, 2021 with an attached Notice of One-Time Change of Physician & Authorization for Release of Medical Information filed by Claimant on January 5, 2021 for a change to Dr. Kareem Sobky at Presbyterian St. Luke, from Dr. Corson at Concentra.

Other relevant procedural history includes Claimant's Petition to the Division's Director for penalties dated January 6, 2021 and Motion for Summary Judgment dated January 15, 2021. The motions were denied on January 27, 2021 by Director Tauriello pursuant to Sec. 8-43-203(2)(a), C.R.S. It is clear that the Motion for Summary Judgement was also filed with the OAC as ALJ Steven R. Kabler also denied the motion on January 26, 2021.

A Prehearing Order for Prehearing Conference of February 8, 2021 was issued by PALJ Susan D. Phillips granting Respondents' motion to engage in discovery with the *pro se* Claimant, denying Respondents' motion to compel Claimant's attendance at an IME, granting an extension of time, vacating a prior hearing set for March 12, 2021, consolidating all issues for the rescheduled hearing, denying Claimant's motion to compel claim file as moot, and denying Claimant's motion for penalties.

On May 7, 2021 and on subsequent dates Claimant sent multiple emails to the Office of Administrative Courts demanding an order that Respondents pay for benefits based on alleged statements made during the May 11, 2021 hearing before ALJ Felter. In an abundance of caution, Respondents filed a Response to Claimant's Motion for Summary Judgment on June 17, 2021. On June 28, 2021 ALJ Felter issued an order denying Claimant's Motion for Summary Judgment.

On July 14, 2021 ALJ Felter issued an Order Concerning Hearing of August 27, 2021 indicating that any ALJ could hear this matter and that no further extensions would be allowed unless under "extreme good cause."

During pretrial matters, Claimant was advised that he had the right to be represented by an attorney and waived that right. He was also advised that he would be held to the same standard as an attorney with regard to his knowledge of the Act, rules and case law and that the court could not assist in his prosecution of the claim. Claimant acknowledge his understanding and requested leave to proceed *pro se* (self-represented).

Claimant's exhibits 1 through 13A and 15 through 17 were admitted into evidence. Respondents objected to Exhibit 1 and 4 as Claimant had circled and written on the exhibits. This ALJ took judicial notice that there were some marks and writing on the exhibits but that this ALJ would not take notice, other than as part of Claimant's position statement regarding these markings, as they do not change the wording on the documents themselves. Respondents objected to Exhibits 15 through 17. These photographs were admitted following Claimant laying a foundation. Respondents' Exhibits A through Z were admitted into evidence over Claimant's objections.

Respondents stipulated that Insurer was the correct insurer for Employer on the Claimant's claim for date of injury of October 23, 2020.

The parties stipulated that Claimant continued to be on work restrictions through April 20, 2021.

FINDINGS OF FACT

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

1. Claimant testified that he was employed by Employer from April 1, 2020 through October 23, 2020 as a Class A truck driver. His duties included hauling flooring products in a large tractor trailer. Claimant had deliveries both within the state and out of state (Wyoming). This required Claimant to check the loads on the trailer, hook up the trailer, drive and deliver the products within a certain amount of time. He would also use a forklift to move the heavy products when necessary. Claimant was only allowed to drive up to 11 hours a day, at which time Claimant had to have overnight stays at motels. Overnights would occur approximately once per week. Claimant would be reimbursed for the overnight expenses including a per diem. Respondents would frequently pay for the motels with a company credit card. Claimant testified that on October 22, 2020 he was able to complete his job duties without difficulty, including unloading his truck while performing deliveries, and that he would not have been able to do so if he had been hurt.

2. During the week of October 23, 2020 Claimant was due to haul product from the Aurora facility to locations that were not familiar to Claimant. Claimant was assigned the new route because a co-worker was on vacation. Claimant objected to the change because he did not know the routes that had to be covered, did not have any training regarding the routes, including the delivery points and customers, the opening and closing times or the deadlines for delivery.

3. Claimant arrived at the Employer's facility extremely early on October 23, 2020 because he needed to obtain the paperwork, familiarize himself with the routes for deliveries, the loads on the trailer, the order of the delivers and whether the products were loaded in the right order in order to accomplish the deliveries. He also needed to make sure that the products were strapped in correctly. Claimant testified that the products were extremely heavy and his first delivery had to happen by 6 a.m. in the morning. On that particular day, it had snowed and the parking lot was covered in snow and ice. Claimant stated that the person in charge of the loading frequently would raise the trailer to a higher level, with the nose higher than the back end, in order to use a forklift, and would fail to level the trailer out after loading. This would cause problems when Claimant was hitching the semi-truck to the trailer because they were not able to couple correctly to secure the trailer to the semi-truck. Claimant needed to have the semi-truck come together with the trailer so that the king pin and lock achieve coupling in order to secure the load. However, if the front end was too high, this cannot happen.

4. On October 23, 2020 Claimant arrived at approximately 2:00 a.m. Claimant had been provided with the security code so that he could enter the building when needed. He entered the building to access the truck, that was kept in the building due to the cold weather. He stated that he had safety glasses, gloves, and steel toed boots, as required. He took the truck to his personal vehicle to get his personal belongings. As Claimant was walking from the vehicle to the truck, his arms full of personal items he was transferring, Claimant states he slipped on the ice and fell forward, injuring his abdomen and both knees. He states that it was so slippery that he lost control and that it was very fast. He also hit his head hard. He does not know if he lost consciousness. Claimant stated that he got up afterwards, after what he thought might have been a few minutes, and continued to the dock area to check the trailer.

5. Claimant assumed that the fall would have been caught by the security system on the building. He stated that the employees are advised that the premises are under surveillance because of the cost of the products, which could amount to millions of dollars. Claimant found out later that the security system was not operational and failed to record the fall as the video set up were just "dummies."[1] Claimant determined since Concentra was not open at that time in the morning and there was no one around to discuss what had happened to him that he would proceed with his deliveries and see how he did. He managed the pre-trip inspection of the semi-truck and drove to the dock area where the trailer was parked in the bay. He found that the trailer was too high. He tried to manually lower the trailer with the hand crank. He struggled with the crank and overstrained himself, causing severe pain in his abdomen and groin. Claimant did not know if the hernias occurred at the time of the fall or when he strained himself but his abdomen was already hurting by the time he was trying to crank the trailer down. Claimant testified that it took him approximately 20 to 30 minutes to get the trailer level so that it could be coupled with the truck.

6. Claimant identified and explained the notations he had made on the pictures he had taken of the parking lot and dock area with his phones. The parking lot and dock pictures were taken on the day of the injury at approximately 5:50 a.m.[2] These pictures were taken with his work phone. He described the hook up mechanism shown on the photos showing the large gap between the trailer and the truck (5th wheel). He stated that the lock jaws had a release handle once the coupling was achieved but it would not operate unless the coupling occurred correctly. When the trailer was not level, the trailer would show the plate on the trailer as uneven. Claimant explained that the trailer must then be lowered so that the trailer skid plate is level or parallel with the 5th wheel plate until the king pin was able to be secured on the plate then the lock jaw released, so the handle could be operated to secure the load. The building pictures were taken on April 11, 2021.[3] These pictures were taken by Claimant with his personal phone. He downloaded and printed the pictures himself. He explained that the difference in color was because he printed some pictures with his own printer, which stopped working, and the remaining pictures with his mother-in-law's printer. He testified that no other person

[1] Exhibit 1 pp. 1-2; Exhibit 17 pp. 1 & 3.
[2] Exhibit 15 & 16
[3] Exhibit 17

had access to either of his phones before he downloaded the pictures. As found, Claimant is credible and has proven that he was injured in the course and scope of his employment, injuring his bilateral knees and abdomen.

7. Once Claimant was on his way, he was forced to stop at the open weigh station. He was advised that he was significantly overweight, at approximately 68,000 pounds. He returned to the facility and unloaded some of the product that he no longer had time to deliver that day due to the delays. He used a forklift to perform the activity. Claimant testified that he was in pain the whole time he was working that day and asked the customers to perform the unloading. On his way back, he contacted Concentra. He was asked questions, including whether he had been exposed to COVID-19. Claimant disclosed that he had been at the VA Hospital, after which he received a call that he might have been exposed. Concentra advised that they would be unable to see him for an exam until after a fourteen day self-quarantine.

8. Claimant returned to the Employer's facility and advised the management that he could not unload the trailer. Claimant stated he later communicated with the Human Resources department for Employer by email, specifically the HR Consultant (J.B.), regarding the accident and incident and the fact that Concentra refused to see him for the next two weeks due to COVID-19 exposure. Since Claimant failed to receive a response from HR, he consulted with his personal provider, Dr. Tutt. He was provided with an appointment for the following Monday. Claimant stated that he did not discuss the work injury with his supervisor because he considered that he had a "hostile work environment" and was not getting along with his supervisor. Specifically, he discussed that his supervisor had threatened him not to make any further complaints about any issues about the company work or the other workers. He therefore would only discuss matters directly affecting his work, schedule or hours, not his medical conditions. As found, Claimant is credible in his testimony.

9. Claimant's direct supervisor testified that he provided text messages that he had kept from communications between himself and "[Claimant's first name] Driver," who he stated was Claimant.[4] The texts included several from June 2020, when Claimant had discussed a work-related back injury that subsequently resolved on November 9, 2020. On Monday, October 26, 2020 Claimant sent the following text to his supervisor:

> Claimant:
>
> Good evening Sir, I have a problem. I was informed today that I may have been exposed to vivid [sic.] 19 at the VA where I go for some of my therapy sessions.
>
> I will begin a new test and screening tomorrow, but not sure how things are handled at work??? I'm being told I should self quarantine for 2 weeks but need to communicate with you.
>
> …

[4] Exhibit 0, bates 75-89.

I attempted my therapy, but was turned away until I complete my screening period and am determined to be safe.

Supervisor:

... If you are not showing symptoms you can come to work.

Claimant:

Do I request sick time, or PTO. I have a mild grade fever and have felt a little sluggish since Friday morning. I need to go to clinic for test and first screening tomorrow, I'd like to request time off.

Supervisor:
Ok let me know when you plan to be back.

Claimant:
I will speak with doctors and keep you informed, thanks Sir.

On October 28, 2020 Claimant sent his supervisor a text stating:

Claimant:

Hello Sir, just spoke with Mr. P[HR] and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there. I will make every effort to keep you informed as soon as I get answers myself.

10. On October 29, 2020 Claimant mentions that he may be seeing a specialist but when questioned by his supervisor for what, he failed to respond. The October 30, 2020 text references that Claimant had submitted information addressing further medical concerns to HR. This was repeated on November 2, 2020, stating that he had texted the information to the HR Consultant. On November 3, 2020, though it seems that the texts are from a different phone or text stream.

11. Claimant responded on Friday, Oct 30, 2020 as follows:

Claimant:
Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns. But on a more pressing scale, I am unable to enter the Paylocity program to enter medical leave for this week, or next. Can you please assist and enter hours for me? Thanks.

12. It is not apparent from the texts that the supervisor responded to the above text based on the provided texts. On Monday, Nov 2, 2020 Claimant sent his supervisor a follow-up text:

Claimant:
Good afternoon Sir, my primary doctor states my fever has returned and my blood pressure is extremely high, so they are continuing the quarantine for now. Other medical information has been sent to HR.

Supervisor:

[Claimant] Hr will be calling you today. They said they haven't heard from you?

Claimant:
Ok, I have been texting Ms. [HR Consultant]'s number all my information.

Supervisor:
Make sure you speak with her today please.

Claimant:
I will be expecting and awaiting her call.

Claimant:
[Supervisor] I tried to call Ms. [HR Consultant] at 801-349-2595 but got no answer. Not sure why I can't reach her for follow up.

Supervisor
That is the correct number so I'll let her know.

Claimant:
Thanks Sir

13. On Tuesday, Nov 3, 2020 the supervisors' texts screen show:

Claimant:
Sorry, I can't talk right now.

14. The next text in the exhibits shows "Text Message, Friday 7:41 AM." It is suggested by the placement of this text that since it is on the same screenshot as the prior November 3, 2020 text, that it would be Friday November 6, 2020. It seems to be addressed to the HR Consultant. This text does not display as the other text sent by Claimant in a grey box, but in green, like the texts from the supervisor. It looks like a copy and pasted text so it may be from October 30, 2020. The text states as follows:

Claimant:
Good morning Ms. [HR Consultant], I'm writing to inform you I may have suffered an OJI. I fell on the ice last Friday in the company parking lot as I was getting ready for driving at 2am. I believe I may have injury to my

Then the message is cut off and continues "necessary by my medical providers." Then another cut off portion states "I believe the hernia problem is the…" and again it is cut off. Following these partial messages, another message from Claimant to his supervisor on "Wednesday at 3:03 PM" states:

Claimant:
Hey [supervisor], I finished sending the rest of those messages to Ms. [HR Consultant] myself. Have a good evening.

15. This ALJ infers from the texts above that Claimant likely authored the texts but, whether the text messages were truly authored at the times suggested by the order

of the list provided by the supervisor is in question. Some texts were clearly sent to the supervisor by another individual such as the time reference of "Text Message, Friday 7:41 AM" as it looks different than the other texts and is in green instead of gray as other texts which are likely authored by Claimant. This ALJ finds that the texts under Finding of Fact numbers 9 through 14 are, in fact, texts sent by Claimant. This is supported by certain references made by Claimant on October 26 which stated that "I attempted my therapy, but was turned away until I complete my screening period." This is consistent with Claimant's testimony that he attempted to see someone at Concentra but was turned away due to his COVID exposure. It also follows that Claimant informed his supervisor on October 28 that he "just spoke with [HR] and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there." This is supported by the fact that Claimant was seen by Dr. Tutt on November 2, 2020. And on October 30 Claimant stated "Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns." From all this information, this ALJ finds that the copied text message listing "Text Message, Friday 7:41 AM" was more likely than not a text message originally sent by Claimant to the HR Consultant on Friday October 30, 2020, advising them of the prior Friday's work related slip and fall accident and clearly advised of the hernia problem, though the full text message was not displayed by the evidence submitted. However this is supported by Claimant's testimony listed above explaining how he was injured and reported the injuries, who's testimony as listed above in Findings of Fact 1 through 8 is found credible.

16. The last text dated "Today 8:18 AM," which this ALJ infers to have taken place around November 9, 2020, based on the supervisor's testimony and the employment records, detailing the Claimant's termination, is clearly addressed to multiple individuals, and states:

> Claimant:
> Good morning all, trying to get things off on a good note. Just need to get my final paycheck provided today as per Colorado guidelines. [Supervisor] I need my clipboard out of the truck, and I will be returning company products as well. [First unknown person] I'll need information on what I need to do to file my short and long term disability claim thru the insurance. [Second unknown person], you're right, Work Comp will take care of my OJI concerns. Thanks, [Claimant].

17. Claimant has a past history of several medical conditions. On June 26, 2016 Claimant was under the care of Dr. Charles Glass, a psychologist, due to a diagnosis of adjustment reaction with anxious features, relating to an on the job slip and fall injury in 2015 when he injured his right shoulder.[5] This care related to Claimant's fear of surgery and his past experiences with surgeries.

18. Claimant went through the Division Independent Medical Examination (DIME) process in 2017, as a result of his right shoulder injury in 2015.[6] The evaluation

[5] Exhibit P, bates 90-93.
[6] Exhibit T, bates 199-231.

included multiple conditions. The DIME physician identified no masses or tenderness in the abdomen.[7] The DIME documented examining the lower extremities showing muscle tone is diminished on gross inspection on the right side compared to the left. He found mild bilateral iliotibial-band tenderness on palpation, sitting straight leg raising was near full, with evidence of hamstring tension bilaterally. Surgery of the right shoulder occurred in April 2017.[8] The first documented work-related injury occurred on September 20, 2007, documenting thoracolumbar condition, for which he was given an impairment rating.[9] The DIME physician noted that the MRI of the lumbar spine showed a mild disc bulge from L4-S1 with moderate facet hypertrophy changes at L5-S1 but found that the lumbar spine condition was not related to the 2017 injury.

19. Claimant had a substantial right knee injury and surgeries resulting in a total right knee replacement (TKA) in January 2018.[10] Prior to surgery he was diagnosed with right knee osteoarthritis (OA) with retained hardware from prior ORIF for Tibial Plateau fracture and prior anterior cruciate ligament (ACL) reconstruction. In April 2018 Claimant complained of left foot problems and was diagnosed with a left foot second intermetatarsal space neuroma.[11]

20. Dr. Cebrian reported that on August 1, 2019 Claimant was seen at UCHealth Emergency Care by Dr. Matthew Zuckerman and Claimant reported that he had a past history of chronic low back pain.[12]

21. Past medical-history is positive for hypertension diagnosed in the mid-1990's, diabetes diagnosed in 2017 and blood clots experienced in 2015 related to contusions to the right lower extremity.[13]

22. Claimant underwent a Department of Transportation (DOT) physical on March 26, 2020. At that time, Nurse Kathy Okamatsu completed the Federal Motor Carrier Safety Regulation examination, including of the abdomen and lower extremities for any abnormalities. She advised that Claimant had no abnormalities for the abdomen or the extremities and met the federal standards but required periodic monitoring of hypertension, finding Claimant qualified to continue driving. The same nurse also performed the October 22, 2019 DOT exam, making similar findings.[14]

23. On August 31, 2020 Claimant established care with Dr. Jennifer Marie Tutt at Centura Health. Dr. Tutt stated that Claimant had hyperextended his left knee four weeks prior to the exam but his symptoms had been slowly improving since the incident.[15]

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[7] Exhibit T, bate 223.
[8] Exhibit T, bate 229.
[9] Exhibit T, bate 202.
[10] Exhibit R, Kaiser medical records, bates 143-162; Exhibit S, bates 170-198.
[11] Exhibit R, bates 167-168
[12] Exhibit Y, bate 439.
[13] Exhibit T, bate 221.
[14] Exhibits 5 and 5B.
[15] Exhibit U, bates 236.

24. Claimant returned to Dr. Tutt on November 2, 2020. Dr. Tutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. She suspected Claimant has an inguinal hernia so she ordered an ultrasound of the groin and also a referral to general surgery. She also placed a referral to orthopedic surgery.[16] Dr. Tutt assessed the following: [17]

> 1. Groin pan.
> Complains of having left groin pain and swelling for almost 2 weeks.
> Symptoms occurred after he slipped on the ice in a parking lot.
> The swelling/bulging gets worse and more painful with deep cough.
> Concerned he may have a hernia. Has a history of a right-sided hernia requiring surgery 12 years ago.
> Minimal pain at rest however with a cough pain can be quite severe. Has been taking Aleve with only partial relief.
>
> 2. Knee pain.
> C/o having left knee pain x 3-4 months.
> Injured his knee by twisting/hyperextending it several months ago.
> At that time had persistent swelling and pain. His symptoms gradually improved with time and using Voltaren gel.
> Reinjured his knee 10 days ago after slipping on ice.
> His current pain is worse than it was before. At rest his pain is a 6 out of 10.
> Has been taking Aleve with partial relief.

25. Respondents completed a First Report of Injury (FROI) on November 6, 2020 documenting that Respondents were notified of the work related injuries on November 3, 2020 regarding injuries to Claimant's knee and groin due to a fall. They reported the date of injury as October 22, 2020[18] and stated that was Claimant's last day of work. The form was completed by an HR Employer Representative, the HR Consultant, which noted Claimant's average weekly wage as $1,180.00.

26. An Employer Termination Slip was issued on November 9, 2020, stating that Employer was unable to accommodate Claimant's light duty restrictions and Claimant was formally terminated from employment with Employer as of November 9, 2020.[19]

27. Claimant was first seen at Concentra on November 9, 2020 by Nurse Kathy Okamatsu. The history reported was that Claimant was in the process of moving items from his personal truck to the company truck, while walking on the icy parking lot. He slipped on the ice, falling forward and landing on both knees but that he did not strike his head. Shortly thereafter, Claimant used both hands to turn the crank arm of his truck to move the landing gear, while lowering the high trailer and had a sudden onset of pain in the left groin. On exam Nurse Okamatsu found tenderness over the left lateral collateral ligament, over the medial collateral ligament and diffusely over the posterior knee. Upon palpation of the left knee she found crepitus and that Claimant had abnormal flexion and

[16] Exhibit U, bates 259.
[17] Exhibit U, bate 261.
[18] Instead of the correct date of October 23, 2020.
[19] Exhibit L, bate 57.

extension while performing range of motion, though without pain. She found mild swelling and tenderness of the right knee proximally to the patella. She also observed mild limping. Upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. She assessed that Claimant had a strain in the left groin, and bilateral knee injuries. Nurse Okamatsu made a causality determination, stating that it is at least 51% likely this condition is a result of exposure at work. She ordered an MRI of the left knee and an ultrasound of the abdomen, as well as x-rays of the bilateral knees. She provided restrictions of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling.

28. Claimant had a limited abdominal ultrasound of the left groin area, on November 9, 2020, which showed a large indirect inguinal hernia.[20] This was pursuant to Nurse Okamatsu's referral. Also on November 9, 2020, Claimant obtained an MRI of the left knee, also pursuant to Nurse Okamatsu, which showed a horizontal tear of the left knee medial meniscus of the posterior horn, mild to moderate medial compartment arthritis, subchondral edema of the medial tibial plateau, moderate patellofemoral compartment osteoarthritis with some moderate to high-grade involvement of the central to lateral trochlea, subchondral edema, and left knee joint effusion.[21]

29. On November 11, 2020, Dr. Thomas Corson reviewed the MRI results with Claimant, which revealed a left medial meniscus tear of the posterior horn and the ultrasound reveals a reducible hernia. Dr. Corson reported Claimant's history of "significant PTSD and severe anxiety (he became tearful and anxious upon hearing the results and the likelihood of needing surgery for the hernia and possibly the meniscus. He sees a psychiatrist for his PTSD and says he was going to need to see him after hearing this news. He has a significant phobia of surgery." Claimant also reported that his right knee was still causing him a fair bit of discomfort as well. On exam Dr. Corson found reducible hernias on both the right and left inguinal sites. He also found swelling of the left knee over the medial joint line and tenderness as well as altered gait. He noted that Claimant was anxious, concerned, quiet and tearful. Dr. Corson modified restrictions to include 5 lbs. lifting occasionally and may not walk on uneven terrain or climb ladders. Claimant was referred to Dr. Robert Glass, psychologist (to assist Claimant with severe anxiety due to likelihood of surgery); to a general surgeon for the hernia, to an orthopedic surgeon at Steadman Hawkins in Vail, Dr. Hackett, for the knee conditions and to physical therapy.[22]

30. Employer sent Claimant a COBRA letter dated November 16, 2020 advising Claimant that he would no longer be entitled to health insurance benefits from Employer as of his termination on November 30, 2020. If he wished to continue health benefits under COBRA beginning December 1, 2020, he would be required to pay a premium of $1,172.61 per month to cover medical, dental and vision benefits.

[20] Exhibit U, bate 318.
[21] Exhibit U, bates 333-334.
[22] Exhibit V, bates 358-362.

31. Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed.[23] The Notice of Contest (NOC) showed a date of injury as October 22, 2020[24], consistent with the FROI filed by Employer. It is noted that the claim number on the NOC of "5153276" is the correct one for this claim, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim.

32. Employer's Statement, which is dated December 1, 2020 and signed by HR Consultant, stating that Claimant was no longer employed as of October 30, 2020.[25] It shows that as of June 1, 2020 Claimant's weekly earnings were $1,191.71 and Claimant worked 40 hours a week.

33. Dr. Charles Glass documented on December 3, 2020 that Claimant was interested in pursuing psychological evaluation and treatment but appointments were only being conducted by telehealth because of the Coronavirus pandemic and Claimant did not have the technical capability to have telehealth appointments.

34. Claimant returned to Concentra for follow-up on December 8, 2020. Dr. Corson examined Claimant, and palpated reducible right and left inguinal hernias. He found right knee swelling, tenderness diffusely over the anterior knee, over the lateral joint line, over the medial joint line, in the undersurface of the patella, in the inferior pole patella, on the distal patella tendon, in the mid portion of the patella tendon and in the superior pole patella, with limited range of motion in all planes. Dr. Corson found swelling of the left knee at the medial joint line, the patella, with tenderness over the medial collateral ligament, diffusely over the medial knee and diffusely over the posterior knee, in addition to crepitus and limited range of motion in all planes. He stated that MMI was unknown because he was awaiting specialist input. He assessed acute medial meniscal tear of the left knee, injury to the right knee and inguinal hernias. Dr. Corson stated that the objective findings were consistent with history and work-related mechanism of injury.

35. On December 15, 2020 the Division issued an Urgent Notice Requiring Immediate Response. It notified Respondents that the period for filing a timely position statement had expired and that they were potentially in a penalty situation, as an admission or denial had not been filed with the Division. As found, Respondents complied with the requirement to file a Notice of Contest on November 19, 2020, though Division may have rejected it due to discrepancies of the date of injury.

36. On December 22, 2020 Dr. Corson again evaluated Claimant and continued to provide work restrictions of lifting up to five pounds, pushing and pulling up to fifteen pounds no crawling, kneeling, squatting, climbing or walking on uneven surfaces.

37. Claimant filed a Notice of One-Time Change of Physician & Authorization form on January 5, 2021 requesting a change from Dr. Corson to Dr. Sobky. On January

[23] Exhibit 10.
[24] Instead of the correct date of October 23, 2020.
[25] Exhibit 9.

6, 2021 Respondents denied the change of physician as Dr. Sobky was not on the designated provider list. Attached to the letter was a designated provider list but nothing on the list or document showed this had been provided to Claimant. Claimant testified that he did not receive the list until he received the January 6, 2021 letter. As found Respondents failed to use the correct form required by the rules as there is no certificate of mailing nor is it signed by Claimant. As further found, the designated provider list was not provided in a "verifiable manner"[26] as required by the rules. It is also found that Claimant filed the One-Time Change of Physician request within ninety days of the date of the injury. The deadline was January 21, 2021, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A). Therefore, Claimant is entitled to a one-time change of physician under this provision. Claimant testified that after he filed the Notice he changed provider to Dr. Sobky who took over care.

38. Dr. Kareem Sobky of HealthOne/OrthoOne, of Colorado Limb Consultants, evaluated Claimant on January 13, 2021 for the bilateral knee problems. He obtained x-rays that showed a total right knee arthroplasty in good position, no sign of obvious complications though a small fleck of bone or cement at the superior pole of the patella, but that the implants seemed to be stable. He also reviewed the left knee MRI, which he read as showing a medial meniscus tear, full thickness chondral loss, full thickness chondral loss of the medial femoral condyle. Dr. Sobky referred Claimant for physical therapy for edema control, strengthening of the quads, hip girdle, stabilization of the bilateral knees, and modalities twice a week for six weeks.

39. On January 15, 2021 Insurer filed an Amended Notice of Contest, which stated that it was "refiled to correct DOL [date of loss] to 10/23/2020." It included the claim number as "5153276," which is the correct workers' compensation claim number in this matter.

40. Claimant was evaluated by Dr. Anthony Canfield first on February 23, 2021 for the bilateral inguinal hernias. It is inferred that this was pursuant to a referral within the chain of referral as the "Workmen's Comp. coordinator" was present during the evaluation. On exam, Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva but the right side was uncomfortable but he did not feel a hernia on the right. He ordered a right sided dynamic ultrasound to rule out possible right groin recurrent right inguinal hernia. Dr. Canfield on exam found Claimant was negative for back pain or joint stiffness and had a steady gait. He stated that the right and possibly the left inguinal injuries were work related. On February 24, 2021 he filed a request for surgery authorization scheduled for March 18, 2021 at Presbyterian St. Luke.

41. Claimant underwent an MRI of his right knee on March 3, 2021. The MRI showed low signal intensity thickening and internal architectural distortion of the quadriceps tendon; longitudinal clefts of hyperintensity at the patellar insertion consistent with partial tearing, overall comprising approximately 15% of the cross-sectional

[26] Exhibit M, bate 58-59.

circumference. The right knee showed signs of mild proximal tendinosis without signs of a tear.[27]

42. Dr. Sobky assessed Claimant again on March 12, 2021. He read the right knee MRI, which showed an interstitial tear of the distal lateral quadriceps but no avulsion, loosening of the prosthesis or fracture of the prosthesis, no patellar tendon or quadriceps tendon avulsion. He found no significant effusion at that time. Dr. Sobky stated that Claimant continued to have significant bilateral weakness of the lower extremities, significant quadriceps atrophy of the right lower extremity, dysfunction and derangement of the left knee, tear of the medial meniscus of the left knee, and noted that Claimant was anticipating hernia surgery the following week. Dr. Sobky advised that he would take additional x-rays of the right knee on his follow up visit to determine what other treatment would be needed but that he should continue with physical therapy.

43. On March 25, 2021 Dr. Alexandra McKenzie issued a report following a limited ultrasound of the right inguinal area. She found no definite evidence of a right inguinal hernia, stating that the ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan for further evaluation.

44. Dr. Corson stated on March 30, 2021 that Claimant's general surgeon, Dr. Canfield, had ordered a CT of his abdomen. He also documented that the MRI of the right knee showed some particle disease, but did not have the actual reports to review. He continued to state that the objective findings were consistent with history and work-related mechanism of injury. Dr. Corson continued to provide work restrictions consistent to those provide in December 2020.

45. On April 20, 2021, Dr. Carlos Cebrian authored an independent medical evaluation (IME). Respondents retained Dr. Cebrian, to conduct an IME evaluation which took place on April 5, 2021. Dr. Cebrian opined that Claimant's alleged mechanisms of injury did not support that he suffered a work injuries on October 23, 2020. Dr. Cebrian addressed the four areas of complaint in order. Regarding the left knee, Dr. Cebrian noted that Claimant's left knee pain complaint began the summer of 2020 due to a hyperextension and twisting injury documented by Claimant's personal care provider Dr. Tutt. Claimant's described his mechanism of injury to Dr. Cebrian as falling forward onto his knees. Dr. Cebrian stated this would be consistent with a bruise or strain, but would not with a meniscal tear. Regarding Claimant's right knee, Dr. Cebrian opined that Claimant had a history of right knee pain and complaints, including a prior right knee arthroplasty. He noted that Claimant did not complain of right knee pain on his initial evaluation with Dr. Tutt and therefore, the right knee complaints were pre-existing, not related to the work injury. Regarding Claimant's hernia, Dr. Cebrian noted that there was no evidence of a right-sided hernia condition. Regarding the left-sided hernia, Dr. Cebrian noted that Claimant's hernia was very large on the initial sonogram, indicating that it was a pre-existing condition. Dr. Cebrian noted that Claimant has a history of hernia repairs including a repair in 2007. Dr. Cebrian concluded that the request for a left inguinal hernia repair was not causally related to the work injury.

[27] Exhibit Z, bates 460-461.

46. Dr. Corson, either by coincidence, communication with the nurse case manager, who was present by telephone throughout the visit, or by receipt of Dr. Cebrian's report, determined on April 20, 2021 that Claimant had reached MMI without need for further care or restrictions. However, his report still documented that the objective findings were consistent with history and work-related mechanism of injury. His assessment was as follows:

1. Acute medial meniscal tear, left, initial encounter (S83.242A)
2. Hernia, inguinal (K40.90)
3. Knee injury, left, initial encounter (S89.92XA)
4. Knee injury, right, initial encounter (S89.91XA)
5. Painful orthopaedic hardware (T84.84XA)
6. Strain of groin, left, initial encounter (S76.212A)

47. Dr. Cebrian testified at hearing consistent with his report. He stated that Claimant had a lengthy history of right knee complaints, including a right total knee arthroplasty. He testified that Claimant's right knee x-ray and other imaging studies did not show any damage to the hardware. With regard to the partial 15% quadriceps interstitial tear shown on the MRI, he stated that it was too small to be significant and was probably age related. Dr. Cebrian testified that Claimant's left knee meniscal injury pre-dated the work injury as documented in August and November of 2020 reports by Dr. Tutt. Dr. Cebrian testified that Claimant's left knee meniscal tear was consistent with a twisting injury not a straightforward fall to his knees initially described by Claimant. Lastly, Dr. Cebrian stated that there was no evidence suggesting that Claimant had or has a right-sided hernia and that inguinal hernias are generally the result of congenital non-work factors, that an upper body cranking motion would not put significant pressure on the groin in a way that would cause or worsen an inguinal hernia. Dr. Cebrian also noted that Claimant had not complained of lower back pain until approximately six months after the work injury. As found, while Dr. Cebrian opined that that the work related incidents of October 23, 2020 did not cause Claimant's injuries to his bilateral knees and inguinal areas, this ALJ does not find his above-summarized report and hearing testimony credible.

48. Claimant testified that when he slipped on ice, he had multiple items in his hands as he was transferring them from his personal vehicle to his work truck. He was unbalanced and was slipping and sliding on the ice. He fell forward but knows that he was unstable on the ice before he actually fell forward. He did not recall exactly how much twisting involved in the manner in which he was falling but knows there was some twisting involved before he fell forward. He also stated that while he was attempting to use the crank handle to lower the loaded trailer, he was slipping on the ice and had to attempt to lower the trailer multiple times before he was successful, all the while slipping on the ice, which was shown in the pictures he submitted.

49. Claimant agreed that he had prior problems with his knees, but not to the extent as after the October 23, 2020 injury. He did not deny that he had a hyperextension problem in the summer, but that it had resolved by the time of this injury, with the care he

had been previously given. He advised Dr. Tutt of that fact, which she documented. He also stated that his abdomen was sore after he fell but that the force involved in pulling on the hand crank was very significant because the trailer was overloaded with 68,000 lbs. of materials and he was slipping while performing the task. He disagreed with his supervisor that the crank was easy to move. Claimant's testimony is credible and persuasive.

50. Claimant testified that he believed he earned $28.00 per hour plus overtime and incidentals. His incidentals were overnight trip per diem of approximately $500.00 per week. He received approximately $125.00 for the phone, $80.00 for the meals and for hotels up to $300.00 per night. Claimant also testified that when Claimant was stranded for the weekend on a Saturday, that his hours were not compensated despite being away from home. He also testified that he did not return to work after the October 23, 2020 date of injury, that Employer made a mistake in first reporting the injury as having occurred October 22, 2020 and that he was formally terminated as of November 9, 2020 because of his restrictions.

51. Claimant's direct supervisor testified he was the warehouse manager for Employer. He stated that someone that has a work related injury can report to him but that Claimant did not. He conceded that employees could report work injuries directly to the Human Resources (HR) department. He would generally communicate with Claimant directly or by text. He identified [Claimant] Drive as Claimant in the text messages he provided, as listed above. He stated that he was not at the warehouse until approximately 7:30 a.m. each day. He stated that Claimant was paid hourly and was provide $20.00 per diem for breakfast and $60.00 per diem for dinner. The supervisor stated that generally he paid for hotels or motels with his own credit card, which was approximately $100.00 to $200.00 per night but that they would reimburse employees for out of pocket costs. The supervisor stated that the crank is not difficult to move but could not state what amount of strength or force in terms of pounds is required or if the weight of the trailer would change the amount of force involved, but that drivers had to do it every day.

52. Insurer's Senior Claims Representative testified that he had been involved in the claim since December 2020. The Claims Representative stated that Insurer received the claim on November 6, 2020. He stated that Insurer's records show that they sent in the Notice of Contest dated November 19, 2020 but that Division rejected the NOC because it did not have the correct date of loss that corresponded with the workers' compensation number. Insurer received correspondence from Division and documented a conversation with a Division representative regarding the NOC that was filed. Insurer then communicated with Employer to resolve the issue of the date of injury. After the Claims Representative was able to communicate with Employer and received further information, Respondent Insurer filed a new NOC on January 15, 2021. He advised that NOCs are required to be filed electronically with the Division pursuant to the rules but that hard copies are sent to the parties. The Claims Representative is found credible. As found, it is determined that Respondents filed a timely Notice of Contest in this matter, which was likely rejected by the Division due to the discrepancy in the date of injury. As

found, both NOCs provided Claimant notice of Respondents' position and no penalties are due for failure to admit or deny.

53. The wage records show that Claimant earned $30,367.87 from April 1, 2020 through October 15, 2020 for a weekly average of $1,073.61 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020, and that Employer reported Claimant's average weekly wages as $1,180.00 and $1,191.71 in two separate documents. Despite these facts, as found, it is determined that the fair approximation of Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, which includes the $80.00 per diem and the average earnings from April 1, 2020 through October 15, 2020. As of December 1, 2020, Claimant lost his health benefits, including medical, dental and vision. Claimant's COBRA benefits amounted to $1,172.61 per month or $270.60 per week [$1,172.61 x 12 / 52]. Therefore, as found, Claimant's AWW, beginning on December 1, 2020, was $1,424.21.

CONCLUSIONS OF LAW

Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2020. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion).

Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to

produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of his employment on October 23, 2020. Claimant slipped on ice in Employer's parking lot, injuring his bilateral lower extremities, including a meniscal tear on the left side and aggravating the right knee as well as causing a quadriceps injury on the right. The accident also resulted in injury to his bilateral inguinal areas causing a definite hernia on the left side and possible hernia on the right side, aggravating the preexisting right sided conditions. This is supported by Claimant's testimony, which will not be recited here, but is contained in Findings of Fact 1 through 8 as well as Findings of Fact 15, 48 and 49. This determination is also supported by the opinions of Dr. Corson, Dr. Tutt, Nurse Okamatsu, Dr. Sobky and Dr. Canfield.

Specifically it is found that Claimant injured his left knee, right knee and quadriceps, and bilateral inguinal areas on October 23, 2020 as a direct consequence of the fall and subsequent efforts in cranking motions to secure the trailer to the truck on October 23, 2020. Dr. Tutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. Dr. Tutt stated that Claimant had symptoms which occurred after he slipped on the ice in a parking lot including swelling/bulging in his abdomen, which gets worse and more painful with deep cough. She was concerned he may have a hernia, as he had a history of a right-sided hernia requiring surgery 12 years before, and reinjured his knee 10 days ago after slipping on ice. Nurse Okamatsu specifically found on exam on November 9, 2020 that Claimant had swelling and tenderness of the right knee proximally to the patella, left knee crepitus and abnormal flexion and extension, and upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. Dr. Corson specifically stated multiple times that the mechanism of the Claimant's injuries were the cause of the work related injuries. Upon examination on two different occasions, he found palpable reducible hernias on both the right and the left. Dr. Corson reviewed the left knee MRI, which he read as showing medial meniscus tear, full thickness chondral loss, and full thickness chondral loss of the medial femoral condyle. Dr. Corson reported that Claimant became tearful and anxious upon hearing the results of the diagnostic testing and the likelihood of needing surgery for the hernia and possibly the meniscus. Dr. Sobky also found that Claimant had a horizontal tear of the left knee medial meniscus and a right knee interstitial tear of the distal lateral quadriceps. This ALJ finds all of this evidence credible and persuasive.

With regard to the bilateral hernias, Dr. Corson continued to state that the Claimant's objective findings were consistent with history and work-related mechanism of injury, continuing to diagnose Claimant with inguinal hernias, left meniscal tear and right knee painful hardware, even at the time of releasing Claimant from care. Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva. On the right side Dr. Canfield noted that Claimant was uncomfortable but he did not feel a specific hernia at the time of exam but ordered a right sided dynamic ultrasound to rule out possible right groin inguinal hernia. The ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan, which has not yet taken place. Lastly,

Claimant underwent a DIME in 2017 and DOT physicals in both 2019 and 2020 with Nurse Okamatsu which included abdominal examinations, all three of which revealed no masses or abnormalities in the abdomen. Nothing in Dr. Cebrian's report or testimony persuades this ALJ that this is not the case. While Dr. Cebrian opined that that the work related incidents of October 23, 2020 did not cause Claimant's injuries to his bilateral knees and inguinal areas, this ALJ does not find that credible or persuasive. As found, based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that the October 23, 2020 incidents aggravated, accelerated or combined with his preexisting conditions to cause disability and need for medical treatment and therefore are compensable injuries. When considered in its totality, the ALJ concludes that the evidence in this case supports the reasonable inferences/conclusions that Claimant suffers from compensable left and right knee injuries including a right quadriceps injury, as well as bilateral inguinal injuries and psychological sequelae from the severe anxiety due to likely need for surgery, as recommended by Dr. Canfield.

Claimant has failed to show that his low back was injured in the claim as he did not have an exacerbation or aggravation of the low back as a result of the October 23, 2020 accidents. Claimant argues that the records from Dr. Sobky demonstrate a spinal injury and foot drop issue. However, no such records were persuasive in this matter. In fact, Dr. Canfield examined him on February 23, 2021 and found Claimant was negative for back pain or joint stiffness and had a steady gait. Medical records show that Claimant failed to mention problems with his back immediately after and subsequent to the injury for several months. The only source of prior medical records is the summary provided by Dr. Cebrian, which show that Claimant has a significant history of chronic low back problems dating back to 2007. The mere fact a claimant experiences symptoms following a work injury does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function or on the job injuries, does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's symptoms and work activities. As found, it is determined that the October 23, 2020 accident did not cause Claimant's continuing low back pain and any evidence to the contrary is found not credible or persuasive. Claimant has failed to show by a preponderance of the evidence that the October 23, 2020 work injury caused any injury or aggravation of his preexisting chronic low back complaints.

Medical benefits

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), the employer has the right to choose the treating

physician in the first instance. It is well established that an employer does not lose the right to designate a treating physician merely because it denies a claim. *Yeck v. Industrial Claim Appeals Office,* 966 P.2d 228 (Colo. App. 1999). Once the employer has exercised its right of selection, the claimant may not unilaterally change physicians without prior approval from the respondents, by statute or an ALJ. Such permission may be express or implied, and a physician becomes authorized if the "employer has expressly or impliedly conveyed to the employee the impression" that he has permission to treat with the physician. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Here, the First Report of Injury states that Claimant provided notice of the injury as of November 3, 2020 and Claimant established care with Concentra as of November 9, 2020. As found, Respondents referred Claimant to Concentra upon notice of the claim. In fact, Claimant testified that he knew he needed to contact Concentra as of the day of injury and did so, but was unable to be seen because of his exposure to COVID-19, so he attended Dr. Tutt on November 2, 2020. This initial visit with Dr. Tutt is considered emergent care services and are compensable.

Claimant was then seen and treated at Concentra as of November 9, 2020. This indicates that Claimant chose to be seen by Concentra providers and the subsequent referrals of those providers. Therefore, as found, Claimant's authorized treating providers are Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Glass and the orthopedic specialist at Steadman Hawkins, Dr. Hackett, pursuant to Dr. Corson's referrals. As found, this is in addition to the diagnostic testing and treatment referred by these providers, including physical therapy, pool therapy, MRIs of the left and right knees, ultrasounds of the abdomen, CT of the abdomen prescribed by Dr. Canfield and the psychological care prescribed by Dr. Corson with Dr. Glass, which are all authorized, reasonably necessary and related to the injury.

It is unclear from the record if Dr. Corson, another authorized provider or if Insurer authorized Dr. Sobky to address Claimant's work related lower extremity injuries. However, Respondents conceded in their brief that Dr. Sobky was already an authorized treating physician in this matter. Therefore, this is taken as a judicial admission and Dr. Sobky is also an authorized treating physician.

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular

treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Dr. Sobky stated on March 12, 2021 that Claimant required continued physical therapy and was to proceed with hernia surgery. Dr. Canfield ordered a CT of his abdomen. Claimant has proven that the surgery, as recommended by Dr. Canfield, and for which he submitted a request for prior authorization, for the left inguinal hernia, is reasonably necessary and related to the compensable work injury of October 23, 2020. Claimant has proven that he requires further diagnostic testing as stated by the Dr. McKenzie, who performed the right inguinal limited ultrasound and recommended a CT scan for further evaluation, as well as Dr. Canfield, which this ALJ finds as reasonably necessary medical care. Claimant was found to have both swelling of the right knee and a quadriceps injury, which also need to be addressed by the authorized treating providers. Dr. Corson referred Claimant to Dr. Glass for psychological treatment due to Claimant's anxiety related to proposed surgery, and which is found reasonably necessary and related to the injury. All of this care did not take place but is found to be reasonably necessary and related to the injury.

Change of Physician

Claimant requested a one-time change of physician to Dr. Sobky. He filed his request on January 5, 2021, on the Division required form, which was certified to the claims handler. On January 6, 2021 Respondents' counsel sent a letter to deny the one time change of physician citing to W.C.R.P. Rule 8-5(A) and (B). Claimant filed an Application for Expedited Hearing related to that One-Time Change of Physician on January 11, 2021. Claimant attached to the Application for Expedited Hearing the Notice of One-Time Change of Physician to Dr. Sobky and Respondents' letter that cited to the rule.

Since the request was filed within the required 90 days pursuant to Sec. 8-43-404(5)(a)(III), C.R.S., which states specifically:

> An employee may obtain a one-time change in the designated authorized treating physician under this section by providing notice that meets the following requirements:
>
> (A) The notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement;…"

Claimant filed the Notice of One-Time Change of Physician & Authorization form on January 5, 2021 to request a change of provider from Dr. Corson of Concentra to Dr. Kareem Sobky at Presbyterian St. Luke. The deadline to request a one-time change of

physician was January 21, 2021, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A).

Respondents' cited in their denial letter WC.R.P. Rules 8-5(A-C), which state as follows:

> (A) Within ninety (90) days following the date of injury, but before reaching maximum medical improvement, an injured worker may request a one-time change of authorized treating physician pursuant to §8-43-404(5)(a)(III). The new physician must be a physician on the designated provider list or provide medical services for a designated corporate medical provider on the list. The medical provider(s) to whom the injured worker may change is determined by the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C).
>
> (B) To make a change pursuant to this Rule 8-5 the injured worker must complete and sign the form established by the division for this purpose. The injured worker shall submit the form to the employer by mailing or hand-delivering the completed form to the person(s) designated by the employer to receive the form. The person(s) so designated is listed on the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C) as the respondents' representative(s). The injured worker may, but is not required to, provide the form to the impacted physicians. In any event, the respondents' representative(s) shall notify the impacted physicians and the individual adjusting the claim of the change, unless an objection is submitted pursuant to paragraph (C) of this Rule 8-5.
>
> (C) If the insurer or employer believes the notice provided pursuant to this rule does not meet statutory requirements and does not accept the change of physicians, it must provide written objection to the injured worker within seven (7) business days following receipt of the form referenced in paragraph (B). The written objection shall set out the reason(s) for the belief that the notice does not meet statutory requirements.
>
> (1) If the employer or insurer does not provide timely objection as set out in this paragraph (C), the injured worker's request to change physicians must be processed and the new physician considered an authorized treating physician as of the time of the injured worker's initial visit with the new physician.
>
> (2) If written objection is provided and the dispute continues, any party may file a motion or, if there is a factual dispute requiring a hearing, any party may request that the hearing be set on an expedited basis.

Respondents cite to W.C.R.P. Rule 8-5(A), which in turn states that "The medical provider(s) to whom the injured worker may change is determined by the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C)." Respondents were on notice that the *pro se* Claimant may request a one-time change of physician.

W.C.R.P. Rule 8-2(A) states

> (A) When an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider. For purposes of this rule 8, the list will be referred to as the designated provider list.

(1) A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury.

(2) The designated provider list must include contact information for the insurer of record including address, phone number and claims contact information. If the employer is self-insured, the same contact information is required including the names and contact information of persons responsible for adjusting the claim.

Respondents had actual notice of the claim likely by October 30, 2020 but no later than November 9, 2020, as he was terminated on November 10, 2020 due to inability to accommodate his restrictions. Respondents failed to provide a copy of the designated provider list by November 16, 2020 in a verifiable manner. Respondents knew or should have known that they failed to provide a timely designated provider list within the seven days from the date of the injury or the date of notice of the injury, as required by rule and statute, pursuant to Sec. 8-43-404(5)(a)(I)(A), C.R.S. and W.C.R.P. Rule 8-2.

W.C.R.P. Rule 8-2(E), specifically states "If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." In this matter, Claimant selected Dr. Sobky as his authorized treating provider. There is no persuasive evidence showing that Respondents provided a designated provider list in compliance with the rules and statute. In essence, Respondents have conceded that they failed to meet the statutory requirements by not including the appropriate form. Therefore, Claimant's selection of Dr. Sobky makes Dr. Sobky the new authorized treating physician.

In *Berthold v. Indus. Claim Appeals Office of Colo.,* 410 P.3d 810 (Colo. App. 2017) the court held that "section 8-43-404(5)(a)(IV) applies only to changes of physician obtained under section 8-43-404(5)(a)(III)." Section 8-43-404(5)(a)(IV)(C) states that "[T]he originally authorized treating physician shall continue as the authorized treating physician for the injured employee until the injured employee's initial visit with the newly authorized treating physician, at which time the treatment relationship with the initially authorized treating physician shall terminate." Here, Claimant filed the Notice of One-Time Change of physician on January 5, 2021 and was evaluated by Dr. Sobky on January 13, 2021. Therefore, the termination provision of the statute requires the termination of the relationship with Dr. Corson happened as of January 13, 2021.

Respondents argue that Claimant waive the right to have this issues addressed as the issue was not addressed in Claimant's post hearing position statement or brief. The respondents do not contend they submitted a designated provider list in compliance with the statute until they attached it to the January 6, 2021 denial and objection to the request for a change of physician. The ALJ noted Rule 8-2(A)(1) specifies the list must be given to the claimant within seven days following the date the employer received notice. The sanction applicable to a failure to timely provide the list involves passing to the claimant the authority to select a physician or chiropractor of the claimant's choosing. See *In re Claim of Austin vs. Wells Fargo*, W.C. No. 4-973-614-05, ICAO (April 20, 2018).

As found Claimant filed the One-Time Change of Physician request within ninety days of the date of the injury in compliance with the rules. A one-time change of physician deauthorizes or terminates Dr. Corson and the Concentra as the authorized treating providers pursuant to statute. Therefore, it is concluded, Claimant has shown by a preponderance of the evidence that he is entitled to a one time change of physician to Dr. Sobky.

While Respondents argue that Claimant reached maximum medical improvement, no evidence was provided showing that Dr. Sobky placed Claimant at MMI.

"Section 8-42-107(8)(b)(I), C.R.S., provides that 'an authorized treating physician shall make a determination' as to the achievement of MMI. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo.App. 2002). A determination of MMI by an authorized treating physician terminates a Claimant's ability to seek further care without a determination by a Division of Workers' Compensation Independent Medical Examiner's (DIME) opinion pursuant to Sec. 8-42-107(8)(b)(II), C.R.S., which states in pertinent part "If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2…" While Dr. Corson did state that Claimant was at MMI on April 20, 2021, Dr. Corson was no longer Claimant's ATP by January 13, 2021, the first time Claimant was evaluated by Dr. Sobky. Therefore, Dr. Corson was no longer Claimant's ATP and Respondents' reliance on his reports after January 13, 2021 are in error and void or stricken.

Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v.United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

As found, Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, and Claimant's AWW beginning on December 1, 2020 is $1,424.21. Respondents filed the FROI on November 6, 2020 reporting Claimant's average weekly wage as $1,180.00 and an Employer's Statement reporting a wage of 1,191.71. Employer conceded that Claimant received a wage increase on June 1, 2020 to $27.50 per hour and that Claimant would also travel with overnights at least once per week. Respondents also conceded that Claimant would be provided a per diem of $20.00 for breakfast and $60.00 for dinner for a total of $80.00 per week. The wage records show that Claimant earned $30,367.87 from April 1, 2020 through October 15, 2020 for a weekly average of $1,073.61 from April 1, 2020 through October 15, 2020 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020 but determined that the fair approximation, despite the increase, is $1,073.61 plus the per diem of $80.00 for a total of $1,153.61 as of the date of the injury. Pursuant to the COBRA letter Claimant's health benefits were terminated as of November 30, 2020. The cost of continuing health benefits, beginning December 1, 2020, was $1,172.61 per month, $270.60 per week, which would increase the average weekly wage to $1,424.21. The ALJ concludes this methodology of calculating Claimant's AWW is the most accurate, appropriate, and fair approximation of Claimant's AWW.

Temporary total disability benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

Respondents argued that if the claim was deemed compensable, that Claimant's entitlement of temporary disability benefits should be terminated as of April 20, 2021 when Dr. Corson released Claimant to full duty. In *Archuletta v. Industrial Claim Appeals Office,* 381 P.3d 374 (Colo. App. 2016), the Colorado Court of Appeals addressed the applicability of the termination provisions enunciated in § 8-42-105(3), C.R.S. The Court specifically held that if the claimant receives a return to work from an attending physician prior to receiving TTD benefits, then TTD benefits cannot cease or be terminated because they never commenced. See also *Chavez v. Costco Wholesales, Inc.,* W.C. 5-096-055-003, I.C.A.O. (February 4, 2022). Further, since Dr. Corson was not Claimant's ATP after January 13, 2021, Dr. Corson's opinion regarding MMI is not compelling, especially in light of Claimant requiring further surgery and treatment that has not yet taken place and has been deemed authorized, reasonable, necessary and related to the October 23, 2020 injury.

As found, Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning October 23, 2020 as Claimant testified that he was able to perform his job on October 22, 2020 and on October 23, 2020 he was not able to perform all of his activities. He specifically testified that he had to request that the customers unload the truck for him. He was unable to work after that date. Further, after he was provided restrictions by the Concentra ATP, Nurse Okamatsu, of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling, Employer issued a termination slip stating that they were unable to accommodate Claimant's restrictions. As found, Claimant's testimony is found credible and the medical records in this case document that Claimant was continually kept on restrictions by Dr. Corson through January 13, 2021 when Dr. Sobky took over care. Dr. Sobky's last note on March 12, 2021 indicated that Claimant would be proceeding with surgery the following week. Dr. Sobky also mentions that Claimant was having significant amounts of dysfunction and limping at that point, with no mention of changing Claimant's restrictions. Claimant is entitled to TTD beginning October 24, 2020 until terminated by law or otherwise released to work or placed at MMI by Claimant's new ATP, Dr. Sobky, as of January 13, 2021.

Penalties

Claimant argues that since the Division issued a letter dated December 15, 2020, stating that Division had not received a timely admission or denial from Respondents, that Claimant is entitled to penalties pursuant to alleged violations of Section 8-43-203(1)(a), C.R.S. and W.C.R.P. Rule 5-2. Section 8-43-203(1)(a) states that "the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…" W.C.R.P. Rule 5-2 states in pertinent part:

> (C) The insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division. If an Employer's First Report of Injury should have been filed with the Division, but wasn't, the insurer's statement concerning liability is considered to be due within 20 days from the date the Employer's First Report of Injury should have been filed. The date a First Report of Injury should have been filed with the Division is the last day it could have been timely filed in compliance with paragraph (B) above.
>
> (D) The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation or Dependent's Notice and Claim for Compensation.
>
> (E) A statement regarding liability is required for any claim in which a division-issued workers' compensation claim number is assigned or a First Report of Injury should have been filed pursuant to paragraph (B) of this rule. A statement regarding liability shall not be filed without a First Report of

> Injury, Worker's Claim for Compensation, or Dependents Notice and claim having been successfully filed and assigned a workers' compensation claim number. A first report of injury must be filed prior to a notice of contest being accepted by the division.

This ALJ infers from Claimant's argument that Claimant is stating that he did not have notice of the denial. However, Claimant failed to state that he did not receive the Notice of Contest dated November 19, 2020 and, in fact, confirmed his address as stated on the Notice of Contest. Pursuant to W.C.R.P. Rule 1-4(1)(A), proper service is to be made by mail. In *Bowlen v. Munford*, 921 P.2d 59, 60 (Colo. App.1996) the court acknowledged the rule that whenever a document is filed with the Division, a copy of the document shall be mailed 'to each party to the claim'; *Kuhndog, Inc. v. Ind. Claim Appeals Office,* 207 P.3d 949 (Colo. App. 2009).

Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed. The Notice of Contest had the correct claim number of 5-153-276, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim. While the Division may have rejected the NOC due to the incorrect date of injury, the NOC served to give notice to Claimant regarding the denial of the claim.

An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise Claimant of the pendency of the action and afford Claimant an opportunity to present a response. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Schmidt v. Langel*, 874 P.2d 447, 451 (Colo.App.1993).

Due process does not require that the method of providing notice be absolutely certain to effect notice in every instance; it only requires that the method be reasonably calculated to effect notice to Claimant. *Kuhndog, Inc. v. Ind. Claim Appeals Office, supra.* Further, the record indicates, and Claimant does not contest, that Claimant was provided actual notice, as he provided a copy of the NOC in his Exhibit packet[28]. Accordingly, the service made in this instance was not deficient. *EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office*, 74 P.3d 516, 518 (Colo.App.2003) (when there is no indication that the prescribed method of notice is jurisdictional, actual notice satisfied due process).

Further, under Sec. 8-43-203(2)(a), an employer "may become liable" to Claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The phrase "may become liable" means imposition of penalties under Sec. 8-42-203(2)(a) is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home,* 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter

[28] Exhibit 10.

future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office,* 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). This has not occurred in this case. The Claims Representative testified that the NOC was filed timely on November 19, 2020 and this is credible.

Claimant failed to prove Employer should be penalized under Sec. 8-43-203(2)(a), C.R.S as there was no harm and, since Claimant received actual notice of the denial, there is no need to address the issue of the cure provision in this matter. The Claimant's claim for penalties is denied and dismissed.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2020 causing injuries to his bilateral knees, right quadriceps and bilateral inguinal injuries, including the sequelae of those injuries.

2. Claimant's claim of a lumbar spine injury or aggravation is denied and dismissed.

3. Respondents shall pay for the authorized, reasonable and necessary medical benefits to cure or relieve the effects of Claimant's industrial injuries of October 23, 2020, including all care, referrals through the Concentra system, diagnostic testing and therapy as stated above, including Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Sobky, Dr. Glass, Dr. McKenzie, Dr. Tutt (for only the emergency visit of November 2, 2020), Denver Integrated Imaging, Health Images Cherry Creek, Presbiterian St. Lukes' Medical Center Diagnostic Imaging Department and the orthopedic specialist at Steadman Hawkins, Dr. Hackett.

4. Claimant has proven by a preponderance of the evidence that he is entitled a one-time change of physician pursuant to Sec. 8-43-404(5)(a)(III) and (IV), C.R.S. to Dr. Kareem Sobky at Presbyterian St. Luke as his new authorized treating physician from January 13, 2021 forward, and terminating the relationship with Dr. Corson and Concentra. Any actions taken by Respondents in reliance of a Concentra provider placing Claimant at MMI after January 13, 2021 is void and stricken.

5. Claimant's average weekly wage as of October 23, 2020 is $1,153.61, for a temporary total disability rate of $769.07. Beginning December 1, 2020 Claimant's AWW is adjusted to $1,424.21, due to cancellation of his health insurance (COBRA), for a TTD rate of $949.47.

6. Respondents shall pay temporary total disability benefits from October 24, 2020 until terminated by law. Claimant is owed temporary total disability benefits from October 24, 2020 through November 30, 2020 in the amount of $4,174.95. Claimant is owed TTD from December 1, 2020 through the date of the hearing, August 27, 2021, in the amount of $36,622.41. TTD shall continue after that date until terminated by law.

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

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

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

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

Dated this 17th day of February 2022.

Digital Signature

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that medical maintenance benefits in the form of 12 chiropractic visits recommended by Authorized Treating Physician (ATP) Greg Reichhardt, M.D. are reasonable, necessary and causally related to his August 30, 2017 industrial injury.

2. Whether Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Pre-Load Supervisor. On August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. He was immediately transported to Medical Center of the Rockies Emergency Department and underwent surgery to stabilize his condition.

2. Claimant subsequently underwent therapy, rehabilitation and pain management. He also received a prosthesis for his right upper extremity.

3. On November 12, 2018 Frederick Mark Paz, M.D. performed an independent medical examination of Claimant. He reviewed Claimant's medical history and conducted a physical examination. After considering the direct history provided by Claimant during this evaluation, the findings on physical examination and prior medical records, Dr. Paz concluded that it was medically probable that Claimant's traumatic right trans-humeral amputation was causally related to his August 30, 2017 accident. Furthermore, Claimant's posttraumatic stress disorder, depression, and headaches were causally related to the August 30, 2017 incident. Finally, Dr. Paz determined that Claimant had reached Maximum Medical Improvement (MMI).

4. On December 17, 2018 Authorized Treating Physician (ATP) Kimberly L. Siegel, M.D. determined that Claimant had reached MMI. Dr. Siegel assigned Claimant a 100% right upper extremity and a 14% mental permanent impairment. She did not assign Claimant a permanent impairment for his cervical spine because his cervical and back pain was myofascial in nature and reactive to the traumatic amputation. Moreover, an MRI of the cervical spine did not reveal pathology consistent with Claimant's symptoms. Dr. Siegel also determined that Claimant was entitled to receive medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

5. On July 19, 2019 Dr. Paz conducted a follow-up independent medical examination of Claimant. Based on his clinical assessments and review of prior records, he determined that Claimant's back symptoms were not causally related to an axial spine diagnosis. Specifically, Claimant's subjective symptoms were not consistent with a lumbar

spine diagnosis. Notably, the chiropractic treatments Claimant had received did not reduce his back symptoms and maintain his functional level of activity.

6. In an October 5, 2020 report Claimant's chiropractor Bruce W. Weber, D.C. recounted Claimant's neck and back condition. He explained that Claimant "had his arm taken off on a conveyor belt while working" for Employer on August 30, 2017. Dr. Weber detailed that Claimant was

> very sore today in neck and back, hard to turn his neck, coupling motion of spine with the loss of his shoulder is severe due to the lack of attachment points of his muscles of his scapula and then to the spine, there is severe asymmetry of his spine and pulling to opposite side. Headaches daily and very sore since he has not been adjusted to compensate for the constant, recurrent, pulling to his upper back due to the loss of his shoulder.

He remarked that Claimant was much better after an adjustment and had been miserable for four months when he was unable to obtain treatment.

7. Claimant explained that since reaching MMI he has been evaluated by ATP Greg Reichhardt, M.D. on a monthly basis. On March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches.

8. On April 2, 2021 Dr. Paz performed a Rule 16 Review of the requested 12 additional sessions of chiropractic treatment. In reviewing Claimant's medical records Dr. Paz considered a February 23, 2021 report from Dr. Reichhardt. Dr. Reichhardt had recorded that, on the evening prior to the examination, Claimant had fallen down two steps, 12 feet across the basement floor and struck his head on a cement wall. Claimant impacted the left frontal area, with no posttraumatic amnesia, loss of consciousness, disorientation, or confusion. Claimant noted that he has suffered neck pain since the February 22, 2021 accident. Based on the preceding medical history, Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable the fall Claimant sustained on February 22, 2021 was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

9. Claimant testified at the hearing in this matter about his need for additional chiropractic sessions. He remarked that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease.

10. On August 18, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Reichhardt. Dr. Reichhardt testified that Claimant's current symptoms include headaches, neck pain, thoracic pain and lower back pain. He also noted that Claimant continues to experience phantom limb pain associated with his right arm amputation. Dr. Reichhardt attributed the preceding symptoms to Claimant's August 30, 2017 industrial injury.

11. Dr. Reichhardt detailed that he disagreed with the opinions of Dr. Paz regarding the denial of Claimant's chiropractic treatment. He explained that, despite the success of an independent exercise program with the vast majority of his patients, Claimant's situation was unique because of his amputation. Specifically, Claimant suffers biomechanical challenges because the loss of his arm creates imbalances in the cervical and thoracic area as well as supporting and manipulating his prosthesis. Dr. Reichhardt summarized that "while I do follow the medical treatment guidelines, recommendation to try to focus people on an active independent exercise program, I do find that his condition represents an extenuating circumstance in that the usage of the chiropractic treatment would still be within the guidelines."

12. Dr. Reichhardt explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that "because of the potential for imbalance due to the loss of his arm and also associated with the use of the prosthesis and conditioning factors that may contribute to that, he has ongoing problems with his neck and upper back that warrant chiropractic treatment more so than the standard cervical strain." Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back.

13. Dr. Reichhardt also commented that Claimant developed migraines after his August 30, 2017 industrial injury. He determined that Claimant's condition involved his neck, either as a direct injury or as a result of excessive strain, and balance associated with his amputation and use of his prosthesis. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

14. In his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing "a lateral deviation of his upper thoracic spine due to the imbalance of muscle pull from side to side due to the loss of his shoulder acting as an attachment point to the muscles." He was laterally deviating his neck to the left shoulder and suffered pain with right lateral flexion, Dr. Weber noted that Claimant's was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to

his amputation. Specifically, Claimant's lower back was "concaving to compensate for the weight difference from one side to another due to the loss of his arm."

15. On January 7, 2022 the parties conducted the post-hearing evidentiary deposition of Dr. Paz. Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based upon his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that "there was no pathology which was causally associated with the symptoms in the cervical, thoracic, or lumbar spine . . . none of the symptoms were identified pathophysiologically to be clinically correlated with Claimant's [occipital headache] symptoms."

16. Dr. Paz also addressed Dr. Reichhardt's reference to imbalance created by the August 30, 2017 right arm amputation as a basis for additional chiropractic treatment. Initially, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. He noted that Dr. Reichhardt's "own testimony was that he really didn't have an explanation as to what structurally the explanation would be as to why there would be imbalance." Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

17. Claimant has demonstrated that it is more probably true than not that medical maintenance benefits in the form of 12 additional chiropractic visits as recommended by ATP Dr. Reichhardt are reasonable, necessary and causally related to his August 30, 2017 industrial injury. Initially, on August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. Claimant subsequently received therapy, rehabilitation and pain management. He also obtained a prosthesis for his right upper extremity. On December 17, 2018 ATP Dr. Siegel determined that Claimant had reached MMI and recommended medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

18. On March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches. Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable that Claimant's February 22, 2021 fall was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

19. Claimant credibly testified that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment

improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease. The medical records and persuasive opinion of Dr. Reichhardt support Claimant's testimony.

20. In an October 5, 2020 report Dr. Weber persuasively recounted that the coupling motion of Claimant's spine with the loss of his shoulder was severe due to the lack of attachment points of his muscles on his scapula and spine. Notably, there was severe asymmetry of his spine and pulling to the opposite side. Claimant experienced daily headaches and was sore in the absence of chiropractic adjustments to compensate for the constant, recurrent, pulling on his upper back due to the loss of his shoulder. Moreover, in his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing a lateral deviation of his upper thoracic spine because of the imbalance of muscle pull from side to side due to the loss of his shoulder that acted as an attachment point to the muscles. Dr. Weber noted that Claimant was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to his amputation.

21. Dr. Reichhardt persuasively explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that, because of the potential for imbalance due to the loss of Claimant's arm and the use of the prosthesis, he has ongoing problems with his neck and upper back that warrant chiropractic treatment. Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause[s] irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. He also commented that Claimant developed migraines after his August 30, 2017 industrial injury. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

22. In contrast, Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based on his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that there was no pathology causally associated with Claimant's symptoms in the cervical, thoracic, or lumbar spine. Furthermore, none of the symptoms were clinically correlated with Claimant's occipital headache symptoms. Finally, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

23. Based on Claimant's credible testimony, Dr. Weber's chiropractic records and the persuasive opinion of Dr. Reichhardt, Claimant has demonstrated that medical maintenance benefits in the form of 12 additional chiropractic visits are reasonable, necessary and causally related to his August 30, 2017 industrial injury. As an ATP, Dr. Reichhardt has consistently treated Claimant during the course of his claim and noted continuing aggravation to the structures in his neck and his back as a result of his right arm amputation. The amputation caused Claimant's left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. Claimant also developed migraine headaches as a result of neck and myofascial pain. Dr. Paz's contrary opinion that Claimant neck and back symptoms are unrelated to the August 30, 217 amputation is not supported by the medical records or persuasive evidence. Accordingly, Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

24. Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S. The record reveals that a medical maintenance benefit in the form of 12 additional chiropractic sessions was requested by ATP Dr. Reichhardt. The request was both unpaid and contested. As detailed in preceding sections of the present opinion, the benefit was ordered by the undersigned ALJ following a hearing initiated through an application for a hearing. Claimant is therefore entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

Additional Chiropractic Treatment

6. As found, Claimant has demonstrated by a preponderance of the evidence that medical maintenance benefits in the form of 12 additional chiropractic visits as recommended by ATP Dr. Reichhardt are reasonable, necessary and causally related to his August 30, 2017 industrial injury. Initially, on August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. Claimant subsequently received therapy, rehabilitation and pain management. He also obtained a prosthesis for his right upper extremity. On December 17, 2018 ATP Dr. Siegel determined that Claimant had reached MMI and recommended medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

7. As found, on March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches. Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable that Claimant's February 22, 2021 fall was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

8. As found, Claimant credibly testified that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease. The medical records and persuasive opinion of Dr. Reichhardt support Claimant's testimony.

9. As found, in an October 5, 2020 report Dr. Weber persuasively recounted that the coupling motion of Claimant's spine with the loss of his shoulder was severe due to the lack of attachment points of his muscles on his scapula and spine. Notably, there was severe asymmetry of his spine and pulling to the opposite side. Claimant experienced daily headaches and was sore in the absence of chiropractic adjustments to compensate for the constant, recurrent, pulling on his upper back due to the loss of his shoulder. Moreover, in his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing a lateral deviation of his upper thoracic spine because of the imbalance of muscle pull from side to side due to the loss of his shoulder that acted as an attachment point to the muscles. Dr. Weber noted that Claimant was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to his amputation.

10. As found, Dr. Reichhardt persuasively explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that, because of the potential for imbalance due to the loss of Claimant's arm and the use of the prosthesis, he has ongoing problems with his neck and upper back that warrant chiropractic treatment. Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause[s] irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. He also commented that Claimant developed migraines after his August 30, 2017 industrial injury. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

11. As found, in contrast, Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based on his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that there was no pathology causally associated with Claimant's symptoms in the cervical,

thoracic, or lumbar spine. Furthermore, none of the symptoms were clinically correlated with Claimant's occipital headache symptoms. Finally, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

12. As found, based on Claimant's credible testimony, Dr. Weber's chiropractic records and the persuasive opinion of Dr. Reichhardt, Claimant has demonstrated that medical maintenance benefits in the form of 12 additional chiropractic visits are reasonable, necessary and causally related to his August 30, 2017 industrial injury. As an ATP, Dr. Reichhardt has consistently treated Claimant during the course of his claim and noted continuing aggravation to the structures in his neck and his back as a result of his right arm amputation. The amputation caused Claimant's left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. Claimant also developed migraine headaches as a result of neck and myofascial pain. Dr. Paz's contrary opinion that Claimant neck and back symptoms are unrelated to the August 30, 217 amputation is not supported by the medical records or persuasive evidence. Accordingly, Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

Recovery of Costs

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

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

14. As found, Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S. The record reveals that a medical maintenance benefit in the form of 12 additional chiropractic sessions was requested by ATP Dr. Reichhardt. The request was both unpaid and contested. As detailed in preceding sections of the present opinion, the benefit was ordered by the undersigned ALJ following a hearing initiated through an application for a hearing. Claimant is therefore entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

ORDER

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

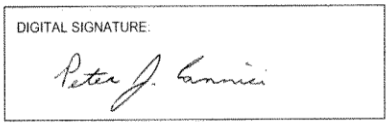
1. Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

2. Claimant is entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: February 17, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-148-535-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 4, 2022, in Denver, Colorado. The hearing was electronically recorded (reference: 1/4/2022, beginning at 1:45 PM, and ending at 2:35 PM)..

The Claimant was present in person and represented by [Redacted]., Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted]shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 13 were admitted into evidence, without objection. Respondents’ Exhibits A through S were admitted without objection. Respondents’ Exhibit B, p. 16 was admitted over objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was

filed, electronically, on January 12, 2022. Claimant filed no timely objections as to form. Therefore, the matter was ready for decision on January 19, 2022. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant has overcome the opinion of John Burris, M.D., the Division Independent Medical Examiner (DIME) by clear and convincing evidence, as to the date of maximum medical improvement (MMI); and, f not, whether the Claimant is entitled to post-MMI maintenance medical benefits.

FINDINGS OF FACT

'Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 64 year-old commercial accounts manager for the Employer.

2. Claimant sustained a prior work injury in November 2017. Claimant pulled herself up into a truck that did not have running boards and injured her chest, shoulder, back and right arm. (Ex. J. 292). Imaging showed degenerative changes. (Ex. G, pg. 251). After undergoing conservative treatment, Claimant was discharged at MMI on July 18, 2018 with no impairment rating. (Ex. G, pg. 255).

3. On October 30, 2019, Claimant sustained another prior work injury when she was cleaning snow off some vehicles and her right foot slipped on ice. She did not fall and was able to steady herself. She reported right low back pain radiating into her buttocks. (Ex. C, pg. 26). Claimant was referred for chiropractic and acupuncture treatment. (Ex. C, pg. 28). Claimant was placed at MMI with no impairment rating on December 6, 2019 by Dr. Gary Zuehlsdorff. Claimant reported that she had only a residual ache in her low back. (Ex. C, pg. 39-40).

4. In this claim, on June 22, 2020, Claimant reported to Dr. Sharon Walker at On the Mend that she pulled herself up into a super duty truck that did not have running boards on June 17, 2020. Claimant testified that she slipped when pulling herself up, but did not fall, and landed back on her feet. Claimant reported low back pain, right shoulder pain and upper extremity numbness. (Resp. Ex. C, pg. 42).

5. Claimant returned to On the Mend on June 30, 2020 and requested a referral back to her treating chiropractor from the prior 2017 work injury. (Ex. C pg. 47).

Claimant began treatment with Dr. Roger Smith for chiropractic care on June 30, 2020. (Ex. D, pg. 155).

6. Dr. Allison Fall performed a Respondents' IME on November 5, 2020. Dr. Fall opined that the mechanism of injury was unclear as there were some variations in the mechanism of injury as Claimant added that she had been pushing on doors which caused injury to her arm prior to attempting to pull herself up into the truck. After a review of the records and examination, Dr. Fall concluded that claimant sustained some myofascial pain as a result of grabbing the handle to pull herself up into the vehicle and then stepping back off. Dr. Fall noted that Claimant's examination was unremarkable and there were no signs of sacroiliac joint dysfunction or radiculopathy. Dr. Fall concluded that any mild muscular strain would have resolved. Dr. Fall noted claimant could pursue ongoing chiropractic treatment on her own. (Ex. B, pg. 24).

7. Claimant continued with conservative care with her chiropractor, Dr. Smith. (Ex. D, pg. 155 – 182). She continued with massage therapy at Vetanze Therapy. (Ex. E, pg. 199-212).

8. On April 6, 2021, Dr. Zuehlsdorff placed claimant at MMI. Dr. Zuehlsdorff opined that Claimant had undergone significant conservative care, including chiropractic care, acupuncture and some physical therapy. Claimant reported only 50% improvement after nearly ten months of treatment. Dr. Zuehlsdorff assigned a 14% whole person for the cervical spine and 18% whole person for the lumbar spine for a combined 29% whole person impairment. Dr. Zuehlsdorff did not recommend any maintenance care. (Ex. C, pg. 111-112).

9. Respondents requested a Division IME.

10. Dr. Burris performed a Division IME on July 20, 2021 and evaluated Claimant's right shoulder, cervical spine and lumbar spine. (Ex. A.). Dr. Burris opined that based on the reported mechanism of injury, the clinical notes, and diagnostic testing, claimant suffered minor lumbar and right shoulder soft tissue strains. (Ex. A, pg. 9).

11. Dr. Burris agreed with MMI as of April 6, 2021. Dr. Burris assigned no impairment rating. Dr. Burris concluded that claimant had completed exhaustive treatment exceeding the Colorado DOWC treatment guidelines without appreciable change in her subjective complaints or functional status. (Ex. A, pg. 9). Dr. Burris supported his opinion that Claimant's subjective complaints were out of proportion to the nature of the workplace event. Furthermore, Claimant's clinical course had not followed a typical physiologic pattern associated with an acute event. Dr. Burris noted that Claimant's diagnostic testing from the recent injury was essentially unchanged from testing predating the event. Dr. Burris opined that Dr. Zuehlsdorff's rating was not

supported by objective findings. (Ex. A, pg. 10-11). Dr. Burris did not recommend any medical maintenance care. (Ex. A, pg. 11).

12. Respondents filed a Final Admission of Liability on August 17, 2021, admitting to Dr. Burris's Division IME opinions. (Ex. 7). Claimant filed an Application for Hearing to overcome the opinions of Dr. Burris. (Ex. 9).

13. Claimant testified that while the mechanism of injury in her current claim was similar to the 2017 claim, her pain from the current claim was much worse overall and it severely impacted her whole body and function. Claimant testified that she did not have any residual issues from her 2017 or 2019 claims.

14. Claimant further testified that she felt she was not at MMI as she needed continued treatment with Dr. Smith, her chiropractor, for her work-related injuries. Claimant testified that she remained in pain and she was unable to do many of the things that she used to be able to do.

15. Claimant testified that Dr. Smith had recently begun to provide a new form of chiropractic treatment and Claimant was optimistic this treatment would improve her condition. She testified to date she had experienced some improvement in her pain and function from the new treatment and she wanted to continue this treatment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Overcoming the Division IME

a. A Division IME physician's findings concerning whether the claimant has reached MMI and regarding permanent medical impairment are generally binding unless overcome by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

b. While claimant testified that she believed she was not at MMI and required more treatment to reach MMI, Claimant failed to prove by clear and convincing evidence that Dr. Burris erred in his determination that Claimant reached MMI as of April 6, 2021.

c. After a review of the records, both Dr. Zuehlsdorff and Dr. Burris concluded that claimant had reached MMI as of April 6, 2021. Claimant offered no medical evidence that Dr. Burris's determination of MMI was incorrect. Claimant's subjective belief that she is not at MMI is insufficient to prove by clear and convincing evidence that Dr. Burris's determination of MMI was incorrect.

d. Similarly, claimant provided no medical records or testimony that the impairment rating assigned by Dr. Burris was incorrect and such evidence was unmistakable and free from serious or substantial doubt. Claimant relies on Dr. Zuehlsdorff's impairment rating to dispute Dr. Burris's impairment rating, but after a review of the records, this is merely a difference of opinion and does not amount to clear and convincing evidence. Furthermore, Claimant's testimony regarding her ongoing pain and lack of function does not constitute clear and convincing evidence that the Division IME made an error with respect to claimant's impairment rating.

Medical Maintenance Benefits

e. A claimant is entitled to post-MMI maintenance medical benefits if future medical treatment will be "reasonably necessary to relieve the claimant from the effects of the industrial injury or occupational disease even though such treatment will not be received until sometime subsequent to the award of permanent disability". *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1998). In deciding whether maintenance care is necessary there must be evidence which establishes "but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that [s]he will suffer a greater disability than [s]he has thus far." *Stollmeyer v. Industrial Claim Appeals Office of State of Colo.*¸916 P.2d 609, 610 (Colo. App. 1995).

f. Neither Dr. Zuehlsdorff nor Dr. Burris recommended any medical maintenance care. Dr. Fall opined that Claimant should pursue chiropractic care on her own.

g. Nonetheless, Claimant has continued to treat with her chiropractor for her low back condition. Claimant has testified that chiropractic treatment continues to help her. Claimant's testimony is credible that the chiropractic treatments from Dr. Smith is necessary to maintain her condition.

h. However, C.R.S. §8-42-101(3)(a)(III) provides that compensation for fees for chiropractic treatments shall not be made more than ninety days after the first of such treatments nor after the twelfth such treatment, whichever first occurs, unless the chiropractor has received level I accreditation.

i. Therefore, based on claimant's testimony, claimant has proven by a preponderance of the evidence that she is entitled to medical maintenance care for the chiropractic treatment by Dr. Smith subject to the limitations set forth by statute.

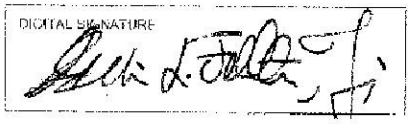
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant failed to prove by clear and convincing evidence that Dr. Burris erred in his opinions as to MMI and impairment rating. Claimant has not overcome the Division IME.

B. Claimant has proven by a preponderance of the evidence that she is entitled to medical maintenance care. Specifically, Claimant has proven she is entitled to chiropractic care, subject to the limits set forth in C.R.S. §8-42-101(3)(a)(III).

DATED this 21st day of February, 2022.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

may access a form for a petition to review at *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

WC 5-148-535-003

OAC CERTIFICATE OF SERVICE

I hereby certify that on **February 22, 2022** a true and correct copy of the foregoing Order was served upon the following parties by email, to the addresses on file with the OAC, who shall provide copies to all other parties pursuant to OAC 16-G.

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

Division of Workers' Compensation
DIME Unit
imeunit@state.co.us

Roger Fraley, Esq.
Irwin Fraley, PLLC
Rfraley201@comcast.net

Amanda Branson, Esq.
Pollart & Miller
Pm-oac@pollartmiller.com

/s/ Mary C.
Clerk - OAC

ISSUES

Whether the claimant has overcome, by clear and convincing evidence, the opinions of the Division-sponsored independent medical examination (DIME) physician that the claimant's cervical spine was not injured, and therefore no impairment rating was assigned to the claimant's cervical spine.

Whether the claimant has demonstrated, by a preponderance of the evidence, that her average weekly wage (AWW) should be increased for the period of February 1, 2021 through February 28, 2021, due to the loss of her health insurance.

FINDINGS OF FACT

1. The claimant suffered an injury at work on March 25, 2020, while working as a barista. On that date, the claimant was injured when she was struck by three boxes of frozen sandwiches that fell from a shelf. The claimant testified that she was struck on the back of her head near the base of her skull.

2. The claimant's authorized treating physician (ATP) for this claim is Dr. James McLaughlin. The claimant first saw Dr. McLaughlin on March 25, 2020. At that time, the claimant reported a headache and some visual disturbances. Dr. McLaughlin diagnosed post concussive symptoms and tightness of the cervical spine. He took the claimant off of all work at that time.

3. On March 27, 2020, Dr. McLaughlin ordered a head computed tomography (CT) scan. On March 31, 2020, a head CT showed no acute intracranial pathology. In addition to the head CT, x-rays were taken of the claimant's cervical spine. The x-rays showed no fracture or bone lesion, and no spondylolisthesis.

4. On April 1, 2020, Dr. McLaughlin noted that the head CT and x-rays of the claimant's cervical spine were normal.

5. On April 20, 2020, Dr. McLaughlin indicated that the claimant could return to full duty work the following day (April 21, 2020).

6. On April 23, 2020, the respondent filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits.

7. On May 4, 2020, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported that she felt very fatigued after working a full shift, with a headache and tightness in her neck. At that time, Dr. McLaughlin limited the claimant to working four hour shifts.

8. On June 25, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that the claimant suffered a contusion to the cervical and occipital area with a minor muscle strain. Dr. Bernton further opined that the claimant's continuing symptoms were likely the result of anxiety, and depression (with somatoform complaints). In addition, he opined that the claimant had reached maximum medical improvement (MMI) as of the date of the IME.

9. On July 31, 2020, Dr. McLaughlin released the claimant to full duty, with no work restrictions.

10. On August 31, 2020, Dr. McLaughlin referred the claimant to Brittany Matsumura for consultation. On September 14, 2020, the claimant was seen by Dr. Matsumura. At that time, the claimant reported occasional visual disturbances, increased migraine headaches, dizziness, and occasional memory issues. Dr. Matsumura noted the claimant's neurologic exam was normal. She recommended the claimant take propranolol to treat her headaches.

11. During his treatment of the claimant, Dr. McLaughlin identified the claimant's diagnoses as: headache and cervical strain.

12. Throughout her treatment with Dr. Matsumura, the claimant's diagnoses were identified as: post-traumatic headache, myofascial muscle pain, cervicalgia, and dizziness.

13. The claimant testified that she believes that both her head and neck were injured on March 25, 2020. The further claimant testified that since the injury she has had pain and issues with her neck range of motion.

14. The claimant's spouse testified that he and the claimant have medical insurance through the employer. He further testified that he believes that the health insurance was canceled in February 2021. The claimant and her spouse learned that their insurance was canceled when they attempted to fill a prescription. It is their understanding that the insurance was reinstated March 1, 2021. A similar situation occurred in June 2020, when the claimant was provided written notice that her health insurance was canceled. However, in February 2021, the claimant did not receive any written notice.

15. On April 19, 2021, Dr. McLaughlin determined that the claimant had reached MMI. At that time, Dr. McLaughlin assessed a whole person permanent impairment rating of 11 percent. This whole person impairment rating was reached by assigning six percent impairment for the claimant's cervical spine (with four percent for a Table 52 rating and two percent for range of motion) and five percent impairment for the claimant's headaches.

16. On July 13, 2021, the claimant attended a Division sponsored independent medical examination (DIME) with Dr. John Hughes. In connection with the DIME, Dr. Hughes reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Hughes identified that the claimant suffered a "work-related blow to the head with development of post-traumatic migraine headaches". Dr. Hughes agreed with Dr. McLaughlin that the claimant had reached MMI by April 19, 2021. Dr. Hughes assessed a whole person permanent impairment rating of five percent. This was based upon the claimant's traumatic head injury. Dr. Hughes opined that the claimant did not suffer a cervical spine injury. Therefore, he did not assess an impairment rating for the cervical spine.

17. On July 21, 2021, the respondents filed a Final Admission of Liability (FAL) which relied upon Dr. Hughes's DIME report.

18. On November 1, 2021, Dr. Bernton authored a report in which he opined that the medical records supported Dr. Hughes's determination that the claimant does not have any permanent impairment to her cervical spine. Dr. Bernton also noted that based upon his review of the claimant's medical records,significant rigidity of the cervical spine was not evident, nor documented consistently. Dr. Bernton further noted that none of the claimant's providers pursued magnetic resonance imaging (MRI) of the claimant's cervical spine.

19. The ALJ credits the medical records and the opinions of Dr. Hughes over the contrary opinions of Dr. McLaughlin. The ALJ finds that it was appropriate for Dr. Hughes to assess an impairment rating without the inclusion of the cervical spine. The ALJ finds that the opinion of Dr. McLaughlin that the cervical spine should have been included in the rating is a mere difference of opinion and does not rise to the level of any error on the part of Dr. Hughes. The ALJ finds that the claimant has failed to overcome Dr. Hughes's DIME opinion regarding the impairment rating.

20. The ALJ finds that the claimant has not demonstrated that it is more likely than not that she is entitled to an increase in her temporary average weekly wage (AWW) for the month of February 2021. The ALJ finds that the claimant has failed to demonstrate that her health insurance was canceled in February 2021. Furthermore, even if the insurance was canceled during that time, the ALJ finds no persuasive evidence on the record that any loss of insurance coverage in February 2021 was related to the claimant's work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v.*

Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the claimant has failed to prove by clear and convincing evidence that Dr. Hughes's impairment rating was incorrect. The claimant has failed to establish anything other than a difference of opinion between medical providers. As found, the medical records and the opinions of Dr. Hughes are credible and persuasive.

6. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and the claimant must have access to the benefit on a day-to-day basis, or an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM*

Corporation, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her average weekly wage (AWW) should be increased for the period of February 1, 2021 through February 28, 2021, due to the loss of her health insurance. As found, the claimant has failed to demonstrate that her health insurance was canceled in February 2021. Furthermore, even if the insurance was canceled during that time, the ALJ found no persuasive evidence that any loss of insurance coverage was related to the claimant's work injury

ORDER

It is therefore ordered:

1. The claimant has failed to overcome the DIME physician's opinion regarding the claimant's permanent impairment rating.

2. The claimant's request for an increase in her average weekly wage (AWW) for the period of February 1, 2021 through February 28, 2021, is denied and dismissed.

Dated this 22nd day of February 2022.

Cassandra M. Sidanycz
Administrative Law Judge

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above

address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained a compensable injury arising out of the course and scope of his employment on June 4, 2021, injuring his left knee.

II. Whether Claimant has proven, by a preponderance of the evidence that he is entitled to medical benefits as a result of a compensable industrial injury.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on September 7, 2021 on multiple issues including compensability, medical benefits that are authorized, reasonably necessary and related to the alleged work related injury of June 4, 2021, average weekly wage and temporary disability benefits. Claimant withdrew the issues of average weekly wage and temporary disability benefits at the time of the hearing.

Respondents filed a Response to Application for Hearing on September 10, 2021 adding issues of responsible for termination and authorization of medical provider. Respondents withdrew the issue of termination in response to Claimant's withdrawal of the issue of temporary disability benefits and stipulated that the providers Claimant was treated by were authorized.

Prehearing Administrative Law Judge Royce Mueller entered a prehearing conference order on December 29, 2021 granting Respondents' motion for a post-hearing deposition of authorized treating provider (ATP) Lori Rossi, M.D. Respondents sent a Notice of Deposition of Dr. Rossi for January 31, 2022.

FINDINGS OF FACT

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

1. Claimant worked for Employer as a heavy duty alignment technician for a period of almost 21 years, on and off. The last period of employment started as of March 1, 2021. The job required Claimant to perform duties involving bending, kneeling and twisting, lifting over 100 lbs. and up to 300 lbs. with lift assistance, laying on the ground and creeper, getting up and down from a creeper, lifting heavy parts in awkward positions and installing them on vehicles. Claimant worked on a variety of vehicles, from cars to large busses and 18 wheelers.

2. Claimant credibly testified that he had not had prior left knee problems before June 4, 2021.

3. On Friday, June 4, 2021, between 9 and 10 a.m., Claimant was working on the kingpins[1] of a large bus for Employer. This required Claimant to remove the wheel, hub and tire assembly from the bus with a dolly. As he was removing the wheel it started to roll and slide. In an attempt to stop the tire from rolling away, he tried to catch the tire with his leg to prevent it from falling. Claimant felt an immediate pop, and pain in his left knee within the hour. Claimant stated that he thought he had tweaked the knee and it would get better with rest over the weekend. He stated that in dealing with heavy machinery, it is common to have these kinds of incidents and felt it was not necessary to report each bump and bruise as that would mean he would report something almost on a daily basis. Claimant stated that he told his coworker, but did not report the injury to HR because they were gone for the day, by the end of the day when he realized the severity of the injury. He stated that he reported the injury first thing on Monday, June 7, 2021.

4. The left knee pain became progressively worse over the following hours and on June 5, 2021 he could hardly put any weight on his left knee. He rested that day, elevating his leg on his couch all day alternating using ice and heat on the knee. On June 6, 2021 Claimant accompanied his wife to the grocery store and he only lasted approximately 15 minutes before he needed to go to his truck and to rest his leg due to the pain. On the way home, Claimant stopped for gas for his vehicle. While he was pumping the gas, he turned towards the truck and his left leg gave out, causing him to fall against the gas pump.

5. Claimant went to the emergency room at Medical Center of Aurora and was first seen by Nurse Gail K. Turner. She noted that Claimant was being seen after an injury on Friday, with continued pain, swelling and decreased range of motion. The note goes on to state that Claimant had left knee pain while attempting to stand at work, with continued pain in the left knee and hip since Friday.

6. Claimant was then seen by an ER physician, Dr. Anna Schubert, who documented a different mechanism of injury involving a recliner. Dr. Schubert concluded after examination that Claimant had a small joint effusion with possible ligamentous injury, recommended therapy, over the counter medication and a follow up with orthopedics. The radiologist, Dr. Benjamin Sacks described that the plain films showed possible small effusion and recommended an MRI of the left knee.

7. Claimant testified that he spoke to the nurse to advise about his work related left knee injury before he was seen by the physician. Claimant testified he does not own a recliner, denied sitting in a recliner anytime between June 4 and June 6, and denied making any statements about getting out of a recliner. As found, the first contact with Nurse Turner is more persuasive and credible over the contrary notations of Dr. Schubert.

[1] The main pivot in the steering mechanism.

8. Claimant was next attended by Dr. Lori Rossi on June 7, 2021 at Midtown Occupational Medicine. Dr. Rossi documented that Claimant injured his left knee after repeatedly getting up and down from a creeper. Claimant went into the office on crutches, with continued pain with ambulation. She noted diffuse anterior swelling and positive McMurray's test,[2] was unable to bear weight and had instability with popping. Dr. Rossi requested that Dr. Noel see Claimant as she valued his opinion with regard to causality. Dr. Rossi at this time stated that the objective findings were yet to be determined as work related. She recommended restrictions, over the counter medication, prescribed a soft knee brace since the knee was unstable, and ice for the swelling.

9. Employer completed the First Report of Injury on June 8, 2021, which noted that Claimant injured his left knee while working under a tractor, performing a wheel alignment and had popping and could not bear weight.

10. On June 10, 2021 Claimant was evaluated by Dr. Lon Noel. Claimant provided a more detailed mechanism of injury where he was performing an alignment with a 350 lb. dolly, while picking up the tire, it shifted and he slid under it. Claimant developed left knee pain, which was progressively worsened causing him to have problems walking. Dr. Noel noted that Claimant had an antalgic gait, favoring the left lower extremity, had swelling anteriorly, with an equivocal McMurray's test. Dr. Noel concluded that the Claimant's left knee injury was work related and that the objective findings were consistent with the mechanism of injury. He also recommended an MRI of the left knee.

11. The left knee MRI from Health Images on June 21, 2021 showed mild degeneration of the ACL, a large area of full thickness and near full thickness cartilage loss in the central patella with mild reactive marrow edema,[3] posterior root rupture of the medial meniscus including mild extrusion of the meniscal body, and cartilage irregularity of the condyle with a small area of high grade cartilage fissuring and small joint effusion.

12. On June 22, 2021, Claimant was seen by Dr. Rossi. She noted that "Causality was originally an issue, but cleared up by Dr. Noel at the last clinic visit." Dr. Rossi now changed that the objective findings were consistent with the history and the work related mechanism of injury. Dr. Rossi reviewed Claimant's left knee MRI and diagnosed him with a medial meniscus tear. Dr. Rossi referred Claimant to an orthopedic surgeon, Dr. Hewitt.

13. Respondents filed a Notice of Contest on July 12, 2021 stating the claim was denied for further investigation for compensability.

14. Dr. Rossi again saw Claimant on July 22, 2021 and continued to recommend restrictions and the prior treatment plan, including the referral to Dr. Hewitt. This was echoed in the reports from August 9, 2021 and August 23, 2021.

[2] Test to identify potential meniscus tears in the knee.
[3] Typically a response to an injury.

15. Claimant was evaluated by Dr. Michael Hewitt, an orthopedic surgeon, on September 3, 2021. He reviewed the MRI and examined Claimant, which showed a large joint effusion. He aspirated 40cc of fluid and performed a cortisone injection. He also recommended an unloader brace.

16. Claimant stated that he was last seen by a doctor about his left knee on September 21, 2021 as his care was denied from then on. Claimant stated that he continued working, though modifying what he was doing, and being very deliberate and careful with what work he performed, as his left knee kept popping, gave out sometimes and continued to have pain every time he put weight down, though he mostly did not have problems with range of motion.

17. Dr. Robert Watson, a level II occupational medicine physician, issued a records review dated December 7, 2021 at Respondents' request. Dr. Watson stated that inconsistencies in the medical records made it more probable than not that Claimant was not injured on the job on June 4, 2021.

18. Dr. Watson testified at hearing consistent with his report, outlining all the inconsistencies in the records, stating that it was more likely that Claimant tore his meniscus while getting up from a recliner.

19. Dr. Rossi testified by deposition on January 31, 2022. She stated that she diagnosed Claimant with an acute posterior root medial meniscus rupture. She testified that initially, after reviewing all the records, she opined that Claimant sustained a work related injury. She stated that it was unlikely that Claimant's ruptured meniscus was caused by standing up from a recliner.

20. As found, it is more likely than not that on June 4, 2021, Claimant injured his left knee in the mechanism he described at the hearing and that is reflected in Dr. Noel's June 10, 2021 report. Dr. Noel took the time to obtain a full description of the mechanism of injury. As found, it more likely than not that the June 6, 2021 report by Dr. Schubert does not accurately reflect Claimant's mechanism of injury. Further, Dr. Noel and Nurse Turner are more persuasive and credible over the contrary opinion of Dr. Watson and the testimony of Dr. Rossi. Lastly, Dr. Rossi's opinion, after Dr. Noel evaluated Claimant, assessing that the injury was work related was more credible than the subsequent change of opinion. As found, Claimant's left knee was asymptomatic before the work related injury, he worked a heavy duty job, with heavy parts, assembling and dismantling the kingpins, which required Claimant to remove the wheel, hub, and tire assembly from the bus with a dolly, all of which were very heavy. As found, Claimant was injured in the course and scope of his employment with Employer on June 4, 2021.

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Compensability

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

relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

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

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

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Indus, Comm'n*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, the medical records, Claimant's testimony, and the opinions of Dr. Noel, the opinion of Dr. Rossi following Dr. Noel's evaluation and before her deposition, and the

records of Nurse Turner are credible and persuasive, over the contrary opinion of Dr. Watson and the deposition testimony of Dr. Rossi, which are not persuasive. Claimant asserted he was working a heavy duty job, working performing an alignment when the tire was sliding and he had to put his leg under the tire to brace it. He immediately felt a pop and shortly thereafter, started feeling pain in his left knee, while getting up and down from the creepers. Further, Claimant had no prior left knee injuries or symptoms before the June 4, 2021 work related injury. Claimant is credible and persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered injuries to his left knee arising out of and in the course and scope of his employment with Employer on June 4, 2021 and that the injury was proximately caused by the June 4, 2021 accident.

C. Medical Benefits

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

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this work injury. As found, Claimant has proven by a preponderance of the evidence that the treatment Claimant received from the emergency room at Aurora Medical Center, Dr. Rossi, Dr. Noel, Dr. Hewitt, Health Images and other providers within the chain of referral was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work related injury, including but not limited to the physical therapy, the braces, crutches and nonsteroidal medications, the aspiration and the cortisone injection. As found, Claimant has proven by a preponderance of the evidence that the physical therapy recommended by Dr. Hewitt is reasonable medical treatment related to Claimant's left knee work related injury of June 4, 2021.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits for date of injury of June 4, 2021 for his left knee injury is compensable.

2. Employer shall cover all authorized, reasonably necessary treatment related to the June 4, 2021 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from at Aurora Medical Center, Midtown Occupational Medicine, Dr. Rossi, Dr. Noel, Dr. Hewitt, Health Images and other providers within the chain of referral.

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

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

DATED this 22nd day of June, 2022.

Digital Signature

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

Note: This order was issued on February 22, 2022. The above cited month was a scrivener's error.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-165-956-003

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the May 19, 2021, request by authorized treating provider ("ATP") Lucas Schnell, D.O., for a left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medical meniscectomy is reasonable and necessary as well as causally related to Claimant's admitted industrial injury.

II. Whether Claimant established by a preponderance of the evidence that the proposed L5-S1 lumbar disc arthroplasty requested by authorized treating provider ("ATP") Stephen Pehler, M.D., on August 19, 2021, is reasonable and necessary as well as causally related to Claimant's admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant suffered an admitted industrial injury on February 19, 2021, while working as a delivery/dock worker for Employer. Before starting work as a deliver/dock worker for Employer in 2019, Claimant worked 20 years in the same position at YRC. In Claimant's position, he had to drive semis and deliver product to different locations.

2. On February 19, 2021, Claimant had backed two semis together, back-to-back, and was moving an aluminum ramp that was folded in half, which weighed about 180 to 220 pounds, between the trucks beds when he felt a pop in his low back which took him down to the ground, hitting both knees and landing on his hands. Claimant described the pain as severe and said that he remained on the ground due to pain until he could pick himself up. Claimant's testimony was consistent with the report of injury made by Brian Alvarez, M.D., three days later on February 22, 2021. *See* Claimant's Exhibit Tab 6, Bate Stamp ("BS") 27.

3. Claimant testified that before his admitted injury of February 19, 2021, he did not have symptoms or pain in either his left knee or low back which lasted more than a few days, had never missed a day of work due to back pain, and had not required any ongoing medical treatment for his left knee or low back.

4. For example, Claimant testified that although he had received treatment for back pain three times on January 8, 2020, January 28, 2020, and August 10, 2020 these singular visits were for pain originating from lifting at work but that the back pain went away and he did no follow-up care.

5. Claimant also testified that he had been involved in two separate car accidents on March 2, 2020, and December 4, 2020 but received no medical treatment from either accident for his back or knee, had no symptoms or lingering pain complaints, and missed no time from work.

6. Claimant also testified that between August 2018 and December 2019 he was treated at Kaiser Permanente for pancreatitis which he thought caused him to suffer from back pain. But his back pain at that time did not involve numbness or weakness in his legs.

7. Claimant's medical records that predate his work injury demonstrate that Claimant did have intermittent back pain for which he received treatment. But the records do not demonstrate that Claimant also had numbness and weakness in his legs.

8. Following Claimant's admitted industrial injury, at his first February 22, 2021, visit with authorized treating provider ("ATP") Bryan Alvarez, M.D., at Aurora Colorado Occupational Medical Partners ("Aurora COMP") Claimant was diagnosed with a lumbar spine sprain and assigned physical therapy, massage therapy, and chiropractic treatment. *See* Claimant's Exhibit Tab 6, BS 27-32.

9. On Claimant's pain diagram, filled out on February 22, 2021, he did not circle the left knee but credibly testified that he told ATP Alvarez about the knee, but he did not know at his first visit whether the knee was related to the back pain or a separate condition. *See* Claimant's Exhibit Tab 6, BS 33. At the first visit, Claimant also indicated on ATP Alvarez's intake form that he had had prior gastrointestinal abdominal pain as well as muscle weakness and previous back pain. *See* Claimant's Exhibit Tab 6, BS 35.

10. Following Claimant's initial visit with ATP Alvarez, Claimant underwent a series of chiropractic treatment with Zachary Jipp, DC, (*See* Claimant's Exhibit Tab 7, physical therapy at Aurora COMP with multiple providers, *see* Claimant's Exhibit Tab 8) and massage therapy (*See* Claimant's Exhibit Tab 9), but such treatments provided no lasting relief.

11. On March 4, 2021, at Claimant's first physical therapy visits, it was noted that he had "occass paresth over bilat hips," and that:

> Pt injured lower spine after pulling a ramp out of the truck. Pt Experienced severe, sudden LBP, and felt a "pop" in his back. The pain took him down to his knees. Pain did improve from DOI but now pain remains unchanged. Pt has begun chiropr. Rx and reports increase in lower trunk soreness with Rx. Sleep is interrupted. Pain level is at 7/10 currently, over lower trunk
>
> *See* Claimant's Exhibit Tab 8, BS 122.

12. At Claimant's second visit with ATP Alvarez on March 8, 2021, Claimant reported the following:

> Bob is a 56 y/o male who presents with lower back pain s/p back injury. Today he reports no improvement of his back pain. He has 6/10 pain that spreads across his lower back as well as one

> episode of a tingling sensation from his back to his L knee. He also reports aching of his bilateral hips and a feeling of instability of the L knee. He denies saddle anesthesia, incontinence, numbness, or pain radiating down his leg. He has done one session of PT and Chiro which he reports exacerbate this back pain. The pain increases with movement and decreases with rest. He is no longer taking any medications for his pain as the flexeril made him "groggy" and the meloxicam gave him diarrhea. He has not been working since the injury. X-ray showed with no signs of fracture. Today we discussed getting an MRI and continuing PT/Chiro/Massage.

See Claimant's Exhibit Tab 6, BS 41 (Emphasis added).

13. On March 9, 2021, at physical therapy, it was noted that along with low back pain, Claimant's "left lateral knee is weak and painful." *See* Claimant's Exhibit Tab 8, BS 125.

14. On March 9, 2021, during massage therapy the massage therapist's objective findings were:

> Palpation reveals hypertonicity and tenderness in b/l lower back. Mid back and upper legs.
>
> Swedish and deep tissue applied bilaterally to latissimus dorsi, mid/low traps, thoracolumbar paraspinals . . . .

See Claimant's Exhibit Tab 9, BS 143.

15. On March 21, 2021, ATP Alvarez noted that Claimant "has had increased left knee instability and the same low back pain as previously noted in his last appointment. *See* Claimant's Exhibit Tab 6, BS 48.

16. On March 22, 2021, ATP Alvarez put in a request for Claimant to have an MRI of the left knee and to continue physical therapy, massage therapy, and chiropractic therapy. *See* Claimant's Exhibit 6, BS 58.

17. On March 22, 2021, when making the MRI referral ATP Alvarez noted:

> Orthopedist Referral
>
> I recommended a consultation with a qualified Orthopedist.
>
> **Referral Reason: L-Medial Meniscal Tear**
>
> Referral Status: Regular 55-year-old gentleman who works as a commercial truck driver. While in the middle of. . . His lumbar spine has been the more painful region and thus is taken out most of his therapy and attention. The left knee symptoms were getting worse and did not improve despite physical therapy exercises. An MRI was obtained and showed a medial meniscal tear with overlying peer meniscal cyst. Please evaluate and appreciate recommendations for management.

See Claimant's Exhibit Tab 6, BS 60.

18. On March 17, 2021, Claimant underwent an MRI of the lumbar spine requested by ATP Alvarez, which MRI found:

    1. Straightening typical lordosis of the lumbar spine.
    2. Multilevel disc bulges and protrusions, most prominent at L4-L5 and L5-S1. Mild to moderate bilateral L5-S1 neuroforaminal narrowing abuts and may irritate the exiting bilateral L5 nerve roots. Mild bilateral L3-4 and L4-5 neuroforaminal narrowing.
    3. Some mild L5-S1thecal sac narrowing and indentation of the anterior thecal sac at other levels.
    4. Multilevel fact arthropathy and some facet joint effusions.

    See Claimant's Exhibit Tab 10, BS 157.

19. On March 24, 2021, Claimant's back pain was slowly improving but his left knee pain and instability remained. *See* Claimant's Exhibit Tab 8, BS 127.

20. On April 1, 2021, at physical therapy it was noted that Claimant's low back pain was at 5/10 and that he was laying in a recliner to relieve pain but that the left knee was still painful. *See* Claimant's Exhibit Tab 8, BS 129.

21. On April 1, 2021, at the massage therapy visit the massage therapist noted:

    > After MT, pt reports better movement in low back. Pain decreased to 3/10. Pain is more localized to right SI area as opposed to wide spread throughout the iliac crest.

    See Claimant's Exhibit Tab 9, BS 145.

21. On April 1, 2021, Claimant had an MRI of the left knee performed at Health Images which was requested by ATP Alvarez. That MRI came back with findings of:

    1. Medial meniscal tear with overlying parameniscal cyst.
    2. Absence of the anterior cruciate ligament consistent with previous complete disruption.
    3. Mild chondromalacia of the patellofemoral compartment.

    See Claimant's Exhibit Tab 11, BS 159.

22. On April 1, 2021, after reading the left MRI knee study, ATP Alvarez referred Claimant out for a consultation with a "qualified orthopedist" noting again:

    > Referral Status: Regular 55-year-old gentleman who works as a commercial truck driver. On the day of injury, the patient was pulling the ramp out from back of the truck when he felt a pop in his low back. The pain was great enough to make him fall to his knees, specifically on the left knee. Since the injury he has reported left knee pain but the lumbar spine has been the more painful and thus has taken most of his attention. The left knee symptoms were getting worse and did not improve despite physical

> therapy exercise. An MRI was obtained and showed a medial meniscal tear with overlying peer meniscal cyst. Please evaluate and appreciate recommendations for management.

See Claimant's Exhibit Tab 9, BS 146.

23. On April 21, 2021, Claimant was still complaining of left knee pain and instability. *See* Claimant's Exhibit Tab 8, BS 140.

24. On April 7, 2021, Claimant, based on the referral from ATP Alvarez, was evaluated at the Center for Spine & Orthopedics by Luca Schnell, D.O., who made a recommendation for:

    1. ACL brace.
    2. Formal physical therapy.
    3. Intraarticular steroid injection today.
    4. Follow-up in 6 weeks for reassessment.
    5. No squatting, stooping, kneeling, climbing, or lifting greater and 30 pounds.

See Claimant's Exhibit Tab 12, BS 161.

25. At the April 7, 2021 visit ATP Schnell injected Claimant's left knee with lidocaine and noted:

> I discussed with Robert that he has an ACL deficiency which potentially could be chronic as I do not see any acute edema or pivot-shift type of lesion. He also has a medial meniscus tear. I think the feeling of instability could be coming from the meniscus or the ACL issue. He does not recall an instability sensation prior to this work related event. We will exhaust conservative treatment. If he fails this, I would consider arthroscopic ACL reconstruction with allograft and partial medial meniscectomy.

See Claimant's Exhibit Tab 12, BS 161-162 (Emphasis added).

26. On May 19, 2021, ATP Schnell noted the following:

> Robert returns and states unfortunately he is still having medial joint line pain and a feeling of gross instability of his knee when he does not wear his ACL brace. He does note that the brace helps him tremendously. He stresses that he did not have any of these symptoms prior to his work-related injury that occurred on February 19, 2021. He has a known complete ACL rupture as well as posterior horn medial meniscus tear with parameniscal cyst.
>
> * * *
>
> Impression:
>
> 1. Left knee posterior horn medial meniscus tear with parameniscal cyst.

2. Left knee complete ACL rupture.
3. Left knee mild primary osteoarthritis.

Recommendation:

1. Left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy.
2. no squatting, stooping, kneeling, climbing or lifting greater than 30 pounds.
3. Follow up for pre-op visit after authorization obtained.

I discussed with Robert he has failed conservative treatment in the form of physical therapy, steroid injection, and ACL bracing. I think that he will have some permanent instability if his ACL rupture is not addressed, as well as some chronic pain with his meniscus tear. I discussed the options of allograft versus autograft for ACL reconstruction. He is amenable to allograft with partial meniscectomy. Regarding cautions, the patient did have an acute injury at work which he relates all of his symptoms to. He said he had no prior problems with the knee before this and now has instability, which would correlate with his ACL rupture. I cannot definitively determine the acuity of his ACL tear. Subjectively the patient denies any prior history of instability. I do think it is reasonable to correlate his twisting injury with the pathology noted on his MRI.

See Claimant's Exhibit Tab 12, BS 164-165.

27. On May 20, 2021, ATP Schnell put in a request for a left ACL reconstruction and meniscectomy.

28. After the surgical request was submitted, Respondent had Claimant's records reviewed by James P. Lindberg, M.D. He noted that if Claimant's missing ACL or the meniscus tear was actually acute and result of the work injury, there would have been ACL remnants and a bloody effusion on his MRI, with significant pain and disability. The complete absence of an ACL was not compatible with an acute injury and the meniscal tear was secondary to his long-standing ACL ligament tear (Resp 015-16). Dr. Lindbergh further noted there was no mention of any kind of twisting injury - in fact the records indicate he fell forward immediately onto his hands and knees. On the other hand, Claimant credibly testified that he really does not know whether he twisted his knee, all he knows is that his body went out due to his back pain and he ended up on the ground and developed back and knee pain. As a result, Claimant most likely twisted his knee during the accident due to the onset of pain and instability after the work accident.

29. Dr. Lindberg did not examine Claimant but based on the record review, gave the opinion that "the meniscus tear is secondary to his long standing anterior cruciate ligament tear and if he decides to have surgery done by Dr. Schnell, it should be

done under his own insurance, that it was not a result of Claimant falling on his hands and knees." *See* Claimant's Exhibit Tab 17, BS 201-204.

30. Dr. Lindberg's report was provided to ATP Schnell who opined as follows:

> After review of Dr. Lindberg's report, I do agree with some of the conclusions of his report. Regarding Mr. Warren's ACL rupture, I cannot directly correlate this with his work-related injury. It is accurate there was no bloody effusion or edema noted on the MRI of Mr. Warren's left knee on 04/01/2021. Therefore, this could be a chronic tear, unrelated to his work-related injury on 02/19/2021.
>
> Regarding his medial meniscus tear, it was initially report to me by Mr. Warren that he had a twisting type injury when he fell, which would coincide with the posterior horn medial meniscus tear. However, I cannot directly say with high probability that his meniscus tear was from his work-related accident. It is unable to be determined from his MRI or clinical exam.
>
> Overall, I cannot directly state that Mr. Warren's multiple injuries to his knee are directly related to his work injury based on his history, imaging findings and clinical exam. I do feel Mr. Warren could potentially have some chronic pain and instability in his knee due to his meniscus tear and ACL rupture. I would be happy to address these issues for the patient in the future outside of his work claim.

See Claimant's Exhibit Tab 12, BS 166.

31. Claimant credibly testified that his left knee has been unstable since the injury, that in his working life he has had no knee problems, and that if in fact the ACL was previously ruptured, the knee was stable until his admitted industrial injury where he fell on his knee. The medical records reflect that after the first visit with ATP Alvarez, the medical records are consistent with Claimant's testimony.

32. While the request for surgery in the knee claim was under denial, Claimant was referred out to Nicholas Olsen, D.O., for a series of injections to his lumbar spine and then to the Center for Spine and Orthopedics. The treatment received at those facilities did not relieve Claimant's symptoms. *See* Claimant's Exhibit Tabs 13-14.

33. Claimant credibly testified that he was unhappy with the lack of progress as it related to his lumbar spine and ATP Alvarez sent him out for a second opinion to the Orthopedic Centers of Colorado where he was evaluated by ATPs Stephen Pehler, M.D., and Maria Kaplan, P.A. At the first visit which occurred on August 11, 2021, ATP Kaplan noted:

> [P]atient is very pleasant 56-year-old male for initial consultation of his low back pain with intermittent right buttock, hip and lower extremity radiculopathy and tingling. He was involved in a work-related injury on 2-19-2021 in which he was lifting a 180 pound ramp, twisted wrong and fell to the ground. Since that time he has had constant and fairly debilitating low back pain. He has completed physical therapy without any relief to his symptoms has

> also had a total of 14 cortisone injections as well as 2 Medrol Dosepaks with minimal improvement to his symptoms. His most recent injection was one week ago. He currently takes Tylenol and ibuprofen. He reports the majority of his pain is in his low back with some right thigh pain intermittently. He has tried muscle spasm medicines and this was not helpful. He has increased pain with lumbar flexion, extension, rotation as well as physical activities and prolonged standing and walking. He has not been able to return back to work due to his pain. He denies changes to bowel bladder function, focal weakness, saddle anesthesia.
>
> * * *
>
> At this point in time, patient is a forms of conservative therapies including physical therapy, anti-inflammatories, pain medicines, rest as well as multiple cortisone injections to the lumbar spine without any improvement to his symptoms. He has reduced qualify of life due to pain and is unable to work or do any physical activities. We discussed surgical intervention due to his symptoms as well as radiographic findings. The surgery would be a L5-S1 lumbar disc arthroplasty. We discussed the risks and benefits of surgery as well as postoperative outcomes and expectations and he would like to move forward with this. We will submit to insurance for authorization and he will need preoperative clearance prior to scheduling. We will prescribe gabapentin to take for nerve pain.

See Claimant's Exhibit Tab 16, BS 197-198 (Emphasis added).

34. On August 15, 2021, a CT was performed of Claimant's lumbar spine. *See* Claimant's Exhibit Tab 15-16.

35. On August 19, 2021, Claimant returned to ATP Pehler at Orthopedic Centers of Colorado who noted that:

> Interval history: This patient is very pleasant 56-year-old male is here today for preoperative consultation. He continues to have debilitating levels of back pain as well as right greater than left buttock and lower extremity pain. He has attempted now 14 corticosteroid injections in the Workmen's Comp. setting including 2 Medrol Dosepaks. He has had only limited and intermittent relief. His symptoms are affecting his quality of life as well as his ability to work. He had previously recommended a lumbar disc replacement.
>
> * * *
>
> Assessment Plan:
>
> This point time, we will continue forward insurance approval for his lumbar disc replacement. We reviewed the risk and benefits as well as expectations in the postoperative setting. He voiced understanding. He does wish to proceed forward. We will hopefully schedule the near future. He continues to have back pain

> as well as buttock and leg pain that is affecting his quality of life as well as ability ambulate**.** He has spondylosis and disc height loss with this protrusion at the L5-S1 level. The rest of his lumbar spine from L1 down to L5 look pristine. He has attempted extensive conservative treatment and continues to be symptomatic.

See Claimant's Exhibit Tab 16, BS 199 (Emphasis added).

36. After receiving ATP Pehler's request for surgery, Respondent had Claimant evaluated by Brian Reiss, M.D. It was Dr. Reiss' written opinion and testimony at hearing that Claimant had a clear history of chronic recurring low back pain that was not consistent with chronic pancreatitis. (See Respondents' Exhibit J, BS 69,70. He also concluded that Claimant's current level of pain was very similar to his prior intermittent recurring lower back pain. *See* Respondents' Exhibit J, BS 70. Lastly, it was also his opinion that the surgery recommended by Dr. Pehler was neither reasonable, necessary nor related to Claimant's admitted industrial injury, that Claimant had returned to baseline but that at most what Claimant required was a core strengthening program. *See* Claimant's Exhibit Tab 18.

37. Dr. Reiss also concluded that the surgery is inconsistent with the Colorado Medical treatment Guidelines. But again, such opinion seems heavily weighted on his contention that Claimant has returned to baseline and just needs some core strengthening – with which the ALJ disagrees. The ALJ also finds that the Guidelines are not persuasive based on the facts of this case.

38. ATP Pehler was provided with Dr. Reiss' denial and issued a report challenging his conclusions setting forth that:

> Dear ABF Freight
>
> Thank you for taking the time to review Mr. Robert Warren's case. As you know, this patient is a very pleasant 56-year-old male that was involved in a work-related injury on 02/19/2021. Prior to this injury Mr. Warrant denies any significant injuries or pathology to his lumbar spine. He does endorse some occasional musculoskeletal injuries that primarily resolved with supportive care. Since Mr. Warren's injury in February of 2021, he has attempted every form of conservative treatment possible. This has included physical therapy, pool therapy, anti-inflammatory medications, muscle spasm medications, corticosteroids, epidural steroid, and facet injections all without any significant symptomatic relief. His symptoms have greatly affected his quality of life and ability to work.
>
> * * *
>
> Imaging obtained in my office and from his prior MRI demonstrated disc height loss and a disc herniation at the L5-S1 level. Given his failure of every form of conservative treatment and continued symptoms, my recommendation was for a lumbar disc replacement at the L5-S1 level. By review of Dr. Reiss's IME performed in

> October of 2021, this request was denied. Dr. Reiss sites his reasoning including that the pain generator has not been identified and that Mr. Warren has not completed all conservative care**.** I respectfully disagree with Dr. Reiss. Mr. Warren has completed an extensive amount of conservative care over the past eleven months. This has included several months of both workman's compensation sponsored physical therapy, and physical therapy funded by Mr. Warren. Dr. Reiss also sites that the pain generator has not been identified. Based on our review of Mr. Warren's imaging, his L5-S1 disc appears to be his only source of pathology. There is no evidence of significant degenerative changes to any other level or any facet degenerative changes present. Mr. Warren has temporarily responded to epidural steroid injections targeting his L5-S1 level. While we certainly understand that a response to a lumbar epidural steroid injection is not an indication for disc replacement, Mr. Warren does meet the indications for a lumbar disc arthroplasty.
>
> My recommendation for a lumbar disc arthroplasty at L5-S1 is a reasonable and indicated procedure to address Mr. Warren's continued and worsening pain and symptoms. He has attempted and failed now approaching eleven months of conservative care with no sustained symptomatic relief.

See Claimant's Exhibit Tab 16, BS 200A.

39. The ALJ finds Dr. Pehler's opinion and rationale for surgery to be credible and persuasive because his opinion is consistent with Claimant's underlying medical records and statements to his medical providers regarding his pain and disability as well as Claimant's completion of conservative medical treatment – which did not help.

40. Claimant credibly testified he understands the risk of lumbar surgery and desires to pursue it.

41. The opinions of Dr. Reiss and those of ATP Pehler could not be more divergent. Dr. Reiss' opinion is based on his conclusion that Claimant's condition has returned to baseline and that Claimant merely needs to improve his core strength. But such opinion is inconsistent with the underlying records, Claimant's testimony, and the opinions of his ATPs. Before the work injury, Claimant could perform his regular job duties and was not suffering from chronic pain. At this point in time, he cannot. In the end, Dr. Reiss' opinion does not appear to offer reasonable medical treatment to improve Claimant's condition. It also appears Dr. Reiss' opinion ignores Claimant's pain complaints and current disability. On the other hand, Dr. Pehler, in his medical judgement, has determined that the surgery he has recommended offers Claimant the best option to cure and relieve him from the effects of his work injury.

42. While the medical records submitted at hearing reveal Claimant has had very little physical therapy, he has undergone other conservative treatment. As noted by Dr. Alvarez, Claimant's conservative treatment has consisted of physical therapy, anti-

inflammatories, pain medicines, rest as well as multiple cortisone injections to the lumbar spine without improvement of his symptoms.

43. Claimant remains under the care of ATP Alvarez who has not yet released Claimant at maximum medical improvement ("MMI") and who noted on September 29, 2021, that:

> Pain in his L-spine is worsening and becoming more constant. Now has constant burning pain in his R hip that radiates down to his calf and foot. Taking ibuprofen and Tylenol with minimal relief. The back surgery is still not scheduled yet. He expresses frustration with his pain the how he has not been able to have surgery, states it is affecting his mood and he feels depressed because he is always fighting the pain. Discussed coping strategies and will f/u 2-weeks.
>
> *See* Claimant's Exhibit Tab 6, BS 109.

44. Based on Dr. Alvarez' September 29, 2021, report, Claimant has not returned to baseline and continues to have chronic and disabling pain that has not been relieved by any of the treatment provided to date. The ALJ finds such conclusions to be credible and persuasive since it is supported by Claimant's testimony and the opinions of the ATPs.

45. On December 8, 2021, Claimant returned to ATP Alvarez who noted "no change overall but with some worsening of symptoms. Court date in week of January 19. Continue HEP." *See* Claimant's Exhibit Tab 6, BS 111J.

46. ATP Alvarez's WC164 forms have consistently maintained that Claimant's injuries are consistent with a history of a work-related mechanism of injury. *See for example,* Claimant's Exhibit Tab 6, BS 39, 58, 75, 80 and 93. ATP Alvarez has concluded that the left knee and low back symptoms are related.

47. ATP Schnell has contended that although Claimant's ACL may have been preexisting, he was asymptomatic before the events of February 19, 2021, and Claimant's testimony is consistent in that regard. Claimant has been symptomatic in the knee since that time and the ALJ finds that the pain and instability Claimant suffers was caused by his work injury.

48. Medical records reflect that Claimant has consistently complained of low back pain shooting into his right leg and down and that those symptoms were not present before February 19, 2021, even though he had had back pain which he contends was related to pancreatitis. Except for some bilateral calf pain, such back pain did not go past his back level.

49. Since the work accident, Claimant has consistently complained of pain in his left knee. Claimant credibly testified at hearing that he wants to undergo the surgery recommended by ATP Schnell on his knee and the surgery recommended by ATP Pehler. He just wants to get back to work. Before this event, Claimant "never missed work."

50. Claimant's testimony and statements to his medical providers mostly tracks the underlying medical records. As a result, the ALJ finds Claimant's statements to his medical providers and testimony to be credible and persuasive.

51. The ALJ finds the opinions of Claimant's ATPs to be credible and persuasive because the ALJ finds their opinions are supported by the underlying medical records and Claimant's statements to them as well as his testimony about his pain and disability since the work accident.

52. The ALJ finds that before the work accident, neither Claimant's back nor knee were disabling and neither required any active medical treatment. But the ALJ further finds that after the accident, both Claimant's knee and back required medical treatment and that both conditions were disabling. As a result, the ALJ finds that Claimant's work injury caused the need for medical treatment – including the surgeries recommended.

53. The ALJ further finds that the surgeries are reasonably necessary to treat Claimant's knee instability and back pain, with radicular symptoms, which were caused by his work accident. Thus, the need for surgery is also related to his work accident.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether Claimant established by a preponderance of the evidence that the May 19, 2021, request by authorized treating provider ("ATP") Lucas Schnell, D.O., for a left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medical meniscectomy is reasonable and necessary as well as related to Claimant's admitted industrial injury.

II. Whether Claimant established by a preponderance of the evidence that the proposed L5-S1 lumbar disc arthroplasty requested by authorized treating provider ("ATP") Stephen Pehler, M.D., on August 19, 2021, is reasonable and necessary as well as related to Claimant's admitted industrial injury.

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42--101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company, W.* C. No. 4-445-060 (February 22, 2002).

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

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians and medical providers, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra.* The ALJ Also considered the Medical Treatment Guidelines.

Respondents contend that the left knee surgery recommended by ATP Schnell is not necessary or related because the symptoms did not develop immediately following the injury. This is in fact not the case as the ALJ has found that the symptoms have been present since Claimant's injury.

Respondents contend that the lumbar surgery recommended by ATP Pehler is not necessary or related as Claimant had a temporary aggravation of his low back condition and returned to baseline and that all he needs is some core strengthening. As found, the medical records reflect that Claimant has not returned to baseline, that the condition he now has is separate and distinct from that suffered when he had pancreatitis and intermittent back pain and that physical therapy, medications, injections, and massage therapy, or Claimant's own therapy, have not resolved the symptoms from that condition. The Respondents also contend the back surgery is inconsistent with the Medical Treatment Guidelines. The ALJ, however, does not find the Medical Treatment Guidelines to be persuasive in this case.

Additionally, ATP Alvarez has confirmed the progression of Claimant's symptoms from the date of injury and they are consistent with the care now being recommended by ATP Schnell and ATP Pehler. There is credible and persuasive evidence that Claimant had no symptoms in either his left knee or low back that required medical treatment or caused any disability just before his admitted industrial injury and Claimant credibly testified away the prior episodes of back pain in 2020 from lifting at work and differentiated the back pain related to his pancreatitis.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In this case, the evidence leads the ALJ to conclude that while Claimant may have had underlying asymptomatic conditions, it was the admitted industrial injury that caused his symptoms and the need for medical treatment.

The ALJ finds and concludes that the surgeries recommended are reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes Claimant has satisfied his burden by a preponderance of the evidence with regard for the left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy and the L5-S1 lumbar disc arthroplasty. The proposed surgeries are reasonable, necessary, and causally related to his work accident.

ORDER

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

1. Respondent shall pay the cost, pursuant to the Colorado Medical Fee Schedule, of the left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy recommended by ATP Schnell on May 19, 2021.

2. Respondent shall pay the cost, pursuant to the Colorado Medical Fee Schedule, of the L5-S1 lumbar disc arthroplasty, recommended by ATP Pehler on August 19, 2021.

3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 22, 2022.

/s/ Glen Goldman

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

ISSUES

➢ Whether Claimant has proven by a preponderance of the evidence that the recommended ketamine treatment is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant is a 60-year-old female who was employed with Employer as a dental biller. Claimant sustained a work injury on January 5, 2017 when she slipped on a sidewalk while at work after a snowstorm. Claimant testified she tripped when she did not see where the sidewalk ended, and rolled her right ankle.

2. Claimant was referred to Dr. Robert J. McLaughlin with St. Mary's Occupational Medicine for medical treatment. Claimant subsequently was referred to Dr. Christopher Copeland for orthopedic evaluation on March 2, 2017. Dr. Copeland eventually performed ankle surgery on July 5, 2017.

3. Due to lingering symptoms, burning and shooting pain, and discoloration. Dr. McLaughlin began to discuss the possibility of complex regional pain syndrome ("CRPS") with Claimant. On October 12, 2017 the doctor referred Claimant to Dr. Brittany Matsumura for pain management. Dr. Matsumura initially evaluated Claimant on November 9, 2017. Dr. Matsumura reviewed Claimant's medical records which were noted in Dr. Matsumura's medical report, obtained a medical history and performed a physical examination. Dr. Matsumura recommended Claimant be referred for a CRPS workup.

4. Claimant underwent the CRPS testing under the auspices of Dr. J. Tashof Bernton on February 26, 2018. Dr. Bernton reviewed the triple-phase bone scan, Autonomic Testing Battery, and Stress Theromography, and opined that Claimant was within diagnostic limits for CRPS. Dr. Bernton recommended sympathetic blocks to determine the extent of CRPS.

5. Claimant underwent right L3 lumbar sympathetic blocks on March 29, April 3, and April 12, 2018 under the auspices of Dr. Kenneth Lewis. Claimant was eventually referred to Dr. Giancarlo Barolat for consideration of a nerve stimulator trial.

6. Claimant consulted with Dr. Barolat on May 9, 2018. The doctor noted the sympathetic blocks gave Claimant good, but short term, pain relief, and that she had

tried many different medications with mixed results. Dr. Barolat opined Claimant was had chronic, severe neuropathic pain syndrome with the characteristics of CRPS type 1, and had failed all conservative treatment modalities. Dr. Barolat recommended the nerve stimulator trial.

7. Claimant returned to Dr. Bernton on June 14, 2018, who noted that since Claimant did not have long-term symptom control from the sympathetic blocks, either a nerve stimulator trial or ketamine infusions should be considered.

8. Respondent initially denied the request of the nerve stipulator trial. Dr. Barolat noted in an appeal letter dated August 30, 2018 that ketamine infusions could be attempted prior to a spine surgery, but instead he opined that the nerve stimulator was reasonable treatment.

9. Respondent subsequently approved the nerve stimulator trial and Claimant began the nerve stimulator trial on July 9, 2019. Claimant eventually underwent the implantation of the peripheral nerve stimulator ("PNS"). Claimant testified that the PNS improved her "stabbing" nerve pain, but other CRPS symptoms persisted.

10. Claimant consulted with Dr. Matsumura on October 22, 2019. The doctor noted that although Claimant had improved with the nerve stimulator, Claimant's activities were limited by pain and she was having periodic pain issues. Dr. Matsumura also noted that Claimant reported that following her PNS implant, she had signficant pain which was improved with ketamine. Dr. Matsumra noted Claimant did have a hallucination with the ketamine as it was given as a quick bolus instead of slowly over time.

11. Dr. Matsumura recommended additional ketamine therapy, noting that Claimant continued to have periodic pain issues. Dr. Matsumura noted that ketamine provided after her surgery was significantly helpful for intense pain. Dr. Matsumura recommended a trial of ketamine compounded neuropathic cream which could incorporate several medications that would assist with Claimant's pain.

12. Claimant testified that the topical ketamine compound cream helped with the burning and pins and needles sensations in her toes. Claimant testified that she thought the ketamine might help with her symptoms and would allow her to bake food and do things around the house. Claimant testified she does not wear shoes due to the pain in her feet and only wears slides.

13. Dr. McLaughlin placed Claimant at MMI on November 21, 2019 and provided Claimant with an impairment rating that included a rating for her CRPS condition, in addition to a rating for her ankle and mental impairment. Dr. McLaughlin recommended post-MMI medical care, including follow up with Dr. Barolat and Dr. Matsumura and continued medications.

14. Respondent filed a Final Admission of Liability on December 18, 2019, admitting to the impairment rating and the post MMI medical treatment.

15. Claimant continued to treat with Dr. Matsumura on January 21, 2020. The doctor noted ongoing issues, including progressive sensitivity of the thigh near the surgical site, calf cramping, skin sensitivity, "bone pain," and weakness. Dr. Matsumura noted Claimant was using a topical cream including ketamine, which was noted to be quite helpful in her pain exacerbations and allodynia complaints. Dr. Matsumura noted that ketamine compound cream was the most effective topical analgesic. Dr. Matsumura noted that Respondent had declined to further authorize that cream. Dr. Matsumura noted that the ketamine cream had been quite effective in maintaining Claimant's function for her severe exacerbations of pain.

16. Claimant returned to Dr. Matsumura on September 15, 2020. Dr. Matsumura noted that Claimant still had pain flares even with the PNS, and had consulted with Dr. Barolat about whether the PNS could be adjusted. Dr. Matsumura noted Claimant had been through extensive conservative treatment for her pain. Dr. Matsumura noted that they had tried a topical ketamine compounded cream which had been helpful in the past, but was denied by the carrier Dr. Matsumura noted that following her stimulator placement, Claimant was given a bolus of ketamine quickly and had symptoms of hallucinations, anxiety, breathing difficulties, however, she has had ketamine with past surgeries without issues. Dr. Matsumura discussed ketamine infusion with Claimant and noted that the ketamine infusion was typically a last resort treatment for ongoing pain despite appropriate conservative efforts.

17. Claimant indicated she was interested in pursuing ketamine infusions, and Dr. Matsumura discussed Claimant's ketamine reaction following the PNS surgery, and discussed the possibility that Claimant's bad reaction was due to the quick administration of the bolus. Dr. Matsumura noted Claimant had ketamine administered following other surgeries before without incident.

18. Dr. Matsumura referred Claimant to Dr. William James at the Western Slope Ketamine Clinic for ketamine treatment. Dr. Matsumura noted Claimant had been through extensive treatment for CRPS with limited improvement and despite having the PNS had ongoing pain flares.

19. Claimant consulted with Dr. William James on October 29, 2020. Dr. James noted Claimant had been diagnosed with CRPS for three years prior, and had treated her symptoms with physical therapy, nerve blocks, sympathetic blocks, and a PNS. Dr. James noted Claimant had ongoing significant physical impairment due to pain. Dr. James opined it was medically necessary to proceed with intervention involving the recommended ketamine infusion.

20. Claimant testified she hoped the infusions would provide pain relief, even if only temporary. Claimant testified that she was aware that the infusions helped with pain for different times for different patients. She testified that even short time periods with no pain would be a great benefit to her, both physically and mentally. Claimant testified she hoped the infusions would help her perform basic tasks around her house on her own, which would be helpful because she needs so much help at home. Claimant testified that if she had the ketamine infusions, and they were effective, she may be able to have a normal outing with grandchildren or go for an extended walk: things she had not been able to do living with CRPS.

21. Claimant testified her physicians had advised her of side effects of ketamine including hallucinations, heart rate changes, blood pressure changes. Claimant testified that she had no side effects with the use of topical ketamine. Claimant further testified she had no side effects when anesthesiologists used ketamine during the two PNS procedures and a third personal surgery. Claimant testified she wished to pursue treatment that included the ketamine infusion because it may provide her with some pain relief.

22. Respondent obtained a records review independent medical examination ("IME") with Mark Paz, M.D. After reviewing Claimant's medical records, Dr. Paz issued a report dated April 14, 2021. Dr. Paz's opined that the ketamine infusion therapy recommended by Dr. James would not be reasonable, necessary treatment related to the CRPS diagnosis in this case. Dr. Paz noted in his report that the proposed ketamine infusion was not supported by Colorado Medical Treatment Guidelines, Rule 17, Exhibit 7. Dr. Paz noted the information from the Colorado Medical Treatment Guidelines indicates that, although low dose daily infusions may achieve some pain relief compared to placebo, the relief with infusion faded within a few weeks.

23. Dr. Paz further noted in his report that the fact that Claimant may have responded favorably to a topical compound that included ketamine the ketamine infusions were not comparable. Dr. Paz noted that the basis for the use of a topical compound pharmaceutical is to minimize a clinically insignificant level with the systemic absorption of the medication in the compound. Dr. Paz noted the compounding cream is utilized to achieve a local effect at the site of the injury (the nerve endings) without systemic side effects. The infusion of ketamine has the objective of achieving a systemic effect. Dr. Paz opined in his report that you cannot extrapolate a predictable benefit of infusions by pointing to prior reported benefit to the topical compound

24. Dr. Paz testified at hearing consistent with his IME report. Dr. Paz noted in his testimony that none of the studies involving ketamine documented any functional improvement in patients with CRPS. Dr. Paz testified that, per the Division Level II accreditation, the objective of treatment is a combination of reduction of pain and improvement in function.

25. Dr. Paz testified that the summary conclusion in the Medical Treatment Guideline references literature that documents ketamine is associated with the risk of potential harm which outweighed evidence of limited short-term benefit in patients with CRPS. Dr. Paz opined in his report that IV ketamine NMDA receptor antagonists were not recommended for treatment of CRPS. Dr. Paz testified that the reason ketamine is not a recommended treatment is based upon the probability of whether the treatment would be beneficial. Dr. Paz testified that if there is a greater than 50% probability that the treatment would be beneficial then the provider must consider the risk/benefit, whether the risks outweigh the benefit. Dr. Paz opined that with regard to the use of ketamine infusions in the treatment of CRPS, the Medical Treatment Guidelines determined the benefits do not outweigh the risks.

26. Dr. Paz also discussed in his report and testimony the issue of undesired side effects associated with ketamine infusion including the risk of emergence reactions which includes delirium accompanied by irrational behavior and cognitive impairment. With regard to Claimant, Dr. Paz noted that Claimant had a documented history of experiencing hallucinations associated with the infusion of a bolus of ketamine which she received following the July 16, 2019 operative procedure for placement of the nerve stimulator. Dr. Paz testified that in his opinion, this factor alone would warrant against consideration of ketamine infusion therapy for Claimant in this matter. Dr. Paz testified that despite Claimant's belief that the occurrence of the hallucinations related to the improper administration of the bolus of ketamine, the fact that a reaction occurred, even if Claimant may not have had a reaction previously, would point against use of ketamine infusion therapy in this case.

27. Dr. Paz discussed in his report Claimant's functioning level throughout her treatment course. Dr. Paz noted that when comparing the January 29, 2018 functional capacity evaluation results with those of February 17, 2020 there was little variation. Dr. Paz opined that by definition the medical maintenance is for the purpose of maintaining the level of function the patient achieved when they reached maximum medical improvement. Dr. Paz opined that Claimant's functioning level remains comparable as it was when Claimant was placed at MMI in November of 2019 and when Claimant completed the FCE on February 17, 2020.

28. The ALJ notes that the Medical Treatment Guidelines relating to CRPS indicate that there are contraindications to ketamine infusions, but the Guidelines also state as follows: "There is some evidence that in CRPS patients, low dose daily infusions of ketamine can provide pain relief compared to placebo."

29. The ALJ finds Claimant's testimony regarding her symptoms and the effectiveness of her medical treatment to be credible and persuasive and supported by the medical records entered into evidence at hearing.

30. The ALJ credits the medical reports from Dr. Bernton, Dr. James and Dr. Matsumura and finds that Claimant has demonstrated that it is more probable than not that the recommended ketamine injections are reasonable medical treatment necessary to maintain Claimant at MMI. The ALJ notes the contrary opinions expressed by Dr. Paz in his report and testimony at hearing, but finds the opinions expressed by Dr. James and Dr. Matsumura to be more credible and persuasive.

31. The ALJ credits the opinions of Dr. Matsumura and Dr. James, along with the testimony of Claimant, over the conflicting opinions of Dr. Paz and finds that Claimant has proven that it is more likely than not that ketamine infusion treatment with Dr. James is reasonable medical treatment necessary to maintain Claimant at MMI by preventing the deterioration of her condition as related to the admitted injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*,

759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

4. The Division's Medical Treatment Guidelines ("the Guidelines") are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. *See* Section 8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). The ALJ is not required to grant or deny medical benefits based on the Guidelines and the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

5. As found, Claimant has proven by a preponderance of the evidence that ketamine therapy injections recommended by Dr. Matsumura and Dr. James is reasonable medical treatment necessary to maintain Claimant at MMI.

6. As found, the opinions of Dr. Matsumra and Dr. James, the progress notes from various providers, and Claimant's testimony found to be credible and persuasive with regard to the issue of whether the recommended treatment is reasonable necessary and related to Claimant's work injury.

7. The ALJ therefore finds that Respondent ia liable for the reasonable medical treatment necessary to maintain Claimant at MMI and prevent the deterioration of her condition, including the ketamine infusion therapy recommended by Dr. James.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to maintain Claimant at MMI including the ketamine infusion therapy recommended by Dr. James.

2. Respondent's liability for the ketamine infusion therapy shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

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

DATED: February 22, 2022

Keith E. Mottram

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the recommended treatment included physical therapy and a referral to a physiatrist is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant is a 56-year-old female who sustained an admitted work injury on March 3, 2003 when she was taking laundry out of a dryer. Claimant was referred for medical treatment and eventually underwent a lumbar discectomy with Dr. Dwyer on May 21, 2003. Claimant later underwent a lumbar fusion surgery on December 12, 2003 after continued complaints of pain after the discectomy. Claimant testified she did pretty well following her lumbar fusion surgery.

2. Claimant was placed at MMI by Dr. Krebs on July 26, 2004 and provided with a 20% whole person impairment rating. Respondents filed and FAL on October 8, 2004 admitting for the 20% impairment rating. The FAL also admitted for reasonable and necessary maintenance care as recommended by an authorized treating physician.

3. Claimant testified she continued to receive maintenance medical care after the FAL was filed. Claimant testified she was in Oklahoma in 2007 through 2009 when she received medical treatment after her back gave out. Claimant testified she returned to Colorado and was treated at Valley View Hospital in 20012 for severe back pain after her back went out again.

4. Claimant testified she had two other injuries during this time. Claimant testified she injured her shoulder on August 4, 2014 when she was driving a transit bus. Claimant testified she also fell off a horse in July 2014. Claimant testified neither of these incidents involved an injury to her low back.

5. Following the incident with the horse in July 2014, Claimant was evaluated by Dr. O'Brien with Glenwood Medical Associates. Dr. O'Brien noted Claimant had multiple contusions and recommended Claimant have x-rays of her right shoulder and left knee to ensure she did not have fractures. Dr. O'Brien otherwise encourages her to stretch the best she can.

6. Claimant continued to treat with Dr. Lippman, Jr. in 2015. Claimant reported to Dr. Lippman, Jr. on September 15, 20015 that the topomax prescription was very effective in relieving her left leg pain down to 0, but she still reported having a back ache.

7. Claimant testified that she experienced a worsening of her condition in October 2019 that involved increased pain in her low back.

8. Claimant sought treatment on March 13, 2020 with Dr. Lippman Jr. Dr. Lippman Jr. diagnosed Claimant with likely facetogenic back pain and recommended a magnetic resonance image ("MRI") of the lumbar spine. Claimant underwent the MRI of the lumbar spine on May 19, 2020. The MRI showed marked loss of disc height at L34 and L4-5 along with desiccation at those two levels. A small left paracentral disc bulge at T11-T12 was also noted.

9. Claimant returned to Dr. Lippman Jr. on July 16, 2020. Dr. Lippman increased Claimant's work restrictions to limit her lifting/pushing/pulling/carrying to no more than 20 pounds. Dr. Lippman Jr. recommended Claimant be referred to Dr. Cole, a physiatrist to review the MRI and determine whether facet injections may be helpful and determine if Claimant should have physical therapy or possibly a rhizotomy.

10. Respondents obtained a medical record review independent medical examination ("IME") with Dr. Douglas Scott on August 22, 2020. Dr. Scott reviewed the medical records including the MRI report and opined that Claimant's current diagnosis was facet generated low back pain without radiculopathy.

11. Dr. Scott noted that the fusion at the L5-S1 level did not cause the facet dysfunction or pain. Dr. Scott noted, however, that the lumbar fusion places more shear stress on the disk levels above the fusion. Dr. Scott opined that this increased stress can accelerate progressive degenerative disk disease at the level or two levels above the fusion level in the lumbar spine leading to progressive desiccation and narrowing of the disk space at these levels. Dr. Scott noted that this may place greater shear and torsional stress of the facet joints.

12. Dr. Scott opined that it was possible that the L5-S1 fusion had accelerated the development of the degenerative disk disease at L3-L4 and L4-L5 and may have contributed to facetogenic pain in the lower back. Dr. Scott opined that it was reasonable to believe that but for the L5-S1 lumbar fusion, Claimant would not have facetogenic pain at this time.

13. Dr. Scott recommended that Claimant be referred for at least six to eight weeks of conservative treatment with physical and manual therapy. Dr. Scott opined that if Claimant was unresponsive to this treatment, she should have a psychosocial

screening before completing the referral to Dr. Cole for his evaluation to consider facet joint injections vs. medial branch block or more physical therapy.

14. Dr. Scott issued a follow up report on October 6, 2020 to clarify that while it was possible that the lumbar fusion may have contributed to the degenerative spondylosis in Claimant's back, it is just as possible that the degenerative spondylosis was caused by Claimant's age, smoking history and/or accelerated by riding horses.

15. Claimant testified at hearing that riding horses actually helped her back pain. This testimony is consistent with the medical records from Dr. Lippman and found to be credible.

16. The ALJ credits Claimant's testimony at hearing along with the medical records of Dr. Lippman Jr. and the August 22, 2020 medical report from Dr. Scott and finds that Claimant has established that it is more probable than not that the recommended medical treatment to Claimant's L3-L4 and L4-L5 disk levels is causally related to Claimant's L5-S1 fusion surgery that was related to her industrial injury.

17. The ALJ notes that following Claimant's shoulder injury while driving the transit bus and the injury when she fell of the horse in 2014, Claimant's medical treatment did not involve her lower back. Claimant treated for those injuries and recovered. However, Claimant sought additional medical treatment to her low back over a year later in September 2015. Claimant appears from the medical records to have had a favorable response to that treatment.

18. Claimant then developed a worsening of her low back condition in 2019 which resulted in the need for additional medical treatment. The ALJ credits the medical records from Dr. Lippman Jr. and Claimant's testimony at hearing and finds that this medical treatment is causally related to her March 3, 2003 work injury and necessary to maintain Claimant at MMI.

19. The ALJ further finds that the recommended medical treatment including the physical therapy and referral to Dr. Cole, the physiatrist is reasonable medical treatment necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

4. As found, Claimant has proven by a preponderance of the evidence that recommended physical therapy and referral to Dr. Cole, a physiatrist, is reasonable medical treatment necessary to maintain Claimant at MMI.

5. As found, the medical records from Dr. Lippman Jr., along with the testimony of Claimant at hearing are found to be credible and persuasive with regard to this issue. Additionally, the ALJ credits the opinions expressed by Dr. Scott in his August 22, 2020 medical report in finding that Claimant has established by a preponderance of the evidence that the recommended treatment, including the physical therapy and referral to Dr. Cole, is reasonable, necessary and related to Claimant's work injury.

6. The ALJ therefore finds that Respondent's are liable for the reasonable medical treatment necessary to maintain Claimant at MMI and prevent the deterioration of her condition, including the recommended physical therapy and referral to Dr. Cole.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to maintain Claimant at MMI including the recommended physical therapy and referral to Dr. Cole, pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: February 23, 2022

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-170-051-001

STIPULATIONS

I. Following the presentation of evidence, the parties conferred and agreed to an average weekly wage (AWW) of $500.00.

II. The parties also stipulated that should the injury in question be determined compensable, Claimant's authorized treating physician is Douglas Bradley, M.D. at Concentra Medical Centers.

The above referenced stipulations are approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence that he sustained a compensable injury to his left shoulder while working as a line cook for Employer on April 13, 2021.

II. If Claimant established that he sustained a compensable left shoulder injury, whether he also established that he is entitled to all reasonable, necessary, and related care for his left shoulder, including, but not limited to, the April 13, 2021 emergency room visit to St. Mary Corwin and the left shoulder surgery performed by Dr. Jennifer Fitzpatrick on May 25, 2021.

III. Whether Claimant established that he is entitled to Temporary Total Disability (TTD) benefits beginning April 14, 2021 and ongoing.

FINDINGS OF FACT

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

1. Claimant is a former line cook for Employer.[1] He began his employment around July 17, 2020. On April 13, 2021, Claimant was reaching for a bowl above his workstation when he heard a pop followed by tingling and numbness in his left shoulder/arm.

2. Claimant testified that the incident in question occurred at approximately 6:45 p.m. while he was preparing to plate a food order. Claimant has a history of pain

[1] Claimant believes that his employment with Employer is ongoing because he was not terminated from his job and because he continues to receive correspondence from the company. Nonetheless, he has not returned to work due to his injury.

and treatment directed to his neck and right shoulder; however, he reportedly never had any left shoulder problems until he began working for Employer in 2020.

3. Claimant's primary care provider (PCP) is Southern Colorado Family Medicine (SCFM). The providers at SCFM have been treating Claimant since 2016. Claimant saw his PCP on August 13, 2020, shortly after starting his work for Employer and approximately eight months prior to the incident in question. Claimant presented to his PCP for evaluation of chronic back pain among other conditions, including GERD, and insulin dependent diabetes. There is no mention of shoulder pain in the note from this date of visit. As part of his treatment plan, Claimant was referred to pain management for his chronic back pain.

4. Claimant presented to Parkview Pain Management on October 5, 2020. During this encounter, he completed a detailed pain diagram that depicts back pain, neck pain, and right shoulder pain[2]. Claimant also checked the box indicating his right shoulder was symptomatic. Notably absent from this pain diagram is any indication that Claimant was experiencing left shoulder pain.

5. A medical report from Parkview Pain Management dated November 9, 2020 documents that Claimant had been working for Employer, which work required him to be on his feet for eight to ten hours per day doing "lots of bending, twisting, and heavy lifting" which activity was causing back pain prompting him to seek treatment. Again, there is no mention of left shoulder symptoms.

6. On April 6, 2021, Claimant presented to Parkview Medical Center in follow-up concerning the treatment of his back pain. During this encounter, Claimant reported a new complaint of a "recent onset of severe left-sided neck pain [with] radiation into the left shoulder and upper arm." Claimant noted that his symptoms were similar to the pain he reported five years earlier, which pain was felt to be emanating from his neck. Because Claimant demonstrated significantly limited cervical spine range of motion, he was referred for a cervical MRI.

7. Several hours later, Claimant presented to St. Mary Corwin Hospital for complaints involving acute pain in the left shoulder. Claimant reported cold, numbing pain, 9 over 10 in intensity. He described the pain as feeling similar to that which he experienced with a prior rotator cuff tear in the right shoulder." Claimant denied prior trauma to the left shoulder and advised that his primary care provider had ordered an MRI.

8. On April 8, 2021, Claimant presented to his primary care provider at SCFM for an evaluation of his "acute" left shoulder complaints. During this visit, Claimant reported experiencing anterior left shoulder pain of one month in duration. Claimant's physical examination was abnormal and an x-ray revealed slight elevation of the left distal clavicle suggestive of possible ligamentous damage. A left shoulder MRI

[2] *See* Resp. Ex. E, pp. 71-83. As noted, Claimant has a documented history of neck, back, and right shoulder conditions consistent with the October 5, 2020 pain diagram.

was ordered. Claimant attributed his symptoms to repetitive activity at work and stated that it felt like his pain was emanating from his rotator cuff. He also requested a "note" for the work he missed on April 6 – 7. Claimant testified returned to work with the note on April 8, 2021. He reportedly spoke to "Mike" (Mike Martinez), the general manager, about his left shoulder condition; however, he testified that no changes were made to his schedule or job duties as a result of the conversation.

9. Claimant testified that he returned to work for his shift on April 13, 2021 and was performing his usual job duties as a cook when the incident in question occurred around 6:45 p.m. He recalled specifically having an order of chicken Alfredo ready, so he pulled the chicken and reached for a pasta bowl to put the food in. Per Claimant, as soon as he reached his fully extended left arm an inch or two above eye level to grab the dishware, he heard a pop and felt tingling and numbing in his left arm. According to Claimant, he dropped the dish, walked away and put his head against the wall in pain." Claimant testified that he then reported the incident to management but was offered nothing more than Tylenol for pain. Claimant testified that he sat at work until he felt capable of driving himself to the Emergency Department (ED) at St. Mary Corwin Hospital.

10. Upon presentation to the ED, Claimant reported that he was "at work and reached out and up and left shoulder popped and went numb." By the time Claimant was evaluated, his left arm numbness had resolved but he was experiencing limited and painful range of motion in the arm/shoulder. Claimant reported having pain in the left extremity the week prior to the incident in question. The history of present illness indicates, "A few hours ago he reached up to grab a dish with his left arm and felt a pop with pain and numbness in the left shoulder." The mechanism is indicated as "overexertion from strenuous movement or load" as well as "overhead work." It is noted that Claimant had problems with the shoulder over the previous week and that an MRI was already scheduled. An x-ray taken as part of Claimant's treatment in the ED did not show acute findings. Claimant was placed in a shoulder immobilizer, counseled "on sprain vs. rotator cuff injury" and advised to keep the MRI appointment that had been scheduled previously. He was then discharged home with an excuse letter indicating that he had been seen in the ED and could return to work on April 15, 2021.

11. Prior to reporting for work on April 15, 2021, Claimant returned to SCFM at 9:40 a.m. During this appointment, Claimant reported that he felt a pop in his left shoulder while at work on Tuesday, April 13, 2021, after which he presented to the ED. Claimant also reiterated that he was having left shoulder pain prior to April 13, 2021 and at the time was "concerned that he was about to tear [the] rotator cuff because he was having symptoms in the shoulder which were similar to before when tore his right rotator cuff a few years ago." The report form this date of visit notes that "[Claimant] made this appointment to request a letter from doctor to his employer stating that they needed to open workman's comp case." Claimant was advised that he would need to see a workers' compensation provider and work with his employer to initiate a claim because SCFM did not treat work related injuries.

Employer documentation reflects that Claimant reported the injury to the Employer at 6:45 p.m. on April 15, 2021.

12. On April 20, 2021, Claimant was given a list of medical providers from which to choose pursuant to WCRP 8 by email. This list included providers at Concentra whom Claimant elected to see for treatment.

13. Claimant presented to Douglas Bradley, M.D., at Concentra on April 21, 2021. In a patient form filled out on this date Claimant indicated that, he reached for a plate and heard a pop and his left hand went numb. A physical examination reflected severely limited range of motion of the left shoulder but no abnormalities, tenderness, and full range of motion in the cervical spine. Dr. Bradley felt that Claimant might have suffered a brachial plexus injury. He prescribed Lyrica, ordered an EMG and recommended that Claimant move forward with the MRI of his left shoulder. Claimant was given "no use" restrictions for the left arm.

14. Claimant testified that he subsequently had a discussion with Mike Martinez, regarding modified work. According to Claimant, Mr. Martinez sat him down at a table and told him he could be a host. Claimant testified that he received nothing in writing regarding the modified duty, which would have clarified what the job duties of a "host" are.

15. On April 22, 2021, Claimant underwent an MRI of the left shoulder. The MRI demonstrated a partial thickness tear of the subscapularis and infraspinatus tendons and a full-thickness, partial width tear and additional partial-thickness and intrasubstance tear of the supraspinatus tendon.

16. On April 24, 2021, Dr. Bradley reviewed the MRI and referred Claimant for evaluation with orthopedist Jennifer Fitzpatrick, M.D. Claimant was evaluated by Dr. Fitzpatrick on May 10, 2021 for complaints involving the left shoulder and left-sided radiating neck pain. Claimant reported that his shoulder pain was interfering with his ability to perform activities of daily living. Dr. Fitzpatrick diagnosed Claimant with an "acute" traumatic complete tear of the left rotator cuff and recommended left shoulder arthroscopic rotator cuff repair with biceps tenodesis distal clavicle excision. Dr. Fitzpatrick sent a prior authorization request on May 12, 2021. The request was denied.

17. Surgery was performed by Dr. Fitzpatrick on May 25, 2021. Following surgery, Claimant was excused from work completely[3] by Dr. Fitzpatrick after the surgery and indicated he could return to work on June 3, 2021 with the restrictions of no use of the left arm and that he must wear a sling.

18. Physician Assistant (PA-C) Catherine Fitzgerald examined Claimant during a post-surgical appointment on June 2, 2021 at Parkview Orthopedics. Claimant reported an eagerness to start physical therapy. Claimant was documented as doing

[3] Claimant had previously requested a leave of absence from work but that work was not able to accommodate.

well. Consequently, he was referred to therapy for his shoulder at Momentum Physical Therapy.

19. On June 30, 2021, Claimant returned to Dr. Fitzpatrick for a post-operative follow-up. Claimant indicated that he felt that some of his pain might be coming more from his neck versus his shoulder. Dr. Fitzpatrick recommended an MRI of the cervical spine.

20. An MRI of the cervical spine was completed on July 8, 2021. The study was compared with a CT of the neck done on August 30, 2015. The impression of the radiologist was multilevel and multifactorial degenerative changes greatest at C6-7 resulting in moderate left and mild right foraminal narrowing.

21. On July 23, 2021, Dr. Fitzpatrick referred Claimant back to Dr. Bradley for treatment. It is indicated by Dr. Fitzpatrick that Claimant's physical therapist believed that his ongoing pain might be coming more from the neck versus the shoulder. An x-ray of the shoulder showed no abnormalities beyond a mild widening of the acromioclavicular joint presumed secondary to the resection of the distal clavicle.

22. On July 23, 2021, Dr. Bradley noted that Claimant still had pain in the collarbone and lateral shoulder with weakness and persistent numbness. The diagnosis included clavicle pain, brachial plexus neuropathy of the left shoulder, and traumatic incomplete tear of the left rotator cuff.

23. Dr. Fitzpatrick reviewed the cervical MRI on August 25, 2021 and indicated degenerative changes contributing to mild left and right foraminal narrowing.

24. On August 27, 2021, Claimant returned to Dr. Bradley with reports of continuing left arm weakness and numbness into his fingertips. Claimant had a nearly fully frozen shoulder after surgery. Claimant remained off work with restrictions of no lifting or carrying more than four pounds, no pushing and pulling more than six pounds.

25. Claimant underwent an independent medical examination (IME) with Dr. Jack Rook at the request of his attorney on September 20, 2021. Claimant reported that he was doing fine with the job until several weeks prior to "an acute injury" that occurred on April 13, 2021. Claimant explained that he started experiencing mild discomfort in the left shoulder that progressively worsened, causing him difficulties with his job duties. He stated that his job involved repeatedly lifting pots, pans, trash and water buckets - frequently greater than 50 pounds. When the activities became extremely painful to perform, Claimant went to the ER and then followed up with his primary care physician, who recommended light duty and referred him for an MRI. Claimant stated that he sustained an acute injury while "reaching above the shoulder level with his left arm, attempting to grab a pasta bowl, he felt and heard a pop in his shoulder that was associated with severe pain." Claimant stated he was unable to use his left arm and could not continue working.

26. Following a records review and physical examination, Dr. Rook diagnosed Claimant with left shoulder pain, status post arthroscopic rotator cuff repair, distal clavicle resection, and biceps tenodesis; incomplete post-operative recovery with ongoing pain and shoulder weakness and limited range of motion; and surrounding myofascial pain involving left-sided paracervical and upper trapezius musculature. Dr. Rook opined that Claimant's initial symptoms were the result of an occupational disease resulting from the physical requirements of the job, including cleaning the grill with a wire brush, performing frequent heavy lifts, repetitive reaching below, at and above shoulder level, and mopping the floor at the end of each work shift. Dr. Rook further opined that, on April 13, 2021, Claimant sustained an acute rotator cuff tear superimposed on the chronic left shoulder pain. Dr. Rook opined that, in light of the lack of prior history of left shoulder problems or alternative mechanism, Claimant sustained an occupational injury to the shoulder.

27. Claimant underwent an IME with Dr. Carlos Cebrian at Respondents' request on October 21, 2021. Claimant provided a history of injury to Dr. Cebrain consistent with that he had reported to Drs. Bradley, Fitzpatrick and Rook previously. Specifically Claimant informed Dr. Cebrain that his left shoulder had begun bothering him weeks prior to April 13, 2021, that he asked his employer to modify his duties without success and that on April 13, 2021, while reaching at approximately eye level for a porcelain bowl, he heard a pop and felt a tearing sensation in his left shoulder. Claimant stated he told his supervisor about his injury before he left work and went to the ED. Per Dr. Cebrain's report, Claimant endorsed pain and numbness in the shoulder as well as jolting sensations in his neck. Dr. Cebrain also documented Claimant's prior history of neck pain[4], right shoulder problems, and diabetes.

28. Dr. Cebrian opined regarding causation for both an occupational disease as well as the acute injury alleged by Claimant. Dr. Cebrian concluded that it was not medically probable that Claimant sustained an acute injury on April 13, 2021 because the mechanism of injury (MOI) was minimal. He explained that simply reaching with an extended arm at shoulder level to lift an empty bowl would not involve sufficient force to cause a traumatic injury or aggravate any preexisting pathology. Dr. Cebrian further indicated that Claimant's job duties were insufficient to satisfy the criteria in the Medical Treatment Guidelines (Guidelines) for development of a cumulative trauma injury. Dr. Cebrain cited the risk factors for the development of cumulative trauma from the Guidelines to include: overhead work of at least 30 minutes per day for a minimum of 5 years; work requiring shoulder movement at the rate of 15-36 repetitions per minute with no 2 second pauses for 80% of the work cycle; and work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle. In concluding that Claimant did not meet the criteria for the development of a cumulative trauma disorder in the left shoulder related to his work duties, Dr. Cebrian noted that Claimant performed limited work about the shoulder level. Dr. Cebrain concluded that Claimant's left shoulder pain, dysfunction and rotator cuff tearing was a result of degeneration, not any work activity. In support of his opinion, Dr. Cebrian noted that Claimant had pre-existing AC joint arthropathy, a

[4] Despite Claimant denial of prior neck complaints.

prior tear in the right rotator cuff in the absence of trauma, a history of tobacco dependence and a history of diabetes, which was poorly controlled at times.

29. Robert Messenbaugh, M.D., a board certified orthopedic surgeon with experience in treating shoulder injuries, performed a review of Claimant's medical records at the request of Respondents on October 31, 2021. Dr. Messenbaugh reviewed both Dr. Rook's IME report as well as the opinions of Dr. Cebrian. Dr. Messenbaugh opined that the mechanism of the reported left shoulder injury was inconsistent with the creation of an acute rotator cuff tear. Dr. Messenbaugh opined that Claimant did not sustain an acute injury to his left shoulder as described. Dr. Messenbaugh also opined that Claimant did not sustain any injury to his cervical spine. Dr. Messenbaugh indicated that he was in full agreement with Dr. Cebrian that there was no acute injury to the left shoulder and that the need for left shoulder treatment, including surgery, was not related to Claimant's alleged April 13, 2021 claim.

30. [Redacted, hereinafter BG] testified as an assistant manager for the Employer. Per a request from Respondents, Mr. BG [Redated] measured the distance between the floor and the shelf where the dishes are stored, where Claimant would have been reaching to grab the pasta bowl in question. Mr. BG [Redated] took the measurements at multiple locations on the shelf across the line. He testified that the height was consistently 66 inches from the floor to the top of the shelf. Mr. BG [Redated] testified that the height to reach the top of the dishes stacked on the shelf could vary by up to six inches depending on how high the dishes are stacked. Mr. BG [Redated] testified that he is 6'1" (73 inches) and Claimant is two to three inches taller, or 6'2" or 6'3". Mr. BG[Redated] testified that his own shoulder was approximately the same height as the shelf (66 inches). With dishes being stacked as high as 6" up from the 66" mark the height of some dishes could be as high as 72", or 6'. Based upon the evidence presented, the ALJ finds that Mr. BG [Redated] would have had to reach his arm up to grab a bowl stacked 6 inches high. If Claimant is 2" to 3" taller than Mr. BG[Redated], the ALJ finds that he too would have had to reach above shoulder height, closer to eye level as Claimant has maintained from the beginning, to grab the bowl in question.

31. Mr. BG [Redated] further testified regarding Claimant's work after the injury. He testified he was instructed to offer Claimant light duty and offered Claimant a job as a greeter. He admitted that he did not consult with Claimant's ATP regarding the job duties and his restrictions. He also did not go over with Claimant what his specific duties as a greeter would be. The Court asked a clarifying question to Mr. BG [Redated] as to whether a modified job offer was provided to Claimant in writing. Mr. BG [Redated] confirmed no written offer was made.

32. Dr. Cebrian testified at hearing as a Level II accredited expert in occupational medicine. During his testimony, Dr. Cebrian reiterated his opinion that Claimant's left shoulder rotator cuff tear and need for treatment was due to degeneration rather than an acute injury or cumulative trauma disorder. According to Dr. Cebrain, the threshold for sustaining cumulative trauma to the shoulder is quite high

and something more common to assembly line workers as opposed to someone performing Claimant's work duties. Dr. Cebrian testified that there must be consistent work above shoulder level for at least five years, repetitive and forceful activity without breaks for at least 80% of the shift or heaving lifting for several years. Dr. Cebrian testified that, based on the duties described by Claimant; there was not a significant amount of overhead activity involved in his work. Therefore, Dr. Cebrian testified that Claimant did not meet the minimum threshold for cumulative trauma of the shoulder.

33. Concerning Claimant's assertion that he sustained a traumatic injury to the left shoulder while reaching to grab a bowl at or slightly above eye level, Dr. Cebrian repeated his opinion that the MOI was "very minor" and insufficient to cause an acute injury. Dr. Cebrian testified that reaching away from the body with the arms is an activity most people do on a regular basis. He then reiterated that there were comorbid factors contributing to degeneration of the tendons of the shoulder, which lead to the tearing in this case. Per Dr. Cebrain, the presence of osteophytes on imaging supported his belief that Claimant's rotator cuff tear was degenerative in nature rather than traumatically induced. He explained that osteophytes caused by degeneration protrude into the subacromial space where the rotator cuff tendons lay and over time cause fraying and tearing with movement of the shoulder. He also testified that Claimant's poorly controlled diabetes and smoking history was a factor in the degeneration and tearing of Claimant's rotator cuff tendons. According to Dr. Cebrain, uncontrolled/poorly controlled diabetes disrupts and weakens tendon function over time creating a predisposition to tearing. Moreover, Dr. Cebrain noted that smoking degenerates tendons more easily than in a nonsmoker. Dr. Cebrian cited Claimant's 2016 right shoulder tear in 2016 in the absence of any trauma or work activity as support that Claimant's left rotator cuff tear was spontaneous (only indicated by the development of pain) and degenerative in nature.

34. During cross-examination, Dr. Cebrian was asked if Claimant's left shoulder condition was degenerative, what caused it to become symptomatic. Dr. Cebrian responded, "So, short of any unknown trauma that occurred that we're not aware of, the degeneration, at some point, became symptomatic and can be something that can cause problems." Upon further questioning, Dr. Cebrian acknowledged Claimant became symptomatic while working.

35. The ALJ has carefully considered Dr. Cebrain's opinions and has weighed them against the balance of the competing evidence, including Claimant's testimony and the reports of Dr. Rook and Dr. Fitzpatrick. Based upon the totality of the evidence presented, the ALJ finds Dr. Cebrain's and Messenbaugh's opinions less persuasive than those of Drs. Rook and Fitzpatrick. In this case, the ALJ credits the medical records as a whole, the opinions of Drs. Rook and Fitzpatrick and Claimant's testimony to find that he probably suffered acute tears of the tendons of the rotator cuff as a direct consequence of reaching away from his body with the left arm to retrieve a bowl on a shelf at about eye level.

36. As presented, the record supports a finding that Claimant sought treatment as a direct result of the pain, numbness and tingling in his left shoulder precipitated by his work related activities on April 13, 2021. Accordingly, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that his left shoulder condition/injury is compensable. As found above, the contrary opinions of Dr. Cebrain are unpersuasive.

37. Based upon the evidence presented, including Claimant's testimony concerning his functional abilities and the reports of Dr. Fitzgerald, the ALJ finds that the left shoulder surgery she performed on May 25, 2021 was reasonably necessary and causally related to Claimant's April 13, 2021 work duties.

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer, i.e. at the restaurant during his regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely plating a food order, which the ALJ concludes is expected of Claimant in his position as a line cook. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" his employment must be resolved before the injury is deemed compensable.

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

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a

causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's left shoulder was symptomatic or required treatment before he began working for Employer. The evidence presented supports a conclusion that Claimant sought care in the emergency room and with his PCP for left shoulder pain in early April 2021, for symptoms he attributed to the repetitive nature of his work. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working his job despite the onset of symptoms. Nonetheless, his duties were not modified and he continued using the left arm/shoulder to complete the duties required of a cook, which probably caused further injury to the rotator cuff on April 13, 2021, as he reached away from his body with the left arm to retrieve a bowl from a shelf above the grill line. Indeed, the MRI unequivocally establishes that Claimant has full and partial thickness tears of several tendons within the left rotator cuff that Dr. Fitzpatrick opined were traumatic in nature. As found, the ALJ credits the opinion of Dr. Fitzpatrick over Dr. Cebrain to conclude that the aforementioned tearing was probably acute, which conclusion is supported by the severity of symptoms and disability Claimant described immediately after the MOI occurred.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing degeneration in the left shoulder, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the increased

symptoms and disability Claimant experienced on April 13, 2021 were a consequence of an aggravation and the industrially based acceleration of his underlying left shoulder degeneration causing tearing of the left rotator cuff. As found, the ALJ rejects Dr. Cebrain's contrary opinions as unpersuasive.

I. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, (outside of the involvement of a different body part) and found here, the discrete injury to Claimant's left shoulder arose out of his involvement in work activity rather than being precipitated by an idiopathic condition he imported to the work place. Accordingly, the ALJ concludes that Claimant was not required to establish that the concurrence of a pre-existing weakness and a hazard of employment lead to his injury in this case.

J. Analogous to the MOI asserted in *Bastian* and *Fisher*, *supra* the MOI claimed to have caused injury in this case arose from activities that, per Dr. Cebrain, are the type which should not lead to a finding of compensability because the forces involved are "minimal" and are activities performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically reaching up and outward from the body, which is performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Dr. Cebrain. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Contrary to Dr. Cebrain's opinion that Claimant could not have injury his left shoulder because the force in reaching away from the body was minimal, the persuasive evidence supports a conclusion that Claimant suffered acute tearing of the left rotator cuff after reaching with his left arm to retrieve a bowl on the shelf above his workstation. While unusual, the ALJ is convinced that a logical connection exists between Claimant's reaching activities at work, his left shoulder symptoms and his need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

K. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, the evidence demonstrates that Claimant's medical care as provided at Concentra (Dr. Bradley) and his referrals, including the orthopedic evaluation and subsequent surgery performed by Dr. Fitzpatrick was reasonable, necessary and related to his acute left rotator cuff tears sustained April 13, 2021. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of his injury. The specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing disability surrounding function of the left shoulder/arm. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left shoulder surgery on May 25, 2021 was reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including Claimant's left shoulder rotator cuff repair performed by Dr. Fitzpatrick.

Claimant's Entitlement to Temporary Total Disability Benefits

M. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the

subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

N. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

O. Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(d)(I) which states: "The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

P. All written offers of modified duty shall clearly state "that future offers of employment need not be in writing" and that "benefits . . . will be terminated if an employee fails to respond to an offer of modified employment." C.R.S. § 8-42-105(d)(III)(A, C).

Q. In this case, Claimant has established that he was injured at work. The evidence presented also supports a conclusion that Claimant was given physical restrictions to include no use of the left upper extremity beginning April 21, 2021 by his authorized treating provider, Dr. Douglas Bradley. Nonetheless, the evidence presented persuades the ALJ that Claimant's restrictions were not accommodated. Consequently, he suffered a wage loss. While Respondents assert that Claimant was offered modified employment, the evidence presented supports a conclusion that Employer did not follow the statutory requirements that modified duty offers be extended in writing. Indeed, Mr. BG[Redated] conceded that nothing was ever offered to Claimant in writing, that the exact details of the modified duty he would be performing were not disclosed, and that the identified modified duty position was not approved by Claimant's ATP. Based upon the evidence presented, the ALJ concludes that Respondents have not provided Claimant with a bona fide modified job offer in compliance with the statue. Respondents contend that because Claimant rejected the verbal offer of modified duty, he is not entitled to TTD benefits. The ALJ is not convinced, determining instead that Claimant's rejection of the verbal offer of modified duty was reasonable considering the fact that Claimant's ATP did not approve the offer and Mr. BG[Redated] did not disclose the specific duties Claimant would be expected to perform as part of his modified duties. Accordingly, Claimant has proven that he is entitled to indemnity benefits beginning April 14, 2021 through the present and ongoing until properly terminated by operation of law.

ORDER

It is therefore ordered that:

1. The parties' stipulation concerning Claimant's AWW is approved. Claimant's AWW is $500.00.

2. Claimant has established, by a preponderance of the evidence, that he sustained a compensable injury to his left shoulder on April 13, 2021, including, but not limited to, a tear of the left rotator cuff and injuries to the surrounding musculature.

3. Respondents are liable for Claimant's treatment with St. Mary Corwin ED, Concentra Medical Centers and all treatment based upon referrals therefrom, including but not limited to his care/surgery with Dr. Fitzpatrick.

4. Respondents shall pay temporary total disability benefits beginning April 14, 2021 and ongoing until terminated according to law.

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

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

DATED: February 23, 2022

/s/ Richard M. Lamphere

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

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Respondents must file an amended final admission of liability ("FAL") admitting for maintenance medical benefits?

FINDINGS OF FACT

1. Claimant was employed by Employer as an automobile mechanic. Claimant sustained an admitted low back injury June 10, 2019 in the course and scope of his employment with Employer when he tripped over an object that was sticking out of the concreate floor.

2. Prior to Claimant's work injury, Claimant had a prior injury to his hip from a motor vehicle accident that occurred when he was 19 years old. Claimant is currently 36 years old as of the date of hearing. Claimant testified at hearing that he did not have medical treatment to his low back prior to the work injury.

3. The medical records establish that as of May 16, 2019, Claimant was receiving medical treatment related to his hip injury with Dr. Kanopsic Jr. Claimant reported at this time that he was having spasms of sharp pain that typically last for a few seconds. Claimant was taking Cyclobenzaprine (Flexeril) at this time. While Claimant reported low back pain at the time of the examination, Dr. Kanoposic opined that given the duration of Claimant's symptoms, he did not believe the etiology of Claimant's complaints were related to a herniated disc.

4. Following his work injury, Claimant was examined on June 10, 2019 by Dr. Utt. Dr. Utt noted Claimant reported no history of back problems, but did have a history of pain into the right buttock and thigh, but not beyond the knee. Claimant returned to Dr. Utt on June 12, 2019 and was diagnosed with a lumbar radiculopathy. Dr. Utt continued conservative treatment which included physical therapy, and medications including Flexeril, Tylenol, and Ibuprofen. Claimant eventually underwent surgery on his lumbar spine consisting of bilateral laminectomy, microdiscectomy, facetectomy, and foraminotomy at the L4-5 with Dr. Agrawal on September 20, 2019.

5. Following Claimant's back surgery, Claimant was released by the neurosurgical physicians' assistant ("PA") Laura Fox on January 2, 2020. PA Fox noted

in her January 2, 2020 report that she recommended physical therapy if Claimant's back started to bother him more.

6. Claimant returned to Dr. Utt on January 10, 2020. Dr. Utt noted Claimant had mild decreased right foot inversion strength. Dr. Utt released Claimant to return to work full duty. Claimant returned to Dr. Utt on February 21, 2020 with reports of numbness, but reported his back pain was improving. Dr. Utt noted Claimant had good lumbar flexion with mildly decreased side bend and extension. Claimant was encouraged to continue stretching and core strength exercising.

7. Claimant returned to Dr. Utt on March 16, 2020 for an evaluation for an impairment rating. Dr. Utt listed Claimant's date of MMI as March 5, 2020[1]. Dr. Utt noted Claimant had been released to return to work without restrictions. Dr. Utt provided Claimant with an impairment rating of 20% whole person. Dr. Utt noted that as of his last visit, Claimant felt he could lift up to 100 pounds rarely with frequent bends, squats, kneel, and climb. Dr. Utt further noted that Claimant needed no further maintenance care and no ongoing medications.

8. Claimant testified at hearing that as of March 2020, he was continuing to take Flexeril, Tylenol, and Ibuprofen for ongoing back and radicular symptoms including numbness into his bilateral feet.

9. Claimant underwent a Division-Sponsored Independent Medical Examination ("DIME") July 30, 2020 under the auspices of Dr. Elfenbein. Claimant reported to Dr. Elfenbein that he was much better after his surgery. With regard to his current complaints, Claimant reported continued low back pain rated 7 out of 10 at its worst with 2-3 out of 10 at it's best and 4-5 out of 10 on average. Dr. Elfenbein provided Claimant with an impairment rating of 16% whole person. Dr. Elfenbein noted in his report that no maintenance care was necessary with relation to the work injury of June 10, 2019.

10. Respondents filed an FAL admitting for the 16% whole person impairment rating and denied maintenance medical treatment.

11. On August 28, 2020 Claimant saw his personal provider, Dr. Dana Patton at St. Mary's Family Practice. Dr. Patton noted that Claimant reported he still had muscle spasms in his low back. Claimant testified at hearing that these muscles spasms were related to his low back injury. Claimant returned to Dr. Patton on October

[1] Dr. Utt's medical report providing the impairment rating does not appear to have a date listed on it. However, the range of motion worksheet lists March 16, 2020 as the date of the exam at the top of the sheet, and the ALJ adopts this date as corresponding to the medical report that provides Claimant's impairment rating.

30, 2020 and reported he continued to take medications including Tylenol, Ibuprofen, and Cyclobenzaprine for pain management.

12. Claimant testified that he attempted to follow up with Dr. Utt's office for continued post-MMI care but told the case was closed.

13. Claimant testified he was evaluated by St. Mary's neurosurgery on January 27, 2021 and was referred for physical therapy. The January 27, 2021 St. Mary's neurosurgery clinic progress note states that claimant presented to the office with a complaint of back pain with radiation to the right lower extremity which had been ongoing and was getting worse. The note references the L4-5 bilateral laminectomy and bilateral discectomy performed September 21, 2019 by Dr. Agrawal.

14. Respondents obtained a records review independent medical examination ("IME") with Dr. Cebrian on February 5, 2021. Dr. Cebrian summarized Claimant's medical records and noted that the L4-5 disc hearnation and resultant lumbar surgery were work related conditions. Dr. Cebrian opined the Claimant was at MMI as of March 5, 2020 and no maintenance care was indicated.

15. Claimant was evaluated by nurse practitioner Crick on April 8, 2021. Ms. Crick noted Claimant continued to complain of low back pain with radiation down into his right lower extremity and numbness/tingling in both feet. Claimant had a new MRI on April 8, 2021 which demonstrated an L5-S1 disc extrusion with right greater than left foraminal narrowing. Ms. Crick recommended a right sided L5-S1 epidural steroid injection.

16. Claimant underwent the L5-S1 epidural steroid injection on April 23, 2021 under the auspices of Dr. Steury.

17. Claimant testified at hearing that after the surgery and being placed at MMI he remained symptomatic from the back injury. Claimant testified he sought medical treatment through his personal physician which was billed through his personal health insurance and received a lumbar spine injection. Claimant testified his symptoms improved after the April 23, 2021 injection. Claimant testified he continues to experience symptoms including tingling into his toes and the bottom of his feet. Claimant testified these symptoms are distinct from his sporadic right hip symptoms from the prior motor vehicle accident.

18. Dr. Cebrian testified at hearing consistent with his report. Dr. Cebrian opined that Claimant's April 8, 2021 MRI showed a new finding at the L5-S1 level. Dr. Cebrian testified that Claimant's previous back surgery involving a microdiscectomy and foraminotomy would not cause a disc herniation at the level below the affected area.

19. Claimant testified on rebuttal that Dr. Argawal had said his surgery could make the disc underneath the surgical site weaker. The ALJ notes that this testimony is not supported by the records from Dr. Anrgawal and does not credit this portion of Claimant's testimony.

20. In addition to the physical therapy Claimant testified he continues to receive medications, including Neurontin and Gabapentin. Claimant testified it had been recommended that Claimant switch to Amitriptyline.

21. The ALJ notes that Claimant's medical records document that Claimant was taking Flexeril prior to his work injury along with other over the counter medications. The ALJ finds that there is insufficient evidence to find that the recommended prescription medications Claimant testified to at hearing, including the Neurontin and Gabapentin are related to Claimant's workers' compensation injury as these ongoing medications are consistent with Claimant's prescriptions from prior to the work injury.

22. Additionally, the ALJ notes that Claimant's most recent MRI shows new findings that were not present initially following his work injury. There is insufficient evidence to establish that Claimant's ongoing complaints for radicular symptoms are related to his work injury and not the new findings referenced in the April 8, 2021 MRI.

23. The ALJ notes that no physician has opined that Claimant's new findings at the L5-S1 level are related to Claimant's June 10, 2019 work injury. The ALJ further credits the opinion of Dr. Cebrian that the findings at L5-S1 are not related to Claimant's work injury and finds this opinion to be persuasive with regard to the need for Claimant's ongoing treatment. The ALJ further finds that the April 23, 2021 right sided L5-S1 epidural steroid injection is likewise not related to Claimant's June 10, 2021 work injury.

24. The ALJ credits the opinions of Dr. Utt, Dr. Elfenbein and Dr. Cebrian and finds that Claimant has failed to demonstrate by a preponderance of the evidence that his need for ongoing medical treatment is related to his June 10, 2019 injury. Insofar as Claimant requests relief in the form of an amended FAL being filed admitting for maintenance medical treatment, the ALJ determines that Claimant has failed to prove that it is more likely than not that Claimant would need post-MMI medical treatment necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

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

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

4. As found, Claimant has failed to prove by a preponderance of the evidence that Claimant needs medical treatment related to the June 10, 2021 work injury in order to maintain Claimant at MMI.

5. As found, the medical reports from Dr. Utt, Dr. Elfenbein and Dr. Cebrian are found to be credible and persuasive with regard to the issue of whether Claimant needs ongoing medical treatment to maintain himself at MMI.

6. The ALJ therefore finds that Claimant has failed to meet his burden of proof and Claimant's request for an admission of liability for ongoing maintenance medical treatment should be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for an amended FAL that admits for maintenance medical treatment is denied.

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

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

DATED: February 23, 2022

Keith E. Mottram

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Memorial Regional Hospital is reasonable and necessary to cure and relieve him from the effects of the occupational disease.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning June 12, 2020,

4. If the claimant is awarded TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment with the employer, thereby ending TTD benefits.

STIPULATION

If the claim is found compensable, the parties have stipulated to an average weekly wage (AWW) of $1,603.05.

FINDINGS OF FACT

1. The employer operates a mine. The claimant began his employment at the mine as a contractor. After one year as a contractor, the claimant was hired as a permanent employee in the position of Mechanic III.

2. The claimant's job duties included driving a large fuel truck around the mine property to fuel various pieces of equipment. The claimant testified that the truck has a 10,000 gallon tank and a two inch hose that runs between 30 and 40 feet.

3. The claimant further testified that for each fuel stop, he would park the fuel truck, and then place a chock block behind one of the tires. The way in which this task is accomplished was that the chock block is lifted off a pole on the side of the truck. Then the chock block is placed on the ground behind the tire. The claimant estimates that the chock block he used weighted 50 to 60 pounds. In addition, during the winter months, the chock block can become covered in ice and frozen debris, resulting in additional weight.

4. The claimant testified that the next part of the fueling process would be to pull the hose from the fuel truck to the receiving vehicle. At times it would be necessary to pull the entire length of the hose. The claimant would then connect the hose, turn the fuel on, and then disconnect, and retract the hose. The claimant testified that for some vehicles he had to reach above his head. At other times, it was necessary to climb onto the vehicle to connect the hose.

5. Once a fuel stop was completed, the claimant would lift the chock block and return it to the post on the truck. The claimant testified that he made between 20 and 30 stops during a 12 hours shift.

6. It is the claimant's position that the repetitive nature of these work activities resulted in an injury to his right shoulder and four bulging discs in his neck.

7. The claimant first sought treatment for his neck and shoulder symptoms on June 12, 2020. The claimant did so on that date, because he was in severe pain. On June 12, 2020, the claimant sent a text message to his direct supervisor, Mr. [Redacted, hereinafter Mr. K], stating that he would be using a sick day because "shoulder is killing me". The claimant did not report to Mr. K[Redacted] that he believed his work activities were the cause of his shoulder symptoms.

8.On August 18, 2020, [Redacted, hereinafter Ms. AS] HR Business Partner for the employer, prepared an Employer's First Report of Illness or Injury regarding the claimant. That form lists the onset of the claimant's illness or injury as "unknown". That same form also stated that the cause of the injury was "[U]nknown. Employee didn't provide a report of injury to his supervisor. Employee contacted Employee Services after his paid leave was exhausted, and indicated on his short-term disability paperwork that the injury was work-related."

9.On September 15, 2020, the claimant completed an Injured Employee's Report for the insurer. That document indicates that the date of the claimant's injury was February 15, 2019 through June 20, 2020. The claimant also identified the injured body parts as his right shoulder and neck. Under "accident facts" the claimant identified "frequent heavy lifting over a period of time".

10.At the request of his attorney, on May 17, 2021, the claimant attended an independent medical examination (IME) with Dr. Gary Zuehlsdorff. In connection with the IME, Dr. Zuehlsdorff reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Zuehlsdorff opined that the claimant's job duties resulted in cumulative trauma to his cervical spine and right shoulder. Dr. Zuehlsdorff also identified that claimant's condition as "a form of repetitive motion injury".

11.At the request of the respondents, on July 8, 2021, the claimant attended an IME with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Failinger opined that the claimant's work

activities did not cause the claimant's neck and shoulder pain. Dr. Failinger noted that the claimant denies any specific incident that initiated the onset of his symptoms. Dr. Failinger also noted that the right shoulder MRI did not reflect "significant shoulder pathology". Dr. Failinger reviewed whether the claimant's symptoms were the result of cumulative activities. Dr. Failinger opined that the claimant's job activities did not meet the criteria for repetitive movement.

12. Dr. Failinger's deposition testimony was consistent with his written report. Dr. Failinger testified that the claimant's job duties did not rise to the level of creating cumulative trauma. Dr. Failinger also noted that the claimant's job duties were not repetitive in nature. Dr. Faillinger opined that the claimant's arm use was "pretty rare and intermittent". In support of his opinion, Dr. Failinger noted that the claimant would fill a truck once every 40 to 45 minutes, or 16 trucks in a 12 hour shift. Dr. Failinger also noted that there is no clear diagnosis of the claimant's condition. Finally, Dr. Falinger testified that the claimant's symptoms are coming from a degenerative condition in his neck. Dr. Failinger does not believe that the claimant's job duties caused an aggravation or acceleration of that pre-existing condition.

13. [Redacted, hereinafter Mr. K], Maintenance Supervisor, was the claimant's supervisor. Mr.K[Redacted] testified that it was the claimant's job to run the lube truck to fuel mobile equipment. During a normal shift, an employee in the claimant's position would make approximately 20 stops. Mr. K[Redacted] testified that the fuel hoses are not connected while "charged". Although there will always be some residual fuel in a hose, while moving and connecting a hose, it is not charged. No fuel connections are done overhead.

14. [Redacted, hereinafter SM] Maintenance Supervisor for the employer testified regarding the claimant's job duties. Specifically, Mr. SM[Redacted] testified that the process for filling a vehicle starts with parking the lube truck near the receiving vehicle. Then the driver of the lube truck places the chock block for the lube truck. The hose is then pulled from the lube truck to the receiving vehicle. During this process the hose is not pressurized with fuel. Once the connection is made, the hose is pressurized to fill the receiving vehicle. When fueling is completed, the hose is depressurized and disconnected from the receiving vehicle. The hose is then returned to the lube truck via a hydraulic winder. At times, multiple vehicles will be driven to the location of the lube truck. In that instance, the lube truck chock block is not moved. Mr. SM[Redacted] estimated that the claimant would fill a total of 16 vehicles during one 12 hour shift. This does not mean 16 stops per shift, as explained above regarding multiple vehicles receiving fuel at the same location.

15. Ms. AS[Redacted] testified via deposition. Ms. AS[Redacted] confirmed that she spoke with the claimant on June 19, 2020. During that telephone conversation, the claimant told Ms. AS[Redacted] that he was reporting "an occupational illness". When Ms. AS[Redacted] requested additional information, the claimant reported that he had hurt his shoulder during a prior job, and he aggravated that injury. Ms. AS[Redacted] testified that she was not given the impression that the claimant was claiming this aggravation happened at work. Ms. AS[Redacted] also testified that she prepared the First Report of

Injury in August 2020 because the claimant had begun to claim that his condition was work related. Ms. AS[Redacted] testified that she attempted to assist the claimant with FMLA leave, and short term disability. However, the claimant was not compliant in providing requested information. The claimant's employment was terminated by the employer on December 23, 2020. Ms. AS[Redacted] testified that the claimant's employment was terminated because he failed to comply with her requests for information, and the claimant had stopped communicating with the employer.

16.The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the testimony of Mr. K[Redacted], Mr. Marshall, and Ms. AS[Redacted]. The ALJ specifically credits the testimony of Mr. K[Redacted] and Mr. SM[Redacted] regarding the claimant's job duties and the equipment utilized to perform those duties. The ALJ credits the opinions of Dr. Fallinger over the contrary opinions of Dr. Zuehlsdorff. The ALJ specifically credits the opinions of Dr. Fallinger that 1) the claimant's job activities did not meet the criteria for repetitive movement and 2) that the claimant's job duties did not cause an aggravation or acceleration of the claimant's pre-existing condition. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

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

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

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id*. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not

necessarily create a causal relationship based on temporal proximity. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer. As found, the opinions of Dr. Fallinger, and the testimony of Mr. K[**R**edacted], Mr. SM[**R**edacted] and Ms. AS[**R**edacted] are credible and persuasive.

ORDER

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

Dated this 25th day of February 2022.

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

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable occupational disease, entitling her to reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 64-year-old woman who worked for Employer as a security guard since June 28, 2016. Claimant's regular shift was from 6:00 a.m. to 2:00 p.m. five to six days per week. Claimant occasionally worked overtime. Claimant spent the entirety of her shift in a guard shack with windows. One window had minimal tinting at the top of the window.

2. Claimant credibly testified at hearing. Claimant testified she experienced exposure to sunlight while working in the guard shack which caused a burning sensation in her eyes. Claimant acknowledged she is also exposed to sunlight outside of work. Claimant alleges her exposure to sunlight while at work caused or worsened her bilateral cataracts. Claimant alleges she suffered an occupational disease with a date of onset on or around November 4, 2020.

3. Claimant's co-worker, [Redacted, hereinafter WG], credibly testified by telephone on behalf of Claimant. He testified that the windows to the guard shack are not tinted and he experiences sun exposure in the guard shack. Mr. WC[Redcted] testified the security guards stay in the guard shack throughout their shifts and that he has also had problems with the sun exposure.

4. On November 3, 2020, Claimant presented to Optometrist Nicole Ramos, O.D. at the Colorado Eye Center with complaints of blurry vision at a distance and near-sightedness out of her right eye. Claimant reported her belief that the sun was causing her cataracts and a burning sensation in her eyes. Dr. Ramos noted that Claimant worked in front of a window with direct sunlight for most of the day. She diagnosed Claimant with age-related bilateral nuclear cataracts and referred Claimant for a surgical evaluation with Ophthalmologist Howard Amiel, M.D.

5. Claimant first presented to Dr. Amiel on November 19, 2020 with complaints of decreased vision bilaterally, which began approximately one year prior. Dr. Amiel's record contains no mention of sunlight exposure and does not address potential occupational relatedness. Dr. Amiel also diagnosed Claimant with age-related bilateral cataracts. He recommended Claimant proceed with cataract surgery.

6. Employer filed a First Report of Injury on November 27, 2020.

7. Claimant underwent right-sided cataract surgery on December 8, 2020 and left-sided cataract surgery on December 22, 2020. Both surgeries were performed by Dr. Amiel.

8. Claimant subsequently attended multiple post-operative evaluations with Dr. Ramos. On December 9, 2020, Dr. Ramos noted, "Will call Workman's Comp to verify that cataracts are not age related." (R. Ex. C, p. 25). Dr. Ramos' medical notes do not otherwise address or discuss the causality of Claimant's condition.

9. Insurer filed a Notice of Contest on December 18, 2020 denying liability for Claimant's injury/illness for not being work-related.

10. Claimant continued to see Dr. Ramos for multiple follow-up appointments until January 26, 2021, at which time she was discharged from care.

11. On April 7, 2021, Chester T. Roe III, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Roe performed an evaluation and medical records review. Claimant reported to Dr. Roe she worked in a guard shack with a window in front of her. She reported the sun burned her eyes while at work and that in May 2020 her right vision worsened. Dr. Roe opined that it is not medically probable the sunlight exposure Claimant experienced at work is casually related to the development or progression of Claimant's bilateral cataracts or her need for cataract surgery. He opined that nothing in his records review or his examination indicated Claimant sustained anything other than age-related cataract etiology.

12. Dr. Roe credibly testified at hearing on behalf of Respondents as a Level II expert in ophthalmology. Dr. Roe explained the difference between an ophthalmologist and an optometrist, stating an ophthalmologist is a medical doctor licensed to treat disorders of the eye while an optometrist, who is not a medical doctor, focuses on correcting vision using lenses. Dr. Roe testified that an ophthalmologist would have more expertise than an optometrist regarding the causation of cataracts. Dr. Roe explained that age is the number one risk factor for developing cataracts and that cataracts are one of the most common age-related eye diseases in the United States, with an average surgical age of 69 years. Dr. Roe testified that, at her age, Claimant is not outside of the norm for developing vision-impairing cataracts requiring surgery.

13. Dr. Roe further testified that there is no Level I peer-review evidence supporting the theory that excessive exposure to sunlight causes or worsens cataracts. He explained that, despite Colorado's high altitude and greater exposure to UV light, cataracts are not more frequently diagnosed in Colorado. He continued to opine that it is to medically probable Claimant's exposure to sunlight through windows while on the job caused, aggravated or accelerated her bilateral cataracts.

14. The ALJ finds the opinions of Drs. Roe and Amiel more credible and persuasive than the opinion of Dr. Ramos.

15. Claimant failed to prove it is more probable than not the hazards of her employment caused, intensified or aggravated her bilateral cataracts.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

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

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

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

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

As found, Claimant failed to prove it is more probable than not she suffered a compensable occupational disease. While Claimant is credible regarding her exposure to sunlight and experience of symptoms while working in the guard shack, there is

insufficient evidence establishing such exposure as the proximate cause of Claimant's bilateral cataracts. At her initial evaluation, Dr. Ramos, an optometrist, noted Claimant's work exposure to sunlight but nevertheless diagnosed Claimant with age-related cataracts. Subsequently, in a December 9, 2020 medical note, Dr. Ramos noted she would "call Workman's Comp to verify that cataracts are not age-related." However, Dr. Ramos' notes contain no further discussion or causal analysis regarding Claimant's condition. Thus, Dr. Ramos did not specifically opine Claimant's condition is work-related. To the extent the ALJ can reasonably infer from Dr. Ramos' notes her opinion is that Claimant's condition is work-related, such opinion is less credible and persuasive than those of Drs. Amiel and Roe. Dr. Amiel and Dr. Roe, both ophthalmologists, credibly determined Claimant's condition is age-related. Dr. Roe credibly testified that ophthalmologists likely have more expertise than optometrists in determining the causation of cataracts. Furthermore, Dr. Roe is a Level II accredited expert in ophthalmology.

Dr. Roe credibly testified that, at Claimant's age, she is not outside of the norm for developing cataracts and requiring cataracts surgery. Importantly, no credible or persuasive evidence was offered establishing that excessive exposure to sunlight causes or worsens cataracts. Dr. Roe credibly opined it is not medically probable Claimant's exposure to sunlight through windows while on the job caused, aggravated or accelerated her bilateral cataracts. Based on the totality of the evidence, the preponderant evidence does not establish that the hazards of Claimant's employment caused, intensified or aggravated her bilateral cataracts and need for cataract surgery. As Claimant failed to prove it is more likely than not she sustained a compensable occupational disease, the remaining issue of medical benefits is moot.

ORDER

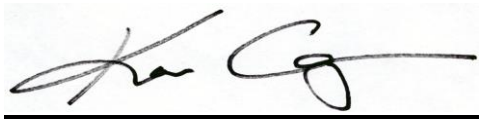
1. Claimant failed to prove she suffered a compensable occupational disease with a date of onset on or around November 4, 2020. Claimant's claim for benefits is denied and dismissed.

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

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

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

DATED: February 25, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose Thomas Corson, M.D. at Concentra Medical Centers as his ATP through his words and conduct.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022.

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

5. Whether Claimant has demonstrated by a preponderance of the evidence that Respondents are financially responsible for medical bills he incurred at UC Health.

FINDINGS OF FACT

1. Claimant has worked for Employer as a Laborer for approximately 24 years. He testified that while at work on June 18, 2021 he fell off scaffolding from a height of approximately 12-13 feet onto his head and shoulder. Employer's General Supervisor transported Claimant to UC Health for emergency medical treatment.

2. At the emergency room at UC Health Claimant reported falling from scaffolding while performing his job duties for Employer. He suffered a head laceration and right shoulder pain. After conducting a physical examination and reviewing Claimant's medical history, Paul Douglas Mack, PA-C diagnosed Claimant with the following: (1) a laceration of the scalp; (2) a likely first degree separation of the right shoulder AC joint; and (3) acute right shoulder pain. Medical providers stapled Claimant's head wound.

3. Claimant submitted the following three medical bills from UC Health at hearing: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received the preceding medical bills associated with his visit

to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp.

4. Claimant remarked that Employer did not provide any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers pursuant to §8-43-404(5), C.R.S. and WCRP Rule 8-2.

5. Claimant did not immediately return to work. However, during the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that his light duty work aggravated his right shoulder condition. He noted that he requested medical treatment and Employer's owner was aware of his pain. However, Employer never provided medical information or a clinic location.

6. Because of his shoulder pain, Claimant stopped showing up for work in July of 2021 but did not notify Employer. He acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns. Finally, Claimant acknowledged that failing to call-in or show-up for work could result in the termination of employment.

7. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021.

8. Employer's Human Resources Officer and Account Manager NJ[Redacted] testified at the hearing in this matter. Her job duties include handling Employer's Workers' Compensation claims. Although she was apprised of Claimant's June 18, 2021 accident, she believed Claimant's injury were limited to a head laceration that was addressed in the emergency room. Ms. NJ[Redacted] was not aware of Claimant's shoulder injury as a result of the fall from scaffolding. She acknowledged that she did not provide Claimant with a list of at least four designated Workers' Compensation providers.

9. Ms. NJ[Redacted] explained that Claimant was injured on Friday, June 18, 2021, but returned to work for Employer on Tuesday, June 22, 2021. Employer assigned Claimant light duty work. Ms. NJ[Redacted] asked Claimant about how he was feeling and told him to reach out to her if he needed anything.

10. Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but she talked with Claimant during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] understood that Claimant was doing well while performing light duty work.

11. Ms. NJ[Redacted] testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

12. Claimant testified that his shoulder continued to deteriorate after he ceased working for Employer. Specifically, his shoulder pain continued to worsen. He thus sought legal counsel to obtain further treatment.

13. On July 21, 2021 Claimant's attorney filed a Workers' Compensation claim. Respondents' filed their own claim on July 22, 2021. The matters were subsequently consolidated.

14. On August 12, 2021 Claimant visited Thomas Corson, D.O. at Concentra Medical Centers to assess his Workers' Compensation injuries. Claimant reported that on June 18, 2021 he was performing his job duties on scaffolding approximately 15 feet high when he lost his footing and fell head first onto packed dirt. He noted that he injured his head and right shoulder and briefly lost consciousness. Claimant reported continuing head pain and limited right shoulder range of motion. He had not returned to work for Employer because he required medical clearance. Dr. Corson assessed Claimant with the following: (1) a closed head injury with concussion; and (2) a right rotator cuff tear. He prescribed medications, ordered a right shoulder MRI and recommended physical therapy. Dr. Corson determined that his objective findings were consistent with a work-related mechanism of injury. He assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position.

15. Ms. NJ[Redacted] commented that Employer would have been able to accommodate Claimant's work restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson. She remarked that there "is always something to do around the office."

16. On August 27, 2021 Claimant underwent an MRI of the right shoulder. The imaging confirmed the diagnosis of a right rotator cuff tear.

17. On November 29, 2021 Claimant returned to Dr. Corson for an examination. Dr. Corson noted that Claimant could return to modified duty employment with the following restrictions: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from the body and no working in a safety-sensitive position.

18. Based on a referral from Dr. Corson, Claimant visited surgeon Craig Davis, M.D. for an evaluation on September 15, 2021. Dr. Davis recommended surgical repair of Claimant's right Shoulder.

19. On December 17, 2021 Respondents filed a General Admission of Liability (GAL). Respondents approved right rotator cuff repair surgery.

20. On January 17, 2022 Claimant underwent right shoulder surgery. Respondents agreed to commence Temporary Total Disability (TTD) benefits as of the date of the surgery.

21. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at a different Concentra location on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician.

22. Claimant has established that it is more probably true than not that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on June 18, 2021 Claimant suffered industrial admitted injuries when he fell off scaffolding at work. He received emergency medical treatment at UC Health. During the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work. Claimant noted that he requested medical treatment and Employer's owner was aware of his pain. However, Claimant remarked that Employer did not provide him with any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers. The record is also devoid of a written list of four designated providers. Finally, Respondents have acknowledged that they did not explicitly meet the requirements of §8-43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

23. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated that it is more probably true than not that Claimant chose Dr. Corson at Concentra as his ATP through his words and conduct. Claimant's conduct reveals that he exercised his right of selection and chose Dr. Corson at Concentra as his ATP. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at Concentra on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022.

24. In the days after the June 18, 2021 work accident Claimant signified through his words and conduct that he had selected Concentra to treat his injuries. Claimant's testimony and the medical records reveal that he chose Concentra and has received treatment through Dr. Corson since August 12, 2021 that has lasted in excess of five months. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician. Accordingly, Claimant selected Dr. Corson at Concentra as his ATP.

25. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022. On June 18, 2021 Claimant fell off scaffolding at work and visited UC Health for emergency care. During the week following the accident, Claimant performed some light duty tasks for Employer. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021. Claimant thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The June 18, 2021 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

26. However, Respondents have proven that it is more probably true than not that Claimant abandoned his position and was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. During the week following his accident, Employer provided light duty work for Claimant in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that the light duty work aggravated his right shoulder condition and he ceased showing up for work on July 16, 2021.

27. Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but talked with him during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] thus understood that Claimant was doing well while performing light duty work. Claimant acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns.

28. Claimant explained that, because of his right shoulder pain, he stopped showing up for work in July of 2021. He did not notify Employer but simply ceased working. Claimant acknowledged that failing to show up or call-in to work could result in the termination of employment. Ms. NJ[Redacted] credibly testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

29. Despite Claimant's contention that he suffered a worsening of his right shoulder condition, the record reveals that his shoulder condition has remained consistent from the time he stopped working until he underwent right shoulder surgery on January 17, 2022. Notably, on August 12, 2021 Dr. Corson assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position. On November 29, 2021 Dr. Corson reduced Claimant's restrictions to the following: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from body and no working in a safety-sensitive position. Ms. NJ[Redacted] credibly commented that Employer would have been able to accommodate Claimant's work

restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson on August 12, 2021.

30. Claimant ceased reporting to work on July 16, 2021, was aware that termination could follow and did not suffer a worsening of condition. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Claimant is thus precluded from receiving TTD benefits for the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

31. Claimant has failed to demonstrate that it is more probably true than not that Respondents are financially responsible for medical bills he incurred at UC Health. Initially, Claimant submitted the following three medical bills from UC Health: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received medical bills associated with his visit to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp. However, the medical bills submitted by Claimant do not include the dates of service correlated with his June 18, 2021 injury, his treatment or any records supporting that the care arose from his industrial injury. The bills simply do not provide the information required by Rule 16-9. Claimant or the providers must provide the information required by Rule 16-9 so Respondents can ensure the treatment relates to the industrial injury, If the additional documentation required by Rule 16-9 is provided, Respondents shall pay the preceding UC Health bills.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Right of Selection

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In Re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. In a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005). Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Bunch v. Indus. Claim Appeals Off.*, 148 P.3d 381, 384 (Colo. App. 2006).

6. Authorization to provide medical treatment refers to a medical provider’s legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC’s 4-

793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (determining that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

7. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch,* 148 P.3d at 383.

8. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

9. As found, Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on June 18, 2021 Claimant suffered industrial admitted injuries when he fell off scaffolding at work. He received emergency medical treatment at UC Health. During the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work. Claimant noted that he requested medical treatment and Employer's owner was aware of his pain. However, Claimant remarked that Employer did not provide him with any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers. The record is also devoid of a written list of four designated providers. Finally, Respondents have acknowledged that they did not explicitly meet the requirements of §8-

43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

10. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated that it is more probably true than not that Claimant chose Dr. Corson at Concentra as his ATP through his words and conduct. Claimant's conduct reveals that he exercised his right of selection and chose Dr. Corson at Concentra as his ATP. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at Concentra on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022.

11. As found, in the days after the June 18, 2021 work accident Claimant signified through his words and conduct that he had selected Concentra to treat his injuries. Claimant's testimony and the medical records reveal that he chose Concentra and has received treatment through Dr. Corson since August 12, 2021 that has lasted in excess of five months. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician. Accordingly, Claimant selected Dr. Corson at Concentra as his ATP. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks, the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917-514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

TTD Benefits and Responsible for Termination

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two

elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

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

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022. On June 18, 2021 Claimant fell off scaffolding at work and visited UC Health for emergency care. During the week following the accident, Claimant performed some light duty tasks for Employer. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021. Claimant thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The June 18, 2021 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three

work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

15. As found, however, Respondents have proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. During the week following his accident, Employer provided light duty work for Claimant in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that the light duty work aggravated his right shoulder condition and he ceased showing up for work on July 16, 2021.

16. As found, Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but talked with him during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] thus understood that Claimant was doing well while performing light duty work. Claimant acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns.

17. As found, Claimant explained that, because of his right shoulder pain, he stopped showing up for work in July of 2021. He did not notify Employer but simply ceased working. Claimant acknowledged that failing to show up or call-in to work could result in the termination of employment. Ms. NJ[Redacted] credibly testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

18. As found, despite Claimant's contention that he suffered a worsening of his right shoulder condition, the record reveals that his shoulder condition has remained consistent from the time he stopped working until he underwent right shoulder surgery on January 17, 2022. Notably, on August 12, 2021 Dr. Corson assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position. On November 29, 2021 Dr. Corson reduced Claimant's restrictions to the following: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from body and no working in a safety-sensitive position. Ms. NJ[Redacted] credibly commented that Employer would have been able to accommodate Claimant's work restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson on August 12, 2021.

19. As found, Claimant ceased reporting to work on July 16, 2021, was aware that termination could follow and did not suffer a worsening of condition. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Claimant is thus precluded from receiving TTD benefits for

the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

Medical Bills

20. Colorado Division of Workers' Compensation (DOWC) Rule of Procedure 16-9(A) specifies that the "treating provider shall maintain medical records for each injured worker when billing for the provided treatment." Rule 16-9(B) further provides that "all medical records shall legibly document the treatment billed" and "shall include at least the following information: (1) patient's name; (2) date of treatment; (3) name and professional designation of person providing treatment; (4) assessment or diagnosis of current condition with appropriate objective findings; and (5) treatment provided."

21. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Respondents are financially responsible for medical bills he incurred at UC Health. Initially, Claimant submitted the following three medical bills from UC Health: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received medical bills associated with his visit to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp. However, the medical bills submitted by Claimant do not include the dates of service correlated with his June 18, 2021 injury, his treatment or any records supporting that the care arose from his industrial injury. The bills simply do not provide the information required by Rule 16-9. Claimant or the providers must provide the information required by Rule 16-9 so Respondents can ensure the treatment relates to the industrial injury, If the additional documentation required by Rule 16-9 is provided, Respondents shall pay the preceding UC Health bills.

ORDER

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

1. Because Respondents failed to provide Claimant with a written list of designated providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2., the right to select an ATP passed to him.

2. Claimant chose Dr. Corson at Concentra as his ATP to treat his June 18, 2021 industrial injuries.

3. Because Claimant was responsible for his termination from employment he is precluded from receiving TTD benefits for the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

4. Respondents are not financially responsible for Claimant's medical bills from UC Health. However, if the additional documentation required by Rule 16-9 is provided, Respondents shall pay the UC Health bills related to Claimant's June 18, 2021 industrial injuries.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.*

DATED: February 25, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-177-672-001

ISSUES

The issues set for determination were:

- Is Claimant entitled to higher average weekly wage?

FINDINGS OF FACT

1. On May 15, 2021, Claimant was injured while working for Employer when she was assisting a coworker in carrying a 300lb bucket of potatoes up stairs.

2. Claimant worked two separate jobs for Employer, packer and process operator. Claimant's rate of pay at the time of her injury as a packer (her main job code) was $19.14 per hour. Claimant's rate of pay as process operator her (secondary job code) was $26.01 per hour.

3. [Redacted, hereinafter AN] testified as a representative of Employer, where she has worked for six years. She is the HR Manager, which is the position she has held for three months. In that capacity, she knew of Employer's practices/policies concerning pay rates based upon job codes and paid time off due to Covid-19.

4. Ms. AN[Redacted] testified Claimant could be scheduled or assigned to work either job code based on business need. Claimant could work in both positions in a given pay period or even in a given day. Claimant worked hours in both categories.

5. Ms. AN[Redacted] also testified that there were two ways in which employees could work overtime. Overtime was either voluntary and awarded based on seniority, or it was mandatory and required, based on reverse seniority. Overtime was not consistently offered or earned and would also vary day to day, and week to week.

6. Ms. AN[Redacted] stated when employees were paid for time off due to Covid-19, they were paid for forty (40) hours per week at their base pay rate. Ms. AN[Redacted] testified that pay at this rate was made pursuant to company policy. For Claimant that was $765.60 (40 hours X $19.14=$765.60).

7. Claimant's wage records were admitted at hearing.[1] These records covered the period for April 9, 2021 to May 15, 2021 and reflected the fact that Claimant worked overtime most weeks in 2020-2021. Specifically, the records showed the fact Claimant worked overtime forty-five (45) out of the fifty-two (52) weeks for the year. The weeks Claimant did not receive overtime included five (5) full weeks and two partial weeks Claimant was off due to Covid-19.

[1] Exhibits 4 and E.

8. Claimant also consistently worked hours as a process operator, at the higher rate.

9. On August 10, 2021, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for medical benefits.[2]

10. On September 16, 2021, an Application for Hearing ("AFH") was filed at the Office of Administrative Courts ("OAC") by Claimant listing the following issues: AWW, TPD, and TTD.

11. On October 1, 2021, a Response to Application for Hearing was filed by Respondents.

12. On October 21, 2021, Claimant received a letter stating that she had exhausted the transitional duty available to her under Employer's Transitional Duty Policy, which provided for temporary work restrictions resulting from occupational injuries. The letter informed Claimant that she would be placed on Workers' Compensation leave with benefits.[3]

13. On January 5, 2022, a GAL was filed on behalf of Respondents, admitting for medical benefits, TPD beginning June 17, 2021 through October 20, 2021, and TTD beginning October 21, 2021. The GAL admitted for an AWW of $1,149.59, which resulted in a TTD rate of $766.39 per week. Respondents calculated the AWW by using Claimant's earnings for one year (52 weeks) leading up to the injury.[4]

14. Claimant was off work for one partial week and four full weeks for pay periods beginning June 21, 2020 and ending July 25, 2020 due to COVID-19. Claimant was off work for one partial week and one whole week again due to COVID-19 for pay periods beginning October 18, 2020 and ending October 31, 2020.[5]

15. Claimant's pay for the weeks she was off work due to COVID-19 was capped at $765.60/week and was calculated using her rate of pay for her main job code per Employer's COVID-19 policy. No overtime was paid during the weeks Claimant was off for Covid-19.

16. The admitted AWW did not fairly compensate Claimant for her wage loss, as using the weeks when she was out for Covid-19 had the effect of lowering the calculated AWW.

17. Claimant is entitled to a higher average weekly wage.

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[2] Exhibit A.

[3] Exhibit G.

[4] Exhibit D.

[5] Exhibit E.

18. The ALJ determined that calculating Claimant's AWW using the 20 (twenty) weeks leading up to her injury more fairly represented her AWW. Claimant was therefore entitled to a higher AWW of $1,302.05 per week. Claimant's TTD rate was $868.03 per week.

19. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2022) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

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

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

AWW

§ 8-42-102(2), C.R.S. (2022) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2022) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair

approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979" and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage." *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), the issue of how to fairly calculate AWW arose where Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bar, Respondents argued the default method for calculating Claimant's AWW was the appropriate methodology for this determination. Specifically, Respondents asserted that calculating Claimant's AWW using the preceding year, which included five full weeks and two partial weeks where Claimant did not receive her full pay, was a fair determination of her AWW ($59,778.92/52=$1,149.59). Respondents contended that Claimant's pay was variable from week to week.

Claimant argued the method used by Respondents did not fairly establish Claimant's AWW. Claimant argued that because of the decrease in pay for the weeks she was out the entire week or part of the week due to COVID-19, the AWW was not an accurate calculation of her AWW. Claimant averred her AWW should be calculated using the 20 (twenty) weeks preceding her injury. Using this calculation, Claimant argued that her AWW was $1,302.05, resulting in a TTD rate of $868.03 per week. The ALJ was persuaded that Claimant met her burden of proof and was entitled to higher AWW.

As determined in Findings of Fact Nos. 2–4, Claimant worked two different positions for Employer. Claimant's rate of pay as a packer was lower ($19.14/hour) than for her work as a process operator ($26.01/hour). Claimant's pay records documented she worked hours in both pay categories from April 9, 2021 to May 15, 2021 (Finding of Fact 4). The ALJ also found that Claimant worked overtime hours prior to her work injury. (Finding of Fact 7). In fact, Claimant's pay records reflected the fact that she worked overtime hours a total of 45 out of the 52 weeks for that period of time. *Id.* The weeks Claimant did not work overtime hours were ones when she was off work taking leave due to Covid-19.

Respondents admitted AWW included those weeks when Claimant was off work due to Covid-19. The ALJ concluded that the admitted AWW was not a fair calculation of Claimant's AWW, as the inclusion of those weeks had the effect of lowering Claimant's AWW. (Findings of Fact 14-16). This was not representative of Claimant's AWW, as she consistently worked hours at a higher pay rate. The pay records admitted at hearing showed Claimant worked not only overtime hours, but also was paid at the higher position rate, which was not included in the Covid-19 wages paid. (Finding of Fact 7).

The ALJ considered Respondents' argument that using the whole period of 52 weeks was the fairest calculation of AWW. As found, this contention did not address the fact that the wages paid while Claimant was off due to Covid-19 did not incorporate either overtime wages of the pay at the higher rate. Accordingly, the ALJ concluded Claimant met her burden of proof and established she was entitled to a higher AWW. (Finding of Fact 17). This comports with the Court of Appeals' holdings in *Campbell* and *Pizza Hut.* The ALJ concluded that an AWW of $1,302.05 per week was a fairer calculation of Claimant's AWW and diminished earning capacity. *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

ORDER

IT IS HEREBY ORDERED:

1. Claimant established she was entitled to a higher AWW of $1,302.05 per week, which gives a TTD rate of $868.03 per week.

2. Respondents shall pay TTD and TPD benefits based upon a TTD rate of $868.03 per week.

3. Respondents shall pay interest at the statutory rate on all benefits not paid when due.

4. Issues not expressly decided herein are reserved for future determination.

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

DATED: February 28, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

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

ISSUE

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

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

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

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

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

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

ORDER

It is therefore ordered that:

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

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

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

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

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

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

DATED: March 1, 2022

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the right knee Synvisc-One injection recommended by Michael DaRosa, M.D. is reasonable, necessary and causally-related treatment for his July 1, 2020 industrial injury.

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Id. at 204).

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

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

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

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

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Treatment

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

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

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

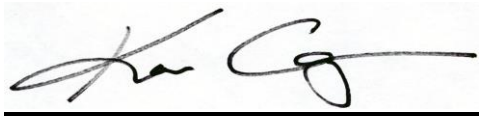
ORDER

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

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

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

DATED: March 3, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

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

ISSUES

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

(See generally, Resp. Ex. A).

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

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

D. The question of whether Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). In this case, Claimant alleges she has had a change in medical condition since being placed at MMI. Specifically, Claimant argues that she has a diagnosis of CRPS Type I or Type II related to her March 22, 2016 industrial injury and/or the hip arthroscopy necessitated by her slip and fall. As noted above, the ALJ is not convinced. Here, the persuasive evidence supports Dr. Lesnak's opinion that there is currently no clinical or diagnostic testing evidence that "in any way meets the specific criteria outlined in the State of Colorado Division of Workers' Compensation Medical Treatment Guidelines [to support] a diagnosis of CRPS, type I or Type II." While the ALJ is convinced that Claimant is experiencing physical symptoms (pain), there is sufficient evidence to support a conclusion that her complaints are somatically driven since her alleged symptoms cannot be accounted for by clinical observation/examination and/or detailed diagnostic testing. Certainly, Dr. Staudenmayer noted previously that Claimant was "over reporting symptoms" and "somaticizing her emotional distress." (Resp. Ex. M, bates 079) Moreover, Claimant had a strong somatic locus during her RIME with Dr. Lesnak. (Id.) Based upon the evidence presented, the ALJ concludes that further testing/treatment for CRPS would be in vain, as it is evident that Claimant does not suffer from the diagnosis.

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

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

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

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

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

SO ORDERED this 3rd day of March, 2022

/s/ Richard M. Lamphere

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

ISSUES

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

STIPULATIONS

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Id. at p. 16).

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

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

(Id. at p. 15).

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

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

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

(Id. at p.18).

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

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

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

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

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

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

(Id. at p. 29).

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

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

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

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

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Treatment

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

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

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

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

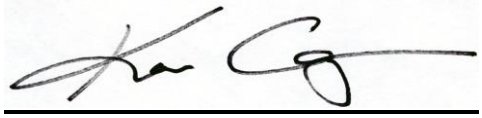
ORDER

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

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

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

DATED: March 4, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

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

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

FINDINGS OF FACT

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

The Work Injury, and Subsequent Treatment

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

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

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

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

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

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

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

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

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

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

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

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

Claimant has Successful Rotator Cuff Repair

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

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

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

Claimant's Neck Complaints Continue, Despite Shoulder Surgery Success

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

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

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

Claimant is Referred to Dr. Laker

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

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

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

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

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

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

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

IME of Dr. Lesnak

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

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

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

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

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

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

Claimant Continues Follow-up Visits

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

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

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

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

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

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

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

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

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

which she made the following recommendations:

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

31. At this same visit, she noted:

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

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

Claimant Testifies at Hearing

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

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

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

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

particularly active.

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

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

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

Testimony from Advanced Professional Investigations Personnel

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

Dr. Lesnak Testifies at Hearing

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

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

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

Medical Benefits, Reasonable and Necessary, Generally

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

Medical Benefits, Related to Work Injury, Generally

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

Preexisting Condition, Generally

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

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

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

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

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

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

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

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

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

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

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

Physical Therapy

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

ORDER

It is therefore Ordered that:

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

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

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

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

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

mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 3, 2022

/s/ William G. Edie

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

ISSUES

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Id. at p. 53).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need

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

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

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

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

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

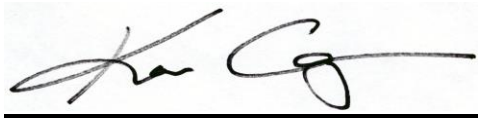
ORDER

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

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

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

DATED: March 4, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

ORDER

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

Dated this 7th day of March 2022.

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

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

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

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

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the DIME physician's opinion regarding impairment was incorrect.

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

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

STIPULATIONS

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] Peripheral Vascular Disease.

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

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

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

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

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

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

[8] Enterobacter cloacae and enterobacter faecalis.

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

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

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

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

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

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

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

[10] Certificate of Mail was not completed.

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

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

B. Overcoming DIME with Regard to Permanent Impairment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo.App. 1995). Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

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

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

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

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

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

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

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

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

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

2. Heart Attack (MI)

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

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

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

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

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

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

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

ORDER

IT IS THEREFORE ORDERED:

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

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

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

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

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

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

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

8. All matters not determined are reserved for future determination.

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

DATED this 7th day of March, 2022.

Digital Signature

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

ISSUES

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

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

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

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

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

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

FINDINGS OF FACT

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

a. Procedural History

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

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

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

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

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

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

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

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

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

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

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

10. On May 18, 2020 ALJ Felter issued an Order Concerning Filings which ordered Claimant to cease and desist from further filings during the pendency of his appeal. Despite the order, Claimant filed multiple applications for hearing. Following a prehearing conference on June 17, 2020, finding that Claimant had a profound misunderstanding of cases he cited to the ALJ and determining that there was a serious abuse of the Workers' Compensation Adjudication system to the detriment of other meritorious cases, ALJ Felter struck the applications and vacated four separate hearings.

11. On October 15, 2021 Claimant filed an Application for Hearing on multiple issues. On November 5, 2021 PALJ Marcus Zarlengo issued an order limiting the issues for hearing to the issue of Claimant's petition to reopen the claim. This ALJ affirmed that procedural order on November 15, 2021. This ALJ also denied Claimant's Motion for Summary Judgement on the same day.

12. At the time of the hearing Claimant failed to appear. Upon discussion with Respondents' counsel, he advised that Claimant had had prior problems signing into the Google Meet system. This ALJ called Claimant and provided instructions on how to sign into the video hearing in order not to cause further delays.

13. At the hearing, Respondents argued that if the claim was reopened without an award of benefits, the order would not be an appealable order. The parties agreed that, if Claimant was successful in reopening the claim pursuant to Sec. 8-43-303, C.R.S., all issues including medical benefits, permanent partial disability, permanent total disability, penalties, and appeal of the multiple prehearing conference orders, were all at issue for this hearing.

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[5] *Webster v. Czarnowski Display Service*, I.C.A.O., W.C. No 5-009-761-07 (August 26, 2020).
[6] *Webster v. Industrial Claim Appeals Office*, 20CA1529 (March 25, 2021) (NSOP).
[7] *Webster v. Indus. Claim Appeals Office*, 2021SC294 (August 16, 2021).

b. Recusal

14. At the commencement of the January 28, 2022 full day hearing, this ALJ addressed Claimant's Motion for recusal of this ALJ filed on January 10, 2022. The motion was not accompanied by the required affidavit, documentation or other evidence pertinent to recusal. The Claimant's Motion contains opinions and conclusions, based on the ALJ's previous rulings against the Claimant, and no assertions of evidentiary (basic) fact, which would create an individual in possession of the relevant facts to harbor doubts about receiving a fair and impartial hearing and decision. A litigant cannot trigger disqualification of a judge by assertions or allegations of bias and impartiality alone, challenging the judge's integrity, which the Claimant has done. The Claimant's motion for recusal was denied. The ALJ herein disregarded any insults by Claimant's and remains fair and impartial concerning the Claimant's claims.

c. Injury

15. Claimant was injured in the course and scope of his employment with Employer on Wednesday, March 9, 2016 when he tripped over a large tote while carrying a metal table base and fell. He stated that he was in the middle of a large area where his boss and other coworkers saw him fall. They ran over to help him up. He kept shaking his head because he immediately felt fuzzy vision. Once his vision cleared, he went to the tote or box and kicked at it, falling again. He continued to work that day, mostly walking around.

16. Once he went home that day, he started having symptoms in his arm, as if it was contracting and shaking. He also stated that he felt like someone jumped on his back and felt like something wrapped around his front. He stated that he passed out until Friday probably due to the pain. When he woke, he felt he was lost, scared and in pain. He called a friend to take him to his employer to ask for help. He was referred to Concentra for care.

17. Claimant reported the injury to Employer on March 11, 2016 and completed an Employee's Report of Work Related Injury. Claimant reported that he tripped and fell, hitting his chest and knee on the concrete. Claimant wrote that he sustained injuries to his right hand, left knee and low back.

18. Employer's First Report of Injury, dated March 15, 2016, noted that Claimant reported injuries to his right rib, left knee, lower back, and third and fourth right fingers.

d. Medical history

19. Claimant presented to Amanda Cava, M.D. at Concentra Health Services (Concentra) on March 11, 2016. Claimant reported that he fell, landing on his right hand and left knee. Claimant complained of lower back pain, left knee pain and right

thumb/wrist pain.[8] Dr. Cava noted normal musculoskeletal, spine, neurologic and psychiatric findings. X-rays of Claimant's right hand demonstrated no fractures, other than preexisting evidence of prior healed fractures. Dr. Cava diagnosed Claimant with a lumbar strain, wrist strain and knee contusion. She released Claimant to modified duty and recommended medication and occupational therapy.

20. Claimant continued to treat at Concentra with complaints of pain in his low back, abdomen, knees, and right thumb/wrist, as well as numbness in his left leg. On March 21, 2016, all other systems were reviewed and found to be negative. Claimant was released to regular duty. On March 25, 2016, Claimant reported to Dr. Cava with complaints of pain in his back and left side/ribs. X-rays of Claimant's chest revealed no acute fracture, infiltrates, or pneumothorax.

21. On March 29, 2016, Claimant was admitted to the emergency department at the University of Colorado Hospital complaining of pain in his low back, groin, and ribcage. Claimant was diagnosed with left-sided low back pain and left-sided sciatica, was referred for physical therapy, and provided with a medical excuse to be off work for two days.

22. On March 31, 2016 Claimant was evaluated by Dr. Brian Counts at Concentra. His principal complaint was abdominal pain, with back pain and abdominal pain radiating to his testicles. Dr. Counts noted a prior history of multiple fractures in the right hand and chronic posterior knee pain for several months. He had complaints of blurred vision, back pain, joint pain, muscle weakness and night pain together with numbness and tingling. After performing a full physical, musculoskeletal and neurologic exam, Dr. Count found normal findings with the exception of the spondylolisthesis at the L5-S1 level. He ordered an MRI of the lumbar spine.

23. Claimant underwent a lumbar spine MRI on April 8, 2016 which revealed (1) disc degeneration at L3-L4, L4-L5 and L5-S1, (2) L3-L4 mild bilateral lateral recess and foraminal stenosis without nerve root deformity, and (3) L5-S1 mild bilateral lateral recess and moderate to severe bilateral foraminal stenosis with compression of bilateral exiting L5 nerve roots.

24. Dr. Cava reevaluated Claimant on April 12, 2016 and assessed a lumbar strain, bilateral lumbar radiculopathy, muscle spasm of the back, and weakness of both lower extremities. She reviewed the lumbar MRI with Claimant and referred Claimant to Michael Rauzzino, M.D., an orthopedic spine specialist.

25. Claimant presented to Dr. Rauzzino on May 3, 2016. Claimant reported falling on his right hand and left knee. Claimant complained of pain in his back, sides and abdomen, numbness and tingling in his lower extremities, tingling in his neck, right shoulder and hand, neck stiffness, and trouble breathing. Dr. Rauzzino noted no acute sensory deficits on physical examination. He remarked, Claimant "had very diffuse

[8] Also shown on Pain Chart, C Exh. 8, p. 730. (Subsequent pain chart show progressively expanding complaints, C. Exh. 8, pp. 724, 722, 723, 718, 714, 712, 708, 705, and 702)

complaints of abdominal pain, headache, arm and hand numbness, low back pain, and leg numbness." Dr. Rauzzino commented that it was difficult to put complaints of symptom together anatomically. He stated that the lumbar spine MRI does not account for the symptoms and he did not see an acute structural change from his low back pain standpoint, therefore, he concluded that Claimant may have had a muscle strain and would benefit from physical therapy.

26. Dr. Rauzzino also recommended Claimant undergo an MRI of his cervical and thoracic spine and consider a referral for psychiatric evaluation due to the possibility of delayed recovery resulting from psychological issues. He stated that Claimant was not a surgical candidate for Claimant's low back injury.

27. On May 3, 2016 Dr. Cava reevaluated Claimant and made referrals for psychological evaluation for anxiety and depression due to the work related injury, and to a physiatrist for treatment as Claimant was not a surgical candidate.

28. On May 10, 2016, Claimant reported to Dr. Cava experiencing difficulty with his speech over the last two weeks. She remarked that Claimant's subjective complaints were greater than the objective exam findings. Dr. Cava diagnosed Claimant with bilateral lumbar radiculopathy, spondylolisthesis at L5-S1, thoracic strain, anxiety reaction, and dysarthria.[9] Dr. Cava recommended a head CT scan, which was negative for bleed, stroke, or other acute findings.

29. On May 31, 2016 Claimant sought treatment at the emergency department of Providence Health Center in Waco, Texas, with complaints of pain in his abdomen, back and leg, as well as a difference in his voice and a pulling sensation on the right side of his face. Jason Smith, D.O. noted, "He also states that he had a seizure-like episode yesterday in which he was shaking. Since then his voice has been dramatically changed, he has had tingling of both legs, and has had jaw pain." Claimant reported use of marijuana and family was concerned with possibility of a stroke. A CT scan of Claimant's head demonstrated no hemorrhage, mass or acute infarct. A CT scan of Claimant's abdomen/pelvis revealed questionable enlargement of the prostate gland and a pars defect at L5 with grade 1 anterolisthesis. Dr. Smith noted, Claimant had a very odd presentation, complains of slight shaking yesterday evening that was then associated with difficulty speaking. Dr. Smith assessed a possible stroke, with simple partial seizure and pars defect in the low back. Dr. Smith noted that he also discussed "the pars intra-articularis fracture with the patient."

30. Claimant testified that he went to the emergency room because his providers at Concentra were not listening to him and that Dr. Counts had advised him he had a fracture in his low back, a pars defect, but he was being forced to work despite

[9] According to the Mayo Clinic Patient Information website, dysarthria occurs when the muscles you use for speech are weak or you have difficulty controlling them. Dysarthria often causes slurred or slow speech that can be difficult to understand. Common causes of dysarthria include nervous system disorders and conditions that cause facial paralysis or tongue or throat muscle weakness.

restrictions and weakness in his limbs. He testified that he was turned away from the emergency room because he provided the workers' compensation information, making the association that they must have spoken with the insurance and that was the reason he was turned away. This ALJ does not find Claimant persuasive in this matter. It is clear from the hospital records that he was provided with a full work-up as they obtained a head/brain CT, and abdominal/pelvis CT scan, which were overall significantly normal, except for the pars defect and possible enlarged prostrate. Claimant was discharged with a diagnosis of simple partial onset seizure and neurosensory deficit. He was advised to follow up with his personal provider.

31. Claimant underwent an MRI of his thoracic spine on June 9, 2016 which revealed minimal disc bulges with no evidence of stenosis. Claimant also had an MRI of the cervical spine which demonstrated mild degenerative changes and disc bulging at multiple levels, with no acute abnormalities and no evidence of neural impingement.

32. Claimant's medical care was transferred to Concentra in Waco, Texas at this point. Claimant presented to Kathryn Wright, M.D. at Concentra on June 24, 2016. Claimant reported having gone to the emergency room with abdominal pain, back pain, leg pain, "his voice sounding different and a pulling on R side of face. He also said he had a seizure-like episode on 6/14/16." She remarked, "I spent close to an hour with this patient going over every work up of all of his MRIs, x-rays and ER visits. He is under the impression that since he never had any health issues before except a fracture to his R hand, all of his pain sites and changes are related to this fall injury." Dr. Wright physically examined Claimant and assessed bilateral lumbar radiculopathy, lumbar strain, spondylolisthesis at L5-S1, muscle spasm of back, thoracic strain, cervical sprain, and diffuse abdominal pain. Dr. Wright referred Claimant to a neurosurgeon.

33. Claimant presented to Stephanie Roth, M.D. at Concentra on July 20, 2016. Claimant advised Dr. Roth that he had done extensive reading and research on his condition and that he was concerned he had foreign language syndrome (FAS). Claimant attributed all of his problems to the work injury. Dr. Roth noted that Claimant demonstrated only 30 degrees of lumbar flexion on examination, but that on the exam table "he goes from supine to sitting up with legs out straight in full extension and able to quickly spin around 180 degrees to put legs at the other end of the table to exam is (sic) L knee." Dr. Roth further noted a normal neurologic and psychiatric exam, with speech appropriate in content and delivery. Dr. Roth assessed lumbar strain, muscle spasm of back, spondylolisthesis at L5-S1, and thoracic strain. She referred Claimant to a neurologist, physiatrist, and psychologist.

34. Claimant was seen at Scott & White Memorial Hospital on July 28, 2016, where x-rays of his lumbar spine showed L5 pars defects with grade 1 anterolisthesis of L5 on S1 and no significant abnormal translational motion.

35. Claimant was seen by a second neurosurgeon, James Cooper, M.D., on July 28, 2016. Dr. Cooper ordered x-rays of Claimant's lumbar spine, which demonstrated L5 pars defects with grade 1 anterolisthesis of L5 on S1 and no significant

abnormal translational motion. Dr. Cooper documented a normal examination and normal x-rays with no evidence of instability. Dr. Cooper opined Claimant was not a surgical candidate. Claimant was also evaluated by Dr. Hudspeth on this day and diagnosed Claimant with diffuse abdominal pain, bilateral lumbar radiculopathy and lumbar strain. As found, nothing in either Dr. Cooper's or Dr. Hudspeth's records showed findings or diagnosis that would change the decision made by ALJ Cayce.

36. Dr. Wright reevaluated Claimant on August 9, 2016. Dr. Wright remarked that she spent extensive time with Claimant regarding all of his complaints and did a thorough examination. She stated Claimant had no neurological deficits and she found no tenderness to palpation on his body from head to toe. Dr. Wright listed Claimant's complaints of pain, paresthesias, voice changes, sore throat, chest wall pain, abdominal pain, and decreased sensation of the scalp. She confirmed that multiple imaging studies had been performed without identification of brain injury, abdominal pathology, or anything other than degenerative discs with mild stenosis.

37. Dr. Wright also evaluated Claimant on August 22, 2016. She noted the chief complaints as "injuries to neck, low back, stomach, left knee and right wrist c/o pain and tingling that start from middle back and radiates to groin area." She documented that the pain in the abdomen extended to both legs to below the knees together with burning pain going down both thighs. Claimant stated that he was getting weak with head shaking sometimes. In her review of systems she detailed that Claimant had blurred vision, chest pressure, pain with bending, but no tenderness to palpation, negative straight leg test and normal sensation. She also commented regarding Claimant's accent but stated that he had normal volume, pace and tone. Her diagnosis was consistent with prior diagnosis. She referred Claimant for further neurological workup and impairment rating.

38. On September 7, 2016, Claimant presented to Martin Solomon, M.D. He sent Dr. Wright a two page letter. Dr. Solomon stated, "This patient reports a history of a work-related injury with resultant neck and low back pain. The patient does report pain in his low back moving down his lower extremities, which may be due to S1 radiculopathies, based on the results of the MRI scan." Dr. Solomon also stated that Claimant had "intermittent speech with a foreign accent. This suggests a possible traumatic brain injury." Dr. Solomon recommended Claimant be referred to pain management for further treatment of his low back pain. As found, the records admitted into evidence from Dr. Solomon failed to opine that Claimant's symptoms of FAS or TBI were work-related.

39. On September 2, 2016 Dr. Wright amended her August 22, 2016 report to retract the referrals she made. On September 15, 2016 she made further amendments to her report stating that she received Dr. Solomon's letter and advised Claimant keep scheduled appointments and/or return to Concentra.

40. Claimant was placed at maximum medical improvement (MMI) by Murray Duren, M.D. at Concentra on September 12, 2016. Claimant continued to complain of back, knee, wrist, abdominal pain and seizure or stroke. Dr. Duren documented, "After lengthy discussion by [Claimant] regarding his problems including his preexisting

conditions and subsequent health issues not supported by the mechanism of injury nor initial presenting complaints, the recommended Physical Examination was refused by [Claimant].” Dr. Duren assessed a lumbar strain, left knee contusion and right wrist sprain and released Claimant to regular duty with no restrictions.

41. John Burris, M.D. at Concentra performed an impairment assessment on October 21, 2016. Dr. Burris remarked, “Clear psychosomatic overlay presented throughout today’s encounter. He is tearful at times when discussing his claim. He is a very poor historian with bizarre symptomatology described.” Dr. Burris reviewed Claimant’s medical records and performed a full physical examination. The diagnostic work up was negative and Claimant's pain diagram did not follow a neuro-anatomical pattern. Dr. Burris found Claimant's examination to be benign with no objective findings. He noted that no pain generator had been identified and Claimant was seen by two neurosurgeons who had not recommended any type of surgery. Dr. Burris found that Claimant was at MMI with no evidence of residual deficits and concluded that Claimant did not sustain any permanent impairment. Dr. Burris did not recommend any permanent work restrictions or maintenance care.

42. Claimant underwent a psychosocial evaluation with Dr. Susan Frensley on March 21, 2017 to determine his mental status for purposes of disability coverage as referred by the Texas Department of Disability Determination Services. Claimant alleged to Dr. Frensley that he hit his head on the ground during the fall at work in March 2016, but did not know if he lost consciousness. Claimant reported that his speech changed in April 2016, which he described as “[I]t felt like a strain coming from my stomach to my throat. It felt like an octopus grabbing my stomach.” Dr. Frensley remarked that Claimant’s “speech is decidedly a Jamaican accent and seems consistent with Foreign Accent Syndrome,” which she noted is most often caused by damage to the brain or a stroke. She stated that despite the FAS, Claimant’s speech remained highly intelligible and was not disordered. Dr. Frensley noted that Claimant had some difficulty relating history. Claimant denied any depressive symptomology.

43. Respondents filed a Final Admission of Liability (FAL) based on the opinion of Dr. Burris. Claimant’s counsel, at the time, filed a timely Objection to the Final Admission of Liability and requested a DIME.

44. John Sacha, M.D. performed the DIME on April 18, 2017. He noted that he was asked to review Claimant’s left-side, which he deemed not work-related, and for “any other areas deemed work related by the examiner.” Dr. Sacha noted that he reviewed all of Claimant’s medical records in detail. Dr. Sacha performed a physical examination, including cognitive, cutaneous, neurologic and musculoskeletal exams. Claimant complained of, among other things, low back pain with radiation to the left abdominal and groin area and lower extremities, neck pain, mid-back pain, numbness and tingling in his arms and thumbs, seizures, anxiety and shakiness. On physical examination, Dr. Sacha noted marked pain behaviors and a normal gait pattern with free and easy movement onto and off of the exam table. Dr. Sacha further noted some paraspinal spasm and pain with range of motion, negative straight leg raise and neural tension tests bilaterally, full

neck range of motion, and minimal crepitus with range of motion in knees bilaterally. He remarked that Claimant had a non-physiologic presentation. Dr. Sacha determined that the majority of Claimant's complaints were not work-related, including personality disorder, cervical complaints, shoulder complaints, brain and shakiness complaints, and knee complaints. He opined that Claimant's low back injury was work-related and ratable.

45. Dr. Sacha opined Claimant reached MMI as of October 21, 2016. He assigned a total combined 8% whole person impairment under the AMA Guides, consisting of a 7% whole person lumbar impairment (5% under Table 53IIB and 2% for range of motion deficits), and a 1% whole person impairment for psychiatric dysfunction. Dr. Sacha agreed Claimant could work full duty without any restrictions. As maintenance care, Dr. Sacha recommended six visits to a pool therapist and six-months of a psychiatric medication regimen.

46. Dr. Sacha specifically states:

> I reviewed all of the medical records in detail and looked at his examination despite the myriad of non-work-related complaints. It does appear that he has had a consistent complaint and findings of low back issues, and I do feel the low back is work related and ratable. I do feel that he also qualifies for a small Impairment from a psychiatric dysfunction because of his poor coping skills and poor people skills. He likely needs some maintenance medications from a psychiatric standpoint to help with these Issues and the adjustment disorder… All other areas and complaints are deemed not work related.

47. Claimant was evaluated on March 21, 2017 by Dr. Susan Frensley, PhD at the request of the Texas Disability Determination for Social Security Administration. ALJ Cayce noted that Claimant only submitted page two of five.[10] However, pages one through five were found in the Court of Appeals record.[11] This documents Claimant's multiple symptoms, including Claimant's ability to work though he may not be able to do so consistently due to anxiety and chronic pain. She diagnosed Somatic Symptom Disorder with anxiety and chronic pain. She stated that Claimant was devoting excessive time and energy to his symptoms and health concerns. She also diagnosed conversion disorder with speech symptoms (FAS), which was only provisional. While this may have been inadvertently missed by ALJ Cayce, it is found, that the diagnosis and findings do not address causation and does not specifically attribute the conditions to the work related injuries, and is a harmless error. As found, Dr. Frensley's opinion does not support a different conclusion than that found by the DIME physician, or that Claimant failed to overcome the DIME opinion by clear and convincing evidence, as found by ALJ Cayce.

e. Claimant's alleged "New Medical Evidence."

48. Claimant submitted and is relying on "new medical evidence" in support of his arguments with regard to error, mistake or change of condition. (Claimant's Exhibit 2,

[10] ALJ Cayce Order of November 9, 2017, Finding of Fact No. 26.
[11] Claimant's Exhibit 7, pp. 172-179 (pp. 57-62 of the COA record, tabbed as Claimant's prehearing submissions).

C.Exh. 2). Exhibit 2 consist of 90 pages. The first record that was not dated prior the hearing held before ALJ Kara Cayce was a four page report[12] and consisted of an Individual Psychotherapy Treatment session with Ms. Lindsey Kidd, M.S., LPC, Intern, dated March 14, 2019. The records showed that Claimant participated in six sessions of therapy, was cooperative with the treatment but demonstrated limited ability to utilize the coping skills to help address his symptoms of depression and anxiety. He demonstrated some slight ability to cope with pain. Ms. Kidd stated that Claimant had plateaued with the treatment and recommended discharge. (The vocational report issued by Ms. Kristine Harris on December 9, 2019 lists the treatment Claimant received from January 24, 2019 through March 14, 2019.[13])

49. The next records were three pages of Texas Worker's Compensation Work Status Reports.[14] They were illegible, and this ALJ was unable to clearly detect the date or the author of the documents. However, two of these reports were found in a different exhibit[15] dated October 24, 2018 and December 8, 2018 by Dr. Gist. He provided work restrictions and noted that the work injury diagnosis were for the low back and psychological issues limited to coping skills. This ALJ infers that these are maintenance care status reports.

50. The next new record in Exhibit 2 was from Dr. Duane Marquart, a chiropractor and radiologist, reading x-rays dated April 5, 2019 which showed degenerative changes of the lumbar, cervical and thoracic spine.[16] These records did not provide a causation analysis or any other analysis that might support reopening.

51. No other "new evidence" medical records were found in this exhibit, though there are multiple other illegible records and pleadings.

f. Other medical records submitted after the October 19, 2017 hearing before ALJ Kara Cayce

52. Claimant was seen at Baylor Scott & White Medical Center on November 15, 2017.[17] The record is for a lumbar spine MRI. The impression was of L5-S1 spondylolysis and spondylolisthesis with foramen but no spinal stenosis; tear in the midline annular fibers at L4-5 with a minimal disc protrusion without spinal stenosis; facet arthritis does result in foramen stenosis.; and bilateral facet arthritis and disc bulge resulting in spinal and foraminal stenosis at L3-4. As found, this report shows nothing that would change the decision made by ALJ Cayce on November 9, 2017. The MRI findings are consistent with ongoing degenerative condition and there are no causation

[12] Claimant's Exhibit 2, pp. 78-81, tabbed as Slides 69-72. (Note: there are multiple reports in this exhibit that are not legible.)
[13] Claimant's Exhibit H, pp. 795-796.
[14] Claimant's Exhibit 2, pp. 82-83, Slides 73-75.
[15] Claimant's Exhibit H, pp. 801-802.
[16] Claimant's Exhibit 2, pp. 85-88, tabbed as Slides 76-79. These can also be found at Claimant's Exhibit I, pp. 803-804.
[17] C Exh. 7, Post Hearing Submission in Court of Appeal File)

analysis that relates the continued degenerative process to the March 9, 2016 work related injuries. As found, nothing in this document supports reopening in this matter.

53. Claimant was evaluated by Dr. Shamonica L. Trunell, a chiropractor on April 5, 2019[18] with complaints of multiple issues including the neck, low back, buttocks, bilateral hands, hamstrings, calves, feet and shoulders. Dr. Trunel stated Claimant had multiple trigger points, spasms, tender points, decreased range of motion and his muscles were starved of oxygen. Under assessment he stated that the goal was to continue treatment to decrease inflammation, segmental dysfunction, muscle spasm. He performed chiropractic manipulation to increase articular motion and flexibility. As found nothing in this report indicates that Dr. Trunell made a causation analysis of the multiple complaints, was recommending treatment to treat the March 9, 2016 work related injuries, and addressed permanent impairment or permanent total disability.

g. Claimant's fraud arguments

54. Claimant stated that he was dissatisfied with the medical treatment he had received and believed he had been "mistreated" by the physicians at various medical facilities. He testified that his providers had him on 5 and 10 lbs. lifting maximum but his physical therapists were pushing him to do up to 50 squats, lifting 50 to 110 lbs. He stated that he kept feeling weaker and weaker all the time while he was working, especially with his arms, but no one would listen to him. He testified that he went multiple times to his employers' human resources department to request that they change his medical provider because they were not listening to him but they never did. Claimant believed that the physicians that treated him committed "fraud." However, Claimant also testified that he was off two days following the accident and then returned to work but when he was provided with work restrictions on April 8, 2016 he was laid off. The FAL dated May 26, 2017 showed Respondents paid for temporary total disability benefits for March 9 through the 21st, 2016 and April 1, 2016 and to MMI. This would show that Claimant may have been working only from March 22, 2016 through March 31, 2016, only 8 working days. Due to the inconsistency of these statements, Claimant is not persuasive in this matter.

55. Claimant acknowledged that he had seven different attorneys representing him on his claim and that, at the time of the DIME with Dr. Sacha, he was given a copy of the DIME packet by one of his prior attorneys. Claimant further stated that at the time of the appointment Claimant himself provided supplemental records to Dr. Sacha for his review.

56. Claimant testified that Dr. Sacha failed to perform his job as a DIME physician, specifically stating that he received a call in violation of Sec. 8-43-503, C.R.S. As found, this section addresses utilization review of authorized treating providers, not DIME physicians.

[18] Found at Exhibit I, pp. 805-807.

57. Claimant stated that "someone" called Dr. Sacha with instructions that included that Dr. Sacha should not review the left side of his body. Claimant testified that there was no other possibility than Respondents calling the physician to provide these instructions. It is specifically found that Dr. Sacha did not receive a call but that he was following the instructions on the paperwork submitted by the parties to review body parts pursuant to the W.C.R.P. Rule 11. Nothing in the report indicates that Dr. Sacha received a call from anyone but that he "was asked to review the left side," which Dr. Sacha concluded was not work related. This ALJ declines to make any inference otherwise. As found, neither Dr. Sacha nor the parties communicated in this matter other than pursuant to allowed procedures.

58. Claimant also testified that Respondents had conspired with Dr. Wright. Claimant alleged that after he had a phone call from the adjuster and discussed with the adjuster that his medical providers were treating him well, all of a sudden things changed and he was placed at MMI suddenly. Dr. Wright did document that there was contact from Colorado, but not whether the contact was from providers from Colorado or from someone else. As found, this ALJ finds no collusion here.

59. Claimant argued that Respondents were committing fraud based on the fact that Dr. Wright changed her report after receiving a call from Colorado. This ALJ declines to make that inference. There is no credible evidence that Respondents acted inappropriately and this was addressed by ALJ Felter in his order, which Claimant was unsuccessful in appealing. This ALJ determines not reopen this case based on allegations alone. Claimant also attempted to implicate his own attorneys as complicit in the acts supposedly perpetrated by Respondents. As found, Claimant has failed to show that there was fraud in this matter.

h. Claimant's mistake arguments

60. Claimant alleged during his testimony that multiple physicians, including Dr. Sacha, failed to consider all of his medical history, medical records and the history of his complaints following the injury. Claimant specifically referred to the fact that Dr. Sacha did not review his complaints as listed by prior providers, including the list of fourteen complaints provided by Dr. Duren on September 12, 2016 and by other providers. As found, Dr. Duren did consider the list of complaints and ultimately assessed that Claimant only had a lumbar strain, contusion of the left knee and sprain of the right wrist as the work related problems.

61. Claimant testified that Dr. Sacha erred by failing to address those medical records he stated were favorable to him (Claimant) and alleged that Dr. Sacha failed to address Dr. Rauzzino's May 3, 2016 record, Dr. Cava's May 3, 2016 report, the May 10, 2016 CT scan and Dr. Solomon's report of September 7, 2016. He stated that these records contained evidence of neurological findings supporting his position, including a head injury. As found Dr. Sacha specifically refers to Dr. Rauzzino in the DIME report, noting that Dr. Rauzzino did not feel Claimant was a surgical candidate. Moreover, Dr. Rauzzino's May 3, 2016 note specifically stated that he did not document any acute

sensory deficits or acute low back structural change. The DIME report also references the CT scan of Claimant's head, which was negative. While he does not mention Dr. Solomon's report specifically, as found, Dr. Solomon did not relate the possible TBI to the work related condition and DIME physicians are only obliged to review the records not include an exhaustive list of all the records they have reviewed. It is found that, while Dr. Sacha did not list every report he reviewed, his findings were supported by the records he reviewed. As found nothing in the evidence provided by either party shows the DIME physician a mistake when issuing his report.

62. Next Claimant testified that since the January 2010 imaging demonstrated that he had no preexisting pathology, that Dr. Sacha and Dr. Burris were incorrect in stating that he had a preexisting condition. This ALJ finds this evidence unpersuasive. As found there were approximately six years between these events and a significant portion of the pathology of his spine was showing degenerative changes by 2016. Further, as found, Claimant admitted that the 2010 documents were before ALJ Cayce for consideration when she issued her order. Notwithstanding the fact that there were preexisting degenerative changes, Dr. Sacha rated the lumbar spine without apportionment, providing a 7% whole person impairment, including 5% for specific disorder and 2% for loss of range of motion. Ultimately, as found, this ALJ fails to see any fraud, mistake or a reason to support reopening based on this argument.

63. Claimant conveyed that Dr. Wright did not give him any documentation that he was going to be placed at MMI, she just stated she would await Dr. Solomon's findings and then he was released from care. He highlighted the fact that "someone" must have changed her report because the August 22, 2016 report then stated that she was withdrawing her referral to neurology after she received a call from Colorado and read the September 7, 2016 report from Dr. Solomon, which only recommended pain management for the low back despite Dr. Solomon's indication that Claimant may have a possible TBI.[19] Claimant stated "someone," he assumed the adjuster, spoke to Dr. Wright, or that the report was changed by "someone." As found, there is no persuasive evidence to support these allegations and it is clear from the August 22, 2016 report and addendums, Dr. Wright is the one to have made both amendments on September 2 and September 15, 2016.

64. Claimant argued that Respondents were in violation of Sec. 8-43-503(3), C.R.S., which states "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment." Claimant contended that Respondents contacted multiple providers throughout his claim. There is no error here as the evidence presented show that Claimant or his attorney, were notified at the same time as the medical providers of the communications or that the communications were not the complete document and this ALJ declines to assume that Claimant or his multiple counsels were not provided the documentation at the same time. Neither did Claimant deny receiving a copy of the letters at the same time they were sent to the providers. These arguments were before ALJ

[19] Traumatic Brain Injury.

Felter and will not be further readdressed. This ALJ is not persuaded that any of the communications or partial communications were dictating care and so finds. Also as found, nothing presented with regard to this argument supports reopening of the claim.

65. Lastly, Claimant argued that ALJ Felter was mistaken in failing to provide him maintenance medical benefits. However, the records submitted to ALJ Felter were the same ones before this ALJ with the exception of several records that do not recommend maintenance care for the diagnosed conditions causally related to the March 9, 2016 injuries. ALJ Felter found that based on the totality of the evidence and multiple references by providers as to Claimant's unwillingness to cooperate and symptom magnification, that no further maintenance care was reasonably necessary and related to the injury. This ALJ finds nothing to persuade that there was a mistake in this finding or anything to persuade this ALJ that sufficiently supports the reopening of the claim.

i. Claimant's error arguments

66. Claimant testified that Dr. Sacha was incorrect when he reviewed Dr. Rauzzino's report May 3, 2016 report, stating that Claimant was not a surgical candidate. Claimant emphasized the Dr. Rauzzino noted that there was "no simple surgery at this point," but that mean that there may be a complicated surgery. This ALJ notes that Claimant is taking this casual statement out of context. Dr. Rauzzino is very clear that Claimant had "no acute structural change" from his low back, had "a muscle strain," had "diffuse complaints" and numbness and would only benefit from physical therapy. He went on to state that the diffuse complaints and psychological overlay were the ones interfering with any other recommendations. Further, another surgeon, Dr. Cooper, opined Claimant was not a surgical candidate. This ALJ finds no error or mistake in Dr. Sacha's reasonable deductions of Dr. Rauzzino's report.

67. Next Claimant emphasizes that Dr. Rauzzino ordered MRIs of the thoracic spine and the cervical spine. The thoracic spine films showed degenerative changes and minimal bulging disc at multiple levels without stenosis. The cervical spine MRI showed multiple broad based central disc bulges or protrusions causing mild stenosis. Claimant testified that both Dr. Burris and Dr. Sacha erred in failing to appreciate the damage to Claimant's thoracic and cervical spine since he had no symptoms before the injury and had continued to have symptoms after the injury. Claimant further testified that both physicians minimized the damage to his spine. ALJ Cayce had this information before her at the time she issued her order in this case and these arguments were proffered during the prior hearings. This ALJ also agrees that the information presented does not rise to the level of clear and convincing evidence to overcome the causation opinion of Dr. Sacha in this matter. As found, this information rise to the level of an error or mistake that may allow Claimant to reopen his prior closed claim or litigation.

68. Claimant alleged that Dr. Sacha and Dr. Burris also disregarded the records of Dr. Solomon dated September 7, 2016 because Dr. Solomon diagnosed the TBI and other conditions. It is found that Dr. Solomon did not determine that the TBI

was work related. His conclusions and recommendations focus solely on the low back, which is what was rated in this case. As found, Claimant failed to prove error here.

69. Claimant stated that Dr. Sacha was in error because his report had conflicting information. Claimant mentioned to Dr. Sacha that he had a change in his voice as a result of the work related injury. Dr. Sacha advised him multiple times that he would terminate the DIME examination if he brought this issue up again, but he never did despite Claimant advising him multiple time that his voice changed. He also stated Dr. Sacha made an error because of the conflicting information that was in the report about walking normally but that Claimant continued to have pain. This ALJ finds nothing in conflict. One is Claimant's perception and symptoms, the other are the medical findings and opinions of the DIME physician. A DIME physician is permitted to review the records, make causation determinations based on those records he reviews and determine which, if any, are the conditions related to the claim that are rateable. As found, Dr. Sacha issued a report consistent with his findings that Claimant only had a spine impairment and a minor psychological adjustment problem related to the claim. This ALJ finds no error, mistake or fraud in Dr. Sacha's report or ALJ Cayce's conclusions with regard to the report.

70. Claimant stated that there was an error by Dr. Sacha in misreading the CT of the head dated May 10, 2016. Claimant focusses on the words "seizure vein and tightness since trauma 2 weeks ago." However, these are simply the "indications" or reasons for having the CT performed, not the findings. In fact, as found, the findings of the CT indicate that the cerebral cortical grey matter was normal and all other findings were normal. This ALJ concludes that there was no error here.

71. Claimant alleged that he had dysarthria and anxiety that were diagnosed and then overlooked. Dr. Duren on September 12, 2016 issued two separate reports. One of the reports stated that Claimant complained of 14 different issues including abdominal pain, anxiety, bilateral lumbar radiculopathy, dysarthria, lumbar strain, muscle spasm of back, paresthesias/numbness, radiculopathy, rib pain, spondylolisthesis al L5-S1 level, sprain of ligaments of cervical spine, strain of thoracic region, testicular/scrotal pain and weakness of both lower extremities. As found, Dr. Duren provided only an assessments as lumbar strain, contusion of the left knee and sprain of the right wrist as the work related problems. This ALJ infers that these are the work related diagnosis. This ALJ found particularly persuasive his statements as follows:

> Attempted discussion of the diagnoses, mechanism of injury, preexisting conditions, significance of the previous imaging results, findings of the neurosurgical consultation, cause of ongoing chronic pain and Impairment Evaluations regarding Colorado was unsuccessful and met with hostility and accusations of "you re [sic.] lying " and "you get paid by the insurance company."

72. Claimant testified that Dr. Murray Duren was not authorized to place Claimant at maximum medical improvement on September 12, 2016. He complained that Dr. Wright was his authorized treating physician and was the only authorized treating physician that had the authority to place him at MMI because she was the primary

authorized treating physician. Claimant also argued that Dr. Duren did not place Claimant at MMI on September 12, 2016. As found, there were two separate reports dated September 12, 2016. The first one documented examinations and a list of problems. The second clearly stated that Claimant was released from care, was at MMI without restrictions and may return to work his entire shift. It is found that both Dr. Wright and Dr. Duren were authorized treating physicians within the statutory definition, both worked at the same clinic and were authorized to treat Claimant, the same way that Dr. Counts, Dr. Cava, Dr. Hudspeth, and Dr. Rauzzino were authorized treating physicians working within Concentra. It is found that Dr. Duren was authorized to make an MMI determination and no error or mistake was made with regard to the diagnosis or finding of MMI to support reopening.

73. Claimant contended that records received by Claimant from social security were clear evidence that the prior findings with regard to permanent impairment was incorrect because Dr. Trunell, a chiropractor, in reading an x-ray found that Claimant had spondylolytic spondylosisthesis of the L5 of 15%. As found, this is simply the degree of fracture and slippage of the vertebra, not an impairment rating in accordance with the *AMA Guides to the Evaluation of Permanent Impairment* that are required to be used under by the Act by providers that are Level II accredited by the Division. Nothing in the records indicated that Dr. Trunell is a Level II accredited provider and this ALJ takes judicial notice of Sec. 8-42-101 (3.5) (a) (I) (A), C.R.S. that a chiropractor may only attain Level I status. As found, Claimant has failed to show mistake in the determination of impairment in this matter and ALJ Cayce made no mistake in finding that Claimant failed to overcome the DIME physician's opinions with regard to causation or impairment.

74. Claimant attempted to persuade this ALJ that ALJ Felter failed to provide a penalty because Respondents terminated temporary disability benefits in contradiction to Sec. 8-42-105(3)(C), which states that benefits cannot be terminated until a "the attending physician gives the employee a written release to return to regular employment." Claimant was found at MMI as of September 12, 2016 by an ATP, who released him to full employment. Benefits terminated pursuant to statute upon reaching MMI. This ALJ fails to see an error where benefits were provided in accordance with the Act.

75. Claimant also testified that he had an electronic box put on his back, which caused seizures on multiple dates. While this ALJ reviewed the records regarding the seizures, including the ER visit with Dr. Smith on May 31, 2016, the records do not suggest that the seizures occurred due to the work related injuries. Dr. Smith specifically stated that "patient's seizure history also seems to be consistent with simple partial seizure last night this is way too long for the patient to be postictal or Todd's paralysis. We'll treat with aspirin..." The records prior to this included Dr. Wright's referral for a CT scan of the head that was negative for bleeds, stroke or acute findings. Claimant later reported a seizure like episode on June 14, 2016. This ALJ determines that the evidence clearly indicated that the seizure disorder, stroke or foreign language disorder are not related to the work related injuries. No error, mistake or fraud has occurred that would justify a reopening and the already litigated claims or revisiting the findings, conclusions and orders by the prior ALJs. Further, at the time of the hearing, this ALJ did not perceive

any problems or alterations of Claimant's voice (FAS), volume, pace and tone, throughout the time Claimant was speaking at the January 28, 2022 hearing for over four hours, either while testifying or providing substantive arguments. In fact, this ALJ specifically finds that Claimant was extremely fluent in English, had cohesive thoughts and could articulate complex concepts and legal arguments throughout the hearing, though his arguments were sometimes not focused on the issues that needed to be addressed during the hearing or the specific evidence that supported his arguments.

76. Next Claimant stated that ALJ Felter was in error when he stated that Dr. Duren had not found that there was a TBI in this case as Dr. Duren listed that as part of the complaints that Claimant had. This ALJ interprets the list of "active problems," as complaints that Claimant was concerned about during the course of his care following the work related accident, not as diagnoses. Dr. Duren went on to state what the work related diagnosis were and none included a closed head injury, brain injury, stroke, neck injury or other work related injuries other than those expressed in his diagnosis and the DIME physician's report of impairment. This ALJ finds that Judge Felter did not commit any errors in this regard and Claimant has failed to show that there are any errors that would justify reopening of the claim.

77. Claimant also debated that ALJ Felter committed an error by putting great weight on the opinions of Drs. Duren, Burris and Sacha when determining that Claimant was not permanently and totally disabled. ALJ Felter found that all three advised that Claimant could return to regular duty and found them credible. Claimant again argues that Dr. Duren was not his authorized treating physician and that he did not release him to work. Claimant's arguments are faulty as stated above. As found, the ALJ had the discretion to make credibility determinations and proceeded to do so. Further as found, ALJ Felter's order was unsuccessfully appealed by Claimant. Nothing in the presentation during the hearing or the evidence submitted provides sufficient evidence upon which to base a claim of error sufficient to reopen the previously litigated claim.

78. Claimant contended that Ms. Kristine Harris' vocational report, introduced into evidence by Respondents, supported the arguments that she listed all records that were not listed in either Dr. Burris nor Dr. Sacha's reports, showing their bias against Claimant, which were beneficial to Respondents and minimized his complaints. But even Ms. Harris only relied on those reports that supported that Claimant could return to work. This ALJ finds no error in this. Physicians, like judges, do not have to regurgitate each and every medical record or report they have reviewed and Claimant testified that he had a copy of the DIME packet submissions and, in fact, took more records to the DIME for his consideration, when he was seen by Dr. Sacha. As found, Claimant was not persuasive in this argument.

79. Claimant claimed that ALJ Felter incorrectly denied him penalties as he is entitled to penalties for "negligence of a stranger," citing Sec. 8-42-203, C.R.S. This statutory provision applies to injuries (or death) caused by the negligence of a stranger and Claimant's ability to obtain benefits from that third party, that are not normally paid by under the Act. It also allows Respondents to seek a right of subrogation if Claimant

recovers from that third party tortfeasor. This ALJ finds that there is no error here either as there are no third party tortfeasors.

80. Claimant argued that ALJ Felter erred when he stated that there was no medical evidence to support that Claimant sustained any closed head injury, brain injury, stroke, neck injury, or other physical or psychiatric injury. As found, Claimant mischaracterized ALJ Felter's Finding of Fact 14 as he stated that there were no permanent injuries related to the claim other than those expressed by Dr. Sacha, the DIME physician in this matter. As further found, it is inferred that ALJs Cayce and Felter were not persuaded or found credible any documents or records that indicated that there were any permanent impairments related to the claim other than the lumbar spine injury and the psychological sequelae of the injury that Dr. Sacha found causally related to the March 9, 2016 injuries, despite any evidence to the contrary.

81. This ALJ finds and agrees with ALJ Felter who, at Finding of Fact No. 16 stated in his order of March 17, 2020:

> The Claimant also testified that other doctors who have treated him, including Dr. Cava and Dr. Solomon, had at times placed him on modified duty, diagnosed other work related injuries including, but not limited to, TBI and traumatic changes to his voice patterns, which were either overlooked or ignored or intentionally misrepresented by his other treating doctors, Respondents and ALJ Cayce, among others. The ALJ finds no credible evidence of any such collusion among the treating doctors, Respondents and/or the OAC or DOWC PALJs.

82. Lastly, Claimant made several other allegations, including but not limited to violations pursuant to Sec. 8-43-503(3), C.R.S. as a result of permitted communications with medical providers; failure of Respondents providing the court with a complete set of the medical records, and change of condition. This ALJ finds these arguments without merit and need not address the specific allegations as they are not supported by the facts, the medical records, or legal authority. Despite Claimant's allegations of wrongdoings, mistake and fraud, this ALJ finds none. It is clear that the medical providers, including the DIME physician, while noting the deficits Claimant was experiencing as well as the complaints, did not relate all other conditions to his workers' compensation claim and injuries of March 9, 2016. It is specifically found that even if there were any evidence that could have been inferred or interpreted as complicity among the providers and Respondents, that evidence is not credible and does not support a determination that there was any fraud, error or mistake to support a reopening of the prior decisions in this matter.

j. Claimant's appeal of the Prehearing Conference Orders

83. Claimant testified that he made a request for medical records from Respondents in November 2017. This was after the DIME took place. He explained that he went to Concentra and was provided with Dr. Solomon's records in an envelope. Claimant further stated that he did not recognize that there was a problem until he

received the Solomon records describing a possible head injury. Claimant claimed that Respondents failed to provide the medical records in this matter. This is not credible or persuasive. As found, PALJ Barbo specifically noted that records were to be provided to Claimant following the Order issued on January 24, 2018, it was confirmed to the PALJ by letter, and documented in his order of June 6, 2018 as well as the order of June 25, 2018 that the records were provided.

84. Further, PALJ Goldstein's order of July 27, 2017 also documented multiple instances of production of the claim file. He specifically stated that:

> At the prehearing conference, respondents counsel represented to the court and opposing counsel that she last supplied the complete claim file to attorney Britten Morrell on December 12, 2016. An order allowing Mr. Morrell to withdraw his appearance was entered by the Division on February 27, 2017. Claimant preceded (sic.) pro se (as a self-represented party) from that date until Robert James entered his appearance on May 19, 2017. At the prehearing conference, respondents' counsel represented to the court and opposing counsel that Mr. James requested and respondents provided all medical records and pleadings subsequent to December 12, 2017 (sic.) [2016]. According to respondents counsel, Mr. James did not request and was not provided the entire claims file. Mr. James, claimant's sixth attorney, filed a motion to withdraw on June 7, 2017 which was granted on June 20, 2017.
>
> At the prehearing conference, respondents objected to providing a new copy of the claim file. Respondents argue that production of the claim file was provided on December 12, 2016 and respondents' counsel has provided all requested documents on and after that date. Further, respondents' counsel argues that the parties agreed that this matter should first proceed to hearing on the issue of overcoming the DIME, and that the claim for permanent total disability benefits should be held in abeyance. Accordingly, respondents' counsel argues, claimant has everything he needs to litigate that issue, and there is no need to provide any documents in addition to those already provided.

PALJ Goldstein ordered supplementation of the claim file for those documents between the time they had been provide previously and the time of the order. This ALJ finds little to show that Claimant was not provided the complete claim file and medical records by Respondents or that they acted in any way inappropriately in this case to justify a reopening of all claims.

85. Claimant also maintained that PALJ Barbo committed an error because he denied Claimant the right to proceed on penalties for failure to admit or deny Claimant's injuries as required by law. Claimant agreed that he received the Notice of Contest Respondents filed on March 18, 2016, which was confirmed by PALJ Barbo according to the documents filed with the Division. Claimant alleged that they could not have been filed by March 18, 2016 because it was not until April 8, 2016 when the MRI of his lumbar spine was performed and his providers knew exactly what was wrong with him. This ALJ finds no error here, either. The statutory provision requiring notice is to admit or deny the claim within 20 days of having notice of the claim, not the specific injuries.

86. Claimant further seems to indicate that, since PALJ Barbo allowed the penalty issues to proceed to hearing that Claimant had already "proved" the right to the penalties. This is not the case. As found, Claimant failed to uphold his burden of proof in these matters and penalties were denied.

87. Claimant also indicated he was appealing multiple other prehearing conference orders, including PALJ Sandberg's, Broniak's, Phillip's and Steninger's. This ALJ finds no meritorious arguments here. As found, the orders were properly addressed by the prehearing administrative law judges who have the authority to address prehearing matters, discovery and ripeness to control the discovery and litigation process and proceeded to appropriately do so.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or

interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. C.R.S. Sec. 8-43-201.

B. Reopening

Section 8-43-303(1) C.R.S., authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including *reopening* on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition. See *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). There is no basis to reopen a claim if the reopening does not lead to the award of additional benefits. *Richards v. ICAO*, 996 P.2d 756 (Colo. App. 2000).

Claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo.App.2000). The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1,* 924 P.2d 1177 (Colo.App.1996). See *Berg v. Ind. Claim Appeals Off. of Colorado*, 128 P.3d 270 (Colo. App. 2005).

Claimant raised several issues in this matter. However, the matter of issue preclusion should be addressed first, before the merits of reopening the claim.

1. Issue preclusion

Under issue preclusion "once a court has decided an issue necessary to its judgment, the decision will preclude re-litigation of that issue in a later action involving a party to the first case." *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 974 (Colo. App. 20l2) (quoting *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007)); see also *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). See also *Davis v. Renfro & Co.,* ICAO, W.C. No. 4-960-859-008 (November 21, 2021)

Issue preclusion completely bars re-litigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom issue preclusion is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d at 47. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Claimant seeks to address the issues of causation, maximum medical improvement, permanent partial disability benefits, medical benefits, penalties, appeals of prehearing orders and permanent total disability benefits based on error, mistake, fraud or change of condition. However, these are identical issues as addressed by ALJ Cayce and ALJ Felter in their orders, which Claimant appealed and were upheld.

Claimant previously raised most, if not all, his allegations of mistake and fraud in the prior proceedings before ALJ Cayce and ALJ Felter. He maintained these allegations until exhausting his appeal rights. For example, all records either were tendered at the time of the litigation, were submitted to either ALJ Cayce or ALJ Felter for consideration or were available to all parties, including Claimant with some due diligence. Claimant was aware of who had treated, evaluated or examined him and had the same access to the records as Respondents. ALJ Felter addressed issues that concerned the alleged errors and Claimant further addressed the issue of error before ALJ Cayce. As such, Claimant is barred from re-litigating the same issues, or any issues that could have been previously raised, by the doctrine of issue preclusion.

2. Issue of Error or Mistake

Reopening may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party alleges that a prior award is based on mistake, the ALJ must determine whether a mistake was made, and if so, whether it is the type of mistake which justifies reopening the case. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). In determining whether a particular mistake of fact or law justifies reopening, the ALJ may consider whether the mistake could have been avoided if the party seeking reopening timely exercised procedural or appellate rights prior to entry of the award. *Industrial Commission v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967); *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984); *In re Claim of Davis*, 111221 COWC, 4-960-859-008 (Colorado Workers' Compensation Decisions, 2021)

A mistake in diagnosis has previously been held sufficient to justify reopening. See *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo.App.1989)(under circumstances where there is a mistake in diagnosis because the medical technology available to the treating physician at the time of the initial order is limited, a petition to reopen based on a mistake of fact may properly be granted). At the time a final award is entered, available medical information may be inadequate, a diagnosis may be incorrect, or a worker may experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, Section 8-43-303 provides recourse to both the injured worker and the employer by giving either party the opportunity to file a petition to reopen the award. The reopening provision, therefore, reflects a legislative determination that in "worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute." *Standard Metals Corp. v. Gallegos*, *supra,* 781 P.2d at 146 (quoting *Grover v. Indus. Commission*, 759 P.2d 705 (Colo.1988)); *Berg v. Ind. Claim Appeals Office*, 128 P.3d 270, 2005 WL 1903825 (Colo. App. 2005).

Claimant's request for reopening fails here, even if the allegations of mistakes were true, they are not the types of mistakes that justify reopening. By way of example, Claimant alleges that the DIME physician did not specifically address every medical report in the DIME report. Assuming for the sake of argument that this is a mistake, it is not the

type of mistake that would justify reopening. It is not material to the prior judicial decision upholding the DIME's ultimate opinion, specifically after the matter was already litigated and upheld through the appellate process. A second example is that ALJ Cayce cited that only one of the five page report of Dr. Frensley was in the record, which may have been considered a mistake. However, the report itself was insufficient as it provided no new evidence, diagnosis or causation analysis to support Claimant's allegation of impairment, thereby making this alleged mistake inconsequential and a harmless error. Further, the Court of Appeals record introduced into evidence by Claimant (Exhibit 7) showed that the complete report was available for review to both the panel and to the Court of Appeals either of which could have addressed the issue of error or mistake previously raised by Claimant and did not.

Next, the new information and medical records in Claimant's exhibits do not provide evidence upon which to link Claimant's conditions of head injury, stroke, dysarthria, anxiety, or other psychological conditions to the lumbar spine and psychological coping impairments related to the March 9, 2016 work related accident. The records that were before ALJ Cayce included these diagnosis, and ALJ Cayce did not consider them persuasive. This ALJ does not find them persuasive either or that they represented a dispute regarding a genuine issue of material fact. Accordingly, this ALJ determines that the request to reopen is no more than a bid by Claimant to re-litigate already determined issues.

Claimant requested reopening based on mistake and is relying on "new medical evidence," including Ms. Lindsey Kidd's report of March 14, 2019, Dr. Gist's Work Status Reports, Dr. Marquart's radiology reports. These records do not provide causation analysis or any other analysis that might support a reopening due to mistake. The "mistake" alleged by Claimant here is not the type of mistake which justifies a reopening. See *Department of Agriculture v. Wayne,* 30 Colo. App. 311, 493 P.2d 638 (1971) (ALJ does not abuse discretion if he denies petition to reopen because facts and evidence existed at time of prior order, and should have been within the knowledge of parties at that time). As found and concluded, the evidence provided by Claimant in the 1026 pages of records, is not sufficient to justify reopening in this matter.

Also as found, nothing in either Dr. Cooper's or Dr. Hudspeth's records showed findings or diagnosis that would change the decision made by ALJ Cayce by this ALJ. As found, Dr. Frensley's opinion does not support a different conclusion, that Claimant failed to overcome the DIME opinion by clear and convincing evidence. As found, the MRI report of November 15, 2017 shows nothing that would change the decision made by ALJ Cayce on November 9, 2017 as the MRI findings are consistent with an ongoing degenerative condition and there are no causation analysis that relates the continued degenerative process to the March 9, 2016 work related injuries sufficient to supports reopening in this matter. As found, Dr. Sacha did not receive a "call" but was only following the instructions on the paperwork submitted by the parties to review body parts pursuant to the W.C.R.P. Rule 11 and "was asked to review the left side," which Dr. Sacha concluded was not work related. As found, Dr. Solomon did not determine that the TBI was work related and his conclusions and recommendations focus solely on the low back,

which is what was rated in this case. As found, both Dr. Durren and Dr. Wright were authorized treating physicians legally qualified to make determinations with regard to MMI.

Neither did PALJ Barbo err when he denied Claimant the ability to proceed to litigate the issue of penalties for failure to admit or deny the claim in a timely manner. Sec. 8-43-203 (1) (a), C.R.S. States in pertinent part that "the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…" Sec. 8-43-101(1) requires Respondents to report an injury within 10 days if there is lost time or a permanent physical impairment. Nothing in either statutory provision requires the parties to wait until they know the nature or extent of the injuries to file a notice of contest. Here, Respondents filed a NOC by March 18, 2016, nine days after the injury and complied with the reporting requirements of the Act. As found, PALJ Barbo did not err in denying Claimant the ability to proceed to hearing on this issue as Claimant conceded that Respondents had filed and that Claimant received the NOC.

Claimant's request for reopening fails because, even if the allegations of mistakes and fraud were true, Claimant failed to prove that additional benefits should be awarded. For example, Claimant argues that Dr. Sacha's impairment rating was incorrect or in error, but without credible evidence that the rating was anything but 8% whole person impairment, no further PPD benefits can be awarded. Further, even if the mistake were true, the authorized treating providers, nor any other providers, are recommending treatment at this time, either for the low back or the sequelae of psychological problems related to the low back, at this time. Neither have any other vocational experts opined that Claimant is permanently and totally disabled. Therefore, Claimant has failed to show that there is any evidence to support any other decisions than the ones already litigated and concluded.

3. Issues of fraud

To reopen the claim on the ground of "fraud," a claimant must prove the following: (1) a false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth or concealment of a material existing fact; (2) knowledge on the part of one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) making of the representation or concealment of the fact with the intent that it be acted upon; (5) action based on the representation or concealment resulting in damage. *Tygrett v. Denver Water*, W.C. No. 4-979-139-002 (December 17, 2021).

Claimant previously raised most, if not all, his allegations of fraud in the prior proceedings. He maintained those allegations until exhausting his appeal rights, including allegations of collusion or violations of the Act and rules by Respondents in allegedly contacting the medical providers, medical providers mishandling or misdiagnosing

Claimant and providers failure to consider all the medical evidence in the matter as outlined in the findings above.

Allegations that Respondents contacted the DIME, that Dr. Sacha and Dr. Burris minimized his injuries or failed to appropriately document the injuries in their reports, that providers failed to acknowledge the pars defect or spinal fracture, or properly documented a preexisting hand fracture, that Dr. Wright's August 22, 2016 or Dr. Burren's September 12, 2016 reports were falsified or changed by someone; that the parties colluded with the DIME physician by contacting him; that Dr. Sacha or the parties communicated or colluded in this matter before the DIME physician issued his report or even that Claimant was denied discovery, are all issues that have been addressed and failed meet the harsh requirements of fraud in order to support a reopening of the claim in this matter. It is specifically found that even if there were any evidence that could have been inferred or interpreted as complicity among the providers and /or Respondents, that evidence is not credible and does not support a determination that there was any fraud to support a reopening of the prior decisions in this matter. Because Claimant has raised and exhausted his appeal rights, and because he failed to prove by a preponderance of the evidence that fraud occurred in this matter, Claimant's request to reopen the claim based on fraud is denied and dismissed.

4. Change in condition

While Claimant stated that he had had a change in condition, no evidence to support a change in condition was presented despite this ALJ's request that Claimant state what evidence was being presented to support a change in condition. In fact, all the medical records submitted were either records provided to ALJ Cayce or ALJ Felter or were available to Claimant in order for him to provide them to ALJ Felter at the December 10, 2019 hearing and/or the continued hearing March 2, 2020 when addressing future medical benefits. Claimant failed to do so. Respondents argue that Claimant was, in fact, improved compared to his presence at the prior hearings. While this ALJ has no present impression of the Claimant's status prior to the hearing held on January 28, 2022, Claimant advanced no persuasive testimony, evidence or argument that tended to show a worsening or change in condition. Claimant failed to show that there was a change in condition to merit a reopening in this matter.

C. Other issues

No other issues need be addressed by this order as Claimant failed to prove reopening based on error, mistake, fraud or change in condition. All other issues are moot.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's has failed to prove by a preponderance of the evidence that he is entitled to reopen the March 9, 2016 claim based on error, mistake, fraud or change in condition.

2. Claimant's claim for further benefits are denied and dismissed and the March 9, 2016 claim is closed.

3. All other issues are moot as Claimant failed to reopen the claim.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 8th day of March, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-099-706-003

ISSUES

I. Whether Claimant is entitled to reinstatement of temporary disability benefits as of July 13, 2021.

II. Whether Respondents are subject to penalties based on their termination of Claimant's temporary disability benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant sustained an admitted injury when she struck the left side of her forehead on a steel beam on January 31, 2019, while employed by Employer.
2. Claimant's date of birth is February 17, 1953, making Claimant 65 on the day of the accident. (Ex., p. 58.)
3. As a result of her work injury, Claimant was diagnosed with a mild traumatic brain injury.
4. Claimant was eventually evaluated for her work-related problems on November 8, 2019, by Dr. David Reinhard, the agreed to authorized treating physician who diagnosed Claimant with head trauma resulting in post concussive syndrome.
5. On December 19, 2019, Dr. Reinhard provided an opinion that Claimant should not work over 4 hours a day, 4 days a week. Work restrictions were provided of no ladders, no waiting on customers, and no activities that required significant new learning, speed of task completion, or multitasking. (Claimant's Exhibit 8 #58)
6. Medical treatment was delayed until an order was entered by ALJ Kara Cayce on March 21, 2021, ordering Respondent's to provide the medical care recommended by Dr. Reinhard. (Claimant's Exhibit 6)
7. While waiting for medical care and treatment Claimant began work with ARC as a "volunteer" at the request of her employer on April 2, 2019. (Claimant's Exhibit 2 #7)
8. Respondent Insurer filed a revised General Admission of Liability on May 2, 2019, with an Employers Supplemental Report of Return to Work attached indicating that Claimant returned to work on April 2, 2019, at reduced wages. (Claimant's Exhibit 2 #10)
9. This modified job offer was provided on [Employer redacted]'s letterhead dated March 20, 2019. (Claimant's Exhibit 10 #61) Claimant began work at ARC as a volunteer working Monday-Thursday 10:00 am to 5:30 pm, with 30-minute breaks at $13.90 per hour. Claimant's doctors had provided restrictions of no stairs or ladders, kneeling or squatting. Sedentary duty 33% of the time. Claimant was requested to

sign an acknowledgement that she remained an employee of [Employer redacted]'s while performing the alternative modified duty with Bowles ARC Thrift Store and remained subject to the Employers attendance and HR policies. (Claimant's Exhibit 10 #62-63)

10. Claimant worked this modified job until March 15, 2020, when the Governor of the State of Colorado issued an emergency public health order as a result of the COVID pandemic. Claimant has a pre-existing condition of asthma that she was receiving active medical care for from Dr. Goodman. Dr. Goodman provided a medical note indicating that Claimant should avoid contagious environments and be able to socially distance for a period of 6-8 weeks. (Claimant's Exhibit 11 #71)

11. On March 16, 2020, Dr. Goodman issued a "Certificate to Return to Work/School." In this Certificate, he stated that Claimant should socially distance for the next 6-8 weeks and avoid contagious environments.

12. On May 15, 2020, Dr. Goodman, the physician who was treating Claimant for her asthma, completed another "Certificate to Return to Work/School." He stated that due to her moderately severe asthma, Claimant had to shelter at home longer due to the COVID 19 crisis. While he said Claimant could return to work on June 15, 2020, he also stated that Claimant should shelter at home until there was no longer a Covid 19 Crisis. (Claimant's Exhibit 12, #72) To the extent these two Certificates – work restrictions - conflict with one another, the ALJ finds that Dr. Goodman determined Claimant should shelter at home until the COVID 19 crisis was over.

13. On May 20, 2020, Respondent attempted to offer Claimant "volunteer" work with ARC using new work restrictions issued by Dr. Reinhard limiting Claimant's work to 4 hours a day for 4 days a week. In addition, he stated that Claimant should not use ladders, wait on customers, and not engage in activities that required significant new learning, speed of task completion, or multitasking. (Claimant's Exhibit 8 #58 and 12 #73-78) Claimant was unable to begin work in May of 2020 due to her pre-existing condition of asthma. As found above, Dr. Goodman, her asthma physician, provided a note indicating Claimant has moderately severe asthma and restricted Claimant to shelter at home until there was no longer a Covid 19 crisis. Thus, Claimant was precluded from working outside of her home by Dr. Goodman. (Claimant's Exhibit 12 #72)

14. Respondent filed an Amended General Admissions of Liability on August 13, 2020 & September 9, 2020, admitting for temporary partial disability benefits through March 25, 2020, and temporary total disability from March 26, 2020, through July 25, 2020, indicating that -0- temporary total disability was due for that period because the amount of unemployment received was greater than Claimant's temporary total disability rate. Respondent then began payment of temporary total disability at the rate of $53.46 per week because Claimant was receiving unemployment at the rate of $219.00 per week. (Claimant's Exhibit 3 #11 & Exhibit 4 #15)

15. On June 30, 2021, Dr. Reinhard, an authorized treating physician, approved another modified duty position with ARC. (Claimant's Ex. 18, #98-99)

16. On July 2, 2021, and based on Dr. Reinhard's approval, another modified job offer was made to Claimant. The job offer required her to begin modified work on July 13, 2021, at the ARC Thrift Store for 4 hours a day 4 days a week. The modified job offer stated that the job duties were "approved by her treating physician." However, Claimant was not only treating with Dr. Reinhard, her workers' compensation physician, she was also treating with her personal physician, Dr. Goodman, for her asthma. Although not an authorized treating physician, there is no indication Dr. Goodman signed off on the July 2, 2021, job offer.

17. On July 13, 2021, Claimant appeared for her shift at ARC. Upon arriving for her shift, a supervisor, Christina, requested Claimant sign a COVID release form. Claimant told Christina that she did not want to sign it because she was over the age of 65 and has asthma. Claimant noted that the COVID form indicates that she should not volunteer due to her age and asthma. The form specifically states that:

> Due to the state of emergency resulting from the COVID -19 virus, ARC Thrift stores is asking all volunteers to agree to the following guidelines while volunteering. *If you are in at risk category for this virus we ask that you do not volunteer. At risk categories included people aged 65 and older, individuals with chronic lung disease, asthma, or serious heart conditions, people who are immunocompromised, pregnant women, and individuals determined to be high risk by a licensed healthcare provider* (emphasis in original). (Claimant's Ex. 12, #81)

Thereafter, Christina looked at the form and went upstairs to the office and returned and told Claimant that the form needed updating and they would finish the paperwork later. Despite the form stating that Claimant should not volunteer due to her age and asthma, Claimant worked an entire shift that day.

18. On July 14, 2021, Claimant appeared and worked a second shift. At the end of her shift, Claimant was approached by the floor supervisor to complete her paperwork. Claimant testified that he requested that they complete the paperwork in the back room by the time clock. Claimant did not want to sign the ARC Thrift Volunteer Agreement and Release of Liability that is quoted above. As noted above, Claimant is over 65 years old and has asthma. The form itself indicates that people who are risk as defined by ARC are advised that they should not volunteer. Claimant did eventually sign the document believing that there had been changes to the form previously provided and that she was not releasing ARC from liability if she contracted COVID and sustained serious illness or death. (Claimant's Exhibit 19)

19. Claimant did sustain a brain injury and was presented with this paperwork in a very busy, noisy open area with a number of people working and talking called the "back room". Claimant described the area as a very large room where people are sorting, vendors are coming in and out by the time clock after she had worked her shift and was getting ready to leave. Claimant was struggling with the noise and confusion of the back-room area. The work in this area had increased her symptoms from the work-related head injury. Claimant felt confused, foggy and was struggling by the end of the shift.

20. The floor supervisor then requested a copy of Claimant's driver's license. Claimant did not want to give them a copy of her driver's license because she was standing by the file cabinet in the back room, which is where she believed the paperwork, including a copy of her license, would be stored. Claimant had previously worked there, and at that time the filing cabinet was located in a locked supervisor's office, which was a secure area. Given the new placement of the file cabinet, and all of the different types of people who were now "volunteering," Claimant did not feel secure with giving a copy of her driver's license to keep to the supervisor who would place it in the file cabinet.

21. Based on the totality of the circumstances, the ALJ finds that Claimant's reluctancy to provide a copy of her driver's license was reasonable due to her concerns about the safety of her driver's license. The ALJ is mindful that Claimant did not voice her concerns to ARC, but neither did ARC ask Claimant as to why she did not want to provide them a copy of her driver's license.

22. Claimant's supervisor then went upstairs, came back down, and told Claimant that she had to leave and that Claimant should call ReEmployability and her employer to get the matter straightened out.

23. As directed by ARC, Claimant contacted ReEmployability – the intermediary who was assisting with arranging Claimant's volunteer work at ARC - and her attorney in an attempt to deal with the issue. ReEmployabillity contacted Claimant's employer via email regarding the matter. Despite Claimant contacting ReEmployability there is a lack of credible and persuasive evidence that ReEmployability, Claimant's employer, or ARC ever contacted Claimant again about the issue and attempted to resolve situation. In essence, there was a breakdown in communication between Claimant, ReEmployability and ARC and why Claimant had to provide a copy of her driver's license and how to resolve the matter.

24. Emails from Cannecia Lowery at ReEmployability show that at 3:55 pm on July 14, 2021, they contacted ARC confirming that Claimant was asked not to return to ARC until she was able to present a photo ID. She was trying to confirm that information. (Claimant's Exhibit 20 #108) But there is a lack of credible and persuasive evidence that they discussed the matter with Claimant. Had they done so, they might have also realized that ARC already had a copy of Claimant's driver's license from her prior volunteer work with ARC.

25. The email response from Stephanie at ARC confirmed that it was a requirement that ARC take a copy of her identification card and confirmed that Claimant was told to contact ReEmployability because they needed to verify that Claimant was who she said she was. Despite the issue being discussed between ReEmployability and ARC, there is a lack of credible and persuasive evidence that this requirement was again discussed with Claimant and that Claimant was given an opportunity to resolve the matter with ARC.

26. As directed by ARC, Claimant did not return and was not contacted again by ReEmployability, ARC or Employer regarding returning to volunteer work at ARC. After contacting ReEmployability, no one contacted Claimant to advise her that she would have to provide a copy of her drivers' license to ARC in order to volunteer

there. Moreover, no one advised Claimant that her failure to provide a copy of her driver's license would be seen as a failure to accept modified employment and that her disability benefits would be terminated. Instead, Claimant received notification that her benefits were being discontinued because she did not appear for her modified work assignment at ARC – even though Claimant appeared for her modified work assignment and completed two shifts.

27. In order to volunteer at ARC, Claimant was required to sign an Employee Acknowledgement that she remained an employee of [Employer redacted]'s while performing alternative modified duty with the ARC Thrift Store in Littleton, Colorado. (Claimant's Exhibit 18 #104) There was also a statement that Claimant was required to comply with [Employer redacted]'s policies regarding employment issues, including attendance and HR policies. The Employee Acknowledgement did not indicate Claimant was also required to comply with ARC's HR policies. Again, the Employee Acknowledgement made clear Claimant was still an employee of [Employer redacted] and had to abide by [Employer redacted]'s HR policies.

28. Stephanie Raynor testified that she was the ARC assistant manager in July of 2021 at the Littleton store. She indicated that ARC has a number of volunteers from various systems working at the store. Some of them are referred through the court systems, others from the county food stamp assistance, in addition to the workman's compensation referred volunteers.

29. Ms. Raynor testified Claimant showed up at ARC and worked two full shifts. She testified that Claimant worked on July 13, 2021, and did not complete the required paperwork until the end of her shift on July 14, 2021. She indicated that because of some fraudulent activity that had been occurring only certain ARC employees could complete the employee paperwork. She also testified that she did not know Claimant and was not aware that Claimant had worked for ARC in 2019-2020, and provided a copy of her driver's license, because she did not begin working for ARC until October of 2020 after Claimant had already left ARC in March of 2020.

30. Ms. Raynor also testified that when she was reviewing paperwork in anticipation of testifying for the hearing she found Claimant's file from her earlier volunteer work with ARC that had a copy of Claimant's photo id in the file. Ms. Raynor testified that there are monthly audits of the files by corporate to confirm ARC's obligations to report hours particularly to the courts.

31. Ms. Raynor also testified that it was ARC's practice to have the supervisor complete the initial forms by asking the volunteer the questions and then circling the answers, then having the volunteer sign the form as well as themselves. (Respondent's Exhibit E #22)

32. Ms. Raynor testified that on July 14, 2021, ARC did actually have a copy of a photo ID confirming Claimant's identity from the previous period of time that she worked there that was located in the filing cabinet located in the back-room area by the time clock. As a result, the request for Claimant to provide a copy of her driver's license or a photo ID was duplicative and not necessary.

33. Ms. Raynor testified that if Claimant is over 65 and has asthma, that she is in a category of people that ARC indicates should not volunteer because ARC workers are "on the front line" of potential COVID exposure. She also testified that she is not able to change ARC policy. As a result, the job offered to Claimant was not reasonably available to Claimant in the first instance.

34. As found, Claimant has moderate to severe asthma and was over 65 at the time the job offer was made. As a result, based on ARC's policy, Claimant was not able to volunteer at ARC and perform the modified duty offered to her. Thus, [Employer redacted], through ReEmployability and Arc, offered Claimant modified employment for which Claimant was not eligible to perform. Therefore, [Employer redacted] did not provide Claimant a valid – or reasonable – job offer of modified employment in the first instance since ARC's policies precluded Claimant from volunteering there.

35. However, despite not providing Claimant a reasonable job offer in the first instance, Claimant did not refuse the offer of modified employment. Claimant appeared and started the modified work. The fact that her modified employment did not continue because Claimant did not provide a photo ID and ReEmployability never got back to her in an attempt to resolve the matter, does not negate the finding that Claimant accepted and started her offer of modified employment. Thus, Claimant began the modified employment.

36. Based on the circumstances, the ALJ also finds that Claimant did not constructively refuse an offer of modified employment. Instead, after beginning the modified employment, a dispute arose between Claimant and ARC about obtaining a copy of Claimant's driver's license and such dispute was not resolved. This merely resulted in Claimant not being allowed to continue performing the modified employment.

37. On August 27, 2021, and despite Claimant starting the modified employment, Respondents filed an Amended General Admission of Liability that terminated Claimant's disability benefits.

38. Because Claimant started the modified employment and worked two shifts, the ALJ finds that the unilateral termination of Claimant's temporary disability benefits was not the action of a reasonable insurer.

39. There is a lack of credible and persuasive evidence that Claimant was terminated from her employment with Employer - [Employer redacted]. Therefore, the ALJ will not make any at-fault findings regarding that issue.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a

preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to reinstatement of temporary disability benefits as of July 13, 2021.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Because the respondents seek to terminate benefits under this section, they have the burden of proof to establish the factual predicates for application of the statute. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (I.C.A.O. December 16, 2004), citing *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000).

There may be more than one "the attending physician." *Popke v. Industrial Claim Appeals Office, 944 P.2d 677* (Colo. App. 1997). If there is a conflict between the attending physicians concerning whether or not the claimant is able to perform modified employment the ALJ may resolve the conflict as a matter of fact. *See Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App. 1995) (concerning physician's release to regular employment).

The Industrial Claim Appeals Office has held that under a proper interpretation of the statute the employment offered to the claimant must be "reasonably available under an objective standard." Whether the offered employment was reasonably available under an objective standard is one of fact for determination by the ALJ. *Simington v. Assured Transportation & Delivery,* W.C. No. 4-318-208 (I.C.A.O. MARCh 19, 1998). Factors that may be considered include the distance the claimant is required to travel and the availability of transportation to reach the employment. *Ragan v. Temp Force,* W.C. No. 4-216-579 (I.C.A.O. June 7, 1996).

Moreover, a failure to begin temporary modified duty includes a constructive failure to begin. *See Liberty Heights at Northgate v. Indus. Claim Appeals Office of State & Carol Vawser*, 30 P.3d 872 (Colo. App. 2001)

In this case, Respondents offered Claimant a job with ARC that was not reasonably available to her. The job offered to Claimant through ARC was not recommended for people 65 and over or those with asthma – due to the COVID 19 pandemic. At the time the job was offered to Claimant, Claimant was over 65 and suffered from asthma. As a result, the job was not reasonably available to Claimant in the first instance.

Moreover, even though the job was not reasonably available to Claimant due to her age and asthma, Claimant did start her modified employment. As found, Claimant started the modified employment worked her first two shifts with ARC until a dispute arose as to whether Claimant had to provide a copy of her ID or her drivers' license to ARC – even though they already had a copy. Claimant was directed to contact ReEmployability and her employer to resolve the issue. Claimant did contact ReEmployability as directed and they contacted her employer. However, neither ReEmployability nor Claimant's employer contacted Claimant in an attempt to resolve the matter and explain to Claimant why they needed a copy of her driver's license to discuss Claimant's concerns about the security of her drivers' license. Moreover, had such a discussion occurred, ARC might have realized that they already had a copy of her driver's license and a request for such was unnecessary or that they could find a safer place to keep Claimant's driver's license.

In addition, the ALJ has considered whether Claimant's conduct constituted a constructive failure to begin her modified employment. Under the circumstances, the ALJ finds and concludes that Claimant did not constructively fail to accept her modified employment. As found, Claimant started her employment as directed and worked two shifts. The court also found that the reason Claimant did not continue her modified volunteer work is because Claimant and ARC had a dispute about whether Claimant had to provide a copy of her driver's license – which ARC already had.

The court also wants to point out that it appears the disagreement and communication problems between Claimant, ARC, and ReEmployability were magnified due to Employer – [Employer redacted] – outsourcing the provision of modified employment to two other companies – ReEmployability and ARC. In other words, Employer – [Employer redacted] – did not directly offer and manage the offer of Claimant's modified employment and Claimant's modified employment. Instead, they

got two intermediaries involved – which only complicated the offer and acceptance of the modified employment and Claimant's continuation of her modified employment.

As a result, the ALJ finds and concludes that the job offer to Claimant was not reasonably available to Claimant in the first instance because at the time of the offer, Claimant was over 65 and had asthma. Thus, Claimant could not volunteer for ARC. The ALJ also finds and concludes that Claimant actually started her modified employment. Therefore, the ALJ finds and concludes that Respondents did not establish by a preponderance of the evidence that Claimant refused an offer of modified employment and that her temporary disability benefits should be terminated. As a result, Claimant is entitled to temporary disability benefits as of July 13, 2021, and continuing.

II. Whether Respondents are subject to penalties based on their termination of Claimant's temporary disability benefits.

Penalties of up to $1,000 per day may be imposed under § 8-43-304(1) based on an objective standard of negligence. Negligence is determined by the reasonableness of the insurer's actions and does not require the insurer's knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997). The imposition of a penalty, therefore, is a two-step analysis. First, it must be determined a violation of an order, rule or statute has occurred. It then must be found that despite the violation, the act or failure to act was not accompanied by circumstances that would have led a reasonable insurer to proceed as it did. Such circumstances typically are by their nature beyond the control of the insurer. Examples would include sudden illness of the individual responsible, power outages, faulty information, insufficient notice, unsound official advice, or horrific weather conditions, among others. Thus, as long as an insurer takes the action that a reasonable insurer would take to comply with either a lawful order, rule or a provision of the Workers' Compensation Act, penalties will not be imposed. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094, 1097 (Colo. App. 1996); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

Section 8-42-105(3)(d)(I) provides that temporary disability benefits terminate when:

> [T]he attending physician gives the claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Moreover, WCRP 6-1(A)(4) provides that temporary disability benefits can be terminated without a hearing by filing an admission of liability form with:

> [A] letter to the claimant or copy of a written offer delivered to the claimant with a signed certificate indicating service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

Section 8-42-105(3)(d)(I) works in tandem with WCRP 6-1(A)(4). In order to terminate temporary disability benefits under Section 8-42-105(3)(d)(I) and WCRP 6-1(A)(4), the Claimant must be offered modified employment, that has been approved by an authorized treating physician, and must fail to begin such employment.

In this case, Claimant was receiving temporary disability benefits in July of 2021. On July 2, 2021, Employer made an offer of modified employment that complied with WCRP 6-1(A)(4). On July 13, 2021, Claimant began her modified employment and worked on July 14, 2021 as well. As found, a dispute arose as to whether Claimant had to provide a copy of her driver's license and Claimant was never called back to continue her modified employment. As further found, Claimant's employer – [Employer redacted] – has not terminated Claimant.

On August 27, 2021, Respondent filed an Amended General Admission of Liability terminating Claimant's temporary disability benefits. This was despite the fact that Claimant had began her modified employment. To the extent there was a factual dispute as to whether Claimant constructively failed to begin, such matter was a factual dispute that was subject to resolution through a hearing and not the automatic termination of benefits pursuant to Section 8-42-105(3)(d)(I) and WCRP 6-1(A)(4). As a result, Respondents violated 8-42-105(3)(d)(I) by unilaterally terminating Claimant's temporary disability benefits after she had accepted and started her modified employment.

In addition, the action of terminating Claimant's temporary disability benefits after accepting and starting the modified employment was not accompanied by circumstances that would have led a reasonable insurer to proceed as it did. Because Claimant accepted and started her employment, there was no basis to unilaterally terminate her benefits without a hearing based on Respondent's contention that Claimant refused to comply with the job offer. As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she is entitled to penalties.

The ALJ has wide discretion in determining the amount of penalties to assess. In determining such, the ALJ can consider the harm to Claimant. In this case, there was a lack of persuasive evidence that Claimant suffered substantial harm due to her temporary disability benefits being terminated. On the other hand, the ALJ finds that her benefits were terminated improperly. The ALJ has also taken into consideration the amount of temporary disability benefits being paid to Claimant at the time they were improperly terminated. As a result, the ALJ finds that Respondents should be assessed a penalty of $50.00 per day for the improper termination of Claimant's temporary disability benefits. Penalties shall run from August 27, 2021, the date the GAL was filed that terminated Claimant's disability benefits, through the date of the hearing, January 6, 2022.

Apportionment of Penalties

If a penalty is assessed under § 8-43-304, C.R.S. the ALJ must apportion payment of the penalty between the aggrieved party and the Colorado uninsured employer fund created by § 8-67-105 C.R.S. except that the amount apportioned to the

aggrieved party shall be a minimum of twenty-five percent of any penalty assessed. The ALJ determines that 65% of the penalty shall be apportioned and paid to Claimant and 35% shall be apportioned and paid to the Colorado Uninsured Employer Fund.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall reinstate Claimant's temporary disability benefits as of July 13, 2021.
2. Respondent shall pay a penalty in the amount of $50.00 per day from August 27, 2021, through January 6, 2022, which is 132 days. Therefore, the total penalty is $6,600.00.
3. Respondent shall pay 65% of the penalty - $4,290.00 - to Claimant.
4. Respondent shall pay 35% of the penalty - $2,310 - to the Colorado Uninsured Employer Fund.
5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 8, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-318-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right eye arising out of the course of his employment with Employer on May 4, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits from June 5, 2021 until terminated pursuant to statute.

FINDINGS OF FACT

1. The parties stipulated that Claimant's average weekly wage at the time of his injury was $800.26.

2. Claimant was employed by Employer beginning July 16, 2016, as a production associate. On May 4, 2021, Claimant was delivering materials at Employer's facility using a cart. Claimant was pulling the cart while walking backward when he stumbled over a wooden pallet. Claimant fell into the pallet and sustained a scrape on his right knee, and ended up on the floor.

3. On May 4, 2021, Claimant reported the incident to his supervisor, [Redacted, hereinafter JA]. Mr. JA[Redacted] testified that Claimant informed him he had scraped his knee on a pallet, but that he was fine. Claimant did not ask to see a physician, and no first aid was administered. Also on May 4, 2021, Claimant completed an incident report for Employer. In that report, Claimant described his injuries as a "scrape" to the right knee. Claimant described the incident as follows: "Just finished delivering totes to deburr department, still had cart, was backing up, tripped over a leaning pallet, scraped right knee on pallet, I fell to the ground." (Ex. 4).

4. At hearing, Claimant testified that his right knee became caught in the pallet, and that he fell on his right hip, shoulder and knee. A co-worker, [Redacted, hereinafter AL], was present in the room where Claimant fell, but did not witness the fall. Mr. AL[Redacted testified that he saw Claimant sitting on the ground on his buttocks. Mr. AL[Redacted asked Claimant if he needed assistance, but Claimant did not require help. Mr. AL[Redacted then returned to his work and did not have any further observations of Claimant.

5. Claimant testified that he began noticing vision problems several days after his fall, and his vision deterioration began accelerating approximately three weeks later. Claimant continued to work from May 4, 2021 until June 4, 2021. At which point Claimant stopped

working because he was not comfortable working due to the decrease in his vision. Claimant did not return to work for Employer after June 4, 2021.

6. On May 25, 2021, Employer's Environmental Health, Safety and Security Manager, [Redacted, hereinafter RP], spoke with Claimant about the May 4, 2021 incident. Mr. RP[Redacted] had been at home on Covid quarantine at the time of the incident. Mr. RP[Redacted] asked Claimant how he was doing, and Claimant indicated he was fine. Claimant did not report any issues with his vision at that time.

7. On June 9, 2021, Claimant was seen at the UCH Primary Care Clinic in Lone Tree, and was evaluated by Rachel Rodriguez, M.D. Claimant reported vision issues in his right eye. Dr. Rodriguez diagnosed Claimant with low vision of the right eye, with normal vision in the left eye, and referred Claimant for an optometry examination. (Ex. G).

8. On June 16, 2021, Claimant saw optometrist Julia Kimball, O.D., at the UC Health Eye Center. Claimant reported to Dr. Kimball that he began having blurred vision eight months earlier, and felt like he was seeing a bubble in his central vision. Claimant also indicated he was concerned his vision issues were due to prior use of Viagra. Claimant reported he had fallen at work one-month earlier, and reported that he "noticed profound vision loss in right eye at that time." Claimant's wife reported to Dr. Kimball that Claimant's right pupil became white after the fall. On examination, Dr. Kimball noted a dense cataract in Claimant's right eye. She also noted the cataract had "bowed the iris forward with concern for angle closure, although IOP measured in normal range today." Dr. Kimball indicated the vision loss appeared to be due to the cataract, but she was unable to tell if Claimant's optic nerve and retina were healthy. With respect to Claimant's right eye, Dr. Kimball diagnosed Claimant with a cortical age-related cataract and referred Claimant to Cara Capitena Young, M.D., for an ophthalmological evaluation. (Ex. 14).

9. On or about June 17, 2021, Claimant emailed Employer advising that he had attended an eye appointment the previous day. Claimant indicated his vision loss was "due to a dense white cataract and bowed iris [his] right eye." Claimant also stated, "Headache and eye pain have been prevalent since the documented fall on May 4th." Claimant requested information on how to initiate a workers' compensation claim. (Ex. 8). Employer then provided Claimant with a designated provider list.

10. On June 17, 2021, Employer filed a First Report of Injury, indicating Claimant sustained a contusion of the knee as the result of the May 4, 2021 incident. (Ex. 1). On June 24, 2021, Employer filed a Notice of Contest, contesting the compensability of Claimant's injuries. (Ex. 2).

11. On June 18, 2021, Claimant saw Kathryn Bird, D.O., at Concentra. Claimant reported right knee and shoulder injuries, and bilateral eye issues. On examination, Dr. Bird noted that Claimant's right knee and right shoulder were normal. Claimant did not recall hitting his head when he fell and indicated he started to develop headaches, nosebleeds, neck pain, and changes in vision after the fall. Dr. Bird could not opine that Claimant's cataract was caused by the May 4, 2021 fall because Claimant "does not

remember hitting his head during the incident. However symptoms started in close proximity to the fall." (Ex. 15).

12. On June 21, 2021, Claimant saw Dr. Capitena Young at the UC Health Eye Center. Dr. Capitena Young diagnosed Claimant with visually significant intumescent white cataract of the right eye. She also noted "Likely traumatic given time frame of vision loss associated with trauma at work but patient not sure if hit head, no history of open globe." A B-scan of Claimant's eye was performed that showed vitreous hemorrhage and retinal detachment. She noted that a detached retina could cause a white cataract. Dr. Capitena Young conveyed to Claimant the relative urgency in removing the cataract and referred Claimant to Marc Mathias, M.D. (Ex. 14).

13. On the same day, June 21, 2021, Claimant saw Marc Mathias, M.D., at the UC Health Eye Center. Claimant reported he had experienced blurred vision for 6-8 months, and after he fell at work his vision became significantly worse. Claimant reported he did not hit his head or eye when he fell. Dr. Mathias diagnosed Claimant with a mature cataract of the right eye, right retinal detachment, and vitreous hemorrhage of the right eye. Dr. Mathias indicated "highest suspicion for rhegmatogenous [retinal detachment] given trauma, but cannot completely rule out component of uveitis." He recommended that surgery take place within two weeks. (Ex. L).

14. On June 25, 2021, Claimant returned to Concentra where he saw Michael Pete, P.A. In addition to his vision issues, Claimant reported burning in the right knee but denied instability. Claimant also indicated he began to develop low/mid back pain on June 19, 2021. Claimant completed a pain diagram in conjunction with the visit identifying pain in the head, left lower back and right knee. On examination, Claimant's right knee was found to be normal, with the exception of the report of a burning sensation. Claimant's shoulder were both noted to be normal on examination with full range of motion, normal strength and no tenderness or impingement signs. Claimant was diagnosed with a right retinal detachment, right knee strain, and low back strain. Mr. Pete recommended physical therapy. Mr. Pete further opined that "based on findings of retinal detachment and onset of symptoms it is 51% probability this occurred with the fall." Mr. Pete offered no other rationale for his opinion that Claimant's retinal detachment was work-related. (Ex. 15).

15. On June 29, 2021, Dr. Mathias performed a retinal detachment repair of the right eye with pars plana vitrectomy, pars plana lensectomy, and posterior synechiolysis. Dr. Mathias' post-operative diagnosis was total retinal detachment, mature cataract and proliferative vitreoretinopathy (PVR). Intraoperatively, Dr. Mathias found extensive pathology in Claimant's right eye. These findings included poor pupillary dilation with 360-degree posterior synechiae, a completely detached retina with extensive subretinal bands and pigment deposition, anterior loop PVR inferiorly, and five retinal breaks. He further noted that the retina did not appear to relax, necessitating the removal of extensive subretinal fibrosis. Claimant saw Dr. Mathias for three additional post-surgical visits (June 30, 2021, July 7, 2021, and July 21, 2021). Dr. Mathias did not offer an opinion on the cause of Claimant's retinal detachment or cataract in any medical record. (Ex. K).

16. On July 8, 2021, Claimant saw Dilip Raghuveer, M.D., at UC Health. Dr. Raghuveer did not offer an opinion on the cause of Claimant's retinal detachment, indicating the issue was beyond his area of expertise. He indicated that Claimant's headaches were likely related to the retinal detachment. (Ex. 17).

17. On July 14, 2021, Claimant saw Kathryn Bird, D.O., at Concentra. Dr. Bird reviewed Claimant's chart, but did not have Claimant's ophthalmology records. Dr. Bird indicated Claimant "did start having eye symptoms within a week of the fall. Trauma, such as a fall, is a cause for retinal detachment. His retinal detachment is more likely than not work related." (Ex. 15).

18. On July 19, 2021, Claimant filed Worker's Claim for Compensation related to the May 4, 2021 fall. Claimant reported injuries to his head, right eye, neck, right shoulder, lower back, and right knee. (Ex. N).

19. At hearing, Clamant testified that 6-8 months before May 2021, he had an issue with visual acuity, which manifested as a "bubble" that distorted his central vision in his right eye, but that he could see around the periphery of his right eye. Claimant testified his vision was stable before May 2021, and did not affect his job. Claimant did not inform employer about his pre-existing vision issue before May 2021. Claimant does not know whether he struck his head when he fell, but did not have any marks or abrasions on his head after the fall. Claimant also testified he immediately had significant pain in his knee and shoulder on May 4, 2021, and that he also had pain in his head and eye on that day. Claimant's testimony that he felt immediate pain in his head, eye and shoulder was not consistent with the incident report he completed on May 4, 2021. Claimant began to develop headaches and nosebleeds two to three days after May 4, 2021, and his vision began to darken thereafter. Claimant testified that he did not associate his vision issues with the fall until June 9, 2021, and did not mention the vision issues to Employer until his June 17, 2021 email. Claimant testified that he has not worked for Employer since June 2021, and moved to Indiana in October 2021.

20. On September 2, 2021, Claimant underwent an independent medical examination with David Drucker, M.D. (With a report issued on September 12, 2021). (Ex. A). Dr. Drucker is a board-certified ophthalmologist, and was admitted to testify as an expert in ophthalmology and eye surgery. Dr. Drucker's testimony was presented by deposition. Dr. Drucker reviewed Claimant's medical records, and performed an examination of Claimant's eye. Dr. Drucker opined that the history and physical findings from Dr. Kimball, Dr. Capitena Young, and Dr. Mathias support the diagnosis of a super chronic right retinal detachment prior to May 4, 2021. Dr. Drucker explained that a "super chronic" retinal attachment refers to a retinal tear that has existed for more than two months.

21. Dr. Drucker noted that the June 29, 2021 surgical record notes shows Dr. Mathias found a bound-down pupil with 360-degrees posterior synechiae; intumescent lens; completely detached retina; extensive subretinal bands; subretinal fibrosis; pigment deposition; an anterior loop with PVR inferiorly; and retinal breaks at five locations. He also noted that Claimant's retina was inflexible and would not lay flat, necessitating an inferior retinectomy.

22. He opined that Dr. Mathias' surgical intraocular findings, (advanced PVR, inflexible retinal tissue, subretinal fibrotic bands, epiretinal fibrosis, and multiple retinal tears), were unlikely to be found in a retinal detachment occurring six weeks earlier. He noted that Claimant's report of a six-to-eight-month history of distorted vision with a visual "bubble" sensation was consistent with a vitreous hemorrhage, retinal tear and/or localized detachment. He indicated it would be normal for this type of pathology to progress over time to the pathology Dr. Mathias observed intraoperatively. Dr. Drucker also opined that it would be highly unusual to find this constellation of "catastrophic findings" after a fall that did not involve direct head or eye trauma six weeks earlier. Dr. Drucker's opinion was that it was unlikely Claimant's eye would deteriorate to the condition Dr. Mathias discovered between his fall on May 4, 2021 and surgery on June 29, 2021.

23. Dr. Drucker also testified that, although possible, it was unlikely that Claimant's pre-existing ocular pathology would be exacerbated or aggravated by the fall Claimant sustained, given the extent and severity of the intraocular findings. Specially, he stated "It is less likely as not that a relatively atraumatic fall not involving head or eye trauma would affect a fibrotic and membrane covered retina." In his deposition, Dr. Drucker indicated the Claimant's retinal tissue was rigid and adhered within the eye, such that the Claimant's relatively minor fall on May 4, 2021 would not likely have caused his pre-existing eye pathology to worsen. The ALJ finds Dr. Drucker's opinions credible and persuasive.

24. On October 10, 2021, Mark Winslow, D.O., issued a report related to an independent medical examination requested by Claimant's counsel conducted on August 12, 2021. Dr. Winslow is board-certified in neuromusculoskeletal medicine and family practice. Based on his review of medical records and examination of the Claimant, Dr. Winslow diagnosed Claimant with a retinal detachment "likely work related" and a mild knee strain, improved. Dr. Winslow was aware of Dr. Drucker's opinion that Claimant's retinal detachment was unlikely to be related to the May 4, 2021 fall based on the extent and severity of the intraocular findings. Dr. Winslow indicated that he disagreed with Dr. Drucker's opinion "and note[d] that the temporal relationship to the fall and the significant immediate changes following this fall make it more likely than not that this traumatic incident exacerbated the previously subclinical and undiagnosed underlying conditions." He further opined that while Claimant "did not strike his head one does not have to strike your head in order to create an intracranial lesion…. The sudden deceleration of a fall as described with traumatic force is sufficient to exacerbate underlying poor retinal condition." Dr. Winslow's opinion, which does not take into consideration Dr. Mathias' intraocular findings, is not persuasive. (Ex. 20).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in

an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold,* W.C. No. 4-960-513-01, (ICAO Oct. 2, 2015)

Claimant has failed to establish by a preponderance of the evidence that he sustained compensable injuries as a result of his May 4, 2021 fall. The primary issue in this case is whether the Claimant's deterioration in vision and total retinal detachment was the result of the May 4, 2021 fall, either by causing the retinal detachment or aggravating or exacerbating Claimant's pre-existing eye pathology. Although there is no dispute that Claimant tripped and fell on May 4, 2021, Claimant has failed to establish that the fall resulted in a compensable injury to his right eye. Claimant's position relies primarily on the timing of Claimant's vision deterioration approximately two to three weeks after May 4, 2021. While there is a correlation between the timing of Claimant's fall, and the subsequent decline in his vision, this correlation alone does not establish causation.

The ALJ finds persuasive the opinion of ophthalmologist Dr. Drucker that Dr. Mathias' intraoperative findings indicated that the retinal detachment was likely a pre-existing, and that a fall such as the one Claimant sustained was unlikely to cause or aggravate the condition.

Dr. Bird and Dr. Winslow attributed Claimant's retinal detachment to the May 4, 2021 fall. However, neither physician provided a cogent, persuasive explanation for the attribution other than the fact that Claimant's vision began to worsen several weeks after the fall, and that trauma can cause a retinal detachment. Neither physician persuasively explained how Claimant's fall, in which he did not sustain trauma to the head or eye, and which resulted in only a scraped knee, caused, accelerated, or aggravated the extensive intraocular pathology found by Dr. Mathias during Claimant's June 29, 2021 surgery. Dr. Winslow's opinion that Claimant's fall was sufficient to result in a retinal tear was not persuasive, given that Claimant's only initial complaint was a scraped knee.

MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is

one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Id.*

Because Claimant has failed to establish a compensable injury to his right eye, Claimant has failed to establish an entitlement to medical treatment for his retinal detachment or vision issues.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997

Claimant has failed to establish an entitlement to TTD benefits. The evidence demonstrates that Claimant worked without restrictions following his injury until June 4, 2021. Claimant then stopped working due to concerns about his vision. Because the Claimant has failed to establish that the May 4, 2021 fall caused his vision issues, Claimant has failed to establish the required causal connection between a work-related injury and the subsequent wage loss.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his right eye on May 4, 2021.

2. Claimant's claim for medical benefits is denied.

3. Claimant's claim for temporary disability benefits is denied.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 8, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, an entitlement to temporary disability benefits.

2. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of his employment on September 2, 2021, and the wage loss resulting from his termination.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 39-year-old man who was employed by Employer as a night fleet fueler. Claimant's job duties included driving a fuel truck to various job sites and fueling vehicles at those sites. Claimant's job required him to carry a fueling hose from the fuel truck to other vehicles, climb ladders while carrying a fueling hose to reach the other vehicle's fuel tank. The fuel hose weighs more than ten pounds, and in performing his job, Claimant was required to drag or carry the hose up a ladder, and reach overhead with the hose, and reach his arm away from his body. Claimant's regular work hours were Tuesday through Saturday, from approximately 3:00 to 4:00 p.m. until after midnight.

2. During the night of August 24, 2021, Claimant sustained a compensable injury arising out of the course of his employment with Employer when he fell from a ladder while working to refuel a vehicle.

3. Claimant reported his injury to Employer that night and was advised to contact his supervisor, [Redacted, hereinafter RB]. Claimant contacted Mr. RB[Redacted] the following morning and was advised to go to Concentra for evaluation.

4. On August 25, 2021, at approximately 9:50 a.m., Claimant was evaluated at Concentra by Barry Nelson, D.O. Claimant reported a mild headache, jaw pain, neck pain and upper back pain. Dr. Nelson examined Claimant and diagnosed him with an acute neck strain and contusion of the jaw. Dr. Nelson assigned written work restrictions of ten pounds for lifting, repetitive lifting, and carrying, pushing/pulling of twenty pounds, no reaching overhead, and no reaching away from the body. Dr. Nelson indicated Claimant could return to modified duty on August 26, 2021, and that the restrictions would remain in place until Claimant's scheduled follow-up visit on August 30, 2021. (Ex. A). Claimant's restrictions remained unchanged until December 2, 2021. On December 2, 2021, Dr. Nelson changed Claimant's restrictions to include lifting, repetitive lifting, and carrying limits of twenty pounds, pushing/pulling of forty pounds, and no overhead reaching. These work restrictions remained in place through Claimant's last documented visit with Dr.

Nelson on December 23, 2021. No medical records were admitted demonstrating that Claimant's restrictions have been lifted. (Ex. A).

5. On August 25, 2021, Claimant provided his supervisor, RB[Redacted], with a copy of the written work restrictions via text message. The work restrictions imposed by Dr. Nelson were such that Claimant could not fully perform his job duties, which required lifting, carrying, pulling, and pushing in excess of the assigned weights, and required Claimant to reach away from his body and above his head. (Ex. C).

6. Claimant testified that during their phone call on August 25, 2021, Mr. RB[Redacted] indicated that another employee would take over Claimant's route, and that Claimant should be available by telephone to provide the replacement driver with information and assistance. Claimant testified that he was available and did speak with his replacement sometime during the week.

7. Claimant further testified that Mr. RB[Redacted] did not instruct Claimant to return to work, and Claimant's impression was that he was to keep Mr. RB[Redacted] updated with his medical restrictions. Claimant testified that he spoke to Mr. RB[Redacted] two to three times following his injury, which is consistent with Mr. RB[Redacted] 's testimony.

8. In internal emails on Friday, August 27, 2021, Mr. RB[Redacted] and others discussed assigning Claimant a limited duty position, including having Claimant ride with his replacement driver and provide instructions. No credible evidence was admitted indicating that this limited duty position was communicated to Claimant in writing or otherwise. Moreover, after receiving Claimant's written work restrictions on August 25, 2021, Employer did not provide Claimant with a written offer of modified employment pursuant to §8-42-105(3), C.R.S

9. Mr. RB[Redacted] testified that he texted and called Claimant several times on August 25, 2021, to ask Claimant to complete an "incident report" for Employer. Both Mr. RB[Redacted] and Claimant testified they exchanged text messages between August 25, 2021 and Friday, August 27, 2021. The text messages were not offered into evidence. Mr. RB[Redacted] characterized his messages to Claimant as instruction Claimant to "call me, and we still need to fill out the accident report, so we know what happened." Claimant testified that Mr. RB[Redacted] did request the incident report be completed. Although Claimant was aware that Employer was requesting the Incident Report, no credible evidence was submitted to indicate that Employer advised Claimant of the timeframe for returning the Incident Report, that Employer placed any urgency on returning the report, or that the failure to return it within any specific timeframe could result in termination or other disciplinary action.

10. On the morning of Monday, August 30, 2021, Claimant spoke with Mr. RB[Redacted] on the phone and also sent Mr. RB[Redacted] a copy of the doctor's report. In an email dated August 30, 2021 at 10:41 a.m., Mr. RB[Redacted] wrote: "[Claimant] just now contacted me, he was under the impression is not able to work at all. [Claimant] thought the light duty didn't start until 8/30. I told [Claimant] we had training

courses we could have had him doing and he was on light duty since he was seen by Concentra. He is currently filling out injury report." (Ex. C).

11. Mr. RB[Redacted] testified that he sent Claimant an email to permit Claimant to perform light duty work in the form of online "Safety Training," on August 30, 2021. He further testified that Claimant completed one night of safety training on August 30, 2021, and that Claimant performed the training for "one night and then he stopped doing it." Mr. [Redacted, hereinafter EB] testified that after August 30, 2021, the Claimant was "unreachable" and did not communicate with Employer until Wednesday, September 1, 2021, when Mr. B[Redacted] contacted Claimant by phone.

12. Mr. RB[Redacted]'s testimony on this issue is inconsistent with the documentary evidence. Exhibit C, p. 70, is an email from [Redacted, hereinafter TS], Employer's HSSE Manager, which shows Claimant was not set up to do online "Safety Training" until August 31, 2021 at 4:33 p.m. At that time, Mr. TS[Redacted] sent Claimant information to access the online training. (Ex. C). On the evening of August 31, 2021, Claimant performed on-line training as requested by Employer. (Ex. C). The email to Claimant communicating the online Safety Training instructions was not admitted into evidence, and no credible evidence was admitted regarding the specific instructions Employer provided to Claimant with respect to the online "Safety Training." Other than the August 31, 2021 email from Mr. TS[Redacted], no credible evidence was admitted demonstrating Employer attempted to contact Claimant on August 31, 2021.

13. On September 1, 2021, Employer's EB[Redacted] emailed Mr. RB[Redacted] asking if Claimant had performed light duty work. Mr. RB[Redacted] responded that Claimant was doing "a light duty course." (Ex. C).

14. At approximately 4:00 p.m., on September 1, 2021, Ms. EB[Redacted] indicated in an email that she had called Claimant and requested that Claimant return the "incident report" "ASAP." (Ex. C). Mr. RB[Redacted] testified that Claimant did return Ms. EB[Redacted] 's call and returned the incident report. The report contained in Exhibit C is undated. Mr. RB[Redacted] testified he did not know when Claimant returned the incident report, but also that Claimant returned the incident report on September 1, 2021.

15. Mr. RB[Redacted] testified that Employer made the decision to terminate Claimant on September 1, 2021, because Claimant had returned the incident report, was non-communicative and had stopped doing online training. On September 2, 2021, Employer's terminated Claimant's employment. (Ex. C). The termination letter authored by EB[Redacted] (Senior HR Manager), identified the reasons for termination as: "no call no shows, poor communication with your manager and not completing assigned work." (Ex. C). The termination letter does not reference the incident report.

16. On October 19, 2021, Respondents filed a General Admission of Liability, admitted for an average weekly wage of $100.00. (Ex. D).

17. Claimant began working for Employer in April 2021, at an initial pay rate of $21.00 per hour. After June 13, 2021, Claimant earned $27.50 per hour, and received a "shift

premium" of $2.50 per hour. Claimant also received overtime pay at the rate of $41.25 per hour, and a shift premium of $1.25, during this time. During the five full pay periods before his injury and after Claimant's raise to $27/50 per hour, (i.e., June 13, 2021 – August 21, 2021), Claimant worked an average of 95 hours per two-week period and earned an average of $1,451.35 per week, which included overtime pay and shift premiums. (Ex. B). The ALJ finds Claimant's average weekly wage at the time of injury was $1,451.35.

18. Claimant testified that he applied for and received unemployment benefits for approximately two months following his injury, ending in November 2021.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant suffered admitted injuries on August 24, 2021, and was under work restrictions through at least December 23, 2021. Notwithstanding that the Employer did not provide Claimant with a written offer of modified employment, Claimant returned to modified employment on August 31, 2021, when he performed online safety training. Accordingly, Claimant's right to TTD benefits terminated on August 31, 2021. However, upon termination of his employment on September 2, 2021, Claimant sustained actual wage loss due to his industrial injury and resulting disability. On and after September 2, 2021, Claimant remained under work restrictions that prevented him from resuming his pre-injury employment. Through at least December 23, 2021, Claimant was medically incapacitated with restrictions of bodily function that caused him to have work restrictions and impairment of his wage-earning capacity. His wage-earning capacity is thus impaired due to his industrial injury and resulting disability. No evidence was presented that Claimant has reached MMI or that his ATP has provided a written release to return to regular employment after September 2, 2021. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from August 25, 2021 to August 30, 2021, and beginning again on September 2, 2021.

Responsibility For Termination

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). "Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011).

Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for his termination. Employer's stated reason for terminating Claimant's employment was "due to no call no shows, poor communication with your manager and not completing assigned work."

No credible evidence was admitted that Employer had a specific "no call/no show" policy or that Claimant violated any such policy even if one existed. Claimant was assigned work restrictions on the morning August 25, 2021, which did not permit Claimant to perform his regular job duties, and Employer was aware of these restrictions. Nonetheless, Employer did not provide Claimant a written offer of modified employment. It was not until 4:33 p.m., on August 31, 2021, that Employer provided Claimant with access to the online training program. Thus, between August 25, 2021 and August 31, 2021, Employer did not assign Claimant work, and Claimant was under no obligation to contact Employer to advise he would be a "no show." Respondents have failed to establish by a preponderance of the evidence that Claimant violated any purported "no call/no show" policy.

Respondents have also failed to establish that Claimant volitionally failed to complete assigned work. Employer did not provide Claimant access to the online training until the late afternoon of August 31, 2021, and Claimant performed the work that evening. The evidence indicates that Employer's expectation was that Claimant would complete the online training during his normal shift, during the evenings. As found, Employer decided to terminate Claimant on September 1, 2021, before Claimant would have had the opportunity to continue with the online training that evening. Thus, Employer decided to terminate after Claimant had completed the only work Employer assigned following his injury, and before he had the opportunity to complete the training on a second day. Although Claimant did not perform the online training on September 1, 2021, this was after Employer's termination decision and was not the reason for termination. Other than the online training assignment on August 31, 2021, no credible evidence was presented

that Employer "assigned" any other work that Claimant could have completed prior Employer deciding to terminate him on September 1, 2021. Accordingly, the ALJ finds that Claimant did not volitionally fail to complete "assigned work," prior to his termination.

With respect to the alleged "poor communication," the evidence was insufficient to establish by a preponderance of the evidence that Claimant's alleged poor communication was volitional. Claimant immediately reported his injury to Employer. Although Mr. RB[Redacted] testified that he left voice and text messages for Claimant, the evidence was insufficient to establish the content of those messages, other than Mr. RB[Redacted] testifying that he left messages to "call me" and to return an incident report. Thus, the ALJ is unable to determine whether Mr. RB[Redacted]'s communications to Claimant informed Claimant of the apparent urgency Employer placed on returning the incident report or returning Mr. RB[Redacted]'s calls within any set period of time. Nor was Claimant informed his failure to immediately return the incident report would result in termination. Mr. RB[Redacted]'s testimony that Claimant refused to communicate with Employer from August 30, 2021 to September 1, 2021, is not persuasive. The only evidence that Employer attempted to communicate with Claimant during that timeframe was Mr. ST[Redacted] sending Claimant the online training at the end of the day on August 31, 2021. The ALJ finds that Respondents have failed to meet their burden of establishing that Claimant's communication issues with Mr. RB[Redacted], were volitional acts rendering the Claimant responsible for his termination.

Although Claimant was capable of the modified work that Employer assigned to him post-injury (i.e., the online training), Claimant was not "responsible" for his termination by Employer during his period of temporary disability. As such, a causal link between Claimant's industrial injury and his post-termination wage loss is established, and Claimant is entitled to temporary total disability benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, continuing until one of the criteria of § 8-42-105(3)(a)-(d), C.R.S, is met.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's average weekly wage at the time of injury was $1,451.35.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, 2020, until terminated by law is GRANTED. Insurer shall pay Claimant TTD benefit during the relevant time period, until terminated by law, subject to any applicable offsets.

2. Claimant's average weekly wage at the time of injury was $1,451.35

3. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the respondents have overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician on the issues of maximum medical improvement (MMI) and recommended medical treatment.

FINDINGS OF FACT

1. On November 30, 2018, the claimant was performing his normal job duties when he twisted while reaching for a hook and felt a pop and pain in his back. The claimant testified that the pain was immediate, sharp, and stabbing. The claimant reported this incident to the employer and was referred for medical treatment.

2. The claimant's authorized treating provider (ATP) for this claim is Dr. Daniel Smith. The claimant was first seen by Dr. Smith on November 30, 2018. On that date, the claimant reported left lower thoracic pain. Dr. Smith opined that the claimant's pain was muscular in nature. He placed the claimant under work restrictions that included only driving.

3. The claimant returned to Dr. Smith on December 7, 2018, and reported continuing thoracic back pain. Dr. Smith listed the claimant's diagnosis as thoracic back sprain. He referred the claimant to physical therapy and prescribed Tramadol. On December 21, 2018, the claimant was seen by Dr. Smith. On that date, Dr. Smith determined that the claimant could return to full duty. The claimant testified that Dr.Smith released him to full duty at that time at the request of the claimant. The claimant further testified that he asked to be cleared to return to work because he could not afford to be off of work.

4. The claimant returned to Dr. Smith on January 31, 2019. On that date, Dr. Smith noted that the claimant had "mostly thoracic pain", but was also reporting "some more low back discomfort with some radicular symptoms down legs". The claimant reported that physical therapy was helping and he was able to perform his work duties.

5. On February 27, 2019, the claimant was again seen by Dr. Smith. On that date, the claimant reported persistent pain that traveled down both legs, with numbness and cramping into his buttocks. Dr. Smith added the diagnosis of "low back pain with radicular component" and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

6. On March 11, 2019, a lumbar spine MRI was performed. The MRI showed multilevel spondylosis and stenosis; a mild broad disc bulge and mild thecal sac narrowing at the L1-L2 level; moderate disc space narrowing with a moderate asymmetric disc bulge at the L2-L3 level; and a mild disc bulge at the L4-L5 level.

7. On March 28, 2019, the claimant was seen by Dr. David Miller for consultation. Dr. Miller noted that the claimant had low back pain with bilateral radicular symptoms into his legs. Dr. Miller also noted that the lumbar spine MRI showed degenerative changes at all lumbar levels. Dr. Miller opined that surgery would not be beneficial to treat the claimant's condition. He also recommended that further physical therapy and injections would likewise not be beneficial. Subsequently, Dr. Smith referred the claimant to Dr. Wade Ceola for a surgical consultation.

8. On July 26, 2019, the claimant was seen by Dr. Ceola. At that time, the claimant reported persistent and significant back and leg pain. Dr. Ceola noted that the claimant had been through physical therapy without relief. Dr. Ceola noted the MRI results and opined that it was possible that the L4-L5 level was the pain generator. As a result, he recommended the claimant undergo injections to at that level. Dr. Ceola did not believe the claimant was a surgical candidate at that time.

9. In August and September 2019, Dr. Michael Campion administered bilateral L4-5 and L5-S1 facet injections. On September 4, 2019, the claimant was seen by Dr. Campion and reported that he did not experience any relief from the facet joint injections. Dr. Campion opined that it was possible that the claimant had bilateral L5 radiculopathy.

10. On October 24, 2019, the claimant was seen in Dr. Smith's practice by Andrew Henrichs, PA-C. At that time, the claimant reported that he could not continue working. As a result, PA Henrichs restricted the claimant from all work.

11. On November 8, 2019, the claimant returned to Dr. Ceola and reported that he had undergone injections, but the injections did not provide any relief. Dr. Ceola noted that the injections were not helpful from a diagnostic standpoint. On that date, Dr. Ceola referred the claimant to Dr. Kenneth Lewis for consideration of a spinal cord stimulator (SCS). Dr. Ceola also referenced the possibility of a future spinal fusion surgery.

12. On November 15, 2019, the respondents filed a General Admission of Liability (GAL).

13. On January 8, 2020, the claimant was evaluated by Dr. Kenneth Lewis for consideration for a SCS. Dr. Lewis opined that the claimant was not a candidate for SCS as he had symptoms of mechanical back pain.

14. On January 9, 2020, the claimant was seen by Dr. Smith. At that time, Dr. Smith noted that the claimant was not a candidate for a SCS. He opined that the claimant should obtain a second opinion from a surgeon.

15. On February 4, 2020, claimant was seen by Thomas Scruton, PA-C at Atlas Arch Neurosurgery. On that date, the claimant reported low back and extremity pain; right greater than left. PA Scruton opined that the claimant's pain was "multifactorial" and recommended diagnostic injections at the sacroiliac (SI) joint.

16. On March 2, 2020, Dr. Lewis performed the recommended SI joint injections. Subsequently, the claimant reported no improvement in his symptoms following the SI joint injections.

17. At the request of the respondents, Dr. Brian Castro performed a review of the claimant's medical records. In his March 29, 2020 report, Dr. Castro opined that on November 30, 2018, the claimant suffered a lifting sprain/strain injury. He also noted that the claimant's initial presentation was of lower thoracic/upper lumbar spine symptoms. It was not until later that the claimant began to report lower lumbar and hip symptoms. Dr. Castro further opined that the claimant's hip symptoms were not related to the November 30, 2018 work injury.

18. On May 7, 2020, the claimant returned to Dr. Ceola. At that time, Dr. Ceola noted that the claimant's pain generator had not been determined. Dr. Ceola recommended the claimant undergo a computed tomography (CT) scan and a psychological evaluation.

19. On May 19, 2020, a lumbar spine CT scan was performed. The CT scan showed mild to moderate loss of disc height and broad disc bulges at L1-L2; L2-L3; L3-L4; L4-L5; and L5-S1; and mild multilevel neural foraminal narrowing.

20. On June 11, 2020, the claimant was seen by Dr. Ceola and the results of the CT scan were discussed. In the medical record of that date, Dr. Ceola noted that the CT scan did not identify "surgically significant pathology". At that time, Dr. Ceola recommended the claimant undergo a discogram to determine if a surgical fusion would be appropriate.

21. On June 23, 2020, Dr. Giora Hahn performed a five level lumbar discogram. In the medical report, Dr. Hahn identified concordant discs at the L3-L4 and L5-S1 levels.

22. Following the discogram, Dr. Ceola recommended the claimant undergo surgery consisting of MIS TLIF[1] at both the L5-S1 and L3-L4 levels.

[1] Minimally invasive transforaminal lumbar interbody fusion.

23. On July 8, 2020, Dr. Castro issued a second report related to his further review of the claimant's medical records. Dr. Castro was specifically asked to state an opinion with regard to whether the recommended spinal fusion is reasonable, necessary and related to the claimant's November 30, 2018 work injury. In his report, Dr. Castro noted that the claimant has demonstrated "somewhat of a nonphysiologic presentation". In addition, Dr. Castro stated his opinion that a discogram is not an accurate assessment of pain, and "is known to be a very subjective test". Dr. Castro opined that the claimant suffered a thoracic sprain/strain injury, for which the claimant had reached maximum medical improvement (MMI). He also noted that all of the claimant's imaging studies show chronic degenerative changes. With regard to the recommended fusion surgery, Dr. Castro opined that the surgery is not related to the November 20, 2018 work injury. Based upon Dr. Castro's opinions, the respondents denied the requested lumbar fusion surgery.

24. On March 11, 2021, the parties appeared before ALJ Sidanycz. In an order dated March 30, 2021, ALJ Sidanycz found that the claimant failed to demonstrate, by a preponderance of the evidence, that the surgery recommended by Dr. Ceola was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 30, 2018 work injury.

25. On June 23, 2021, the claimant was seen by Dr. Davis Lorah for an impairment rating. Dr. Lorah assessed a whole person impairment rating of 15 percent. This rating was reached by combining a Table 53 impairment and additional impairment for range of motion. In the medical record of that date, Dr. Lorah identifies the claimant's date of MMI as May 17, 2021.

26. Subsequently, the claimant was seen by Dr. J.E. Dillon for a Division sponsored independent medical examination (DIME). In connection with the DIME, Dr. Dillon reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her DIME report, Dr. Dillon opined that the claimant was not at MMI. In support of this opinion, Dr. Dillon noted that the claimant "remains significantly symptomatic and would likely benefit from further active treatment." Dr. Dillon specifically recommended that the claimant pursue the spinal surgery recommended by Dr. Ceola. Dr. Dillon further opined that this procedure is indicated and warranted, as the claimant has failed extensive conservative care. Dr. Dillon also noted that prior to the work injury, the claimant was able to perform his physically demanding job duties, but now he is disabled as a result of his continuing symptomatology. In the DIME report, Dr. Dillon assessed a whole person permanent impairment rating of 22 percent.

27. The claimant testified that his current symptoms include constant and unbearable pain. The claimant wishes to pursue the fusion surgery recommended by Dr. Ceola.

28. Dr. Castro's deposition was taken on January 24, 2022 and is consistent with his written reports. Dr. Castro testified that he still does not believe the recommended surgery is reasonable, necessary, and causally related to the claimant's injury. More specifically, it is Dr. Castro's opinion that the claimant's pain generator has still not been identified. With regard to the results of the discogram, Dr. Castro opined that discograms are "very subjective". Dr. Castro does not believe that the risks of the recommended spinal fusion surgery outweigh the possible success. It is Dr. Castro's opinion that the surgery will likely diminish the claimant's function. Dr. Castro recommends that the claimant continue with physical therapy and medications as maintenance treatment.

29. The ALJ credits the medical records and the opinions of Dr. Dillon over the contrary opinions of Dr. Castro. The ALJ finds that the respondents have failed to demonstrate that it is highly probable that Dr. Dillon erred in reaching her conclusions as the DIME physician.

30. The ALJ recognizes that this is seemingly contrary to the March 2021 order regarding the same recommended surgery. However, as the ALJ explained at the outset of this hearing, this issue does not fall into an analysis of issue preclusion or *res judicata*. Previously, it was the claimant's burden, by a preponderance of the evidence, to demonstrate that the recommended medical treatment (the fusion surgery) was reasonable, necessary, and related to the work injury. In the current matter, it is the respondents' burden, by clear and convincing evidence, that the DIME physician's opinions are in error. While much of the evidence and facts presented at the two hearings were similar, the ALJ is able to reach a different conclusion at this time based upon the existence of a DIME opinion and the higher burden of proof.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the respondents have failed to overcome, by clear and convincing evidence, the opinion of the DIME physician on the issues of MMI and recommended medical treatment. The respondents have failed to establish anything other than a difference of opinion between medical providers. As found, the medical records and the opinions of Dr. Dillon are credible and persuasive.

ORDER

It is therefore ordered that the respondents have failed to overcome the DIME physician's opinions regarding MMI and recommended medical treatment.

Dated this 10th day of March 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Evidentiary Issues

   a. Admissibility of witness statements obtained by Employer.

   b. Admissibility of OSHA Reports.

II. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her left leg in the course and scope of her employment with the Employer on January 29, 2021.

III. Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to reasonably necessary medical benefits to cure and relieve her from the effects of the alleged January 29, 2021, work injury.

IV. Whether Claimant is entitled to an award of temporary total disability benefits from February 8, 2021, to February 26, 2021 and from March 1, 2021 to March 26, 2021.

V. If the claim is found compensable, whether Respondents have shown Claimant violated a known safety rule thereby resulting in a 50% reduction in benefits.

STIPULATIONS

1. In the event of a compensable claim, the parties stipulated as follows:

   a. Claimant's average weekly wage is $676.55

   b. [Employer redacted] Health Services, UC Health, and Banner Health Burn Center are the authorized treating providers.

   c. Temporary total disability benefits from February 8, 2021 through February 26, 2021 and March 1, 2021 through March 26, 2021.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

Claimant's Alleged Work Injury on January 29, 2021

1. On January 29, 2021, claimant worked at [Employer redacted], a meat processing plant, trimming tripe, and cutting honeycomb. Hrg. Tr. 44:6-10.

2. Claimant testified she had been asked to wash the tripe table prior to lunch. Hrg. Tr. 47:20-21; 48:7-8; 48:11-12. Claimant testified she used the red hose with 180-degree water to clean the table. Hrg. Tr. 49:11-13. Claimant reported that the hot water had gotten into her work boot (in part because she did not have protective gaiters on) and burned her left leg causing severe first and second-degree burns. Hrg. Tr. 47:21-25 – 48:1-4; 51:15-18.

3. The severity of the burns is shown in Claimant's Exhibit 1.

Claimant Failed to Report the Work Injury for Nearly Seven Hours after It Occurred

4. On January 29, 2021, at about 6:30 pm, Claimant presented to the [Employer Redacted] Health Clinic and was evaluated by David Concha, EMT. Resp. Ex. E, p. 100. Claimant informed Mr. Concha the alleged injury occurred at 11:30 am earlier in the day. *Id.* Claimant told Mr. Concha she noticed the significance of the injury after returning home from the hospital with her mother and after changing her clothes. *Id*. Claimant reported she left work without reporting the injury because it was not painful. *Id*. Mr. Concha observed blistering with large amounts of swelling and yellow coloration and displayed limited range of motion at the ankle due to the severity of the blistering. *Id*.

5. A [Employer redacted] employment record noted Claimant reported an injury almost seven hours after it had occurred which is against company policy. Resp. Ex. E, p. 133.

6. Mr. Concha referred Claimant to the emergency room for further care. *Id*.

Claimant was Diagnosed with first and Second Degree Burns over her Left Leg and Foot

7. On January 29, 2021, Claimant was evaluated at UC Health Greeley Emergency and Surgery Center. Physician assistant Julie Menefee observed two areas that were likely "second-degree burns which were blistered over the crease of the ankle. Other areas are likely first-degree burns." Resp. Ex. B, p. 26. The extent of the burns is also demonstrated in the photographs submitted by Claimant in Exhibit 1. As a result, Claimant had significant and severe first and second degree burns which would have most likely caused immediate pain.

8. Ms. Menefee noted the "incident occurred today at 11:30 while working at [Employer redacted]. She did not notice the burn until she took her boot off at 5:30." *Id*. at 27. This history Claimant provided of not noticing the burn until 5:30 p.m. was directly inconsistent with her testimony at hearing in which she stated that she started to get undressed to take a shower about a half hour after getting home earlier in the day in which she noticed her skin was wrinkly.

9. Claimant was referred to Northern Colorado Burn Center for additional care after bacitracin was applied to the wounds. *Id*. at 22-23. On February 1, 2021, Claimant presented to physician's assistant Eric Hofmann reporting a burn injury to her left ankle and top of her foot. Resp. Ex. A, p. 2. Mr. Hofmann noted the blisters had not yet popped and documented Claimant's report that she was unable able to wear shoes due to the swelling and the pain. Claimant described the pain as "constant, burning, and stabbing." *Id*. at 3. Mr. Hofmann diagnosed Claimant with first- and second-degree burns. *Id*. at 5.

Claimant Admitted She Did Not
Immediately Report the Incident to her Employer

10. At hearing, Claimant testified her team lead, [Redacted, hereinafter PR] asked her to clean the tripe table prior to lunch at around 11:00 am. Hrg. Tr. 48:7-8. Claimant testified she used one hose to clean the table and floor which was the 180-degree hot water hose. Hrg. Tr. 74:15-19. Claimant testified she felt moisture in her boot but did not think to report the incident to her employer. Hrg. 51:2-8.

Video Surveillance Shows Claimant
Wearing Gaiters and Apron Over Her Clothing

11. Claimant testified she had no difficulty walking around after the incident and did not notice any burns because she did not change her leggings before leaving her shift early. Hrg. Tr. 50:22-23; 53:2-5. This testimony lacks credibility since she had suffered severe first and second-degree burns and it most likely would have been painful when the incident occurred.

12. Claimant testified at the time of the incident she was wearing her apron and work boots, but no gaiters. Hrg. Tr. 75:13; 45:16-23. Claimant told Dr. Smith, at UC Health she was not wearing gaiters or any other type of protective equipment which is usually used when handling the red hose. Resp. Ex. A, p. 12. Clamant told Dr. Smith that she did not have protective gaiters on because otherwise her contention about being burned at work would not make sense (since the gaiters would stop the hot water from going into her boot).

13. Video surveillance showed Claimant walking down the hallway in an apron and gaiters after the alleged work injury. Resp. Ex. H & I. As a result, her statement to [Employer redacted] and Dr. Smith that she did not have protective gaiters on at the time of the alleged incident lacks credibility.

14. When confronted with the fact that she had gaiters on right after the reported injury occurred, Claimant provided a different explanation that did not make sense. Claimant testified after she cleaned the table, she went to put on gaiters before going to ask her supervisor for permission to leave work early due to her mother's medical condition. Claimant testified she put on the gaiters after she returned from lunch in case her supervisor did not allow her to leave work early. Hrg. Tr. 71:9-13.

15. Again, Claimant's explanation does not make sense - that she was going to ask her supervisor to leave work but yet decided to put on gaiters for the first time that day minutes before she made such a request to the supervisor. Claimant had no reason to put on the gaiters at lunch as she was asking her supervisor to go home. As a

result, the evidence shows that Claimant was wearing gaiters at the time of the alleged work injury.

Following the Alleged Incident, Claimant Requested Permission to Leave Work Early

16. Claimant testified she requested permission from her supervisor to leave work early to tend to her mother who was experiencing medical problems and had to go to the doctor. Hrg. Tr. 50:12-17. Claimant testified she left [Employer redacted] around 12:15 pm and got home around 12:40 pm to 1:00 pm. Hrg. Tr. 50:10; 51:9-12. Claimant subsequently testified she only lived about a couple of minutes away from work. Hrg. Tr. 60:21.

17. Ms. [Redacted, hereinafter KP] was Claimant's former supervisor at [Employer redacted]. Ms. KP[Redacted] no longer works for [Employer redacted]. Ms. KP[Redacted] testified she talked with Claimant for about 20 minutes to calm her down (because of her mother's medical issues) before she allowed Claimant to leave. Ms. KP[Redacted] recalled it was around 12:20 to 12:30 when Claimant left. Hrg. Tr. 90:1-6; 93:1-4.

18. Ms. KP[Redacted] testified Claimant's clothes were not noticeably wet. Hrg. Tr. 92:14. Ms. KP[Redacted] testified Claimant wore light clothing which would have made it obvious if she was wet. Hrg. Tr. 95:10-14.

19. Ms. KP[Redacted] testified at no time during her conversation with Claimant, did she report she had hot water in her boot or had been burned at work. Hrg. Tr. 93:19-20. If Claimant had actually suffered severe first and second degree burns at work, she would have most likely felt pain immediately and mentioned it – or formally reported it - to Ms. KP[Redacted].

20. The ALJ finds Ms. KP[Redacted]' testimony to be credible.

Claimant Seen Walking Normally and Wearing Gaiters Prior to Leaving Work

21. On March 10, 2021, Dr. Smith reviewed video from [Employer redacted]. The video showed footage of Claimant waking down a hallway after the alleged incident wearing what appeared to be gaiters. Resp. Ex. A, p. 21. Dr. Smith noted that at the initial visit, Claimant was adamant she was not wearing gaiters when the injury occurred.

22. Claimant agreed she put on regular shoes before leaving the facility. Hrg. Tr. 77:19-24.

Claimant Delayed Returning to Work upon Discovering the Burn and Provided Further Inconsistent Statements about the Alleged Injury

23. Claimant testified that once home, she undressed to shower and noticed red bubbles on her shin. Hrg. Tr. 51:15-21. Claimant testified she thought about how she cleaned the table and felt water in her boot and went back to her job to report the injury.

24. Claimant initially testified she believed she returned to [Employer redacted] about an hour and half or two hours after she arrived home. Hrg. Tr. 52:7-8; 63:14-18.

25. Claimant testified she returned to work around 2:30 pm to report the injury. Hrg. Tr. 63:19-21. Claimant later testified it was maybe past 3:00 when she returned to work because different nurses were on shift. Hrg. Tr. 77:8-13.

26. Claimant testified she was in no hurry to rush back for care because she did not think the burns were that severe. Hrg. Tr. 66:9-14.

27. Claimant also testified she did not go to the hospital to see her mother. Hrg. Tr. 65:7-9. Instead, Claimant went home to check on her sister and remained at home for a few hours before returning to [Employer redacted]. Hrg. Tr. 63:17-18.

28. Claimant ultimately conceded it was around 6:30 pm. when she returned to [Employer redacted]'s occupational health facility. Hrg. Tr. 80:17-21.

29. Claimant's contention about when she noticed the severe first and second-degree burns is inconsistent. She told the medical provider detailed above that she first noticed the burn at 5:30 p.m. when she finally took her boots off after going to the hospital, etc. She testified at hearing that she took got undressed to take a shower shortly after getting home and noticed the burn which would have been around 1:00 p.m. to 1:30 p.m.

30. In any case, Claimant's story lacks credibility and was inconsistent. She provided numerous different and inconsistent timelines for when she discovered the burns for the first time.

Claimant's Authorized Treating Physician Found the Burns Were Not Work-Related

31. Dr. Smith opined in all medical probability that her alleged injury did not occur at work. *Id*. Specifically, Dr. Smith stated as follows: "it is very doubtful with the type of injury she sustained that she would not have immediately experienced significant pain that would have affected gait, behavior and prompted a report to someone that she was injured…if [Claimant] did not injure herself at work then she most likely injured herself at home in the several hours she was absent from work. Home accidents can occur such as with boiling or near boiling water that cause similar injures to those she sustained and therefore could be a plausible explanation for how she sustained her injury outside of work." *Id*.

32. Dr. Smith also noted that Claimant mispresented the fact that she was wearing protective gaiters at the time which would have protected her from the boiling water entering her boot. The ALJ finds Dr. Smith's opinions to be credible and persuasive.

Claimant is Witnessed Using the Blue Hose

33. Team lead, PF[Redacted] testified on January 29, 2021, he had asked Claimant to clean the tripe table before lunch. Hrg. Tr. 99:13-20. Mr. PF[Redacted] testified he personally observed Claimant using the blue hose to wash the floor which contains 120-degree water which would not have caused a burn. Hrg. Tr. 99:23. The ALJ finds Mr. PF[Redacted]' testimony to be credible and persuasive.

34. Mr. PF[Redacted]' observations are crucial because Claimant admitted that she used only one hose (the red hose) for the cleaning job. As a result, PF[Redacted]' testimony is directly inconsistent with Claimant's allegations about her using the red hose and suffering a burn injury at work.

Both Ms. KP[Redacted] and Mr. T[Redacted] Testified it was Procedure to Use the Blue Hose Prior to Lunch Breaks

35. Ms. KP[Redacted] testified it was standard procedure for employees to use the blue hose, which is 120 degrees, when cleaning tables and the floor prior to lunch. The red hose is only used during shift changes to prevent contamination. Hrg. Tr. 87:8-11.

36. Safety manager, Neil T[Redacted] also testified regarding the cleaning procedures at [Employer redacted]. Mr. T[Redacted] testified that prior to lunch, the tables are cleaned with the blue hose and prior to shift changes, the tables, and floors are cleaned with the red hose. Hrg. Tr. 111:6-10; 111:19-23.

37. Mr. T[Redacted] testified [Employer redacted] sought to limit the time employees used the 180-degree red hose because it increased the temperature index of the floor. Hrg. Tr. 112:2-5.

38. As a result, Claimant's contention that she was using a red hose and it caused a burn injury at work is not credible.

[Employer redacted] Representatives Testified Claimant Received Training on Using the Red Hose

39. Ms. KP[Redacted] further testified Claimant knew that any time the red hose was in use, the requisite proper protective equipment would need to be used. Hrg. Tr. 85:19-24. Ms. KP[Redacted] testified Claimant was provided this training when she was hired.

40. Mr. Fernandez testified that if the red hose is used, a yellow rain suit needed to be worn and is obtained from the supervisor or himself. Hrg. Tr. 102:4-5.

41. Claimant testified she used the red hose because it was faster and that is what others would do. Hrg. 48:14-17; 49:11-13.

42. Mr. T[Redacted] further testified Claimant had acknowledged she had received the requisite 180-degree testing and failure to wear the required yellow rain suit constituted a major safety violation. Hrg. Tr. 110:12.

Records of the Employer

43. Based on the statements of Counsel, the appearance of the documents and the contents of the documents, the witness statements and OSHA Reports were

maintained by Employer and therefore records of the employer and admitted into evidence.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

I. Evidentiary Issues

a. Whether the witness statements submitted by Employer are admissible.

Witness statements and investigative reports maintained by the employer – hearsay – are admissible as "records of the employer" pursuant to 8-43-210.[1] Once a witness statement or investigative report is admitted into evidence - additional challenges to its reliability go to its weight. Thus, strong cross-examination, presentation of opposing evidence, and argument are the appropriate ways to attack questionable but admissible evidence.

1. Hearsay - in the form of medical records, physician reports, vocational reports, and records of the employer - is admissible under 8-43-210.

The admissibility of evidence in Colorado workers' compensation hearings is governed by Section 8-43-210 of the Workers' Compensation Act. It states in pertinent part:

> The Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; ***except that medical and hospital records, physicians' reports, vocational reports, and records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case*** (emphasis added).

Section 8-43-210.

One of the few Colorado Supreme Court cases to analyze the evidentiary rules applicable in workers' compensation cases is *Department of Labor and Employment v. Esser,* 30 P.3d 189 (Colo. 2001). In *Esser*, the Court wrestled with the conflict between the express language of Section 8-43-210 and 8-41-301. Section 8-43-210 allows medical records and physician reports - hearsay - to be admitted into evidence without being subject to the hearsay rules contained in the Colorado Rules of Evidence. That said, 8-41-301 provides that a Claimant must prove a claim for mental impairment by the oral testimony of a licensed physician or psychologist. The conflict exists because although 8-43-210 allows the admission of Claimant's medical records and reports into evidence to establish her claim for benefits, the lower court's interpretation of Section 8-41-301 required the claimant to have the psychiatrist or psychologist testify at hearing or by deposition.

[1] The analysis starts with the broad admissibility of medical records and physician reports under the same statute, 8-43-210.

In analyzing the evidentiary matter, the Court resorted to certain basic tools of statutory construction. The tools included determining the legislative intent of the act. The court, in determining the legislative intent, looked at:

i. the Act's policy declaration, and
ii. the plain and ordinary meaning of the words the General Assembly chose to use in 8-43-210.

Thus, the *Esser* court set forth the express purpose of the Act:

> It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" *be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation,* recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike.

Esser at 196.

The Court then went to Section 8-43-210, which contains the basic evidentiary provisions appliable to workers' compensation claims in Colorado.

The statute provides in pertinent part:

> [T]he Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; ***except that medical and hospital records, physicians' reports, vocational reports, and records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case*** (emphasis added).

In analyzing the evidentiary provisions of the Act, the Court noted that:

> The Act obviously includes relaxed evidentiary standards, see § 8–43–210, in pursuit of its purpose of cost-effective, timely delivery of workers' compensation benefits to claimants.

Esser at 196.

The relaxed evidentiary standards referenced by the Court pertain to the admissibility of medical records, physician reports, vocational reports, and "***records of the employer***" (emphasis added). As a result, the relaxed standards in Section 8-43-210 allows certain enumerated documents to be admitted into evidence without formal identification — foundation. In other words, documents containing hearsay, which might be excluded under the Colorado Rules of Evidence, are admissible as substantive

evidence for the truth of the matter asserted in a workers' compensation case. And as stated in the *Esser* opinion, the remedy to rebut the hearsay in the medical report is for the opposing party to obtain an order compelling the licensed professional to appear for cross-examination at the hearing or at a deposition, under Colo. Rev. Stat. §§ 8-43-207(1)(a), 8-43-207.5(2), 8-43-212, 8-43-315 (2000) *Esser* at 191. See also CRE 806.

2. Although there are no Colorado cases defining "records of the employer," the term "record" has been defined by the Colorado Supreme Court in other matters to mean "a documentary account of past events."

There is not a Colorado Court of Appeals or Supreme Court case that has determined whether investigative reports or witness statements are "records of the employer" and admissible under 8-43-210. The Colorado Supreme Court has, however, had a chance to determine what constitutes "a record." In *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361 (Colo. 2001) the Court embarked on defining "a record" since the term was not defined in the federal Pilot Records Improvement Act. To define "a record" the Court went directly to Webster's Dictionary and Black's Law dictionary. The Court cited the definition of a record set forth in Webster's and Black's. The Court stated:

> Generally, "a record is piece of writing that recounts or attests to something . . ." *Webster's Third New International Dictionary: Unabridged* 1898 (1993). *Black's Law Dictionary* 1279 (7th ed. 1999) defines a record as a documentary account of past events designed to memorialize those events.

Sky Fun at 367.

It is typical for witness statements and investigative reports to document past events. As a result, both witness statements and investigative reports fit within the plain and clear meaning of a record as stated in Webster's and Black's dictionary. Thus, when kept by the employer, the witness statements and investigative reports are records of the employer.

3. The statute does not restrict the admissibility of medical records, medical reports, and records of the employer – hearsay – just because they were prepared in anticipation of litigation.

In *Ackerman v. Hilton's Mechanical Men, Inc*., 914 P.2d 524 (Colo. App. 1996), the respondents submitted a letter written by a physician who evaluated the claimant's medical records and concluded the claimant was intoxicated at the time of the accident and that his intoxication most likely caused the accident. The ALJ credited the physician's opinion as stated in the letter and ordered the claimant's compensation to be reduced by 50%. *Id*. The claimant unsuccessfully argued that for evidence to be admitted pursuant to Section 8-43-210 without formal identification - foundation - such evidence must be inherently trustworthy, accurate, and reliable. Claimant argued that:

> [T]he only evidence which is inherently trustworthy and reliable in workers' compensation proceedings, and thus the

> only evidence that §8–43–210 is intended to include, consists of reports and records prepared to assist in the history, treatment, examination, diagnosis, or prognosis of claimants and their injuries, ***and not medical records which were prepared for litigation purposes*** (emphasis added).

Ackerman at 526

The court held that even though the report was prepared either in anticipation of litigation, or specifically for litigation, the statute did not provide any limiting language that prevented the report from being admitted into evidence. The court stated:

> Contrary to claimant's arguments, the General Assembly created no exceptions which made admissibility of a physician's report dependent upon either the type of physician's report being offered, i.e., treating or consulting, or the reason for which the report was written. And, since the General Assembly has not explicitly created such an exception, we have no authority to infer the existence of one.

Ackerman at 527.

In support of its conclusion, the court went through the legislative history of the statute since its inception in 1919. The court noted that in 1923, the statute was amended to limit the admissibility of physicians' reports to reports created by "attending or examining physicians." As a result, if a physician reviewed the claimant's medical records and rendered an opinion in a report, without examining the Claimant as done in *Ackerman*, the report would not be admissible. In 1983, however, the statute was repealed and reenacted. In the reenactment, the General Assembly deleted any reference to reports of specific classes of physicians, such as an "attending" or "examining." As a result, "physicians' reports" in general were to be admitted.[2] The court did not, however, analyze whether a physician's report would also qualify as a medical record. *Ackerman* therefore did not address the issue as to whether records encompass reports.

[2] In *Ackerman,* the court held that there is a distinction between "records" and "reports." The respondents in Ackerman sought the admission of a physician's letter that contained the physician's opinion about the claimant's blood/alcohol level at the time of a work-related accident. The court held that the term "report" refers to a "formal statement or account of the results of an investigation." *Ackerman*, 914 P.2d at 526. The court found that the physician's opinions, which were based on the results of toxicology tests, constituted a physician's "report," and therefore, held it was unnecessary to determine whether the physician's letter also constituted a "medical record." Thus, one could argue that a report that includes the results of an investigation is not a record. But that is a very persuasive argument because *Ackerman* specifically said they did not address whether the physician report was also a medical record. (*Ackerman* at 526.) ("We conclude that the letters at issue here are "physicians' reports" within the meaning of the statute; hence we need not determine whether the materials also qualify as "medical records.'")

4. The relaxed rule of evidence in Section 8-43-210 eliminates the need for medical records, physician reports, and records of the employer to be subject to the foundational requirements of the business record exception to the hearsay rule in CRE 803(6).

Medical records and physician reports are submitted and admitted into evidence under 8-43-210 in almost every workers' compensation hearing. The medical records and physician reports routinely consist of independent medical examinations that are undertaken and performed solely in anticipation of litigation. Despite being prepared solely in anticipation of litigation, and being hearsay, they are no doubt admissible pursuant to 8-43-210. *See Ackerman*, *supra.* (Letter – report - written by physician in anticipation of litigation is admissible under 8-43-210.).

Moreover, IMEs, are hearsay. *See Klein v. State Farm Mut. Auto. Ins. Co*., 948 P.2d 43, 50 (Colo. App. 1997) (IME reports are hearsay.) Plus, IME reports are hard to qualify as a business record under 803(6).[3]

5. A self-serving letter written by the employer is admissible as a record of the employer to establish the basis for Claimant's termination.

A letter written by an employer setting forth the basis for the claimant's termination – hearsay - is considered a record of the employer and admissible. *Churchill v. Sears, Roebuck & Co*., 720 P.2d 171. (Colo. App. 1986). In *Churchill*, the employer wrote a letter saying the claimant was terminated for lack of office skills, lack of interest in improving, absenteeism, and poor judgment. At hearing, the employer submitted the letter as substantive evidence of the basis for Claimant's termination. Claimant objected to the letter being admitted because she was not afforded an opportunity to cross examine its author. She also disputed the contents of the letter. Despite her objection, the court determined the letter was admissible under the statute as a "record of the employer." As a result, the *Churchill* court admitted the hearsay evidence based on the plain language of Section 8-43-210.

[3] IMEs performed in anticipation of litigation are admissible under 8-43-210 and not admissible under CRE 803(6) as a business record. There is not a Colorado case on point that specifically says an IME is not a business record. But there are several cases from other jurisdictions addressing the issue under evidentiary rules like Colorado's CRE 803(6). In *People v. Huyser*, 221 Mich App 293 (1997), the Michigan Court of Appeals concluded that the trial court erred by allowing the State to use, in its prosecution, an expert witness report of the doctor it [hired] to examine the victim of a sex crime. Because the report was prepared for the purpose of litigation, the Court believed it lacked trustworthiness of a record generated exclusively for business purposes. *Id.* Other courts faced with the same issue, such as the Supreme Court of Main in *State v. Tomails*, 736 A.2d 1047 (Me. 1999), reached the same conclusion, holding forensic expert reports are the antitheses of the business records addressed by the Maine version of Rule 803(6) and the fact that they are prepared in anticipation of litigation is a common reason for finding that they lack trustworthiness. Similarly, in *McElroy v. Perry*, 753 So.2d 121 (2000), the Florida Court of Appeal's reached the same conclusion. Thus, Defendants' insurance medical exams and reports (IMEs) and other expert reports are not admissible under the business record exception. *Id*.

6. An investigation into the possible cause of an accident, leading to a statement from a co-worker in an email — hearsay — is admissible as a record of the employer.

In *McIlravy v. Harpel Oil Co*. W.C. No. 4-756-089, the claimant alleged the ALJ based his conclusion that there was no toxic exposure to diesel fuel on improperly admitted hearsay – an email from a coworker. The claimant objected to Exhibit O, an email from an employee to the employer stating that he talked to the decedent one hour before he got back into town on April 2nd and that the decedent said nothing to him about being exposed to diesel fuel. An employer representative testified that when the claimant informed her that the decedent had been exposed to diesel fuel, she sent out a general email to all employees asking if anybody knew about the incident. The employer representative testified that she kept that information in the employer's records because it was part of her job duty as Director of Transportation to keep track of spills. The ALJ allowed the Exhibit, finding it to be an employer's record. On appeal, the claimant argued that the email is not a record of the employer but an investigative report, and that without this evidence the ALJ could not otherwise reasonably conclude that a diesel exposure had not occurred. The panel perceived no reversible error. The panel based its opinion on Section 8-43-210, which it classified as an exception to the general rule that hearsay is not admissible and found the email to be a record of the employer. The Panel concluded that "We are not persuaded that the ALJ was mistaken in his determination that the documents in this regard were employer records." *Id*.

7. Section 8-43-210 provides each party ample time to rebut any statements contained in the employer witness statements or investigative reports.

Section 8-43-210 requires the employer to exchange with claimant each employment record they intend to introduce as evidence at the hearing at least twenty days before the hearing. The statute provides:

> All relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date.

This mechanism and due process safeguard of providing the records at least 20 days before the hearing allows the claimant to prepare to rebut the information in the records of the employer. As a result, if the claimant wants to rebut a witness statement or investigative report, the claimant can rebut the evidence at the hearing. The claimant can rebut the evidence by testifying at the hearing.[4] The claimant can also rebut the evidence by subpoenaing to the hearing the witness who provided the statement. Plus, the claimant can also subpoena any other witness with relevant information to rebut the records of the employer. *Esser* at 197. (A party may obtain an order compelling a

[4] *See Walker v. Director of Insurance*, Mo. Admin. Hrg. Comm., No. 05-1585, December 20, 2006), 2006 WL 4007572. (Ability of a party to testify and rebut hearsay statements in letters admitted at hearing, which were hearsay, provides "ample due process protection" in non-criminal matters.)

witness to appear for cross-examination at the hearing or deposition pursuant to sections 8-43-207(1)(a), 8-43-207.5(2),8-43-212, and 8-43-315.)

8. CRE 806 acknowledges that some hearsay will be admissible, and upon its admission, sets forth how to attack, or support, the credibility of the out of court declarant / statement.

Colorado Rule of Evidence 806 specifically addresses the methods by which a party may attack or support the credibility of an out of court statement. In other words, CRE 806 recognizes that hearsay evidence may be admitted under certain circumstances, and when it is admitted, sets forth how each party may either attack or support the credibility of the declarant – who is absent and cannot be cross examined. CRE 806 allows each party to attack or support the witnesses statement as if the witness had testified.

CRE 806 provides in pertinent part:

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

As a result, CRE 806, through other witnesses, lets you cross examine the declarant. For example, another witness can be questioned about a conflicting statement the declarant allegedly made to someone else. This occurred in *United States v. Bernal*, 994 F.2d 1518 (1st Cir. 1989). In *Bernal*, a co-conspirator's hearsay declaration was received into evidence against the defendant.[5] The defense lawyer impeached that declarant by eliciting, on cross-examination of a prosecution witness, that this same co-conspirator (the hearsay declarant) had given quite a different version which exculpated the defendant from guilt. Such evidence is received not as substantive evidence, but as non-substantive impeachment evidence to be considered by the fact-finder in determining the hearsay declarant's credibility.[6]

The rationale behind Rule 806 is sufficiently stated by the Advisory Committee's Note in the Colorado Rules of Evidence: "this rule recognizes that a hearsay declarant should be, so far as possible, subject to impeachment and rehabilitation as if he or she had testified. Evidence may thus be offered to show the declarant's bias, character for truthfulness, felony convictions, consistency [and inconsistency], and the like."

Therefore, if an employment record, in the form of a witness statement, is admitted into evidence pursuant to CRS 8-43-210, then another witness with personal knowledge should be able to testify as to any inconsistencies that

[5] See Anthony M. Brannon, Successful Shadowboxing: The Art of Impeaching Hearsay Declarants, 13 Campbell L.Rev. 157 (1991).

[6] *Id.* at 175, 176.

were made by the hearsay declarant. For example, if a witness statement is admitted into evidence which indicates that the hearsay declarant did not see the claimant injure himself at work while lifting a cinder block, another witness on the stand, maybe a co-worker of the hearsay declarant, can testify that he heard the hearsay declarant say while they were at lunch that he saw Claimant injure his back while lifting a cinder block at work.

CRE 806 also provides that the party against whom the hearsay statement has been admitted may call the hearsay declarant as a witness, and cross examine him as to the statement. The ability to call the hearsay declarant, or any other witness to refute the hearsay statement, is aided by the requirement of 8-43-210, which requires all relevant employer records, such as a witness statement, to be exchanged with all parties at least twenty days before the hearing date. Thus, 8-43-210 dovetails with, and is congruent with, CRE 806. In other words, 8-43-210 allows the witness statement into evidence and CRE 806 allows the party against whom the statement is offered to test the veracity of the statement through examination of other witnesses, or cross-examination of the declarant. In addition, the party against whom the hearsay statement is offered, can also argue to the ALJ, the limited weight to give the hearsay statement because of possible bias, inconsistency with other evidence, and the fact that the proponent of the statement did not produce the witness at the hearing and subject the hearsay declarant to provide the statement under oath – and be subject to direct cross-examination.

9. The ALJ does not have to credit or find persuasive an investigative report or witness statement.

The ALJ does not have to credit records of the employer that are admitted into evidence. *Jarnagin v. Busby, Inc.,* 867 P.2d 63, 66 (Colo. App. 1993)(the credibility of witnesses and the sufficiency, probative effect, and weight of the evidence are all within the province of the trial court); *Absolute Emp. Services, Inc. v. Industrial Claim Appeals Off.,* 997 P.2d 1229, 1234 (Colo. App. 1999)("Although there may be some evidence in the record from which the [trier of fact] could have drawn [a particular] inference ..., [the trier of fact] certainly was not compelled to find this evidence persuasive....") *Littlefield v. Bamberger*, 32 P.3d 615, 619 (Colo. App. 2001).

As a result, if a party submits a witness statement into evidence, but does not produce the witness to testify, the ALJ can determine the weight to give the witness statement under those circumstances. For example, the employer might submit a witness statement from a coworker that says the claimant told him he hurt his back at home and not at work. But if the coworker is not brought to testify in person – the judge may decide to not credit the hearsay statement.[7] But, on the other hand, if the employer also produces an emergency room report from the week before the alleged

[7] The mere maintenance of hearsay documents in a personnel file does not overcome the inherent reliability problem with the evidence. *See Lynch v. City of Philadelphia,* 87 A.3d 398 (Pa. Commw. Ct. 2014)

work accident, which says the claimant said he hurt his back at home, the ALJ might credit the witness statement.

Admissibility and Weight Given to Witness Statements

Section 8-43-210 governs the admissibility of certain hearsay in workers' compensation proceedings, but not the weight to be given to that hearsay. The clear meaning of the statute does not limit the type of employment records that are admissible. Moreover, any attempt to limit the admissibility of certain employment records based on factors set forth in the exception to the hearsay rule - 803(6) – would nullify the plain language of Section 8-43-210. As a result, once an investigative report or witness statement is admitted into evidence, additional challenges to its reliability go to its weight. Thus, strong cross-examination, presentation of opposing evidence, and argument are the appropriate ways to attack questionable but admissible evidence.

In this case, the ALJ has admitted the witness statements into evidence and reviewed them since they are records of the employer but has not credited them or given them any weight. Some are in Spanish and were not translated. Plus, some statements are illegible. Moreover, some of the witness statements contain double hearsay. Except for Mr. T[Redacted], Respondents did not produce any of the witnesses who wrote the statements to testify. Therefore, they were not subject to cross-examination at the hearing. As a result, the ALJ has not credited the witness statements and has not given them any weight.

b. Admissibility and Weight Given to OSHA Reports

In this matter, the same analysis applies to the OSHA records. The OSHA records were received and maintained by Employer and therefore became records of the employer. The OSHA reports were thus received into evidence. That said, the findings of the OSHA investigation are disputed and are being litigated. Therefore, based on the disputed findings contained in the OSHA reports, the ALJ has not credited the information contained in the OSHA reports and has not given them any weight.

I. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her left leg in the course and scope of her employment with the Employer on January 29, 2021.

For a claim to be compensable, the claimant must prove that: (1) the injury arose out of the claimant's employment, and (2) that the injury was in the course of the claimant's employment. C.R.S. §8-41-301(1)(b). The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). It is claimant's burden to prove by a preponderance of the evidence that she was injured in the course

and scope of employment. A preponderance of the evidence is that which leads the tier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Claimant must also prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999). Further, while a pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment, when the claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

Claimant testified at hearing that on January 29, 2021, she was cleaning the tripe table using the 180-degree hot water red hose, when she felt warm water trickle off her apron into her work boot and get her sock wet. Claimant testified she cleaned the table prior to the lunch at around 11:30 am and only used one hose (the red hose only) to clean the table and floor. Claimant also alleged repeatedly that she did have protective gaiters on that would have stopped the water from getting into her boot.

Claimant testified she did not think to report the incident because she felt no pain. Multiple witnesses credibly testified Claimant did not mention any incident prior to requesting permission to leave work early at around 12:15 pm.

In light of the photographs admitted as Claimant's Exhibit 1, this testimony lacks credibility. If Claimant had suffered the severe first and second degree burns at work as demonstrated by the photographs, she would have most likely experienced significant pain, had trouble walking, and notified the employer immediately. Dr. Smith credibly confirmed this fact in a report submitted into evidence at the hearing.

Video surveillance shows Claimant walking the [Employer redacted] corridors wearing a long apron and gaiters just minutes after the alleged work injury. Claimant is seen walking with a normal gait and no pain. Claimant told [Employer redacted] and Dr. Smith she had not being wearing gaiters at the time of the incident (because otherwise her contention about how the injury occurred would not make sense as the water would not have entered her boot).

When confronted with this fact at hearing, Claimant incredibly testified that she put on the gaiters right after cleaning the table, but before talking to Ms. KP[Redacted] to request the rest of the afternoon off due to a family emergency. Claimant would have had no reason to put on the gaiters at lunch if she was requesting to go home. Moreover, her foot was allegedly already wet so the story about putting protective gaiters on at lunch makes no sense. It is clear from the surveillance that Claimant had the gaiters on after the alleged injury which would have protected her from water getting into her boots or a burn occurring.

Claimant's hearing testimony regarding her timing of the discovery of the burns and return to [Employer redacted] to report said burns also conflicts with the history documented in the medical reports.

She told a doctor initially that she did not notice any burns until taking off her boots for the first time at 5:30. However, she testified at hearing that she took a shower at around 1:00 p.m. and noticed the burns and was back to report the injury at [Employer redacted] around 2:30 to 3:00.

Claimant eventually conceded there was about a seven-hour gap between when she alleged the injury occurred at 11:30 am and when she went back to [Employer redacted] to report the incident at 6:30 pm. Claimant testified she was in "no rush" to report the incident because she did not think the burns were severe. But the photographs demonstrate the severity of the burns.

Mr. Fernandez credibly testified he witnessed Claimant using the blue hose. This testimony aligns with Mr. T[Redacted]'s and Ms. KP[Redacted]' testimony that it was customary and procedure to use the blue hose to rinse off the table and floors before taking a lunch break. Claimant testified she did only use one hose when washing the table and floor. As a result, Claimant's contention further lacks credibility. If Claimant was using the blue hose, she would not have burned herself at work.

Dr. Smith noted in all medical probability that Claimant did not sustain an injury at work. Dr. Smith credibly documented that with the first and second degree burns Claimant sustained, it would be very doubtful Claimant would have not experienced immediate pain that affected her gait and behavior to prompt her to immediately report the injury. Dr. Smith also noted that claimant had lied to her about whether she was wearing gaiters.

Dr. Smith credibly noted Claimant likely injured herself at home in the several hours she was absent from work.

Claimant's story simply lacks credibility and was inconsistent. If she had suffered severe first and second-degree burns, she would have most likely noticed them immediately and would not have waited seven hours to go back to [Employer redacted] to report the alleged injury and seek medical treatment.

As found, the totality of the evidence presented persuades the ALJ that Claimant failed to prove, by a preponderance of the evidence, that she sustained a compensable injury on January 29, 2021.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for Workers' Compensation benefits is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 11, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-800-001

ISSUE

1. Whether Claimant overcame the Division Independent Medical Examination (DIME) opinion of Stanley Ginsburg, M.D. regarding the impairment rating by clear and convincing evidence.

2. If Claimant has overcome the DIME physician's opinion, what is the correct impairment rating?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 73 year-old male who worked for Employer as a Safety and Health Consultant. On February 24, 2020, Claimant sustained a work-related injury to his lumbar back when he was involved in a motor vehicle accident while driving in whiteout conditions. (Tr. 16:25-17:12).

2. Claimant was taken to the emergency room at Memorial Hospital of Converse County, Wyoming. He complained of lower back, right hand, and right hip pain. X-ray imaging revealed a compression fracture of the L4 vertebral body. (Ex. 6).

3. On February 27, 2020, Claimant began treating with Authorized Treating Physician (ATP) Kathryn Bird, D.O., at Concentra. After conservative modalities, including injections, did not improve Claimant's condition, surgery was recommended. (Ex. 15).

4. On September 17, 2020, Bryan Castro, M.D. operated on Claimant. The operation included a spinal fusion posterior transforaminal interbody fusion and decompression L4-5 and decompression right L3-4. (Ex. 13).

5. Following a course of post-operative rehabilitation, Dr. Bird placed Claimant at MMI on March 3, 2021. She also performed lumbar range of motion measurements on Claimant. (Ex. D).

6. When performing lumbar range of motion measurements, the physician measures a claimant's lumbar flexion, lumbar extension, right lateral flexion, left lateral flexion and straight leg raising maneuvers. Each category of measurements is done three times. *AMA Guides to the Evaluation of Permanent Impairment (Third Edition Revised).*

7. When performing lumbar range of motion measurements on Claimant, Dr. Bird measured Claimant' flexion at 7%, his lumbar extension at 6%, his lumbar right lateral flexion at 3%, and his lumbar left lateral flexion at 3%. The total lumbar range of motion

impairment was 19%. Dr. Bird's series of three measurements for each category resulted in only numbers divisible by five. (Ex. D).

8. Dr. Bird assigned Claimant a 29% whole person impairment rating for his lumbar spine, based on the 19% loss for range of motion and a 12% Table 53 specific disorder. *Id.*

DIME Examination

9. Respondents objected to the 29% whole person impairment rating assigned by Dr. Bird and filed a Notice and Proposal and Application for a DIME. Stanley Ginsburg, M.D., was selected as the DIME physician. The DIME occurred on July 8, 2021. (Ex. B).

10. Dr. Ginsburg performed lumbar range of motion measurements on Claimant. Dr. Ginsburg measured Claimant's lumbar flexion at 7%, his lumbar extension at 3%, his lumbar right lateral flexion at 2%, and his lumbar left lateral flexion at 1%. The total lumbar range of motion impairment was 13%. Dr. Ginsburg's series of three measurements for each category resulted in only numbers divisible by five. *Id.*

11. Dr. Ginsburg agreed with Dr. Bird that Claimant reached MMI on March 3, 2021. He assigned Claimant a 24% whole person impairment rating based on the 13% loss for range of motion and a 13% Table 53 specific disorder. *Id*.

12. On August 3, 2021, Respondents filed a Final Admission of Liability (FAL) consistent with the opinions of Dr. Ginsburg. The FAL admitted to a MMI date of March 3, 2021, and a 24% whole person impairment rating. (Ex. A)

Claimant's IME

13. Claimant's counsel requested that Gary Zuehlsdorff, D.O., perform a Claimant's IME. On October 6, 2021, Dr. Zuehlsdorff evaluated Claimant. (Ex. E.)

14. Dr. Zuehlsdorff performed lumbar range of motion measurements on Claimant. Claimant's lumbar flexion was measured at 7%, his lumbar extension at 4%, his lumbar right lateral flexion at 3%, and his lumbar left lateral flexion at 2%. The total lumbar range of motion impairment was 16%. Dr. Zuehlsdorff's range of motion measurements, unlike those of Drs. Bird and Ginsburg, are not all numbers divisible by five. *Id.*

15. Dr. Zuehlsdorff agreed with the MMI date of March 3, 2021. He assigned a 27% whole person impairment rating based on a 16% loss for range of motion and a 13% Table 53 specific disorder. *Id.*

16. With regard to the range of motion impairment, Dr. Zuehlsdorff stated in his IME report that "there are simply differences upon three different dates of 19% from Dr. Bird, 13% from Dr. Ginsburg, and 16% from [him]". *Id.* Dr. Zuehlsdorff opined that given the variability one would see in measurements of the lumbar spine on a day-to-day basis, the three range of motion impairments reflect a range of which Claimant could fall into. *Id*.

Respondents' IME

17. On November 8, 2021, Nicholas Kurz, D.O., evaluated Claimant at the request of Respondents' Counsel. (Ex. C).

18. Dr. Kurtz performed lumbar range of motion measurements on Claimant. Claimant's lumbar flexion was measured at 4%, his lumbar extension at 3%, his lumbar right lateral flexion at 0%, and his lumbar left lateral flexion at 1%. The total lumbar range of motion impairment was 8%. Dr. Kurtz's range of motion measurements, like those of Dr. Zuehlsdorff, are not all numbers divisible by five. *Id.*

19. Dr. Kurtz agreed with the MMI date of March 3, 2021. He assigned a 19% whole person impairment rating based on an 8% loss for range of motion and a 12% Table 53 specific disorder. *Id.*

20. Dr. Kurtz questioned Dr. Ginsburg's measurements because they were even numbers in increments of five (Dep. Tr. 44:2-22). Dr. Kurz credibly testified that Dr. Ginsburg's range of motion measurements met the Division of Workers' Compensation definition of valid. (*Id*. at 45:1-5). Dr. Kurz further testified that the ultimate say with respect to the impairment rating is with the DIME. (*Id.* at 29:13-18).

21. Dr. Zuehlsdorff, credibly testified that Dr. Ginsburg's range of motion numbers appear to be rounded. (Tr.45:16-18). Dr. Zuehlsdorff testified, however, that the Division of Workers' Compensation has never commented on this "rounding phenomenon." (Tr. 45:5-7). Dr. Zuehlsdorff testified that rounding the range of motion numbers would affect the actual impairment rating by, at most, a couple of percentage points. (Tr. 47:3-9).

22. The ALJ finds that while Drs. Kurtz and Zuehlsdorff both credibly questioned Dr. Ginsburg's measurements being in increments of five, this testimony is not persuasive. As both Drs. Kurtz and Zuehlsdorff testified, Dr. Ginsburg's measurements are not contrary to the Division guidelines or the AMA guides.

23. Dr. Zuehlsdorff testified that he and Dr. Ginsburg measured Claimant's lumbar flexion impairment at 7%. He testified that his left and right lateral flexion measurements each differed by 1% from Dr. Ginsburg's measurements. Dr. Zuehlsdorff testified that the 1% differences between him and Dr. Ginsburg can be attributed to a person's day-to-day variability. (Tr. 63:14-64: 8).

24. While Dr. Zuehlsdorff believes that his lumbar measurements are more accurate that Dr. Ginsburg's, there is no evidence that Dr. Ginsburg's impairment rating is incorrect.

25. The ALJ finds that Claimant did not overcome Dr. Ginsburg's opinions on impairment by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

DIME Physician's Impairment Findings

The party seeking to overcome the DIME physician's finding regarding permanent impairment bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must

be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Ginsburg, assigned Claimant a 24% whole person impairment rating. (Findings of Fact ¶¶ 10 and 11). That opinion must be overcome by clear and convincing evidence. Claimant's expert, Dr. Zuehlsdorff, assigned Claimant a 27% whole person impairment rating. (*Id.* at ¶¶ 14 and 15). While Dr. Zuehlsdorff and Dr. Kurtz questioned Dr. Ginsburg's measurements because the numbers were all factors of five, neither doctor opined that Dr. Ginsburg's measurements were incorrect. (*Id.* at ¶¶ 20 and 21). Dr. Zuehlsdorff noted the minor differences between his and Dr. Ginsburg's measurements, and credibly testified that it could be attributed to Claimant's day-to-day variability. (*Id.* at ¶ 23).

Dr. Ginsburg offered an opinion regarding Claimant's impairment rating that differs from the opinions of Drs. Zuehldorff, Bird and Kurtz. There is no evidence, however, that Dr. Ginsburg's opinion regarding Claimant's impairment rating is incorrect. Claimant did not introduce sufficient evidence to meet his burden of proof to overcome Dr. Ginsburg's findings regarding impairment.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by clear and convincing evidence that the DIME physician's impairment rating is incorrect.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 11, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant established that she suffered a compensable Coronavirus ("Covid") infection arising out of her work duties on or about November 24, 2020.

II. If Claimant established that she suffered a compensable Covid infection, whether she also established, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical treatment to cure and relieve her of the effects of said infection.

III. If Claimant established that she suffered a compensable Covid infection, whether she also demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits between July 12, 2021, and November 30, 2021.

Because the ALJ concludes that Claimant failed to establish that she suffered a compensable Covid infection, this order does not address issues II-III.

FINDINGS OF FACT

Based upon the evidence presented at hearing along with the deposition testimony of Dr. Fall, the ALJ enters the following findings of fact:

Background

1. Claimant, a 42 year-old woman, is employed as a case worker for Respondent-Employer. Claimant works at [Employer's facility, redacted]. Her job duties and responsibilities include assisting criminal offenders with job placement, preparing release documentation and assisting with court hearings. In November of 2020, Claimant's typical work hours were from 8:00 a.m. to 5:00 p.m. Monday through Friday with Saturdays and Sundays off.

2. Claimant's husband works at the same facility as Claimant but in a different department. During November 2020, Claimant's husband was working in the Transportation Department, which required that he move inmates around the correctional facility. His work shift was typically from 7:00 a.m. to 3:00 p.m., Monday through Friday with some 12-hour shifts as needed. In November of 2020, when Claimant and her husband were not working, including on weekends, they generally spent their time at home together.

3. During November 2020, Claimant, her husband and their daughter generally ate meals together at home. Claimant and her husband shared a bathroom, a

bedroom, and all other areas of their home. They also drove together in the same vehicle numerous times, went on community outings together, including shopping and dining and engaged in intimate contact with one another.

Claimant's Potential non Work-Related Exposure to Covid

4. During November 2020, Claimant shared a 3-bedroom, 1300 sq. ft. single family home with her husband and her daughter, who is 20 years old. The house is located in Florence, Colorado in Fremont County.

5. Neither Claimant nor her husband or daughter wore face coverings (masks) while together in their personal residence or when driving to and from places together in their vehicles. When conducting business in the community, Claimant, her husband and her daughter would only wear masks when required by the business establishment.

6. Claimant, her husband, and their daughter dined at Chili's Restaurant on November 6, 2020 and November 21, 2020. On each occasion, when dining at the restaurant, Claimant, her husband, and daughter took their masks off while at the table and while eating. Chili's was open to the public at that time and other diners were present in the restaurant without masks.

7. Claimant and her family members had numerous visitors to their family home during November 2020, while Claimant was present. None of the visitors wore masks while inside Claimant's house. The visitors included Paul Anderson, Claimant's father, and people who regularly worked in public places, including Shelby Murphy who worked at Walmart, Skyler Ross and Colton Walker who worked at Target, Jordan Brown who worked at Royal Gorge, and Desiree Fox who also worked at the Royal Gorge.

8. On November 22, 2020, Claimant's husband began to experience symptoms consistent with a Covid-19 infection, including fatigue, shortness of breath, headache and symptoms consistent with pneumonia. (Exh. J, p. 72).

9. Claimant testified that her husband tested for Covid on November 22, 2020, at a drive-thru test site. This test would return a positive result. According to Claimant's testimony, her husband tested positive for Covid on November 24, 2020, by a Binax Rapid test given by the Department of Corrections (DOC). (See also Exh. J, p. 72).

10. Per Dr. Fall, Claimant's husband probably had COVID on November 22, 2020 when he started having symptoms. (Fall Depo., p.25).

11. Claimant testified that she was scheduled to work on November 24, 2020 and would have reported to work that day, but just before her shift, she was advised by her husband that he had tested positive for Covid. (See also Exh. J, p. 72).

12. Claimant reported her husband's symptoms and positive test result to the call-in nurse line established by Respondent-Employer as soon as she learned that her

husband was Covid positive, i.e. on November 24, 2020. (Exh. J, p. 72). Claimant was instructed to go home, quarantine and test. She did not report to work.

13. Claimant inconsistently reported the onset of her symptoms to the nurse line. According to LB[Redacted] and Exhibit J, in one message Claimant reported being tired and run down on November 24, 2020. During another call, she reported her symptoms started November 25, 2020, when she was "real sick" with a sore throat, sinus problems and headaches. (Exh. J, p. 72).

14. Claimant testified that her own symptoms started on November 25, 2020, one day before Thanksgiving.

15. Claimant's first Covid positive test result came back on November 30, 2020, approximately one week after her husband had first tested positive.

16. Between August and mid-November of 2020, Claimant was required to undergo weekly PCR testing for Covid. For eleven weeks, Claimant tested negative for Covid. Claimant's first positive test result came after she spent hours and days in direct and unprotected contact with her husband, who had tested positive for Covid no later than November 24, 2020.

17. Between November 20, 2020 and December 1, 2020, the following events transpired:

- On Friday, November 20, 2020, Claimant took holiday and compensatory time; she was at home 24 hours. (Exh. N, p. 89). According to Dr. Fall, Claimant's husband [Redacted] was probably contagious for Covid by this date. (Fall Depo. p. 25).

- On Saturday, November 21, 2020, Claimant and her husband were at home together for extended time periods. (Exh. N, p. 89) (Exh. N, p. 89). Claimant testified she, her husband and her daughter went out to eat at Chili's restaurant.

- On Sunday, November 22, 2020, Claimant was at home 24 hours; her husband was also home during this time, during which he first complains of Covid like symptoms.

- On Monday, November 23, 2020, Claimant works 8 hours. Claimant's rapid Covid test is negative. Claimant is at home for the balance of the day with her symptomatic husband, whose symptoms persist. (Exh. N, p. 89).

- On Tuesday, November 24, 2020, Claimant was instructed to return home, quarantine and take a PRC test given that her husband had just tested positive for Covid by his rapid test.

Claimant returns home and spends the day with her Covid positive husband. (Exh. N, p. 89).

- On Wednesday, November 25, 2020, Claimant remains home in quarantine with Covid positive husband. (Exh. N, p. 89). Claimant reports developing Covid like symptoms on this date, approximately 3 days after her husband fist complained of symptoms. Based upon the evidence presented, it is unknown if Claimant takes another rapid or PRC test on this date.

- On Thursday, November 26, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89).

- On November 27, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89). Claimant's PCR test results from Nov. 24, 2020 are negative. (Exh. J, p. 72).

- On November 28, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89).

- On November 29, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p.89).

- On November 30, 2020, Claimant was at home 24 hours with Covid positive husband. (Exh. N. p. 89). Claimant takes another Covid test. (Exh, D).

- On December 1, 2020, Claimant was at home for 24 hours with her Covid positive husband. (Exh. N, p.89). The results from Claimant's November 30, 2020 test are reported as positive for Covid. (Exh. D, p. 46).

18. The only known Covid positive person Claimant was exposed to without personal protective equipment (PPE) during the aforementioned time period was her husband.

19. When the facility received Claimant's Covid test results on December 1, 2020, Claimant was asked if she wanted to pursue workers' compensation benefits. Nine days later, she responded that she did not. (Exh. I, p. 69). No mention is made of any purported work-related exposure when she responded to this query.

20. Claimant worked a total of 3 shifts, or 24 hours, between November 18, 2020 and November 24, 2020, when she was sent home without working due to her husband's positive Covid test. She quarantined before testing positive herself on November 30, 2020. While at work during the aforementioned shifts, Claimant wore PPE, as did all other staff and facility offenders. During this time, Claimant was exposed to her

husband for approximately 248 hours during that period - almost 10 times longer than she was exposed to others at work. Further, Claimant never wore PPE around her husband whom the scientific data, according to Dr. Fall, demonstrates was probably positive for Covid on November 22, 2020, after developing symptoms. As noted, his diagnosis was confirmed on November 23, 2020.

Claimant's Contrasting Potential for Exposure to Covid While at Work

21. [Employer's facility] is located in Canon City, Colorado in Fremont County. The facility consists of at least five separate buildings that house offenders. The buildings are designated A, B, C, D, and E, which are referred to by names reflecting the letter assigned to the building, e.g. building E is referred to as Echo Unit. (Exh. O, p. 103). Claimant performs the majority of her work in her private office in Building E. The office has a door that could be closed to separate her from common areas within the building.

22. Strict safety protocols were in place in November 2020 concerning the use of protective equipment and social distancing due to the Covid pandemic. (Exh. O). The protocols changed over time from October 2020 to November 2020 to account for changes in the Center for Disease Control's (CDC's) knowledge of Covid transmission and spread. When in a building with any offenders known to have Covid, the staff was required to wear PPE including, goggles, an N 95 mask, a face shield over the mask, a gown and gloves. (Exh. O, p. 97). Claimant was required to, and did, wear at least a KN 95 rated mask at all times while in the facility as did offenders when interacting with staff.

23. The facilities Covid safety protocols were based on the best available scientific knowledge at the time and were authored based on input from Randolf Maul, M.D., Chief Medical Officer, and Health Authority for the Department of Corrections. (Exh. O, p. 96).

24. Both staff and offenders could be reprimanded or punished for failure to follow the aforementioned safety protocols. (Exh. Q. p. 107). Claimant testified that staff and offenders generally complied with the protocols. She testified that she never reported any staff to management for failure to comply with the protocols. Offenders who failed to comply could be subject to punishment under the Code of Penal Discipline, which could result in a loss of earned good time against the offender's sentence. Claimant never reported any failures of offenders to comply with the facilities safety protocols.

25. As stated above, Claimant's office was located in the Echo (E) building. As of November 19, 2020, Echo building did not house any known Covid positive offenders. (Exh. O, p. 103).

26. When Claimant met with offenders in her personal office, she would wear a KN 95 mask. As noted, offenders also wore masks during meetings with facility staff.

27. Claimant testified that she did not meet with known Covid positive offenders in her office. Rather, known positive offenders resided in buildings other than Echo

Building and were restricted to their assigned buildings. Covid positive offenders were not allowed to leave their buildings to travel to other buildings on facility grounds. Indeed, they were not even allowed to travel to the "chow" hall for meals. Instead, they had their meals delivered to their cells.

28. When Claimant had occasion to go into a building were Covid positive inmates resided, e.g. Alpha (A) Building, she wore the highest level of PPE available, including a gown, a personally fitted N 95 face covering, a face shield over that and gloves. (Exh.O, p. 96, 99). The N 95 is the highest-rated mask for personal protection. Every offender also wore a KN 95 mask when interacting with staff members. As of November 2020, out of 107-housed offenders in Alpha building, 27 were known to have Covid. (Exh. O, p.103).

29. Claimant testified that, other than Echo, the only building she recalls going into in November 2020 was Alpha building. Alpha building was being used as a quarantine unit at the time. The majority of the offenders housed in Alpha building, approximately 75%, did not have Covid. (Exh. O, p. 103). The cells in Alpha building had windows that could be opened.

30. The only time Claimant would have to go into Alpha building would have been to obtain the signatures of offenders who were scheduled to be released. Claimant did not present any credible evidence that she obtained signatures on release documents in the latter half of November 2020, which is when she contends she contracted Covid as part of her work duties.

31. Claimant did not establish that anyone she may have interacted with in Alpha building actually had Covid. She presented no persuasive evidence that she was in direct contact with a Covid positive offender in the latter half of November 2020. Rather Claimant contends that because the facility had an active Covid positivity rate of a least 40.44%, her infection had to have resulted from her work environment. According to Claimant, the prisons positivity rate means that she had a better than 40% chance of contracting Covid at work, which she contends, "far exceeds that risk of catching the virus outside of her work." As noted below the ALJ is not persuaded.

The Testimony of [Redacted, hereinafter SB]

32. SB [Redacted] testified as a member of the prisons management team. He oversees inmate programs administered by prison staff, including Claimant. At the time Claimant alleges she contracted Covid in the facility, SB[Redacted] was Claimant's Captain and direct supervisor. SB[Redacted] testified that only inmates who were on a discretionary release and were not Covid positive could be released in November 2020. Therefore, he testified that any signature Claimant obtained from an offender who was scheduled for discretionary release would not have been Covid positive. Accordingly, the risk that Claimant would have had close contact with a Covid positive offender was significantly reduced. If an offender was scheduled for mandatory release, he could be

released even if he had Covid; however, Claimant presented no convincing evidence that she obtained signed paperwork from such an inmate in the latter half of November 2020.

33. SB[Redacted] reiterated that anyone entering Alpha building, for any reason, was required to don full PPE. He also echoed that once an inmate was identified as Covid positive, that inmate was not free to leave the quarantine area or access the day hall. According to SB[Redacted], the facility instituted cohorting and restricted staff and inmate movement around the facility by November 2020. SB[Redacted] testified that if inmates were non-compliant with established safety protocols, incident reports were to be prepared. He testified that he received no such reports from Claimant outlining inmate non-compliance, nor did he ever receive any reports of face-to-face contact Claimant had with any confirmed Covid positive inmate. As noted, Claimant presented no convincing evidence that she interacted with a Covid positive offender during the two weeks before she became symptomatic on November 25, 2020, nor did she testify she had been in a building with Covid positive offenders, such as Alpha Building during that time. Even if there had been such an interaction, the evidence presented supports a finding that such contact would have likely occurred over minutes, not hours, and while both parties were wearing PPE.

34. During cross-examination, SB[Redacted] agreed that prior to November 2020, the facility experienced problems with staff and inmate compliance in wearing masks as instructed. Indeed, on October 13, 2020, an email sent by the Associate Warden, Lance Miklich, to prison staff verified that there was a problem getting staff members to wear their masks. The email provides in pertinent part:

> The department continues to struggle with staff and offenders wearing their masks as directed. CMC will now take the next step in holding our staff and inmates accountable. Our staff and inmates have been reminded and directed for several months prior to this point. (Exh. Q, p. 107).

35. Warden Thomas Little also sent an email to prison staff regarding the problem with Covid spreading throughout the facility on October 13, 2020. Warden Little noted: "As you all are aware, we have experienced staff positives here at CMC and there have been numerous outbreaks throughout the department."

36. Additional measures to distance staff from each other were instituted including suspension of communal meals. While some staff and inmates had an apparent problem adhering to the facilities safety protocols as documented in the aforementioned email, there is a dearth of evidence to suggest that Claimant was ever exposed to or had physical contact with a known Covid positive staff member or offender when neither party was wearing any PPE. Indeed, Claimant reportedly wore her PPE consistently.

37. On November 2, 2020, Warden Little sent out another email mentioning that the facility was experiencing a "spike" in Covid-19 cases. Nonetheless, Warden Little noted: "At this point, it appears that the risk to anyone being exposed has been relatively

low as our employees have been diligent in utilizing barrier masks while at the facility." Claimant contends that the evidence presented supports a finding that she was infected at the same time that this "spike" occurred in the facility.[1]

38. Accepting Claimant's assertion that she was infected no later than the date of Warden Little's November 2, 2020 email means that she did not experience symptoms for 23 days post infection until she developed symptoms on November 25, 2020. While Claimant argues that she was "infected" in early November 2020, the evidence presented persuades the ALJ that does not have a convincing understanding as to when she actually contracted Covid. Indeed, in her position statement, Claimant notes:

> Claimant tested positive on November 30, 2020, and was feeling symptoms as of November 25, 2020. That means she was infected sometime before the 25th, likely within five days of that time period, ***but it could have been fourteen days or more as well***. In any event, we know that the Claimant was infected at the same time that the virus was spreading rapidly throughout the prison where she worked, at an infection rate that exceeded 40%. (Emphasis added).

Thus, Claimant contends that "[i]t makes sense that the Claimant was infected as a result of her work at the prison." (Claimant's Post-Hearing Position Statement, p. 4).

The Testimony of [Redacted, hereinafter LB]

39. LB[Redacted] testified as Respondent-Employer's Human Resources Analyst. Ms. LB[Redacted] testified that she was part of the facilities Covid response team, which maintained a Covid hot line that employees were instructed to call to report, among other things, positive test results. According to Ms. LB[Redacted] , prison staff were required to undergo weekly PCR tests and daily Binax rapid tests before each shift. Ms. LB[Redacted] and Claimant both testified that staff members were not allowed to work if they had a positive Binax test on the day of work or if they were exposed to a known Covid positive person outside of work.

40. As noted above, Claimant contacted the hot line on November 24, 2020 and left a voice mail message that she had been exposed to her husband who had a Covid positive Binax test. (Exh. J, p. 72). Her voice mail message was returned and during a subsequent conversation with the hot line representative, Claimant indicated that she had taken a test and was "tired and rundown." (Id.) Claimant contacted the hot line again on November 27, 2020. She left a voice mail indicating that her husband was Covid positive, but her test result from November 24, 2020 was negative. Nonetheless, she reported experiencing symptoms. (Id.) During a follow-up phone conversation with hot line personnel, Claimant reported that she developed a sore throat, sinus symptoms and "really bad headaches" on November 25, 2020. She also reported that her husband's symptoms began on November 22, 2020. (Id.) Follow-up testing was scheduled for November 30, 2020 (five days after the onset of reported symptoms as recommended).

[1] See generally, Claimant's Post Hearing Position Statement, p. 4.

(Id.) Claimant was contacted after her November 30, 2020 test returned a positive result. During this conversation, Claimant reported that she worked the day shift and that prior to her positive test result she worked on November 19, 2020, November 20, 2020 and November 23, 2020, (presumably because her required daily Binax tests were negative). (Id.) She also advised that she worked in her office in Echo Unit, wore a N 95 and offenders wore KN 95 masks during contact with one another. (Id.) She did not identify any significant staff contact and noted that she did not carpool or socialize with staff. (Id.) Ms. LB[Redacted] testified that she determined there was no significant offender or staff contact that would have triggered further contact tracing measures at the facility. In other words, Claimant's reporting raised no concerns that she had indeed contracted the virus at the facility nor potentially infected anyone else at work.

The Medical Record Evidence

41. Claimant first sought medical care for reported Covid symptoms on December 12, 2020, at UC Health Urgent care in Canon City. Claimant arrived to the clinic with complaints of shortness of breath, cough, fatigue and loss of voice. (Exh. B, p. 25). She reported a positive Covid test result from November 30, 2020 and when asked by Medical Assistant (MA) Jessica Montelongo if there had been a known exposure to Covid, and if so to whom, Claimant reported: "Yes, husband". (Id.) Claimant did not report any known or suspected work exposures. However, she did report that her husband has been diagnosed with COVID pneumonia and the record reflects that he had been seen in the clinic the week before she presented there. (Exh. B, p. 21-22). A chest X-ray was ordered and revealed a normal heart size, clear lungs no consolidating infiltrates and normal pulmonary vascularity. (Exh. B, p. 22). Claimant was diagnosed with "bacterial sinusitis and bronchitis likely as a complication from Covid." She was prescribed antibiotics, a Medrol dose pack and an inhaler followed by a discharge to home with instructions to return if her symptoms worsened.

42. On January 4, 2021, Claimant was seen by Dr. Alfred Arline at Kaiser Permanente in Pueblo. Claimant reported headaches and sinusitis and was now status post 2 weeks of Covid leave, and some sick leave and vacation. Claimant complained of fatigue but no shortness of breath. She reported "initial COVID like symptoms, around 24th of November, after exposure to her husband, who was positive for COVID-19". (Exh. C, p. 38). With respect to Claimant's fatigue, Dr. Arline was "UNSURE OF HIS (sic) RELATED SOME OTHER ETIOLOGY, OR UNFORTUNATELY CONSEQUENCE OF PREVIOUS COVID-19 INFECTION". (Exh. C, p. 39). A cardiac exam, including an EKG for reported palpitations was reportedly normal.

43. As part of a questionnaire provided at check-in for her appointment on January 4, 2021, Claimant indicated that her visit was not related to Third Party Liability including workers' compensation. (Exh. C, p. 41).

44. On January 6, 2021, Claimant sent the employer an e-mail indicating that she wanted to file for workers' compensation benefits. (Exh. I, p. 70). At hearing, Claimant testified the impetus for this was her diminishing lack of personal/vacation leave.

45. After asserting on January 6, 2021, that her Covid infection was caused by an exposure at work, Claimant returned to UC Health Urgent Care in Canon City on January 7, 2021. During this encounter, Claimant reported that an "incident" occurred at work on November 23, 2020, which caused her to develop Covid-19 symptoms. (Exh. B, p. 12). Claimant did not mention a work incident exposing her to Covid to her medical providers previously nor did she testify at hearing about a specific incident purportedly exposing her to Covid at work on November 23, 2020. Finally, she did not testify that her symptoms began on November 23, 2020. Rather, she testified that her symptoms started on Wednesday, November 25, 2020, the day before Thanksgiving. Despite Claimant's report that she was exposed to Covid at work, the report from this date of visit indicates that it was "unknown" whether Claimant's exposure arose from a work related mechanism. (Id.) Repeat chest x-rays performed during this appointment revealed normal heart and lungs.

46. Claimant returned for treatment at Canon City Urgent Care on April 19, 2021 where she was reevaluated for persistent complaints of fatigue and shortness of breath by Physician Assistant (PA-C) Steven Quakenbush. (Exh. B, p. 9). PA-C Quackenbush did not opine on the cause of Claimant's Covid. Rather, he said MMI was pending a "decision on work-related causality and compensability."

47. On May 26, 2021, Claimant was seen at Kaiser Permanente to obtain Family Medical and Leave Act (FMLA) paperwork. She reported that she had been denied workman's compensation but felt too winded to go back to work. Claimant was informed that "the Kaiser FMLA office had determined that FMLA for HX of COVID was not allowed long term." (Exh. C, p. 44). Claimant then reported to her PCP on May 26, 2021, that she had been "trying to get FMLA but [the] Kaiser clinic denied." (Exh. F, p. 53).

48. Claimant underwent Holter monitoring for reported tachycardia at Pueblo Cardiology on February 2, 2021. She underwent monitoring for 72 hours and was evaluated by Dr. Bhavith Aruni afterwards on February 19, 2021. Results of Holter monitoring revealed an average heartbeat of about 66 bpm and a maximum heart rate of 170 bpm along with occasional PVCs. (Exh. H, p. 64). Although she had episodes of tachycardia (related to deconditioning after her Covid infection), no arrhythmias were noted on monitoring. (Exh. H, p. 65). Outside of being provided materials concerning diet, exercise and immunity, no further treatment recommendations were documented by Dr. Aruni following this visit.

49. Based upon careful review of the medical records admitted into evidence, the ALJ finds that none of the medical care providers who have treated or examined Claimant for her Covid symptoms have performed an analysis regarding the likely cause of Claimant's Covid infection, i.e. whether it stems from a work related exposure or arose from another cause.

Dr. Fall's Medical Records Review and Subsequent Deposition Testimony

50. Respondents sought the opinions of Dr. Allison Fall regarding the likely cause of Claimant's Covid infection. After review of Claimant's available medical records, her time sheets and her discovery responses, Dr. Fall issued a report outlining her opinions on September 10, 2021. (Exh. A). As noted, in addition to review of the available medical records, Dr. Fall scrutinized Claimant's answers to Respondents interrogatories. In those responses, Dr. Fall notes that Claimant reported that she had been tested for Covid on November 24, 2020 with a negative result. She also noted that Claimant reported being tested daily by Respondent-Employer prior to reporting to work and that all Covid testing yielded negative results until November 30, 2020, when a rapid test came back positive. According to Dr. Fall, Claimant's testing results supported an indication that the earliest exposure would be around November 18, 2020, with the positive test result placing the exposure around November 21, 2020. This would have been the weekend Claimant's husband became symptomatic and the same day Claimant and her family went to Chili's Restaurant. (Exh. N).

51. Dr. Fall noted that Claimant reported in her interrogatory responses that other than her husband, she did not have direct contact with anyone else outside her work that had tested positive. She also dismissed any suggestion that Claimant's exposure leading to her infection would have occurred in October or early November when Claimant was working in food service, as any such exposure timeframe would be inconsistent with the Covid testing results.

52. Concerning the situation Claimant suggested was a likely exposure from November 23, 2020, when she reportedly informed a Covid positive offender who was in her office for about 30 minutes that his parole was being suspended and he began crying, took off his mask and blew his nose, Dr. Fall noted that this was the only exposure she had at work between November 20, 2020 and the end of the month and that the exposure was short in duration and while Claimant and the offender were both wearing PPE. Comparing this incident to the time Claimant spent in direct contact with her Covid positive husband and her other movements about the community lead Dr. Fall to conclude that it was more probable that Claimant contracted Covid from her Covid positive husband.

53. Dr. Fall testified as an expert in the area of Physical Medicine and Rehabilitation (PM&R) by deposition on October 18, 2021. She is Level II accredited and by virtue of this accreditation is versed in performing causation analyses. While she is not an epidemiologist or infectious disease specialist, the ALJ finds that she is fully accredited and qualified to render causation opinions on respiratory, pulmonary and infectious conditions.

54. As part of the causation analysis in this case, Dr. Fall testified that she reviewed the available records/data and performed a risk analysis to answer the question of whether Claimant's Covid infection was more likely to have arisen as a result of her work duties or from other sources outside of her work. (Fall depo. pp. 8-11). Based upon the information she was provided, including Claimant's Covid testing results, Dr. Fall reiterated her opinion that Claimant was likely exposed to Covid virus between November 19th and 23rd, 2020. After concluding that Claimant's work on the food line in late October

or early November was not relevant since Claimant had serial negative tests for weeks thereafter, Dr. Fall then reviewed the potential for and nature of any exposure, i.e. duration and closeness of the contact and whether the contact was had while using PPE, to determine the cause of Claimant's Covid infection.

55. According to Dr. Fall, the highest risk scenario for the transmission of Covid is where one person has Covid and the other is exposed to that person and neither are wearing a mask. (Depo. Fall, p. 15). Length and type of exposure is also a risk factor. Parties who simply walk by and pass each other are at lower risk than people sitting in a restaurant for hours as this creates the potential for exposure to higher viral loads. (Depo Fall, p. 15). People who engage in one-on-one interaction within 6 feet of each other with neither party wearing a mask are at the highest risk for transmitting Covid. (Depo. Fall, p. 16). Certainly, direct contact, such as eating meals together and intimate contact, would increase the risk of transmission. (Depo. Fall, p. 26). Based upon her review of the information provided, Dr. Fall concluded that Claimant's risk for contracting Covid-19 was much higher outside of work than while at work. Indeed, Dr. Fall testified that it was medically more probable that Claimant contracted Covid outside of work because her husband was Covid positive and was probably infectious during time frames she had prolonged close contact with him without wearing any PPE. Accordingly, Dr. Fall concluded that Claimant was probably exposed to Covid by her husband who then transmitted it to her. (Exh. A, p. 6; Fall depo, p. 30).

56. The ALJ credits the unrebutted opinions of Dr. Fall to find that Claimant was at higher risk of contracting Covid from her husband than she was at work. While the evidence presented persuades the ALJ that Claimant was exposed to the virus sometime before November 25, 2020 and that there were cases of Covid among prison staff and inmates at the facility where she worked, Claimant presented no persuasive evidence that she was in contact with any known Covid positive staff member or inmate while at work.[2] Importantly, even if Claimant had established that she had been exposed to a Covid positive staff member or inmate, the evidence presented supports a finding that any interaction between the two would have occurred while Claimant was wearing her required full PPE whereas she was completely unprotected while she was around her husband who tested positive for Covid approximately one week before she did. The ALJ can't presume that Claimant contracted Covid at work simply because some staff and offenders had it.

57. Based upon the evidence presented as a whole, the ALJ finds that Claimant has failed to establish that her Covid infection was likely caused by an exposure to the virus at work. Indeed, the persuasive evidence supports a finding that Claimant was, more likely than not, exposed to Covid by her husband who transmitted it to her. Accordingly, her case must be denied and dismissed. Because Claimant failed to

[2] Based upon the testimony of Major Bourne, any suggestion that Claimant was exposed to Covid positive inmates in her office is unconvincing. Indeed, the undisputed evidence supports a finding that Covid positive inmates were not permitted to leave the quarantine area of the buildings where they were housed.

establish that she suffered a compensable Covid exposure, the remaining issues surrounding her entitlement to medical and indemnity benefits need not be addressed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving, by a preponderance of the evidence, that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Fall are supported by the medical record and the available medical literature concerning transmission and spread of Covid-19. Accordingly, the ALJ concludes that her opinions are credible and more convincing than the contrary testimony of Claimant.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and

resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. Under the Workers' Compensation Act, an injured employee is entitled to compensation where his/her medical condition is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, the question for determination is whether Claimant's alleged Covid infection arose out of an exposure related to her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As noted above, proof by a preponderance of the evidence requires the proponent to establish the existence of a

"contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable Covid infection by interacting with co-workers and inmates within the correctional facilities where she worked. According to Claimant, repeated exposure to a work environment wherein the Covid positivity rate among staff/inmates was at least 40.44% caused her infection, which in turn lead to SOB, sore throat, sinusitis and persistent symptoms consistent with Long Haul Syndrome all of which hastened her need for medical treatment. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease.

G. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

H. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Anderson, supra*.

I. As noted, Claimant asserts that her repeated exposures to the work environment at Four Mile Correctional Center caused a Covid infection characterized by SOB, sinusitis headaches and heart palpitations. Claimant asserts that this infection and subsequent symptoms are compensable because they are fairly traced to the employment as a proximate cause, and they do not come from a hazard to which Claimant was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed caused her symptoms, her need for treatment and the disability for which benefits are sought.

J. In support of her claims, Claimant argues that there is a temporal connection between her symptoms and her presence at work to establish causation in this matter. However, as explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Crediting the opinions of Dr. Fall, the ALJ concludes that Claimant's subjective perception of occupational exposure is unreliable, probably incorrect and fails to establish the requisite causal connection to establish that she suffered a compensable injury. In this case, the evidence presented supports that Claimant worked in a facility where staff and inmates had tested positive for Covid. Nonetheless, she did not prove that she had direct contact with any Covid positive individual at work. Accordingly, she requests that the ALJ conclude that her infection was caused by exposure to Covid that may have existed in the air. She surmises further that because the infection rate at the facility was better than 40%, that there was a lot of virus which she could have come into contact which caused her infection. While Claimant may have been exposed to Covid in the air in the workplace, it does not support a sufficient nexus between her Covid and the work environment. Rather, the evidence presented supports a conclusion that Claimant's Covid symptoms were, more probably than not, caused by unprotected contact Claimant had with her husband, who was probably contagious by November 20, 2020. Indeed, the only known Covid positive individual that Claimant was exposed to between November 18, 2020 and November 30, 2020 was her husband to whom she was exposed for lengthy period of time without wearing PPE. Although the PPE Claimant was wearing at work may not have prevented 100% transmission of the Covid virus, the PPE Claimant was wearing in conjunction with the use of a mask by the offenders and/or other staff would have provided more protection against the virus than none at all. Accordingly, the ALJ concludes that Claimant's risk of exposure to Covid through her intimate contact with her known Covid positive husband was greater than any casual exposure Claimant may have experienced to Covid in the workplace when all parties were using some form of PPE.

K. Here, the evidence presented supports a conclusion that Claimant has failed to establish the requisite causal connection between her Covid infection and related symptoms and her work duties. Specifically Claimant failed to establish that her employment exposed her to a hazard that was more prevalent in the work place than in her own home given her prolonged exposure to her Covid positive husband. Claimant's failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to her claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Accordingly, her claim for benefits must be denied and dismissed and her remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits based is denied and dismissed.

DATED: March 14, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant prove he suffered a compensable low back injury on March 5, 2021?
- If Claimant proved a compensable injury, what is his average weekly wage (AWW)?
- Did Claimant prove a lumbar CT scan and an epidural steroid injection recommended by Dr. Lee are reasonably needed to cure and relieve the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant has worked as a technician in Employer's Tire & Lube Express department since June 2018. He performs tire repairs and replacements, oil changes, and other basic vehicle maintenance tasks. He also stocks automotive merchandise. The job is physically demanding and routinely requires lifting up to 50 pounds. He occasionally lifts up to 75 pounds when working with larger truck wheels and tires.

2. On March 5, 2021, Claimant was removing boxes of oil from a "six-wheeler" and placing them on the floor. When he lifted one of the boxes, he felt a "twinge" and a "pop" in his right lower back.

3. Claimant reported the incident immediately to his supervisor, Tyler Crown. Mr. Crown completed an Employer's First Report of Injury and described the accident as "taking bulk oil boxes off six-wheeler and placing on floor." The injury was described as a back "strain."

4. Claimant continued working for a short time after the accident, but the pain worsened and he asked to leave early. He went home and applied ice and heat to his low back.

5. Claimant saw Dr. Lindsey Junk on March 6, 2021. Claimant explained he hurt his right low back the day before while lifting oil at work. Physical examination showed significant muscular tightness over the lumbosacral region "with the right significantly worse than the left." Dr. Junk diagnosed low back pain and muscle spasms. He prescribed Percocet and a muscle relaxer. Dr. Junk also took Claimant off work until his next appointment because of his "acute injury."

6. Claimant followed up with Dr. Junk on March 9, 2021. His back was feeling better after taking the pain medication and muscle relaxers. Examination showed "improved but still present muscular tightness in the right lumbosacral region." Dr. Junk scheduled Claimant to return in a week for "possible discharge from Workmen's Comp."

7. Claimant tried to return to work but his back pain quickly flared. As a result, Dr. Junk limited him to four-hour shifts.

8. On March 23, 2021, Dr. Junk referred Claimant to physical therapy and liberalized his restrictions to allow 8-hour shifts, split evenly between sitting and standing.

9. On March 30, 2021, Dr. Junk noted the longer shifts had exacerbated Claimant's back pain. Physical examination showed significant tenderness and multiple trigger points in Claimant's low back. His maximum shift was reduced to four hours.

10. Claimant followed up with Dr. Junk on April 13, 2021. Dr. Junk documented Claimant "has been having an intermittent course of progression and then regression with continuing pain in his lower back as well as some intermittent tingling in his feet." Dr. Junk again took Claimant off work.

11. Claimant had a lumbar MRI on April 28, 2021. It showed degenerative disc and facet changes, primarily at L4-5 and L5-S1. There were no disc herniations, nerve root impingement, or other acute abnormalities.

12. On June 2, 2021, Claimant told Dr. Junk he thought he could do light duty at work without exacerbating his back pain. Dr. Junk noted reduced soft-tissue tenderness to palpation of the lumbar region.

13. Claimant returned to part-time light-duty work on June 3, 2021 with a 25-pound lifting limit.

14. At his follow up appointment on June 15, 2021, Claimant stated he was "doing fairly well" with the light duty work assignment. Dr. Junk referred Claimant to Dr. Larry Lee for an orthopedic evaluation.

15. Claimant saw Dr. Lee on August 2, 2021. Dr. Lee noted Claimant underwent a left-sided L5-S1 microdiscectomy 10 years ago that resulted in "chronic nerve damage" and "chronic left lower extremity weakness." Claimant indicated the leg weakness had gotten worse since March 2021. Dr. Lee diagnosed degenerative disc disease and nonspecific "post-laminectomy syndrome." He was concerned Claimant may have developed an L5-S1 pars fracture and ordered a CT scan "to better evaluate the osseous structures" in Claimant's lumbar spine. He also indicated ESIs were "available" if Claimant wanted to pursue them but provided no specific discussion regarding their intended purpose or whether they were related to the industrial injury.

16. As noted by Dr. Lee, Claimant has a history of low back problems, including a lumbar surgery several years ago.[1] Claimant underwent ESIs after the surgery, the last in approximately 2016. Claimant testified the prior ESIs provided only short-term relief.

17. Claimant suffered a lumbar strain in January 2018 while lifting a toolbox. Treatment records from 2018 show the symptoms were primarily confined to the left lower back and left leg. A January 31, 2018 MRI showed post-surgical changes from a prior left L5-S1 hemilaminectomy and degenerative disc disease, most pronounced at the L5-S1 level. Claimant was referred to an orthopedic surgeon. In April 2018, Claimant told his

[1] There is conflicting evidence regarding whether the prior surgery was in 2010, 2011, 2012, or 2014.

PCP the orthopedic surgeon had suggested a fusion, but he wanted to try physical therapy first. Claimant participated in PT for approximately five weeks, with limited benefit. He stopped PT in June 2018 because he was moving to Lamar. Claimant had a primary care visit with Dr. Michaud on October 19, 2018. The primary focus of the appointment was hypertension and restless leg syndrome. The past medical history section of Dr. Michaud's report references Claimant's prior back surgery, but no current back-related symptoms or limitations were reported. Nor was any treatment recommended specifically for the low back. A previous prescription for hydrocodone-acetaminophen was listed as "discontinued . . . reason: course complete." On December 5, 2018, Dr. Michaud prescribed gabapentin for the restless leg syndrome. No complaints of back issues were documented. A review of past records performed by Respondents' IME showed no mention of Claimant's low back after December 2018. There is no persuasive evidence to suggest Claimant desired or required any further treatment for low back problems until the March 5, 2021 work accident.

18. Dr. Anant Kumar performed an IME for Respondents on November 9, 2021. Dr. Kumar also testified at hearing to elaborate on the opinions expressed in his report. Dr. Kumar agreed Claimant may have suffered a minor "sprain strain" from lifting the box of oil, but opined the injury should have resolved uneventfully within a few weeks. He opined Claimant could have been treated with heat, ice, and OTC medications. He opined the strain resolved and any ongoing back or leg symptoms are related to Claimant's underlying degenerative spine condition instead of the work accident. He noted Claimant's symptoms were initially limited to axial back pain and later "metamorphosed" to include leg symptoms. Dr. Kumar opined neither a CT scan nor ESIs are reasonably needed or causally related to the work accident. He pointed out Claimant had previously tried ESIs, without benefit. Because the recent MRI showed no new pathology to cause lower extremity symptoms, there is no reason to think ESIs will be effective now. He also thought it virtually impossible that the work accident could have caused a pars fracture. He did not believe a lumbar CT would appreciably add to the understanding of Claimant's current condition.

19. Dr. Kumar's opinions are partially credible. His opinion that Claimant suffered no compensable injury is not persuasive. His conclusion that Claimant reached MMI is beyond the ALJ's jurisdiction. His opinion that a CT scan is not reasonably necessary is less persuasive than Dr. Lee's opinion. However, the ALJ credits Dr. Kumar's opinion that bilateral L5-S1 ESIs are not reasonably necessary to cure and relieve the effects of Claimant's the work injury.

20. Claimant proved he suffered a compensable injury to his low back on March 5, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. Dr. Junk corroborated a muscle strain with spasms affecting Claimant's right lower back within a day of the accident. Dr. Kumar essentially conceded that Claimant suffered a strain at work on March 5. Claimant reasonably pursued treatment and suffered a period of disability proximately caused by the accident. These facts are sufficient to establish a compensable claim.

21. Claimant proved the lumbar CT requested by Dr. Lee is a reasonably necessary diagnostic evaluation for the work injury. The CT scan has a reasonable prospect of further defining the underlying pain generator, assisting Claimant's ATPs with causation determinations, and suggesting a course of treatment.

22. Claimant failed to prove bilateral ESIs are reasonably needed to cure and relieve the effects of his compensable injury. Dr. Lee provided no discussion or justification for bilateral ESIs other than to state they are "available" if Claimant wants them. Dr. Lee offered no explanation of how bilateral ESIs would be causally related to a right-sided soft-tissue injury. Dr. Kumar's opinions regarding the ESIs are credible and persuasive. Claimant previously tried ESIs with no benefit and the April 2021 MRI shows no new work-related pathology reasonably likely to be improved by ESIs.

23. Computation of Claimant's AWW is complicated by a work-related knee injury he suffered on August 23, 2020. He ultimately underwent a right knee arthroscopy, medial meniscectomy, and chondroplasty of the medial femoral condyle and patella on October 15, 2020. He participated in extensive post-operative physical therapy, and was released at MMI on February 26, 2021 (approximately one week before the low back injury). Although minimal records related to the knee injury were submitted at hearing, it is reasonable to presume Claimant ability to perform his physically demanding job was limited before[2] and after the surgery. Claimant testified he was working regular hours for approximately three weeks before the back injury, but that testimony is inconsistent with wage records that show less than 10 hours of work in the pay period from February 13 through February 26, 2021. Under the circumstances, it is more appropriate calculate Claimant's AWW using only pay periods before the knee injury.

Week Start	Hours	Week Start	Hours
2019-09-14	25.55	2020-03-07	39.37
2019-09-21	40.97	2020-03-14	39.87
2019-09-28	38.53	2020-03-21	39.78
2019-10-05	36.85	2020-03-28	39.35
2019-10-12	40.18	2020-04-04	38.92
2019-10-19	40.10	2020-04-11	38.87
2019-10-26	26.05	2020-04-18	38.62
2019-11-02	41.45	2020-04-25	30.05
2019-11-09	40.73	2020-05-02	0.00
2019-11-16	40.13	2020-05-09	7.90
2019-11-23	41.15	2020-05-16	30.77
2019-11-30	40.58	2020-05-23	24.13
2019-12-07	38.60	2020-05-30	0.00
2019-12-14	30.92	2020-06-06	0.00
2019-12-21	0.00	2020-06-13	0.00
2019-12-28	0.00	2020-06-20	24.07
2020-01-04	39.93	2020-06-27	40.55
2020-01-11	32.70	2020-07-04	39.77
2020-01-18	24.22	2020-07-11	39.45
2020-01-25	39.08	2020-07-18	0.00

[2] Dr. Morley's records show Claimant was still using crutches to ambulate shortly before the surgery.

2020-02-01	39.65	2020-07-25	0.00
2020-02-08	39.57	2020-08-01	40.82
2020-02-15	39.58	2020-08-08	31.45
2020-02-22	23.72	2020-08-15	39.17
2020-02-29	39.68		

Total hours:	1,462.82
No. weeks:	49
Avg hours:	29.8534
AWW:	$447.80

24. Based on the foregoing factors, Claimant's AWW is $447.80.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury to his low back on March 5, 2021. Claimant's testimony regarding the incident and onset of symptoms was

credible. Claimant has recounted the accident in a consistent manner on multiple occasions, including to his supervisor immediately after the accident. Dr. Junk corroborated a muscle strain with spasms affecting Claimant's right lower back within a day of the accident. Dr. Junk reasonably prescribed medication, ordered diagnostic testing, and referred Claimant to physical therapy. Although Claimant has a significant history of low back problems, his prior issues were primary on the left side of his back, whereas the injury affected his right side. Moreover, he performed a physically demanding job without limitation and required no treatment for any low back problems since 2018. There was a significant change in Claimant's functional status after the March 5 accident, and he was appropriately put on restrictions that precluded his regular work. Dr. Kumar essentially conceded that Claimant suffered a strain at work on March 5. Dr. Kumar's opinion that the strain did not result in a compensable injury because it required no treatment is not persuasive. Claimant reasonably sought treatment for an acute back strain directly caused by his work activity. And Dr. Kumar's argument that any strain resolved quickly and Claimant is at MMI does not persuade the ALJ that Claimant suffered no compensable injury in the first instance.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Compensable medical treatment includes reasonably necessary diagnostic evaluations and testing. The respondents must cover diagnostic testing that has a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

As found, Claimant proved the lumbar CT requested by Dr. Lee is a reasonably necessary diagnostic evaluation for the work injury. The CT scan has a reasonable prospect of further defining the underlying pain generator (even by ruling out potential conditions), assisting Claimant's ATPs with causation determinations, and suggesting a course of treatment.

Claimant failed to prove bilateral ESIs are reasonably necessary to cure and relieve the effects of his compensable injury. Dr. Lee provided no discussion or justification for bilateral ESIs other than to state they are "available" if Claimant wants them. He provided no explanation for how bilateral ESIs would be appropriate treatment for a right-sided soft tissue injury. Dr. Kumar's opinions regarding the ESIs are credible and persuasive.

C. Average weekly wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $447.80.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on March 5, 2021 is compensable.

2. Claimant's average weekly wage is $447.80

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to the lumbar CT ordered by Dr. Lee.

4. Claimant's request for bilateral L5-S1 ESIs is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 15, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with Employer.

- If Claimant has proven she sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the L4-S1 anterior posterior fusion is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury?

- The parties stipulated prior to the hearing that Claimant had sustained a compensable injury to her right shoulder in the course and scope of her employment with Employer. The parties further stipulated that Claimant's medical treatment to date for the right shoulder injury was reasonable and necessary to cure and relieve the effects of the industrial injury. The parties stipulated that the issues of average weekly wage ("AWW"), temporary total disability ("TTD") and temporary partial disability ("TPD") would be reserved for determination at a future hearing.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her right shoulder on January 21, 2021 when she was setting up a portable x-ray machine, grasped the locking handle on the machine and twisted the handle. Claimant testified that the portable x-ray unit weighs between 1200 – 1500 pounds. Claimant testified that when she squeezed the handles, her shoulder was immediately inflamed. Claimant testified she attempted to squeeze the handle again, but did not have enough strength, so she need to use both hands.

2. Claimant testified that following the injury, she did not have function of her right arm. Claimant testified that she completed x-rays of two more patients, but did not have function of her arm as she completed these duties. Claimant testified she finished her shift and did not report her injury to her employer. Claimant testified she went home and treated her injury with Aleve and ice.

3. Claimant testified her low back started hurting when she was trying to move patients and the portable x-ray machine. Claimant testified that as the day went on, her low back became inflamed. Claimant testified she did not recall a specific event that led to her low back pain. Claimant testified she was more concerned with her

shoulder initially. Claimant testified she had no low back pain prior to January 11, 2020. Claimant returned to work the next day and reported her injury to employer.

4. The Workers' Compensation First Report of Injury was completed by Employer on January 15, 2020. The First Report of Injury notes that Claimant reported her in jury on January 12, 2020, and reported she felt low back and right shoulder pain at the end of her shift which was "noticeable after use of portable imaging".

5. Claimant was referred to Dr. Staqg for medical treatment. Dr. Stagg initially evaluated Claimant on January 15, 2020. Claimant reported to Dr. Stagg that she was doing an x-ray on January 11, 2020 and developed pain in her right shoulder and low back. Claimant reported intermittent radiation in to the lower extremities, but denied numbness or tingling or loss of function. Claimant reported improvement with her right shoulder pain. Claimant was diagnosed with an acute shoulder strain and a lumbar spraint. Dr. Stagg referred Claimant for an x-ray of the lumbar spine and recommended physical therapy.

6. The x-ray of Claimant's lumbar spine was performed on January 15, 2020 and showed mild degenerative disc disease ("DDD") with grad 1 anterolisthesis of L4 andL5 and levocurvature of the mid lumbar spine.

7. Claimant returned to Dr. Stagg on January 21, 2020. Based on the results of the lumbar x-ray, Dr. Stagg recommended Claimant be referred to a neurosurgeon.

8. Claimant was examined by Dr. Wong on January 31, 2020. Dr. Wong noted Claimant reported lumbar spine pain after a lifting injury on January 11, 2020. Dr. Wong recommended a magnetic resonance image ("MRI") of the lumbar spine.

9. Claimant returned to Dr. Stagg on January 29, 2020. Claimant reported to Dr. Stagg that her back was doing worse. Dr. Stagg noted that Dr. Wong had recommended an MRI of the lumbar spine and agreed that an MRI was appropriate.

10. Claimant underwent the MRI of the lumbar spine on February 6, 2020. The MRI showed a L5-S1 small left paracentral disc extrusion causing mass effect upon the descending left S1 nerve root. The MRI also showed mild foraminal narrowing on the left with facet hypertrophy present bilaterally at L5-S1 and L4-5. A broad based disc bulge was noted at the L4-5 level.

11. Claimant returned to Dr. Stagg on February 20, 2020. Claimant reported to Dr. Stagg that she was still having pain with radiation to the left extremity. Dr. Stagg noted the results of the lumbar MRI and recommended that she return to Dr. Wong and also obtain an epidural steroid injection ("ESI") with Dr. Bullard.

12. Dr. Stagg's records note that he discussed the case with Dr. Wong on or about March 3, 2020. Dr. Stagg noted that Dr. Wong had reviewed the MRI results and was not currently recommending surgical intervention. Dr. Stagg noted Dr. Wong recommended possible injection and conservative treatment with therapy.

13. Claimant retuned to Dr. Stagg on March 9, 2020. Dr. Stagg noted Claimant reported being about the same. Dr. Stagg noted the ESI was scheduled to proceed on March 11, 2020. Dr. Stagg recommended that Claimant also continue with her physical therapy.

14. Claimant underwent a bilateral L4-5 and L5-S1 facet steroid injection with Dr. Bullard on March 11, 2020.

15. Claimant had a telephonic evaluation with Dr. Stagg on March 31, 2020. Claimant repotted to Dr. Stagg that she immediately had good relief after the injection, then her symptoms got worse for a couple of days, and then gradually got somewhat better. Dr. Stagg noted that they discussed what Claimant could do, and he recommended that she increase her activity and work on some stretching, the follow up in 2 to 3 weeks.

16. Claimant had another telephonic evaluation on April 22, 2020. Claimant reported still having a significant amount of pain in the back, with some radiation down both legs. Claimant also reported not being able to have her routine therapy due to the CoVid pandemic. Dr. Stagg recommended continued conservative treatment included four (4) massage therapy visits.

17. Claimant had a telephonic evaluation on May 13, 2020 with Dr. Stagg. Claimant reported being frustrated because things were not improving. Claimant reported she was still having pain in her back with some radiation into her extremities. Claimant reported her symptoms increased when she increased her activity. Claimant reported the ESI did not give her a great deal of relief.

18. Claimant was able to be physically examined by Dr. Stagg on May 27, 2020. Claimant reported doing better with less pain, but still some occasional radiation down her right leg when she is up and walking. Dr. Stagg kept Claimant on work restrictions and recommended she finish her course of therapeutic massage.

19. Claimant returned to Dr. Stagg on June 17, 2020 and reported she had not had much improvement. Dr. Stagg noted there was some improvement initially after the ESI, but Claimant still reported some intermittent pain down the right and left extremity which would happen 2-3 times per day. Dr. Stagg recommended Claimant explore a facet injection and referred Claimant back to Dr. Bullard.

20. Claimant underwent bilateral facet injections at the L4-5 and L5-S1 levels on July 17, 2020.

21. Claimant returned to Dr. Stagg on July 22, 2020 and reported marked improvement of her pain following the facet injections[1]. Dr. Stagg recommended Claimant continue with her exercise program and core strengthening.

22. Claimant returned to Dr. Stagg on August 12, 2020 at which time Claimant reported that while the facet injections had helped some, they were not long lasting. Claimant reported she felt she had not made significant improvement, but wanted to avoid surgery. Dr. Stagg referred Claimant to Dr. Frazho for a second opinion about possible future injections.

23. Claimant returned to Dr. Stagg on September 2, 2020 with complaints of continued pain. Dr. Stagg noted Claimant had been evaluated by Dr. Wong seven months prior, and recommended she return to Dr. Wong due to the fact that she had not had a resolution of her symptoms with the conservative treatment. Dr. Stagg provided Claimant with an Oswestry, which provided a score of 34 showing moderate disability. Dr. Stagg noted no depressive symptomatology.

24. Claimant underwent a repeat MRI of the lumbar spine on October 5, 2021. The MRI showed no change in the L5-S1 small left paracentral disc extrusion. Facet degenerative changes were also noted.

25. Claimant returned to Dr. Wong on October 21, 2020. Dr. Wong noted Claimant's medical treatment since his last evaluation and recent October MRI. Dr. Wong recommended that if Claimant wished to pursue surgery, he would recommend an L4-S1 fusion. Dr. Wong noted Claimant was unsure how she wished to proceed.

26. Claimant had a teleconference appointment with Dr. Stagg on October 26, 2020. Claimant reported Dr. Wong had recommended an L4 through S1 fusion, and she wanted to proceed with this recommendation as she was still having significant pain in her back. Claimant was able to be evaluated by Dr. Stagg on October 29, 2020. Dr. Stagg noted Dr. Wong's surgical recommendation and agreed with this recommendation due to the persistence of Claimant's symptoms. Dr. Stagg also referred Claimant to Dr. McCoy for treatment of her shoulder.

27. Claimant testified at hearing that she wishes to proceed with the surgery recommended by Dr. Wong.

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[1] Dr. Stagg's July 22, 2020 medical report appears to contain a typographical error with regard to the date of the facet injections. Dr. Stagg noted the injections occurred on 6/17/2020. However, the medical records show that the injections occurred on 7/17/2020.

28. With regard to the proposed surgery, Respondent obtained a records review from Dr. Larson on February 12, 2021. Dr. Larson opined that Claimant's low back condition was not related to the January 11, 2020 work injury. Dr. Larson opined that the imaging did not demonstrate any acute injury to Claimant's lumbar spine, but instead showed pre-existing lumbar degenerative disc disease. Dr. Larson opined that it was unlikely that work activities caused any long term or permanent change to Claimant's condition causing the need for medical treatment. Dr. Larson opined that at most, Claimant sustained a muscular strain at work, but the strain did not cause an aggravation or acceleration of her underlying degenerative disc disease.

29. Respondent referred Claimant to Dr. Ericson for an independent medical examination ("IME") on May 5, 2021. Dr. Erickson reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Ericson noted that Claimant reported that she noticed some brief episodes of muscle discomfort in her low back prior to January 11, 2020. Claimant reported the low back discomfort would resolve quickly with Aleve and rest. Claimant reported to Dr. Erickson that after the injury on January 11, 2020, she noticed some tightness in her lower back when she went home from work. Claimant reported later than evening she noticed a different sensation in her low back which was not muscular but seemed to be more structural and deeper.

30. In reviewing Claimant's MRI, Dr. Erickson elicited the help of Dr. Carpenter, an MSK expert radiologist. Dr. Erickson noted the MRI showed mild diffuse lumbar spondylosis with preservation for the most part of disc height. Significant degenerative changes were noted from L4-S1, with bilateral severe facet joint arthropathy without any pars defects. Dr. Erickson noted clear evidence of anterolisthesis, grade 1, at L4-5. Imaging studies confirmed this was a mobile defect, with mild instability. Dr. Erickson noted there was no evidence of any acute disc herniation or fracture, or any abnormality which could be clearly attributed to the injury on January 11, 2020. Dr. Erickson reported that the L4-5 instability was secondary to severe and progressive arthropathy of the involved faced joints.

31. Dr. Erickson opined that Claimant's work injury demonstrated evidence of a work-related sprain/strain of the right shoulder, which was now for the most part resolved. Dr. Erickson opined that Claimant's low back condition was most likely related to severely arthritic facet joints from L4-5 to L5-S1, causing grade 1 anterolisthesis, unstable, of L4 on L5. Dr. Erickson opined that this abnormality was a progressive degeneration which was now symptomatic, but was in no way caused by the work injury.

32. Dr. Erickson testified at hearing consistent with his IME report. Dr. Erickson testified he is Board Certified in Orthopedic Surgery and Level II accredited. Dr. Erickson testified Claimant has a very mild L4-5 anterolisthesis and pretty severe arthritic changes in her facet joints. Dr. Erickson testified that the radiology studies

showed no evidence of acute changes to Claimant's lumbar spine. Dr. Erickson testified it was his opinion that Claimant's low back condition was not related to her January 11, 2020 work injury.

33. Dr. Erickson testified at hearing that Claimant's low back condition that was being addressed involved instability at two levels. Dr. Erickson testified that his underlying condition was asymptomatic prior to the January 11, 2020 injury. Dr. Erickson testified this condition was not caused or aggravated by the work injury.

34. Dr. Wong issued a report on May 24, 2021 in which he opined that Claimant most likely had an asymptomatic lumbar degenerative condition consisting of L5-S1 degenerative disc disease as well as a L4-5 spondylolisthesis. Dr. Wong noted it was asymptomatic until Claimants work injury where she was lifting and moving the portable x-ray machine. Dr. Wong noted that Claimant's injury was reported appropriately and opined that a lumbar fusion would help her symptoms and was reasonable and necessary treatment to improve her pain.

35. Dr. Stagg issued a report on May 27, 2021 after reviewing the IME and the note from Dr. Wong. Dr. Stagg deferred to Dr. Wont's expertise regarding his treatment of the spondylolisthesis and agreed with his assessment.

36. The ALJ credits the opinions expressed by Dr. Wong over the contrary opinions of Dr. Erickson and finds that Claimant has demonstrated that it is more probable than not that the injury on January 11, 2020 aggravated, accelerated or combined with a pre-existing condition to cause Claimant's need for medical treatment involving her low back, including the recommended L4-S1 fusion.

37. The ALJ notes that the medical records demonstrate that Claimant's low back condition was asymptomatic prior to January 11, 2020, despite the degenerative changes shown on the radiology reports. The ALJ notes that Claimant reported to Employer on January 12, 2020 that the January 11, 2020 injury resulted in pain to her low back that necessitated medical treatment.

38. The ALJ relies on the testimony of Claimant at hearing along with the employer's first report of injury and medical records entered into evidence at hearing and finds that Claimant has established that it is more probable than not that the January 11, 2020 work injury aggravated, accelerated of combined with a pre-existing condition to cause Claimant's need for medical treatment to her lumbar spine, including the recommended L4-S1 fusion. The ALJ notes that the records establish Claimant's testimony that prior to the January 11, 2020 injury, her low back condition did not necessitate medical treatment to her lumbar spine. However, after the January 11, 2020 work injury which resulted in contemporaneous repots of pain in Claimant's low back, Claimant necessitated medical treatment for her low back condition. As such, the ALJ finds that the work injury on January 11, 2020 at the very least, accelerated or

combined with Claimant's pre-existing condition to cause the need for medical treatment involving Claimant's lumbar spine, including the L4-S1 recommended fusion.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, Claimant's injury on January 11, 2020 aggravated, accelerated of combined with a pre-existing condition to cause Claimant's need for medical treatment to her lumbar spine, including the recommended L4-S1 fusion. As found, the testimony of Claimant regarding the onset of symptoms related to the January 11, 2020 work injury along with the medical records and employer's first report of injury are found to be credible and persuasive in reaching this decision.

6. As found, Claimant has proven by a preponderance of the evidence that medical treatment to her lumbar spine recommended by Dr. Wong is reasonable and necessary to cure and relive the Claimant from the effects of the industrial injury. As found, the opinions expressed by Dr. Wong are credible with regard to this issue.

7. The ALJ therefore finds that Respondent is liable for the reasonable and necessary medical treatment necessary to cure and relived Claimant from the effects of the industrial injury to her lumbar spine, including the recommended L4-S1 fusion.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury, including the medical treatment to Claimant's lumbar spine. Respondent shall be paid pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: March 16, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the DIME physician's opinion of Dr. Alicia Feldman has been overcome with regard to the impairment and what is the impairment.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 14, 2020 through December 9, 2020.

III. Whether Respondents proved by a preponderance of the evidence that Claimant was terminated for cause as of September 15, 2020.

IV. Whether Claimant proved by a preponderance of the evidence that he is entitled to an increase in average weekly wage due to discontinuation of health insurance benefits.

V. Whether Claimant proved by a preponderance of the evidence that he is entitled to maintenance medical benefits after maximum medical improvement.

VI. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award for disfigurement caused by use of a brace and alleged limping.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 13, 2021 listing the issues of compensability, medical benefits that are reasonably necessary, overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) on impairment rating as well as permanent partial disability benefits, offsets, credits and overpayments.

Claimant filed a Response to Application for Hearing dated September 22, 2021 adding the issues of authorized medical benefits after maximum medical improvement, temporary disability benefits, disfigurement, permanent total disability benefits and interest on benefits owed not paid when due.

STIPULATIONS OF THE PARTIES

The parties stipulated that Dr. Alicia Feldman, the DIME physician, was not provided, as part of the medical records packet, a copy of the preexisting injury and impairment records, at the time the DIME took place on August 17, 2021.

The parties further stipulated that, at a minimum, an apportionment of 7% impairment rating for Claimant's lumbar spine is appropriate as Claimant acknowledged

receiving these benefits based on the Final Admission of Liability (FAL) dated April 9, 2012.

The parties stipulated that Claimant was not seeking to overcome the DIME physician's determination of maximum medical improvement (MMI).

The parties stipulated that Claimant was not seeking temporary total disability (TTD) benefits after December 10, 2021, when Claimant was released to full duty by his authorized treating physician (ATP), Dr. Jeffrey Baker.

The parties stipulated that, if found appropriate, any increase in average weekly wage (AWW) would only affect an award for permanent partial disability (PPD) benefits.

The parties stipulated that, if called to testify, Ms. [Redacted, hereinafter AM] would testify that she sent a copy of the task letter to Claimant and/or his counsel on August 24, 2020. Claimant also stipulated that, if called, Ms. [Redacted, hereinafter ST] would testify that she sent the September 2, 2020 copy of the job offer with the attached task letter signed by Dr. Baker on August 31, 2020. Claimant stipulated that Claimant was not asserting a technical deficiency with regard to the modified job letter sent on September 2, 2020.

The parties stipulated that there was good cause for the delay in production of Dr. John Raschbacher's Additional Medical Record Review and Addendum report dated February 7, 2022. Claimant continued to object to the admissibility of the February 7, 2022 report issued by Dr. Raschbacher despite the stipulation for good cause. Claimant declined to request a continuance of the hearing against counsel's advice. Over Claimant's continued objection, the report, Respondent's Exhibit labelled BB was admitted into evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was born on May 28, 1983 and 37 years old at the time of the admitted work related injury of July 22, 2020. Claimant worked as a blade operator for Employer on road projects since April 4, 2020. A blade machine or motor grader is a heavy equipment machine that grades roads. Claimant testified that he was fixing the roads with the blade to grade the roads, to build and repair the roads. Claimant was parked when struck by a large scrapper, a very large machine.

2. On July 22, 2020 a box scraper hit Claimant from behind, injuring Claimant's low back and neck. Claimant testified that box scrapper was a heavy equipment machine with two engines, one in front and one in back, that had a large container, and underneath the container a blade to smooth the ground that was much larger than the blade machine Claimant was sitting in. The scraper was travelling at approximately 30-35 miles per hour when it hit him. Claimant reported significant damage to the blade machine, including damaging the front windshield with the impact from behind.

3. Claimant was involved in a prior work related injury on August 1, 2011 while lifting roofing materials.

4. Dr. Robert Kawasaki evaluated Claimant with regard to prior injury on March 1, 2012 which noted that Claimant continued to have minimal symptoms with lumbar spine pain at 3/10 on a visual analog scale (VAS). He documented Claimant's prior MRI findings that showed minimal degenerative changes and shallow, mild disc bulge at the L4-5 level. He diagnosed a lumbar spine strain and provided an impairment rating consisting of 5% for Table 53, page 80, section II B of *the AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised)*, and noted loss of range of motion (ROM) of 2% whole person. Dr. Kawasaki assigned a 7% whole person impairment rating to the injury by combining the specific disorder of the spine and ROM rating. Dr. Kawasaki released Claimant to full-time, full-duty work based on a Functional Capacity Evaluation and indicated that Claimant did not need any further medication and discharged him from his care.

5. Dr. Steven Bratman of Concentra attended Claimant in follow up on March 8, 2012, releasing Claimant to full duty work without restrictions, the impairment assigned by Dr. Kawasaki and no maintenance care.

6. The Respondents on the 2011 claim filed a Final Admission of Liability on April 9, 2012 admitting to the 7% whole person impairment rating, which Claimant stipulated he was paid.

7. Claimant requested a Division of Workers' Compensation Independent Medical Examination (DIME) in the 2011 claim and Dr. Miguel Castrejón was assigned as the DIME physician. He evaluated Claimant on August 1, 2012 with Claimant still reporting a sharp and stabbing pain to the left of his midback and across his lower back with pain extending into the lateral posterolateral thigh with pain at a 5-6/10 on visual analog scare (VAS) following return to work on July 31, 2012, the day before the evaluation. The DIME physician reviewed the medical records and opined that Claimant was not at MMI. He recommended trigger point injections and a trial of medication for the thoracic spine myofascial symptoms and electrodiagnostic testing with regard to the lumbar spine, including possible right SI joint injections under fluoroscopy, and chiropractic treatment as well as medications. Dr. Castrejón provided a provisional impairment rating as required by the Level II accreditation teachings. Under the *AMA Guides,* he stated Claimant would qualify for a 10% whole person impairment rating for the SI joint dysfunction consisting of a 5% for the specific disorder, under Table 53IIB, and 5% for loss of range of motion.

8. Claimant proceeded to settle his 2011 claim by signing a settlement agreement on September 21, 2012, before the filing of a general admission was due. As part of the settlement for the claim, Claimant received the amount of $20,000.00. The Division approved the settlement on October 1, 2012. The Division records state that the DIME completion was cancelled as of October 26, 2012. The settlement documents do not show which portion, if any, was designated for lost wages (7 months), closures, waivers or medical benefits in order for Claimant to achieve MMI and which, if any, was designated for further impairment.

9. Claimant testified that, after he settled his claim, he continued doing his own therapy and exercises for a period of about eight months, his back and leg problems eventually resolved and he returned to full work without any problems including the kind of work he performed with Employer.

10. Claimant reported the July 22, 2020 work related injury to his employer and was referred to Concentra Medical Centers for care.

11. Claimant was initially seen by physician assistant Stephen Toth who document the injury consistent with Claimant's testimony and other medical record histories. He reported that Claimant complained of neck and upper back pain with numbness into his right extremity. He order x-rays of the cervical spine. He noted tenderness in the right paraspinal muscles, the right rhomboid muscles and the trapezius muscle with normal but painful range of motion of the cervical spine. He described Claimant's pain as constant, sharp, dull and aching in nature. The severity of the pain was moderate. Associated symptoms included back stiffness and exacerbating factors included bending. Claimant was released to modified work, restricted from driving company vehicles due to functional limitations.

12. A Physician's Report of Injury (M164) form for July 22, 2020 was completed by Dr. Jeffrey Baker stating Claimant was examined, provided medications and an order for x-rays of the cervical spine, as well as returned to modified duty including no driving company vehicles due to functional limitations. The cervical radiology report by Steven Abrams, M.D. was normal with no acute fractures or subluxation.

13. Claimant testified that Mr. Toth later apologized to him for failing to properly document Claimant's lumbar spine problems that he complained of at the time of the initial visit. Claimant also stated that he returned to work the following Friday, and was advised by the foreman, Guadalupe, that there was no job available until he receive a full duty release by his providers. This ALJ takes notice that the Friday after the initial visit would have been July 24, 2020.

14. Ms. Elva Saint, a therapist at Concentra, noted on July 24, 2020 that Claimant had back and right low back pain, with the pain going up into the right shoulder blade. She noted that the pain radiated into the right buttocks, was constant and aching. Claimant had decreased range of motion. Upon exam, she noted Claimant had right sided muscle spasms and tenderness in the right paraspinal muscles, the sciatic notch, sacrum and right sacroiliac joint. Ms. Saint recommended physical therapy to address objective impairment and functional loss. After the PT session, lumbar spine x-rays were performed.

15. Claimant was also seen by Nicholas Wright, DPT, who, after examination of the lumbar spine, recommended manual manipulation, noting that posteroanterior testing in thoracic and lumbar spine reproduced right paraspinal pain. He performed functional dry needling and L4-5 lumbar paraspinal stimulation.

16. Respondents filed a General Admission of Liability (GAL) for the July 22, 2020 work related injury on August 27, 2020 admitting to an average weekly wage (AWW) of $1,171.71. They also started temporary total disability benefits as of July 23, 2020 at the rate of $781.14 per week.

17. On September 2, 2020 Employer sent Claimant a letter advising that Claimant's treating physician had authorized modified duty and multiple different jobs beginning September 14, 2020. However, the letter specified a notation that Claimant "must call Billy the day before to ensure that the job is still in progress."

18. The list of approved jobs by Dr. Jeffrey Baker dated August 31, 2020 included machine inspection and lubrication, washing trucks or equipment, painting machines, sweeping the garage or shop, counting trucks, cleaning up work sites, answering phones, filing and purging or shredding files. The only restriction was that Claimant could not drive.

19. Claimant received the letter dated September 2, 2020. Claimant recognized the letter but it was only one page. He stated that Billy was one of the Employer owners. He stated that he did not know the address of the Mayfield subdivision, as he had not been there before. No exact address is noted on the letter. Further, Claimant stated that the list of jobs was not attached. This ALJ takes notice that the Certificate of Delivery shows a date of August 24, 2020, which was before the August 31, 2020 date of approval by Dr. Baker and that the September 2, 2020 letter fails to show that there was any attachment to the letter, despite the parties' stipulations above.

20. Claimant testified that he called Billy on three different occasions and on the third try he left a message letting Bill know he had received the letter and was calling him about the modified duty job to find out what was available. Claimant stated that the following Tuesday or Wednesday Bill called him back and Claimant was able to speak with him. Claimant testified that they discussed Claimant's accident and current condition. Bill advised that he would be contacting the insurance company to find out what he could do to get Claimant more medical care for his back, and would get back to him. Claimant stated that he never was contacted by Bill after that and Claimant never returned to work. Billy never advised Claimant whether the job was still "available," and Claimant would have shown up for work if he had been advised one was available, as well as where and when he should return to work. Claimant also testified that he contacted multiple Jennifer, the business' secretary, and the second supervisor and owner, Russ. Neither of them returned his calls. Claimant considered Employer's failure to return his phone calls, as well as Bill's failure to get back to him as promised, as a kind way of discharging from his employment. He stated that this is common in the industry where an Employer does not call back, it meant that they were not interested in having the employee come back to work.

21. Respondents filed a second GAL on September 15, 2020 terminating temporary total disability as of September 13, 2020 and starting temporary partial disability benefits at the rate of $61.14 from September 14, 2020 forward.

22. On November 20 2020 Dr. Scott Parker evaluated Claimant at Concentra for a chiropractic consultation. He obtained a history from Claimant consistent with his testimony and reviewed the lumbar spine MRI. He noted that Claimant's primary complaints related to the right sided cervicothoracic and lumbar pain, with tightness in the thoracic region and a sharp burning pain going into the gluteus muscles travelling into the hamstring and stopping at the popliteal fossa. He did not observe any pain behaviors. He noted restrictions palpated at the cervical spine and thoracic spine, specifically on the

right. He found trigger points palpable in the bilateral trapezius, rhomboid, and lumbar spine muscles. He palpated adhesions in the upper back and neck and mild muscle spasms as well. He diagnosed lumbosacral sacroiliac strain and dysfunction, and cervicothoracic strain. He proceeded with manual therapy, soft tissue mobilization, neuromuscular re-education, and low-grade manual manipulation. He recommended five additional treatments. Claimant returned to see Dr. Parker on November 25, 2020 noting right SI joint was mildly tender to palpation, but unrestricted.

23. Claimant saw Dr. Parker on December 2, 2020 and reported that he had done well with the prior treatment, being close to being pain-free but that evening he became very sore and his muscles spasming. He noted continuing sharp burning sensation in the right gluteus muscle travelling in to the hamstring. Claimant continued to have muscle spasms and trigger points. His diagnosis remained the same. Despite these findings, Dr. Parker would end this and other reports with stock language that "he [Claimant] transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors, and then ambulated well and appeared comfortable."

24. On December 2, 2020 Claimant was attended by Nicholas Wright, DPT. He noted that Claimant was reporting stress related to surveillance. Mr. Wright noted that Claimant was still restricted from driving company vehicles due to functional limitations. He reported conflicting information in his report as it states "Suboccipitals: No increased muscle tone. Severe increased muscle tone." He noted a bilateral positive slump test. He noted that Claimant continued with right lumbar spine concerns and that he was not progressing in therapy. He further noted that "Unfortunately I do not see him healing physically prior to his mental health improving." He also stated that Clamant "was educated in proper care of injury to optimize rehabilitation time, including education for pain management, activity modification, and expectations for recovery. Educated in the role of mental health in physical healing."

25. Claimant returned to Dr. Parker on December 9, 2020 for chiropractic care. Claimant reported that he had attended a massage therapy visit on his own, but continued to have a sharp burning pain in his low back and gluteus muscle travelling into his hamstring. He proceeded with chiropractic care and noted Claimant continued to have muscle spasms on palpation, adhesions and trigger points. Claimant retuned the following day and reported he was somewhat improved.

26. Dr. Baker examined Claimant on December 10, 2020 stating that Claimant reported he was feeling improved since the last visit, though continued to have sharp and burning low back pain that was continuous though the intensity varied and did not cause radicular symptoms though did cause numbness and tingling with prolonged sitting. Claimant was instructed to follow up with Dr. Richard and Dr. Brady as well as return to clinic for a follow up appointment in three weeks. He provide medication, transdermal patches and external cream. Dr. Baker stated that the objective findings were consistent with the work related mechanism of injury.

27. Claimant reported to Dr. Baker that he suspected that Employer was having him investigated, that someone had vandalized his house, and that he had once discharged his gun accidentally while cleaning the gun. Upon exam, Dr. Baker noted that Claimant's judgement and insight were normal, and mood and affect were appropriate.

He noted on exam Claimant had tenderness in the lumbar spine paraspinal muscles and the right sciatic notch and revealed muscles spasms with limited range of motion. He assessed a lumbar strain, cervical sprain and muscle spasms related to the motor vehicle accident.

28. Claimant reported to Dr. Baker he had not been working at that time. Claimant conveyed that he had 2 job offers but needed to have no work restrictions. Dr. Baker then released Claimant to return to full duty as of this date. It is inferred from this report, in conjunction with the approved job list and restrictions, Claimant continued to have the no driving company vehicles restrictions until this date, but no other restrictions. Claimant was instructed to follow up in 3 weeks.

29. Claimant testified that he did not return to work for Employer after the full duty release on December 10, 2020. Claimant stated that he did not reach out to his employer because they never contacted him about the modified duty despite saying that they would. Claimant did not wish to beg for a job. Claimant stated that it is commonly understood in the field he works in that if a worker called and was advised they would get back to them but failed to do so, that it was a nice way of saying that they were letting him go. Claimant testified that he had spoken with the company secretary Jennifer, as well as both owners, Billy and Russ, and no one ever got back to him, that is why he thought he was terminated.

30. Claimant stated he had applied for multiple jobs at multiple employers, but when he advised that he had an ongoing workers' compensation claim, they would not hire him because of the risk despite showing the full duty release. Claimant was unable to get a job until September 20, 2021, when he finally contacted a friend at a prior employer to get the job. Once he showed them the full duty release, they took a chance on him. Claimant stated that it was not necessarily because he thought he could perform the full duty well but that he felt that he had to provide for his family. Claimant stated that he would have returned to work for Employer if they had offered him any job, which they did not.

31. Respondents filed a new GAL on December 10, 2020 terminating TPD benefits as of December 9, 2020.

32. On December 11, 2020 Claimant was again treated by Dr. Parker and the report is very similar to prior reports including that he continued to have a sharp burning pain in his low back and gluteus muscle travelling into his hamstring. He noted restrictions palpated at the cervical spine and thoracic spine, specifically on the right. He diagnosed lumbosacral sacroiliac strain and dysfunction, and cervicothoracic strain. He proceeded with chiropractic care and noted Claimant continued to have muscle spasms on palpation, adhesions and trigger points.

33. Also on December 11, 2020 Dr. Baker completed an M164 stating Claimant was to return to consult the following Wednesday. Another M164 was issued on December 16, 2020 for Claimant to follow up the following Friday. It is not clear if Claimant was seen on either of these follow up dates.

34. Claimant was evaluated by Molly M. Brady, PsyD, on December 15, 2020. Claimant described the work incident consistent with his testimony. He reported to Dr.

Brady that he found chiropractic care helpful in combination with massage therapy but that physical therapy had been discontinued. Dr. Brady reported that Claimant was experiencing considerable distress secondary to what he described to be a pattern of investigation and vandalism that he believed was conducted by individuals hired by his employer. Claimant described anger and fear associated with these perceived acts. Claimant stated that several family members had also witnessed evidence of tampering of the home intrusions and that he and his family had been very upset. He explicitly noted to Dr. Brady that he was prepared to defend himself and his family from intruders with deadly use of force and was important to him that others understand the seriousness of his experience. Claimant described his pain levels and changes. Dr. Brady observed no obvious pain behaviors during the interview. Claimant answered without hesitation when asked for information omitted on the history intake forms.

35. Dr. Brady noted no changes to Claimant's concentration or memory but stated that he had changes to mood including increased irritability, anger and even lack of tolerance towards his children, which Claimant reported was not his parenting style. Claimant denied any plan to injure others and stated that he did not have a firearm in his home at that time. Claimant reported a reduction in appetite, increased sadness and tearfulness, increased withdrawal, fatigue, lower libido, as well as guilt for putting his family through the investigation issues. He reported being concerned with his family's safety, and was losing sleep. Claimant declined to be administered the Behavioral Health Inventory 2 (BHI2). Claimant explained that he was aware that he probably would never be able to get back to who he used to be but wished to achieve some sort of normal for him. Dr. Brady reported that Claimant was less satisfied with his medical providers in this case, that he did not believe his provider's interpretation of the MRI and wished a second opinion. Claimant reported that he was interested in having someone to talk to that would not judge him.

36. Dr. Brady diagnosed pain disorder associated with psychological factors and a medical condition. Dr. Brady declined to provide Claimant with psychotherapy as he failed to take the recommended testing. She noted that Claimant was struggling with chronic pain related to the injury and frustrations secondary to the perceived investigation and surveillance, especially the safety of his family. She strongly recommended that, if any surveillance was being conducted, that it be halted due to concerns of escalation. She further stated that Claimant's lack of trust in those that he is dependent upon for his care also represented a source of distress, a notable possible complication to his capacity to benefit from treatment and to successfully move forward after the workplace injury. Dr. Brady recommended collaborative communication regarding medical treatment options available as well as clarification/agreement between the medical providers and Claimant as to when MMI had been reached.

37. On January 13, 2021 Dr. Baker reevaluated Claimant with reports of constant back pain as well as pain, weakness and a burning sensation in his right leg. Claimant reported that driving still caused increased pain in his lumbar spine. From Dr. Brady's report, he noted Claimant had refused further treatment but that she was very concerned about Claimant's "paranoid delusions" and that she reported Claimant believed Dr. Baker was not telling him the truth. Dr. Baker duplicated some of the reports of history from the December 10, 2020 report. On reexamination he found right sided

lumbar spine muscle spasms and limited range of motion. Claimant did agree, at that point to an evaluation pursuant to a psychiatry referral to help with his sleep. Dr. Baker stated that Claimant's psychiatric condition was making it very difficult to treat Claimant as Claimant believed Dr. Baker was lying to him. Dr. Baker indicated that if he did not follow up with psychiatry he would not continue to treat him. A referral was issued but did not specify the name of the psychiatric provider. He continued the current treatment plan and scheduled a follow up recheck in 3 weeks. Dr. Baker stated that the objective findings continued to be consistent with the work related mechanism of injury.

38. On February 1, 2021 Claimant was evaluated by Dr. Megan Richard at UCHealth for electrodiagnostic evaluation and consultation regarding lumbar spondylosis with radiculopathy. Claimant reported that he continued to have right sided neck stiffness as well as pain, right sided midthoracic pain and muscle spasm, and right sided lower lumbar spine with radiation down the posterior aspect of the thigh that does not cross the knee. He would also get anterior right leg burning pain with different positioning of his back and hips.

39. Upon examination, Dr. Richard found Claimant had a positive seated and supine straight leg raise on the right, positive slump test on the right, positive Kemp[1] test on the right - all of which caused burning pain at the right buttock and behind the right thigh and knee. She found that FABER[2] and FADIR[3] tests both exacerbate his right buttock pain and radiation of pain into the posterior right thigh, that facet loading maneuvers standing somewhat exacerbated his lumbar pain, but not severely. She noted 5/5 strength with the exception of reduced ability to perform calf raises on the right indicating a possible S1 nerve lesion. She noted an antalgic gait, offloading right lower extremity, and hesitancy to fully extend right hamstring/knee.

40. Dr. Richard reported that Claimant was attentive, pleasant and appropriate with normal speech, not rapid and pressured, delayed or slurred, and his behavior was not agitated, slowed, aggressive, withdrawn or hyperactive. She noted normal judgment and he was not impulsive or inappropriate.

41. Dr. Richard conducted a nerve conduction study that was normal. Claimant had an abnormal needle electromyography (EMG) study that demonstrated complex repetitive discharges and neurogenic recruitment in the right Tibialis Anterior (L4/L5) and Extensor Hallucis Longus (L5/S1), indicating a chronic L5 radiculopathy with subsequent reinnervation, suggestive of a chronic right lower extremity motor radiculopathy affecting the L5 nerve root. She stated that nerve conduction studies address mainly the function of large myelinated nerve fibers and patients with small-fiber neuropathy can have normal sensory nerve conduction studies. She diagnosed Claimant with lumbar spondylosis with chronic right L5 radiculopathy, chronic right-sided low back pain, chronic midthoracic back pain, chronic right-sided neck pain, muscle spasms, neuropathic pain.

42. Dr. Richard made a referral for physical therapy at Colorado in Motion in Loveland, CO for his chronic low back pain with right lower extremity radiculopathy,

[1] Kemp test is performed to evaluate pathology of the disc or disc involvement.
[2] FABER test is performed to evaluate pathology of the hip joint or the sacroiliac joint.
[3] FADIR stands for Flexion, Adduction, Internal Rotation test and refers to a clinical examination test performed to assess the hip function.

weakened core and gluteal musculature, muscle spasms, and impaired mobility. She stated that Claimant would benefit from lumbar spine injections in order to improve his current pain and impaired mobility and made a referral to Foxtrail Pain Clinic for his lumbar spondylosis and right lower extremity radiculopathy in the distribution of the L5/S1 nerve root. Dr. Richards recommended a trial epidural steroid injections as well as potentially facet blocks in the lumbar spine. She also recommended continued massage, acupuncture and chiropractic care as well as medications and patient education.

43. Claimant testified that Dr. Baker referred Claimant for the EMG/nerve conduction study to Dr. Richard as well as to Dr. Brady.

44. Claimant returned to see Dr. Baker on February 10, 2021 with continued constant back pain. Dr. Baker reported that Claimant did see a Dr. Perrin once but missed the second appointment due to some miscommunication. He was offered a job but declined because of his concerns about his back pain. Claimant advised Dr. Baker that he wished to transfer his care to another clinic and Dr. Baker agreed that he would follow up at another clinic but was to continue with specialist care, stating that "Injured Worker is not at MMI, but is anticipated to be at MMI in/on 5/1/2021."

45. Dr. Parker evaluated Claimant also on February 10, 2021. Claimant complained of low back pain and, to a lesser degree, cervical and thoracic pain. Claimant reported a sharp sensation in the right gluteus muscle traveling into the hamstring, problems with sleeping and exacerbation of his pain with cold weather. Claimant requested to continue with chiropractic care. On exam he noted trigger points in the bilateral trapezius, rhomboid, and lumbar muscles. He palpated adhesions in the bilateral thoracolumbar fascia and mild muscle spasm was also palpable. His impression was stable lumbosacral/sacroiliac strain/dysfunction and cervicothoracic pain/strain complaint. He proceeded with manual therapy, traction, soft tissue mobilization, neuromuscular re-education and low-grade manual manipulation. Dr. Parker advised the patient to continue his exercises and to be careful to slowly ease back into physical activity.

46. Claimant returned to see Dr. Parker on February 17, 2021, when Claimant stated that the treatment had been helpful but continued with the right sided spine discomfort. Claimant reported that the pain increased with the cold, had a sharp sensation in his right gluteus muscle going to his hamstring and continued to have disrupted sleep. He also reported he was taking medication he obtained from a doctor in Mexico, was performing his home exercises and awaiting the injection recommended by Dr. Richard. On exam Claimant had mild discomfort while performing range of motion of the cervical spine and lumbar spine. Straight leg and Patrick's were negative, but Claimant had mildly positive Hibbs[4] and hyperextension. Claimant was tender to palpation to the right sacroiliac join. He found adhesions as he palpated the bilateral thoracolumbar fascia and trigger points in the bilateral trapezius, rhomboid, and lumbar muscles with mild muscle spasm. He performed manual traction, neuromuscular re-education, soft tissue mobilization, and low-grade joint mobilization treatments. He stated that Claimant had maximized benefit from the treatment and released him from care.

[4] A positive Hibbs test is indicative of SI joint or ligament pathology.

47. Dr. Baker issued an M164 on February 17, 2021 which did not specify any return date for follow up but that Claimant was still not at MMI.

48. Claimant attended an independent medical examination (IME) at Respondents' request with Dr. John Raschbacher on February 26, 2021. Dr. Raschbacher took a history from Claimant, performed a physical examination and completed a medical records review. Claimant described the pain across his low back, right buttock pain that travelled to the right knee, sometimes felt numb to the right lateral ankle and foot, as well as neck pain. He stated that he also had discomfort that radiated up to the neck on the right side. Examination showed positive Gaenslen's[5] and Patrick's[6] tests that produced low back pain on the right. He had decreased sensation on the right foot and unweighted the right lower extremity, shifting his weight onto his left foot. He also had decreased range of motion.

49. Dr. Raschbacher stated that on history and physical examination and review of the medical records, it did appear that Claimant's presentation and request for medical care was related to the alleged injury suffered on the job. There was no evidence that it related to or stemmed from a pre-existing condition. He stated that, one might conclude medically, it was reasonable that based on his reported mechanism of injury that he did in fact likely have strains of the cervical spine, right shoulder area and lumbar spine. Due to psychological factors present, as long as Claimant's feelings of animosity toward his employer remained, it would be extremely unlikely that he would cease to complain of significant pain and significant inability to function physically, making any further medical care unlikely to produce effect and restore function. Dr. Raschbacher also stated that there was no reason from a medical standpoint that Claimant could not have performed the jobs described in the August 24, 2020 job task list.

50. On February 26, 2021 the Concentra Center Operations Director sent a letter to the adjuster in the claim stating as follows:

> Due to recent behaviors in our center, Concentra has made the decision to terminate the care of one of your injured worker[s]…
>
> In the most recent months, the injured worker has raised concerns with statements made throughout various visits with his medical provider and physical therapist. He has also refused to comply with recent treatment recommendations. As a result, we have determined that it is in the best interests of both parties for [Claimant] to seek care from another provider. …
>
> [Claimant] has been notified of the decision to terminate care by way of a certified letter signed by Dr. Jeffrey Baker. The letter refers [Claimant] to contact your office immediately to make arrangements to obtain health care services from another facility. *(Claimant's name, redacted.)*

51. Claimant was seen at the emergency room at UCHealth Medical Center of the Rockies on March 4, 2021 stating that he had had an increase in low back and right leg pain. He advised that his pain was a bandlike ache and intermittently sharp to the right buttock with ambulation. Claimant reported that his provider had discharged him

[5] Gaenslen's test detects musculoskeletal abnormalities and primary-chronic inflammation of the lumbar vertebrae and sacroiliac joint.
[6] Patrick's test or FABER test is performed to evaluate pathology of the hip joint or the sacroiliac joint.

from the Concentra practice and did not have one to replace them. Claimant was evaluated by nurse practitioner Bree Bacalis, who examined Claimant, finding he walked with a slight limp and determined that he required medications. He was diagnosed with acute right sided low back pain with right-sided sciatica. They administered a Norflex patch and Toradol, prescribed a Medrol Dosepack and Flexeril. He was advised not to lift anything heavy, stretch his back and leg, use a heating pad as needed and take over the counter medications as needed.

52. On March 30, 2021 Claimant was attended by Dr. Michael Brown at UCHealth Foxtail Pain Management for bilateral sacroiliitis, chronic sacroiliac pain, sacral spondylosis, myofascial pain syndrome and chronic pain due to trauma. They placed an order for spine injections at that time to take place with Dr. Brown at the Harmony Surgery Center for bilateral sacroiliac joint injection with flouroscopy.

53. Claimant testified that Dr. Baker, Dr. Richard and Dr. Brown agreed that he required the SI joint injection but it was not authorized. He further stated that he would like to obtain the injection.

54. On May 3, 2021 upon first examining and evaluating Claimant, Dr. Sanchez agreed with Dr. Raschbacher that Claimant was at MMI without impairment. On physical exam (PE) Claimant exhibited mild pain behaviors, mood and affect were appropriate but mildly anxious, with speech at a normal rate and tone. She noted that Claimant had complaints of balance and not feeling solid on the ground but had an equivocal Romberg's test. Claimant was tender to touch diffusely in the right paraspinal side and had bilateral positive straight leg tests. She found impressive that Nicholas Wright, PT, stated on December 2, 2020 "unfortunately, I do not see him healing physically prior to his mental health improving" which was then compounded by Dr. Raschbacher's assessment on February 26, 2021 stating that the patient is "unlikely" to exhibit "significant functional gain or positive response subjectively to further treatment." Dr. Sanchez found that the patient tended to externalize all of his problems and was unwilling to be introspective. She noted that Claimant seemed to be unwilling to acknowledge that personal stressors may be contributing to his ongoing pain complaints. Dr. Sanchez simply advised Claimant that if he would like to receive ESI injections he should use his private insurance. She highlighted to Claimant that she found his physical exam was not consistent with "expected" findings given his MRI and EMG and his lack of response to conservative treatment. On May 4, 2021 Dr. Sanchez summarized medical records.

55. On May 13, 2021 Respondents filed a Final Admission of Liability (FAL) terminating benefits pursuant to Dr. Sadie Sanchez's report dated May 3, 2021, and denying maintenance medical benefits after MMI.

56. Claimant objected to the FAL in a timely manner on May 26, 2021 and completed the Application for a Division Independent Medical Examination.

57. Claimant returned to UCHealth MCR on August 9, 2021 and was evaluated by Cole O'Hara, M.D. Claimant presented with ongoing back pain since a reported work-related injury around 1 year before. They noted the patient has had ongoing pain from his neck to his lower back with radiation of pain into both legs but denied any numbness or weakness. The patient denied any new injury, fever or chills. Claimant reported that he had multiple evaluations including pain management and neurology, and had an MRI

report with him several months old that revealed mild lumbar disc disease. The patient described sharp pain that involved the entire right side of his back from his neck to his tailbone region that worsened with movements. Claimant stated that he had a recommendation to have injections at the pain management clinic but work comp insurance denied it.

58. Dr. O'Hara's clinical impressions were of chronic neck and right sided low back pain and a differential diagnosis that included chronic low back pain, lumbar radiculopathy, cervical radiculopathy, cauda equina syndrome. Upon exam he noted that the pain involved almost his entire back, most consistent with muscular spasm. He noted that Claimant appeared quite uncomfortable and was given a dose of IM[7] dilaudid. He reviewed Claimant's PDMP[8] and did not see any concerning findings. He was prescribed a few days of oral pain medication to get him through the exacerbation of pain. Dr. O'Hara noted that, while Claimant had established care with pain management as well as spine surgery, he recommended that Claimant pursue acquiring Medicaid given his lack of success with the work comp claim. Dr. O'Hara stated Claimant would benefit from comprehensive pain management. He was prescribed Norco upon discharge, he was advised to follow up with Dr. Brown for injections and with Dr. Robert Benz for an orthopedic surgery consult at Orthopaedic & Spine Center of the Rockies.

59. The DIME physician, Alicia Feldman, M.D. of Colorado Clinic, evaluated Claimant on August 17, 2021. She reviewed the medical records and provided a summary of the relevant records. Dr. Feldman took a history consistent with Claimant's testimony of a heavy equipment motor vehicle collision. Claimant reported that he had initial thoracic pain and shortness of breath in addition to acute anger of the accident. Claimant had onset of pain in his neck, right scapula, and low back following the accident. He reported difficulty with activities of daily living including pain with lifting his children. He needed to sit down to get dressed. He reported difficulty bending while showering. On physical exam, Dr. Feldman found Claimant has diffuse tenderness to palpation over the right side of the cervical, thoracic, and lumbar spine, had tenderness to palpation over the right SI joint, pain with all bending, flexion, extension, and side bending, and decreased sensation to light touch over right L5 distribution. She found Claimant had a positive straight leg raise on the right, negative on the left, positive FABER on the right, positive thigh thrust on the right, positive pelvic disruption on the right. He also had limited range of motion.

60. Dr. Feldman provided a clinical diagnosis of work-related right-sided low back pain, lumbar sprain/strain, and possible right-sided sacroiliac joint mediated pain. Dr. Feldman stated Claimant reached MMI on May 3, 2021 as he had extensive treatment with physical therapy, chiropractic, and medications. He had an extensive workup including x-ray, MRI, electrodiagnostic testing, and psychological evaluation. He had refused psychotherapy, and at that point, the second opinion occupational medicine doctor did not recommend further treatment. Given Claimant's lack of trust in his occupational medicine providers, Dr. Feldman did not expect further treatment within the workers' compensation system to result in any significant functional gains and felt that

[7] Intramuscular.
[8] Prescription Drug Monitoring Program.

MMI was appropriate. She stated that Claimant deserved a second evaluation with an occupational medicine doctor which occurred on May 3, 2021.

61. Dr. Feldman noted that Claimant had had greater than 6 months of medically documented pain and rigidity, had actively treated with chiropractic through February, and had ongoing pain and functional limitations for which she thought it was appropriate to award an impairment rating. These add up to 12% whole person impairment for loss of range of motion of the lumbar spine. She stated that the straight leg raise validity test for lumbar flexion was valid. Utilizing Table 53IIB for unoperated medically documented injury and a minimum of 6 months of medically documented pain and rigidity with or without muscle spasms associated with none to minimal degenerative changes on structural tests of the lumbar spine she assigned a 5% whole person impairment. The 12% and 5% combined to a 16% whole person impairment. Utilizing the apportionment calculation worksheet, the current Table 53IIB 5% minus the previous 5% left an apportioned 0% for the specific disorder of the spine. Range of motion measurements was 12% minus the previous 0% resulted in a 12% whole person apportioned impairment rating. Dr. Feldman disagreed with Dr. Sanchez's 0% impairment rating. Dr. Feldman stated she felt Claimant had objective evidence of injury to his lumbar spine, likely SI joint based on his physical exam and history, although the true extent of his pain and impairment was somewhat complicated by the significant psychological distress and distrust he had for some of his providers. She did not recommend maintenance care as she agreed with Dr. Sanchez that Claimant should seek treatment outside of the workers' compensation system given his significant distrust for the occupational medicine providers and further treatment within that setting would not be productive.

62. The DIME process was concluded as of the Division's Notice of September 9, 2021.

63. Dr. Benz's report of May 17, 2021 stated that Claimant had ongoing pain in his lumbar spine that radiated to his lower extremities and upper back. He stated that the MRI showed moderate degeneration of the lower lumbar spine most severe at L4-5 with no evidence of nerve root compression. He diagnosed Claimant with mild multilevel lumbar disk degeneration and probable right SI joint dysfunction. He suggested that possible treatment options was an SI joint injection on the right and, if this was helpful, a CT scan of the lumbar spine to include the SI joints to determine if an SI joint fusion would be appropriate.

64. Dr. Raschbacher issued an addendum report on February 7, 2022 following receipt of the 2011 claim records. Dr. Raschbacher noted that it did not appear that Dr. Feldman, the DIME physician, was provided with the prior impairment rating and should be afforded the records for purposes of apportionment, though he continued to assert that there was no objective evidence of injury other than a strain/strain that should have resolved, and therefore, no impairment was appropriate in this matter. He also stated that the video surveillance should be provided to the DIME physician, if one existed. Dr. Raschbacher's opinion with regard to impairment is not credible.

65. This ALJ reviewed the video surveillance in this matter, which consisted of approximately 55 seconds, showing Claimant walking to a vehicle. This ALJ viewed that Claimant had a visible antalgic gait, favoring his right side.

66. Dr. Raschbacher testified as an expert in occupational medicine and a Level II accredited physician. He stated that the abnormal EMG showed that there was chronic damage to the L5 nerve root and that it was trying to reestablish enervation and normal nerve function. He stated that the report issued on February 26, 2021 summarized his opinions prior to receiving the 2011 injury medical reports.

67. Dr. Raschbacher stated he received training regarding apportionment of spinal impairments from the recent Level II accreditation course including receiving some apportionment tables. He stated that it was clear that Dr. Feldman did not have the prior records available when she did the impairment rating and she completed the forms correctly. He stated that Dr. Feldman used the apportionment tables when an impairment was not available and that she relied on Claimant's statement that he had a 5% rating from his 2011 claim. He stated that the Division requires physician to subtract like from like, so only a Table 53 from a prior specific spine impairment and loss of range of motion from other measurements of range of motion. He testified that, assuming that the correct apportionment was the 10% provided by Dr. Castrejón's, then the 5% for Table 53IIB from the 5% Table 53IIB would result in a 0% for specific disorder and the 5% for loss of range of motion is subtracted from the 12% ROM impairment found by Dr. Feldman, would result in a 7% whole person apportioned impairment. Assuming that the 7% whole person assigned by Dr. Kawasaki was correct, then the 5% for Table 53IIB would be subtracted from the 5% Table 53IIB resulting in a 0% for specific disorder, and the 2% for loss of range of motion would be subtracted from the 12% ROM impairment found by Dr. Feldman, resulting in a total of 10% whole person apportioned impairment rating.

68. Dr. Raschbacher testified that nothing in the *AMA Guides*, Impairment Rating Tips or the Level II accredited course materials indicated that a physician could not assign an impairment rating to a strain or sprain if it did not resolve but that most did resolve without impairment. Dr. Raschbacher stated that he did not see the surveillance, but was not specifically surprised that there was only 55 seconds of surveillance nor did he state he knew whether there were any objective evidence of anything in particular with regard to the surveillance. He testified that he agreed with Dr. Feldman's opinion with regard to maintenance care, where, since Claimant did not achieve any functional gains or improvement from the medical care he had received to date, Claimant should not have any maintenance care in the workers' compensation setting.

69. Under Division of Workers' Compensation (Desk Aid #11) Impairment Rating Tips: Updated July 2020, the Spinal Rating for specific disorder under Table 53, stated that "[W]henever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity." As found here, Claimant clearly had at least six months of documented pain and rigidity, the last of which is inferred as loss of range of motion, both of which are documented by the providers above, including pain, muscle spasms and adhesions as well as objective findings.

70. Claimant received a COBRA letter on December 10, 2021 which terminated his medical, dental and vision care showing a monthly premium of $914.59 beginning as of January 1, 2022. Claimant confirmed that he lost these benefits in December 2021. As found, the fair approximation of the Claimant's wages from May 3, 2021 forward is $1,171.71 plus the $211.06 (914.59x12/52) from the discontinued COBRA benefits for an AWW of $1,382.77 and a TTD rate of $921.86.

71. Claimant testified that he attempted to return to a similar field of employment from December 10, 2020 through September 2020, as a blade operator or grader, but he was unable to return to other similar jobs that required heavy lifting and other manual activities as part of the job. Claimant finally was able to locate and secure a job through a friend on September 20, 2021 with a prior employer.

72. Claimant testified that he uses a back brace that was recommended by Dr. Parker but that he cannot use the back brace all the time because then his back would become more weakened. He stated that he uses it intermittently as needed. He stated that he continues to have a limp and watched the surveillance video, confirming that the person in the video was him. As found, Claimant has a noticeable limp, favoring his right lower extremity. The ALJ finds that Claimant should be awarded $1,000.00 for this disfigurement.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office,* 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME Physician's Opinion

Respondents seek to overcome Dr. Feldman's determination of impairment in this matter. Respondents must prove that the DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician

correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*.

Respondents need only prove that any one particular impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating

protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

Here, Respondents seek to overcome the DIME physician's opinion. Dr. Alecia Feldman complied with the requirements of the law by apportioning impairment to Claimant's preexisting injury based on the history provided by Claimant as the parties failed to provide the DIME physician with the preexisting records of impairment. However, the parties in this matter stipulated that Claimant's proper apportionment was "no less than 7% whole person impairment," contrary to Dr. Feldman's apportionment of 5% whole person impairment. Therefore, Respondents, based on this stipulation, have overcome Dr. Feldman's DIME opinion.

Respondents argue that the correct impairment in the 2020 claim is 0% whole person impairment as designated by Dr. Raschbacher, as Claimant suffered from a strain/strain that should have resolved within weeks of the work related injury. Dr. Raschbacher's opinion is not credible in this matter as Claimant testified that he continued to have pain in his low back going down his right lower extremity that has not resolved. Dr. Raschbacher's opinion is contrary to the *AMA Guides* and the Impairment rating tips that allow for a strain of the lumbar spine that has continued greater than six months, including pain and rigidity, to be assessed impairment under Table 53IIB. As found and concluded, it is clear from the records of Dr. Feldman, Dr. Richard and Dr. Benz as well as Dr. Baker and Dr. Parker that Claimant had ongoing low back pain and rigidity, including muscle spasms, positive findings on exam, and valid loss of range of motion, and these physician's opinions are more persuasive than Dr. Raschbacher's opinion.

In the alternative, Respondents argue that the proper impairment to be apportioned is the 10% whole person provided by Dr. Castrejón, the DIME physician in the 2011 claim. As found, the impairment rating by Dr. Castrejón was only a provisional impairment rating as he was not at MMI at the time of the evaluation, and Dr. Castrejón recommended further care that was anticipated to change the level of impairment. Claimant settled the matter within 30 days of the deadline. Claimant testified that he continued to perform home therapy and exercises and, after the following 8 months, no longer had problems with his low back. Based on this credible testimony, this ALJ determines that the 7% whole person impairment rating for the 2011 claim as provided by Dr. Kawasaki is the more appropriate and the correct impairment rating to apportion in this matter. Therefore, Claimant's correct impairment rating for the 2020 claim is 10% whole person apportioned impairment rating based on Dr. Raschbacher's application of the AMA Guides and the proper apportionment as well as Dr. Feldman's measurements. Respondents failed to show that Claimant should not have any impairment related to this claim. Claimant proved by a preponderance of the evidence that Claimant continued to have an apportioned impairment rating of 10% whole person.

C. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007). Under section 8-40-201(19), C.R.S. the cost of health insurance coverage shall not be included in the Claimant's average weekly wage, so long as the employer continues to provide such health insurance coverage. Under Sec. 8-42-107(8)(d), C.R.S. the AWW *shall* include the amount of the employee's cost of continuing the employer's group health insurance plan upon termination. However, *Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991) holds that where there is ambiguity in the Act we should construe the entire statutory scheme in a manner that gives consistent, harmonious, and sensible effect to all its parts.

An AWW calculation is designed to compensate for total wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Sec.* 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008).

Respondents argued that Claimant is not entitled to the increased average weekly wage as Claimant voluntarily left his employment by not showing to work pursuant to the September 2, 2020 offer of modified employment. There is nothing persuasive in the record that indicates that Claimant continued to be an employee or that he was eligible to return to work. In fact, Employer failed to return Claimant's calls with regard to continued employment. Health insurance benefits were formally terminated as of December 31, 2021 and COBRA to start as of January 1, 2022. This is a unique case where no medical impairment benefits have been paid to date. Based on the totality of the evidence, this ALJ finds and concludes that a fair approximation of the AWW should include the COBRA benefits, pursuant to Section 8-42-107 (8)(d), C.R.S., and that AWW is calculated as $1,382.77, only for purposes of calculating medical impairment benefits as PPD compensates Claimant for future loss of capacity to earn wages. Here, while Claimant

returned to a similar field of employment, he was unable to return to other similar jobs that required heavy lifting and other manual activities. It is further found that the Claimant's earnings at the time his COBRA benefits were terminated would more fairly compensate Claimant for his future loss of earning capacity rather than computing permanent impairment benefits based on the wages paid to Claimant by his employer at the time of the injury. See *Spencer Jones v. United Parcel Services*, WC No. 4-669-404, ICAO (November 12, 2008); *Gibbons v. Progressive Roofing*, WC No. 5-034-260-01, ICAO (September 21, 2017); *Nanez v. Mechanical & Piping Inc*., WC No. 4-922-618-04, ICAO (June 16, 2017). Claimant as proven by a preponderance of the evidence that the COBRA benefits should be included in Claimant's average weekly wage to bring it to $1,388.77 for a TTD rate of $921.85.[9] Claimant has shown that PPD benefits owed shall include the COBRA amount.

D. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008).

Respondents argued that Claimant's entitlement of temporary disability benefits should be terminated as of September 14, 2021, 2020 when Dr. Baker released Claimant to modified duty and Claimant was sent an offer of modified duty employment pursuant to W.C.R.P. Rule 6-1(A) and Sec. 8-42-105(3), C.R.S. Claimant conceded he was not alleging a technical deficiency in the Rule 6 letter dated September 2, 2020. However, Claimant argued that Claimant complied with the instructions in the letter, which required Claimant to call Employer, specifically stating that "[B]ut you must call Billy the day before to ensure that the job is still in progress." This ALJ infers that the words in the letter "still in progress" means "available." As found, pursuant to Sec. 8-42-105(4)(b)(II)(C), it was impractical for Claimant to return to modified work as Employer failed to advise Claimant that there was a job still available. See *Slafter v. Volunteers of America*, W.C. No. 5-125-703-001, ICAO, (December 9, 2020). As further found, Claimant was not responsible for

[9] This ALJ rounds down calculations from .055 and down to the next cent and up when it is above .055.

his loss of employment. Claimant credibly testified that he contacted Bill prior to the date he was to start his modified duty. It was not until, after leaving a message during the third call, that Billy returned Claimant's call and Bill never mentioned a modified duty job. He advised Claimant that he was going to contact the insurance adjuster to determine if he could get Claimant further care as Claimant reported he had ongoing problems, and then Bill would call Claimant back. Bill failed to call Claimant back. Further, Claimant also contacted multiple other Employer representatives including Jennifer, the business' secretary, and the second supervisor, Russ, without response. Claimant considered Employer's failure to return his phone calls, as well as Bill's failure to get back to him as promised, as a discharge or termination of his employment. As found, Employer's actions are objectively viewed as a discharge as Claimant complied with instructions and sufficiently followed up, without Employer's response. Claimant has shown that Claimant is entitled to temporary total disability benefits as the supervisor failed to provide further instructions after communicating with Claimant in this matter that a job continued to be available. As found Claimant has shown by a preponderance of the evidence that he was unable to return to modified employment as he did not have instructions regarding whether work was still available. Claimant is, therefore, entitled to temporary total disability benefits from September 14, 2020 to the date he was released by Dr. Baker to regular duty on December 10, 2020.

E. Grover Medical Benefits

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the

causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Dr. Sanchez, Dr. Feldman, Dr. Parker and Claimant's physical therapist opined that he would not benefit from any further care under the workers' compensation system. Claimant was placed at MMI as of May 3, 2021. While Drs. Richard and Benz made recommendations for further care, the recommended care was in the nature of being curative and neither opined whether the recommended care was to maintain Claimant at MMI. Dr. Sanchez, Dr. Feldman, and Dr. Parker's opinions were more persuasive than the opinions of Dr. Richard and Dr. Benz in this matter. Claimant has failed to show by a preponderance of the evidence that he is entitle to maintenance medical care.

F. Disfigurement Benefits

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). Claimant has an observable limp and testified that he continued to have a limp. This ALJ finds and concludes that Claimant is entitled to compensation due to the observable limp. Claimant has proven by a preponderance of the evidence that the limp should be compensated and Claimant is entitled to $1,000.00 for the disfigurement.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay Claimant based on the apportioned 10% whole person impairment for his lumbar spine injury related to the July 22, 2020 admitted claim.

2. Claimant's average weekly wage for purposed of calculating medical impairment benefits is $1,388.77, which includes the COBRA premium amount.

3. Respondents shall pay Claimant temporary total disability benefits from September 14, 2020 through December 9, 2020 at the rate of $781.14 per week. Respondents may take credit for any temporary partial disability paid for this period.

4. Claimant's claim for maintenance medical benefits is denied and dismissed.

5. Respondents shall pay Claimant a disfigurement award in the amount of $1,000.00.

6. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

7. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated this 17th of March, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-076-766-002

ISSUES

I. Whether all physical impairment ratings are converted to a whole person and combined when determining the applicability of the cap provision in 8-42-107.5.

II. Disfigurement

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant sustained an admitted injury on March 19, 2018, within the scope and course of his employment with Employer to his low back and right knee while employed as a laborer.
2. As a result of his work injury Claimant underwent a right knee replacement surgery on October 21, 2019. Claimant underwent numerous procedures for his low back (facet injections, medial branch blocks, lumbar medial branch radiofrequency ablation and a recommendation for a lumbar fusion).
3. Claimant was placed at maximum medical improvement (MMI) on April 19, 2021, by Dr. McFarland. Respondents requested a 24-month Division Independent Medical Examination (DIME) which was performed by Dr. Robert Mack. Dr. Mack placed Claimant at maximum medical improvement (MMI) as of April 19, 2021, and provided an impairment rating of 15% whole person for the low back, and 36% of the right lower extremity which converted to a whole person impairment rating of 14%. Combining the two impairment ratings resulted in a 27% whole person impairment rating using the AMA Guides (Third Revised) combined values Chart. (Ex. 5, p.151-153)
4. On August 18, 2021, a Final Admission of Liability (FAL) was filed admitting for the DIME impairment rating providing of 15% whole person impairment and 36% scheduled impairment of the lower extremity. (Ex. A) The FAL also admitted for temporary total disability benefits (TTD) from 5-9-18 through 4-19-21 at the rate of $677.89 per week for a total of $104,201.37, and TTD paid of $115,241.30. In remarks the carrier indicated, "See attached DIME report no PPD owed as benefits paid past the first cap. All benefits not specifically admitted are denied. Overpayment to be collected from future benefits." Insurer claimed an overpayment of $27,771.12.
5. On August 24, 2021, the Division of Workers' Compensation Claims Management Unit requested a corrected admission within 10 days consistent with the legal concept that when a claimant is assigned a scheduled and a whole person impairment rating, the impairment ratings are reduced to a single whole person rating to the determine the applicable cap. The impairment ratings are then compensated separately. (Ex. B) The error letter went on to indicate that the medical report assigns a whole person

impairment rating of 27% whole person and as this is greater than 25% the $174,938.15 cap is in effect.

6. The Claims Management Unit calculated permanent partial disability benefits (PPD) as $175,938.15 less TTD admitted of $104,201.37 = $70,736.78 and advised that this should be listed in the benefits section and any amount credited against PPD should also be listed in the remarks section.

7. On September 7, 2021, a subsequent FAL was filed admitting for TTD in the amount of $104,201.37 and a 15% whole person impairment rating and a 36% scheduled lower extremity impairment rating. (Ex. C, p.1) In the remarks section, the carrier stated: "Second cap is taken in consideration when determining amount of PPD owed. 15% (whole person PPD rating from the DIME) × 400 weeks × 1.08 age factor × $677.89 = $43,927.27 14% (Extremity PPD rating from the DIME) × 208 weeks × $297.56 = $8,644.95- These total $52,595.22. Carrier paid $115,241.30 ‗ $87,470.18 (First Cap) = $27,771.12 = $24,824.10 left to be paid."

8. On September 27, 2021, the Claims Management Unit mailed another error letter (Ex. D) requesting that a corrected admission of liability be filed consistent with the statement in their previous letter that "when a Claimant is assigned a scheduled and a whole person impairment rating, the impairments are reduced to a single whole person prating to determine the applicable cap. The impairments are then compensated separately. The medical report assigns a whole person rating of 27%. As this is greater than 25%, the $174,938.15 cap is in effect. We calculate PPD as $174,938.15 - $104,201.37 = $70,736.78, which should be listed in the benefits. Any amount credit against PPD should be listed in the remarks section."

9. On October 6, 2021, a third FAL (Ex. E, p.1) was filed admitting for TTD in the amount of $104,201.38 and for 15% whole person impairment and 36% scheduled impairment of the lower extremity. The remarks section contains the following: "Claimant was placed at MMI on 4/19/2021 with a 15% whole person rating & a 36% lower extremity rating. See attached DIME report from Dr. Mack dated 7/30/2021. Calculations are 15% × 1.08 x 400 weeks × $677.89 = $43,927.27 & 208 weeks × 36% × $297.56 = $22,281.29. TTD overpaid by $11,039.92." Moreover, in the benefit history, Respondents admitted for TTD in the amount of $104,201.38. They also admitted for PPD benefits for Claimant's 15% whole person impairment rating in the amount of $43,927.27, as well as PPD benefits for Claimant's 36% scheduled impairment in the amount of $22,281.29. As a result, Respondents admitted for TTD and PPD benefits in the amount of $170,409.94. They also claimed an overpayment in the amount of $11,039.92. The Respondents did not, however, state that they were limiting Claimant's PPD award based on the statutory cap contained in C.R.S. Section 8-42-107.5.

10. Claimant has a surgical scar on his right leg around his knee area as a result of the total knee replacement surgery performed as a result of his admitted claim. The surgical scar is approximately 9 inches long, raised, discolored and uneven in appearance. Claimant also walks with an antalgic gait and uses a cane to assist with his balance when walking especially outside the home outside, and when he is going to be on his feet for long periods of time or walking.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether all physical impairment ratings are converted to a whole person and combined when determining the applicability of the cap provision in 8-42-107.5.

As set forth in their proposed order, Respondents contend that the statutory cap contained in 8-42-107.5 limits Claimant's PPD award. Respondents contend that only the whole person rating is used to determine the statutory cap. Thus, Respondents contend Claimant's 15% whole person impairment rating does not exceed the first statutory cap of 25% and Claimant's combined TTD and PPD benefits are limited to the

first statutory cap of $87,470.18. Therefore, under this scenario Respondents contend Claimant is not entitled to any PPD benefits because he received more than $87,470.18 in TTD benefits. In the alternative, Respondents contend that the first statutory cap applies to Claimant's 15% whole person impairment rating and that the second statutory cap of $174,938.15 applies to Claimant's 36% scheduled impairment rating. Under this second scenario, Claimant would not be entitled to any additional PPD benefits for his 15% whole person impairment rating, but Claimant would be entitled to PPD benefits for his 36% scheduled rating since his 36% extremity rating exceeds the first statutory cap of 25%. The ALJ disagrees with both of Respondents' proposed interpretations.

The determination of the applicability of CRS Section 8-42-107.5 (the caps provision) is a separate and distinct determination from the determination of the calculation of compensation to be paid for a permanent impairment pursuant to CRS Section 8-42-107 (scheduled impairments vs. impairments not on the schedule of injuries). Thus, when determining the applicability of the cap provision in section 8-42-107.5 all of the physical impairment ratings are converted to a whole person and combined.

Section 8-42-107.5 in effect at the time of Claimant's injury provides that:

> No claimant whose *impairment rating* is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose *impairment rating* is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments. For purposes of this section, any mental impairment shall be combined with the physical impairment rating to establish a claimant's impairment rating for determining the applicable cap……. (Emphasis added).[1]

Section 8-42-107.5 was enacted in 1991 to limit the total award a claimant receives for temporary and permanent partial disability benefits. The differentiated caps represent a legislative attempt to distinguish between those workers who are more seriously injured from those who are less seriously injured. *See Colorado AFL–CIO v. Donlon,* 914 P.2d 396, 403–04(1996).

Respondents take the position that there is no statutory or binding case law that requires an insurer to convert scheduled ratings to a whole person impairment rating and combine the whole person ratings for the determination of the applicable cap provision. There are, however, numerous Industrial Claims Appeals Office (ICAO) opinions regarding the issue of combining scheduled and whole person impairment ratings for the purposes of determining the applicable cap provision. The first case was *Quackenbush v. Tenant Roofing Inc.,* W.C. No. 4-218-272 (I.C.A.O. June 19, 1998). In *Quackenbush,* the ICAO panel addressed whether a claimant's right arm injury should

[1] The dollar amounts contained in the benefits cap provision, section 8-42-107.5 CRS, is adjusted each year by the percentage of the adjustment made by the director to the state average weekly wage pursuant to section 8-47-106. *See* 8-42-107.5. Based on Claimant's date of injury, the first benefit cap is $87,470.18 and the second benefit cap is $174,938.15.

be treated as a 29% extremity impairment or converted to a 17% whole person impairment for purposes of the application of section 8–42–107.5, the benefits cap provision. The panel held that the term "impairment rating" was ambiguous, and it determined that converting the extremity impairment rating into a whole person impairment was necessary in order to prevent giving greater benefits to less seriously injured workers in contravention of the legislative purpose behind the benefits cap provision.

There is not, however, a court of appeals or supreme court opinion directly on point. There is statutory support for the use of whole person impairment ratings in the statute and the rules. CRS Section 8-42-101(3.5)(a)(II) requires that all permanent impairment ratings shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition Revised, effective July 1, 1991. WCRP 12-1 implements the Division's permanent impairment rating guidelines of how to appropriately utilize and report permanent impairment ratings. WCRP 12-4 specifically instructs that "Any physician determining permanent physical impairment shall: (B) Use the instructions and forms contained in the AMA Guides and; (C) *convert scheduled impairment rating to whole person impairments* (emphasis added) and (D) report final whole person and/or scheduled impairment rating percentages in whole numbers." The AMA Guides to the Evaluation of Permanent Impairment Section 2.2 also requires the determination of impairment to be based upon the "whole person." The AMA Guides specifically provide that: "To support systems that require such determinations, the reference tables of the Guides take into account all relevant considerations in reaching "whole person" impairment ratings." AMA Guides, Section 2.2.

In this case, the DIME doctor, utilizing the AMA Guides to Physical Impairment (Third Edition Revised) Lower Extremity Impairment Records Part II (Hind Foot, Knee, Hip), provided a 36% impairment rating of the knee for a total lower extremity rating of 36% which converted to 14% impairment rating of the whole person (Table 46). (Ex. 5, p.152). The DIME doctor then, using Figure 84 Spine Impairment Summary, provided a 15% whole person for the lumbar spine, and pursuant to #7 on the form for impairments of other organ systems, included the right knee and provided a 14% impairment rating pursuant to page 68 of the AMA Guides. The whole person impairment ratings were then combined for a total of a 27% total whole person impairment rating. (Ex. 5, p.153)

Using this framework, the Supreme Court in *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996) held that when an employee is involved in a work-related accident that results in both a scheduled injury and a non-scheduled injury, the scheduled injury must be converted to a whole person impairment rating and combined with the non-scheduled injury whole person impairment rating in calculating permanent disability benefits and paid by the whole person formula.

In response to the *Oqueda* decision, the General Assembly amended subsections 8-42-107(7)(b)(I) to (III) in 1999 to end the whole person calculation and payment of benefits pursuant to the whole person formula whether scheduled or not by clarifying that each type of injury shall remain separate and be compensated solely on the basis of applicable statutory schedule or benefit formula. The General Assembly added to the statute in this 1999 amendment a legislative declaration and provision that provides for

mental and emotional distress to be compensated under a different provision of the Act, and prohibits such impairments from being combined with a scheduled or a nonscheduled injury. Ch. 103, sec. 1, § 8-42-107, 1999 Colo. Sess. Laws 298, 299.

After the General Assembly overruled *Mountain City Meats* in 1999 legislation, ICAO revisited the issue and reached the same result in *Schank v. Wizard,* W.C. No. 4-497-494 (I.C.A.O. Sept. 19, 2003); In *Schank,* a DIME physician rated the claimant as having 22% impairment of the cervical spine and a 38% impairment of the upper extremity, which the physician converted to 23% whole person impairment. The physician then combined the ratings for a combined total of 40% whole person impairment. The ALJ awarded scheduled disability benefits based on 38% impairment to the upper extremity, and 22% whole person impairment. Relying on *Quackenbush v. Tennant Roofing, Inc*., W.C. 4-218-272 (June 19, 1998), and the claimant's combined whole person rating of 40%, the ALJ determined the claimant is subject to a combined limit of $120,000, rather than $60,000 for TTD and PPD benefits.

In *Schank*, the panel reviewed the analysis of their decision in *Quackenbush* to confirm that the 1999 amendments to subsections 8-42-107(7)(b)(I) and (II) CRS, did not change how section 8-42-207.5, the cap provision is applied to injuries. The panel held that when a claimant has scheduled and nonscheduled impairments all the physical impairments are converted to a whole person impairment rating for the purposes of determining the applicable cap in section 8-42-107.5 CRS.

In *Quackenbush*, the issue was whether the claimant's right-arm injury should be treated as 29% impairment of the arm or converted to 17% whole person impairment for purposes of the application of section 8-42-107.5 CRS. In resolving the issue, the panel noted that the term "impairment rating" is not defined in the Workers' Compensation Act and is ambiguous. As a result, the legislative intent and history was reviewed.

The panel noted that the language enacted in Senate Bill 218, which is currently codified at Section 8-42-101(3.7) CRS, provides that all "impairment ratings used under articles 40 to 47 of this title" are to be calculated in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised (AMA Guides). The AMA Guides provide for both extremity ratings and whole person ratings but express the preference that all ratings be converted to the whole person. In *Mountain City Meat Co. v. Oqueda*, 919 P.2d 254, the Court held that by incorporating the AMA Guides into the Act, the legislature explicitly created authority for the conversion of an upper extremity injury to a whole person impairment rating. Therefore, in *Quackenbush*, the panel held that the reference to the claimant's "impairment rating" in section 8-42-107.5 CRS was ambiguous.

In view of the statutory objectives inherent in the schedule and section 8-42-107.5 CRS, the panel concluded in *Quackenbush* that application of the claimant's 29% scheduled disability rating would do violence to the statutory scheme by giving greater benefits to less seriously injured workers who suffer scheduled disability injuries. In contrast, conversion of the claimant's scheduled disability rating to a whole person rating caused the claimant's injury to be subject to the cap intended for less serious injuries. Therefore, the panel held that the cap applied to scheduled disabilities, and for purposes of determining whether the $60,000 cap has been reached, the scheduled

disability must be converted to a whole person impairment so that scheduled and nonscheduled injuries are treated similarly.

Respondents in *Schank* argued that sections 8-42-107(7)(b)(I) and (II), CRS [1999 Colo. Sess. Laws, Ch. 103 at 298 which apply to injuries that occur after July 1, 1999], were enacted to overrule *Mountain City Meat Co. v. Oqueda*, and to ensure that when the claimant sustains both scheduled and nonscheduled injuries, the loss shall be compensated on the schedule for scheduled injuries. Section 8-42-107(7)(b)(II) CRS provides that, "[W]here an injury causes a loss set forth in the schedule in subsection (2) of this section and a loss set forth for medical impairment benefits in subsection (8) of this section, the loss set forth in the schedule found in said subsection (2) shall be compensated solely on the basis of such schedule and the loss set forth in said subsection (8) shall be compensated solely on the basis for such medical impairment benefits specified in subsection (8)."

The panel was not persuaded that section 8-42-107(7)(b)(II) CRS undermined the holding in *Quackenbush* and disagreed with the respondents' contention that scheduled injuries are not subject to the benefit cap. In particular, the panel rejected the respondents' contention that because *Quackenbush* relied on *Mountain City Meat Co. v. Oqueda*, and *Mountain City* was expressly overruled by section 8-42-107(7)(b)(II) CRS, *Quackenbush* was necessarily overruled. The panel explained that in *Quackenbush* they relied on *Mountain City* for the proposition that the legislature created a methodology for converting scheduled disability ratings to whole person impairment ratings by incorporating the AMA Guides into the statute. Section 8-42-107(7)(II) CRS did not alter the statutory requirement that medical impairment ratings be completed in accordance with the AMA Guides or the fact that the AMA Guides contain a method for converting extremity ratings to whole person impairments. Accordingly, the principle on which the panel relied in *Mountain City* was not overruled by subsections 8-42-107(7)(I) and (II) CRS.

The panel also noted that section 8-42-107.5 CRS is designed to create a maximum benefit cap on the recovery of TTD and PPD benefits. Although TTD benefits are intended to compensate for a claimant's immediate wage loss, both TTD and PPD benefits compensate a claimant for the extent to which his or her physical impairment impacts the claimant's past and future ability to earn wages. *See Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 404 (Colo. App. 1995). The panel noted that under the respondents' construction, all wage loss benefits payable under the schedule of disabilities would be excluded from the statutory limit on wage loss benefits. Consequently, the panel held that the respondents' construction is inconsistent with the overall purpose of section 8-42-107.5 CRS.

Using the respondents' analysis would elevate scheduled injuries above whole person impairments because a scheduled disability award would be payable regardless of the statutory cap. For example, a claimant who has a 29% scheduled disability, which would convert to 17% whole person impairment, would not be subject to the $60,000 limitation in section 8-42-107.5 CRS if scheduled disabilities were irrelevant to the cap. However, a claimant whose injury results in whole person impairment from 17 through 25% would be subject to the $60,000 combined cap. Under these circumstances, the less seriously injured worker could actually recover the more generous award of

permanent disability benefits that was reserved for workers with whole person impairment. This result would frustrate the statutory scheme for compensating permanent partial disability enacted by Senate Bill 218.

In *Dillard v. Industrial Claim Appeals Office,* 134 P.3d 407 (Colo. 2006), the Supreme Court held that section 8-42-107(7)(b)(III) CRS precluded combining a mental impairment rating with a physical impairment rating for the purpose of obtaining the benefit of the higher cap set forth in section 8-42-107.5 CRS. In *Dillard*, Claimant was assigned 23% whole person impairment to the cervical spine, 2% rating for the damage to the left hip which equaled 25% whole person impairment when combined. The DIME physician also assigned 5% rating for mental impairment. The DIME physician opined that Claimant suffered a total of 29% whole person impairment. (*See Dillard v. Pepsi Bottling* (WC No. 4-467-177 March 19, 2004)

The Court in *Dillard* held that the "shall not be combined" language is unique to section 8-42-107(7)(b)(III) (then existing section that indicated that a mental impairment should not be combined with a scheduled or nonscheduled injury). The Court noted the preceding subsection section 8-42-107(7)(b)(II) CRS contains nothing like it to prevent combining scheduled and nonscheduled injuries into a whole person impairment rating for the purposes of section 8-42-107.5 CRS. Thus, the mental impairment language, "shall not be combined with a scheduled or a nonscheduled injury," must have meaning. That meaning, when applied to section 8-42-107.5 CRS, is that mental impairment ratings are not to be combined with scheduled or nonscheduled injuries when calculating the applicability of the higher cap contained in section 8-42-107.5 CRS.

In this case, the medical report assigns a whole person impairment rating of 27%. As this is greater than 25%, the $174,938.15 cap is in effect. The amount of TTD and PPD to which Claimant is eligible for is $174,938.15. Since Claimant was entitled to $104,201.37 in temporary disability benefits, there remains $70,736.78 under the statutory cap that can be paid in permanent partial disability benefits. In this case Claimant's 15% whole person impairment rating has a value of 15% × 1.08 × 400 weeks × $677.89 = $43,927.27. Claimant's right lower extremity rating has a value of 208 weeks × 36% × $297.56 = $22,281.29. As these combined amounts total $66,208.56 and are less than $70,736.78, Claimant is entitled to the payment of $66,208.56 in permanent partial disability benefits. Respondents, may, however, reduce such amount by any overpayment of temporary disability benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's 15% whole person impairment rating has a value of 15% × 1.08 × 400 weeks × $677.89 = $43,927.27. Claimant's right lower extremity rating has a value of 208 weeks x 36% × $297.56 = $22,281.29. Claimant's total permanent partial disability benefit award equals $66,208.56.

2. Respondents admitted for $104,201.37 in temporary disability benefits. Therefore, the total amount payable for temporary and permanent partial disability benefits is $170,409.93.

3. Claimant's combined whole person impairment rating is 27% which is greater than 25%. Therefore, the applicable cap pursuant to 8-42-107.5 is $174,938.15.

4. As a result, Respondents shall pay Claimant $66,208.56 in permanent partial disability benefits – less any overpayment of temporary disability benefits.

5. Claimant has a surgical scar on his right leg around his knee area as a result of the total knee replacement surgery performed as a result of his admitted claim. The surgical scar is approximately 9 inches long, raised, discolored and uneven in appearance. Claimant also walks with an antalgic gait and uses a cane to assist with his balance when walking especially outside the home and when he is going to be on his feet for long periods of time or walking. Therefore, Respondents shall pay Claimant disfigurement benefits in the amount of $3,500.00.

6. The parties specifically reserved the issue of permanent total disability benefits. Therefore, such issue is reserved.

7. All other issues not expressly decided herein are also reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 17, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment on or about April 10, 2020 in the form of CoVid-19?

- If Claimant has proven an occupational disease, the parties have stipulated that the medical treatment Claimant has received is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the occupational disease.

- If Claimant has proven an occupational disease, the parties have stipulated that Claimant's average weekly wage ("AWW") is $1,674.50 from the date of the injury up until April 13, 2021 when his AWW increased to $2,175.00 due to his COBRA health insurance benefits.

- If Claimant has proven an occupational disease, the parties have stipulated that Claimant is entitled to temporary total disability ("TTD") benefits beginning April 13, 2020 through ongoing.

- If Claimant has proven an occupational disease, the parties have stipulated that Respondents reserve the right to claim any allowable offsets against Claimant's TTD benefits in the future.

FINDINGS OF FACT

1. Claimant was employed in Employer's underground coal mine as a bolter. Claimant testified that over the course of his employment with Employer, he performed numerous jobs including Ram Car Operator, Scoop Car Operator, Materials Hauler and Log Truck Driver. Claimant testified he began working for Employer on August 28, 2019. Claimant testified that he lived with his wife and two children in Eckert, Colorado.

2. Claimant testified he worked on Crew C, with approximately 40 to 50 other people on the crew. Claimant testified that when the COVID-19 pandemic began in March 2020, Employer begin to stagger the sub-crews in locker rooms so that all of the workers in Crew C would not be getting showered and dressed before and after work shifts at the same time. Claimant testified that members of Crew C would interact throughout the work day and in locker rooms, and that during shift changes members of Crew C would briefly interact with Crews A and B.

3. Claimant testified that employees were required to wear masks while traveling in the mantrip to move into or out of the mine, but otherwise, it was his understanding that masking was not required at work. The mantrip is a truck that fits 8 people and is utilized by the employees to drive into the mine to perform their work. Claimant testified he would be underground in the mine during his entire shift. Claimant testified his shift was 8 hours long.

4. Claimant testified that the level of participation in mask-wearing was not good. Claimant testified that his coworkers did not wear masks during work shifts, and that members of Crew C ate lunch together in a small, 5-foot by 12-foot chamber, without masks. Claimant testified that members of Crew C were also in close contact during their safety meeting each morning. Claimant testified that while underground, the employees would have to scream at each other in order to be heard.

5. Claimant testified that during an eight-hour shift, he was in close contact with his bolt partner and third man all day. Claimant testified that close contact would be within several feet of his bolt partner and third man. Claimant testified he was also in constant contact with his supervisor, [Redacted, hereinafter AC], during the day, including close contact in the kitchen for approximately 45 minutes during the day.

6.Claimant testified that in the mine, air only flowed one way. Claimant explained that the intake air comes into the mine through a vent and is blown down through the mine and then recycled out the exhaust shaft.

7.Claimant testified that he took Employer's CoVid policies seriously, but that it was not feasible to wear masks underground and there was not much social distancing while working underground due to the confined space.

8.Claimant testified he became aware on April 10, 2020 that Mr. AC[Redacted] was quarantined due to suspected CoVid symptoms, but testified that members of Crew C were never formally advised of any employee who was on Crew C who tested positive for CoVid.

9.Claimant entered into evidence at hearing a spreadsheet maintained by Employer that listed employees who has suspected CoVid symptoms or exposure to CoVid. Claimant testified that his wife had not had any cold or CoVid symptoms in the week prior to April 12. Claimant testified that he and his family took precautions against CoVid in March and April 2020, including wearing masks to the grocery store.

10.Claimant testified his only non-work activities in the days leading up to his getting sick were going to the grocery store and a pet food supply store. Claimant testified he did not see either of his two older daughters from January to July 2020. The ALJ finds Claimant's testimony with regard to this issue to be credible.

11. Delta County's health department issued press releases indicating the status of CoVid infections confirmed via testing early in the pandemic. On March 20, 2020 there were zero positive cases in the county. The county reported its first positive case on March 24, 2020. Three additional cases were reported on April 3, 2020. A fifth case was reported April 6, 2020.

12. By the time Claimant first developed his symptoms on April 12, 2020, one additional CoVid case was confirmed via testing in Delta County for a total of six CoVid cases.

13. Claimant testified he awoke on the morning of April 12, 2020 and felt like he had a severe head cold, with fatigue, fever, runny nose, sore throat, and cough, and was worried he had contracted CoVid. Claimant testified he contacted Employer's human resources manager, [Redacted. herinafter SL], on Monday, April 13, 2020, and told him he was sick and would not come to work. Claimant testified that Mr. SL[Redacted] did not instruct him to undergo a CoVid test or give instructions on where he could get tested.

14. Claimant sought care with Dr. Craig Delta County Memorial Hospital on April 15, 2020. The report from Dr. Craig noted that Claimant had been sick for approximately five (5) days and noted his wife was sick as well. Dr. Craig noted Claimant's symptoms were consistent with CoVid and that Claimant works at a pleace that likely has positive coronavirus at this time. Dr. Craig diagnosed Claimant with coronavirus infection, and advised him to go home, isolate, and not go to work.

15. Claimant testified at hearing that the report that his wife was also sick was not accurate. Claimant testified that his wife did end up getting CoVid symptoms, but not until April 17, 2020. Cliamant testified that his children developed symptoms on April 20 and 21, 2020, but that the rest of his family did not undergo CoVid testing because they were presumed positive for CoVid through their symptoms and exposure to Claimant. Claimant's testimony in this regard is found to be credible.

16. Claimant testified that he and his wife both continued with CoVid symptoms. However, Claimant did not see a doctor again until May 13, 2020, because his physician did not want to see him until several weeks after the onset of his symptoms. Claimant testified that when he was eventually evaluated, the physician would only evaluated Claimant in the parking lot.

17. Claimant began treating with Dr. Purvis, Dr. Abuid, who is a pulmonologist, Dr. Gilbert, who is another pulmonologist, and then eventually to a post-CoVid care clinic in Fruita, Colorado. Claimant testified he developed Covid long hauler syndrome and has not felt well since April 11, 2020.

18. Claimant was eventually terminated by Employer on April 13, 2021 after that he had exhausted all his paid and unpaid leave of absence and short-term disability benefits.

19. Claimant testified he believed he contracted CoVid due to his employment because he worked in a mine with one-way ventilation with many coworkers who did not wear masks while working. Claimant testified that during the state's shelter-in-place order, he was an "essential worker". Claimant testified all he did outside of the home was go to work and buy groceries for his family. Claimant testified he and his family stayed home and did not see any other people outside their home. Claimant testified that he believed the only place he would have contracted CoVid was at work.

20. Claimant testified that after contracting CoVid, he continued to have severe fatigue, tremors, headache, dizziness, weakness, brain fog, difficulty with memory, and difficulty articulating thoughts. Claimant testified he is still undergoing treatment for these symptoms.

21. AC[Redacted] testified at hearing on behalf of Employer. Mr. AC[Redacted] is an underground production supervisor for Crew C and was Claimant's direct supervisor. Mr. AC[Redacted] testified that on an average workday, he would interact with Claimant several times per shift. Mr. AC[Redacted] testified that he worked on Thursday, April 9, and awoke on Friday, April 10 with fever and body aches. Mr. AC[Redacted] testified he returned to work on April 27 after getting a doctor's clearance, and after the Employer-ordered quarantine of Crew C ended. Mr. AC[Redacted] testified that he never underwent a test for CoVid during the time he was in quarantine.

22. SL[Redacted] , human resources manager for Employer, testified at hearing on behalf of Employer. Mr. SL[Redacted] , as part of his job with Employer, began preparing a chart to track employees' health status after the CoVid outbreak started in March 2020, A copy of the chart was entered into evidence as Claimant's Exhibit 7 and Respondents' Exhibit E. According to the chart, an Employee in Crew C, represented in both lines 15 and 24 of Employer's spreadsheet, went off of work on March 30 with symptoms in his ears and throat, as well as fatigue and aches. That employee returned to work on April 1 0 (a day Claimant worked), and then later tested positive for CoVid on or about April 14, 2020.

23.Mr. SL[Redacted] testified that 24 workers were identified as having CoVid symptoms or contact with an employee with symptoms between March 23 and April 14, 2020, including Claimant. Mr. SL[Redacted] testified that because there were positive CoVid cases in Crew C, the entire crew was shut down for approximately one week. Mr. SL[Redacted] testified that as the pandemic was starting, Employer did not require a negative CoVid test in order for an employee to return to work after developing symptoms. Mr. SL[Redacted] testified that four employees of Employer tested positive on April 13 or 14, 2020, including Claimant. Mr. SL[Redacted] testified all four of these employees were all on Crew C.

24. The ALJ notes that the spreadsheet does not indicate which workers tested for COVID-19 or which workers had negative tests. The spreadsheet also indicates that certain employees returned after getting a doctor's note.

25. Mr. SL[Redacted] testified they had an employee who carpooled with another Crew C member on April 7 who later tested positive for CoVid. The other employee who was in the carpool then tested positive for COVID on or about April 20, 2020.

26. Mr. SL[Redacted] testified that the State of Colorado's data showed an outbreak at Employer's location as of April 21, 2020.

27. Respondents obtained a record review independent medical examination ("IME") report from Dr. Barton Goldman on October 22, 2021. Dr. Goldman reviewed Claimant's medical records and the CoVid symptom spreadsheet prepared by Employer is preparing his IME report. Dr. Goldman opined Claimant contracted CoVid in April 2020, and had ongoing need for treatment for his Post-Acute Sequelae of SARS Co-V-2 Infection ("long CoVid"). Dr. Goldman noted that based on the data contained in the employee case spreadsheet provided by the employer, approximately 17 employees reported upper respiratory tract infections prior to April 13, 2020, but it was not until those cases reported on April 13, 2020, including that of Claimant, that confirmed positive CoVid testing results are being documented. Dr. Goldman ultimately opined in his report that Claimant was equally exposed to CoVid outside his employment.

28. Dr. Goldman opined in his report that the overall medically probably exposure timeframe for Claimant in this case would begin around March 27, 2020 to as recent as April 7 or 8, 2020. Dr. Goldman noted that whomever was the vector that resulted in Claimant's CoVid infection was likely not symptomatic for at least another 1-2 days at the time of transmission or just beginning to have symptoms within the exposure time frame.

29. Dr. Goldman testified at hearing in this matter. Dr. Goldman noted in his testimony that any employee listed in the sheet in late March or early April could have been the individual who introduced the virus into the occupational environment, but that one could not determine introduced the virus into the environment. Dr. Goldman did confirm there was an "outbreak" at Employer's facility, but that he could not opine that Claimant contracted CoVid at his workplace because of potential community spread. Dr. Goldman testified that one of the four employees who tested positive for CoVid on April 13 or 14, 2020 was likely patient zero who brought the CoVid into the work environment.

30. Dr. Goldman testified that the timeline of patients' exposure to coronavirus and development of symptoms is highly variable and could be between two and fourteen days. Dr. Goldman testified that for CoVid, the time of exposure to the time of symptoms is generally 5 to 7 days and most contagious 1 to 3 days before symptoms start. Dr. Goldman testified that symptoms generally resolve 10 to 14 days after the

initial onset of symptoms. Dr. Goldman testified that Claimant's probable exposure timeline was March 27 through April 10, 2020, and the most probable range was April 4 to April 7, 2020. Dr. Goldman testified that according to the symptom spreadsheet maintained by Employer, between March 27 and April 10, 2020, nine employees reported potential CoVid symptoms to employer. Dr. Goldman also testified that in April 2020, as the pandemic was starting, CoVid testing was difficult to obtain. Dr. Goldman agreed that according to the testimony at hearing, Employer was not requiring symptomatic employees to obtain a negative CoVid test before returning to work. Dr. Goldman further testified that symptom presentation of CoVid could be highly variable, including the possibility of asymptomatic presentation.

31. Dr. Goldman testified it was not possible to know if any of the nine employees who reported symptoms between March 27, and April 10, 2020 had CoVid. Dr. Goldman further testified that it was possible that any one of the nine people who reported symptoms between March 27 and April 10, 2020 who were not tested for COVID could have been CoVid carriers. Dr. Goldman testified that because on April 13 and 14 four employees reported symptoms and were later tested positive for CoVid, it was possible, but not probable, that all four of those employees contracted CoVid from the same person.

32.The ALJ notes Mr. SL[Redacted] ' testimony that approximately 24 employees reported COVID-like symptoms or exposed to someone with symptoms between March 23 and April 14, 2020, and that because COVID testing was in short supply, Employer did not require a negative CoVid test, but only a doctor's note, before an employee was allowed to return to work after reporting symptoms or exposure.

33. The ALJ credits Employer's records that Claimant and another employee were the first two workers to test positive for CoVid, on or about April 13, 2020. The ALJ notes that two more employees tested positive on April 14, 2020. The ALJ notes that one of the employees that tested positive for CoVid on April 14, 2020 had previously left work with CoVid symptoms on March 30, 2020, before returning to work with Employer on April 10, 2020, and ultimately leaving work after his positive test.

34. The ALJ notes that the evidence establishes that two employees on Crew C tested positive for CoVid on April 13, 2020 and two more employees on Crew C tested positive for CoVid on April 14, 2020. The ALJ notes that prior to that time, and during the period of time in which Dr. Goldman testified would likely be in the period of time that Claimant would have been exposed to CoVid, numerous other employees reported CoVid symptoms to Employer.

35. The ALJ further notes that because Employer was not requiring a negative CoVid test prior to having an employee return to work during the period of time in question, Dr. Goldman's testimony with regard to the identity of patient zero being one of the first four who tested positive on April 13 and April 14is not credited. The ALJ

further notes that based on Dr. Goldman's testimony with regard to the period of time between exposure and the onset of symptoms, the ALJ does not credit his testimony that one of the first four positive tests was patient zero. Especially in light of the fact that there is evidence of numerous other employees who reported symptoms, but a lack of evidence of whether they were tested for CoVid.

36. The ALJ finds that Claimant has established through the evidence and his testimony at hearing that it is more likely than not that Claimant suffered a compensable occupational disease arising out of and in the course of his employment with Employer.

37. The ALJ credits Claimant's testimony regarding his activities in the workplace and outside the workplace during his probable exposure period and finds this testimony to be credible. The ALJ notes that the evidence reflects that there were numerous employees with Employer who had symptoms but did not necessarily test for CoVid between March 23 and April 10, 2020. The ALJ further notes that the first positive tests for CoVid came in a cluster of four positive tests over a two day period.

38. The ALJ notes that based on Dr. Goldman's testimony regarding the period between a patient's exposure and the onset of symptoms provides evidence that the cluster of initial positive tests were provide a "reasonable probability" that Claimant's contraction of coronavirus was precipitated by his work activities, namely being around coworkers who carried the virus. The ALJ likewise credits records showing only six COVID-19 cases in Delta County (the place of Claimant's residence) in late March and early April 2020.

39. In this case, the ALJ relies on the testimony of Claimant and the records from the Employer including the spreadsheet maintained by the Employer to track employee's potential symptoms and exposure to CoVid in March and April 2020 and finds that Claimant has demonstrated that it is more likely than not that Claimant was exposed to CoVid through his Employer. The ALJ finds that the Claimant has demonstrated that it is more probable than not that he was exposed to CoVid through his work at the mine. The ALJ relies on the fact that Claimant and three other co-workers all tested positive for CoVid within a 2 day period as evidence that Claimant's exposure in this case came through his work with Employer.

40. The ALJ further notes that in the time period after March 23, 2020, the records from Employer demonstrate that numerous employees were out from work with either CoVid symptoms or due to an exposure to CoVid. The ALJ finds that these records provide credible evidence that it is more likely than not that Claimant was exposed to and contracted CoVid through his work for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of a particular disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

6. As found, Claimant has proven by a preponderance of the evidence that he sustained an occupation disease arising out of and in the course of his employment with Employer in contracting CoVid on or about April 13, 2020. As found, Claimant's testimony regarding his actions outside of his employment as opposed to his exposure while in the mine is found to be credible and persuasive with regard to this issue.

7. As found, the records from Employer demonstrating that four employees tested positive for CoVid within a 2 day period is credible evidence that Claimant was exposed to and contracted CoVid through his work with Employer. As found, the records from Employer that show the employees reporting CoVid related symptoms prior to April 13, 2020 is found to be credible evidence that Claimant was exposed to ad contracted CoVid through his employment.

8. As found, Claimant is entitled to medical treatment consistent with the stipulation provided to the Court at the commencement of the hearing.

9. As found, Claimant is entitled to TTD benefits at the AWW set forth in the stipulation of the parties at the commencement of the hearing. Specifically, Claimant is entitled to TTD benefit at an AWW of $1,674.50 for the period of April 13, 2020 through April 12, 2021. Claimant is entitled to TTD benefits based on an AWW of $2,175.00 for the period of April 13, 2021 to ongoing.

10. The issue of offsets is reserved by Respondents.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his occupational disease.

2. Respondents shall pay Claimant TTD benefits at an AWW of $1,674.50 for the period of April 13, 2020 through April 12, 2021. Respondents shall pay Cliamant TTD benefits at as AWW of $2,175 for the period of April 13, 2021 and ongoing.

3. All matters not determined herein are reserved for future determination

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: March 17, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his request for an umbilical surgical consultation is reasonable, necessary, and related to his work injury?

II. Has Claimant shown, by a preponderance of the evidence, that his request for an orthopedic surgical consultation for possible carpal tunnel release is reasonable, necessary, and related to his work injury?

III. Has Claimant shown, by a preponderance of the evidence, that his request for a bilateral upper extremity EMG referral is reasonable, necessary, and related to his work injury?

STIPULATIONS

The parties concurred that Claimant was placed at MMI on 7/6/2021, with a 15% Whole Person Impairment Rating, and that the controlling Final Admission of Liability admitted for Medical Maintenance benefits. Claimant is pursuing this claim on the basis of Medical Benefits, and is not seeking a reopening. The parties further agreed that, pending a decision in this case, the issue of Permanent Total Disability would be preserved and held in abeyance. The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Procedural Background

1. Claimant suffered an admitted injury on February 9, 2018. Following his injury, he returned for a brief time, prior to undergoing surgery on March 23, 2018. Claimant then returned to modified duty on July 22, 2018, until eventually retiring in December, 2019. (*see* Ex. 1). His medical treatment continued.

2. Respondents filed a Final Admission of Liability on January 25, 2021, admitting for, among other items, maintenance medical care for Claimant's upper extremities. (Ex. V). Claimant's ATP, Dr. Finn, has since filed a request for a referral to a general surgeon for a hernia, which was denied by Respondents on May 25, 2021 (Ex. PP). Dr. Finn later filed a request for a referral to an orthopedic surgeon, which was denied on August 2, 2021 (Ex. DDD). Dr. Finn also requested bilateral upper extremity EMGs, which was also denied on August 2, 2021 (Ex. CCC). Respondents have now filed an Application for

Hearing based upon a Rule 16 pre authorization denial for the proposed treatments, *supra.* By agreement of the parties, other issues have been held in abeyance, pending a resolution of this matter.

The Work Injury, and Subsequent Treatment

3. Claimant worked as a fabricator for Employer. His job duties included fabricating and building products to go on Employer's trucks and lawnmowers and the like. On February 9, 2018, Claimant injured his left arm when he was stabbed by a piece of metal that had broken off of a saw.

4. As a result of the injury, Claimant underwent multiple left arm surgeries. He has since been diagnosed with bilateral upper extremity CRPS. Claimant reports pain and other symptoms, including loss of feeling and sensation and tremors, as well as loss of function.

Initial IME by Dr. Polanco

5. Frank Polanco, M.D. performed an independent medical evaluation, dated September 19, 2019 on behalf of Respondents. (Ex. A). He agreed with Claimant's diagnosis of bilateral CRPS, as summarized below:

> Sustained laceration involving left ulnar nerve. Appeared to be a superficial injury but as further symphysical therapyoms developed he was diagnosed with ulnar injury by EMG. Underwent ulnar nerve neuroplasty and then revision with ulnar nerve transposition. Dr. Reinhard suspected complex regional pain syndrome (CRPS) and proceeded with testing that was unequivocal. Symphysical therapyoms persisted with atrophy of left arm, ongoing pain and symphysical therapyoms moving to the right arm. There is little doubt that he has developed CRPS. Initial testing of the right arm is supported via ganglion block to establish the diagnosis. A Bier Block to the left arm may provide a longer period of pain relief. Recommends eliminating work restriction and initiating an active program of strengthening and conditioning to improve and maintain function and muscle strength. 40 hours of work conditioning can be requested within the guidelines to support a more intensive therapy program. Recommends Bier Block two left upper extremity; catapress patch trial; diagnostic right stellate ganglion block, if positive proceed with QSART testing; eliminate work restrictions; physical therapy/work conditioning with focus on left arm; consider peripheral nerve blocks if allowed by the carrier to facilitate rehab, not at MMI. (Ex. A, pp. 5-6).

6. On January 9, 2020, Claimant treated with ATP Robi Baptist, M.D., who noted Claimant's medical history and confirmed his CRPS diagnosis in both arms. Claimant reported severe pain down both arms. Dr. Baptist noted Claimant continued to treat with Dr. Reinhard.

7. On January 21, February 18, and April 28, 2020, Claimant underwent bilateral cervical stellate ganglion injections. (Ex. 7, pp. 215-222). On January 28, 2020, Claimant treated with Dr. Reinhard, who confirmed Claimant's bilateral CRPS diagnosis, and recommended bilateral cervical stellate ganglion blocks. *Id* at 219-220.

8. On May 20, 2020, Dr. Reinhard performed a series of trigger point injections (TPIs). *Id* at 210-211.

9. On July 16, 2020, Dr. Reinhard assigned Claimant an impairment rating of 15% whole person rating for his bilateral upper extremity CRPS condition. *Id* at 208-209.

10. On August 5, 2020, Claimant underwent a FCE, which determined Claimant's functional limitations from the work injury. (Ex. 8, pp. 223-242).

11. On August 21, 2020, Claimant returned to Dr. Reinhard, who noted Claimant was in significant pain, and reported other symptoms from the FCE. Dr. Reinhard performed a series of TPIs. (Ex. 7, pp. 205-207).

12. On September 14, 2020, Claimant returned to Dr. Baptist, who then referred Claimant to Kenneth Finn, M.D., for pain management. (Ex. 5, pp. 73-77).

13. On October 5, 2020, Claimant treated with Kenneth Finn, M.D., to whom he was referred by Dr. Baptist, for pain management. Claimant reported the nature of his injury and the medical treatment he has undergone as a result. Dr. Finn noted:

Examination

Elbow / Arm:

Atrophy and giveway weakness of left hand intrinsics. Allodynia and hyperalgesia in both median and ulnar pattern on the left. Well healed surgical scars without evidence of infection. Tender along the left medial epicondyle. Tinels positive over the median and ulnar nerve at the wrist and ulnar nerve at the elbow bilaterally. DTR 1/4 at biceps, brachioradialis, and triceps symmetrically.

Assessments

1. Carpal tunnel syndrome, left upper limb - G56.02 (Primary)
2. Complex regional pain syndrome I of left upper limb - G90.512
3. Lesion of ulnar nerve, left upper limb - G56.22

Dr. Finn then prescribed pain medications. (Ex.4, pp. 62-63).

14. On December 8, 2020, Claimant underwent a series of TPIs with Dr. Finn. (Ex. 4, pp. 60-61). On December 15, 2021, Claimant underwent more TPI injections. *Id* at 58-59. On December 22, 2020, Dr. Finn performed a series of TPI injections in Claimant's mid and upper back. Claimant reported pain and symptoms relief following the

injections. Dr. Finn referred Claimant for additional physical therapy and TPI injections. *Id* at 56-57.

15. From December 27, 2020, through March 3, 2021, Claimant underwent eight physical therapy sessions. (Ex. 6, pp. 171-204).

16. On December 29, 2020, Claimant treated again with Dr. Baptist, who reviewed his medical history and confirmed his CRPS diagnosis. Dr. Baptist then assigned Claimant permanent work restrictions. (Ex. 5, pp. 64-67).

DIME by Dr. Hall

17. Dr. Timothy Hall, MD performed a DIME exam on Claimant. In his report, dated January 19, 2021, (Ex. T), Dr. Hall concurred with the MMI date of 7/16/2020, and assigned an impairment rating of 15% WP for Claimant's CRPS. He also recommended work restrictions, based upon the FCE, and Claimant's response to performing it.

18. Regarding Medical Maintenance Care, Dr. Hall noted:

> Maintenance care should involve his medications which include cyclobenzaprine and the relatively low dose of oxycodone that he is taking. He should continue with Dr. Finn and *should be provided with just about anything that Dr. Finn feels is necessary* to control and/or improve his present chronic condition. *Id* at 95. (emphasis added).

Treatment Continues

19. On January 26, 2021, Claimant returned to Dr. Finn, who performed a series of TPI injections. (Ex. 4, pp. 52-55). On February 1, 2021, Claimant returned for more TPI injections. *(Ex. 4, pp. 50-51).* On February 8, 2021, Claimant underwent another series of TPI injections with Dr. Finn. Claimant reported right greater than left upper extremity pain. *Id* at 48-49.

20. On April 22, April 30, May 4, May 11, 2021, Claimant underwent an additional series of TPI injections prior to his physical therapy appointment. *Id* at 40-47.

21. From April 27, 2021, through June 15, 2021, Claimant underwent 16 physical therapy sessions. (Ex.6, pp. 107-170). In his May 14, 2021 physical therapy report, physical therapist Anthony Purviance noted that Claimant was "experiencing tenderness in his left upper quadrant with increased pain with Valsalva." On physical examination, PT Anthony noted Claimant had tenderness to palpation over his left upper quadrant. *Id* at 137-139.

22. On May 18, 2021, Claimant treated again with Dr. Finn, and reported that at his last physical therapy appointment, he felt a pop in his umbilicus and feels that he

may have a small hernia. On physical examination, Dr. Finn found a small protrusion around the superior umbilicus. Dr. Finn referred Claimant for a surgical consultation regarding the "umbilical hernia he reports developing during PT for treatment of his work condition." Dr. Finn also performed a series of injections in Claimant's upper extremities. (Ex. 4, pp. 37-39).

23. On May 25, 2021, Respondents denied Dr. Finn's referral to Brock Bordelon, a general surgeon, to address Claimant's hernia. (Ex. PP, p. 233).

24. On May 27, 2021, Claimant returned to Dr. Finn, who performed another series of injections. (Ex. 4, pp. 35-36). On June 1, 2021, Claimant treated with Dr. Finn and reported that physical therapy is helping his pain and other symptoms. Dr. Finn performed another series of injections. *Id* at 33-34. On June 8, 2021, Claimant treated with Dr. Finn, who recommended Claimant undergo a left upper extremity EMG, since Claimant continued to report symptoms post-surgery, yet never had a post-surgery EMG. He noted that Claimant's TPIs were helping temporarily. Dr. Finn performed a series of injections, and otherwise maintained Claimant's treatment plan. *Id* at 31-32.

Subsequent IME by Dr. Polanco

25. In a subsequent IME report, dated June 21, 2021, Dr. Polanco took a medical history from Claimant, and note that his abdominal exam stated that "Palpation reflects a small umbilical hernia." *Id* at 239. Dr. Polanco then noted in his report:

X. RECOMMENDATIONS

Surgical assessment of the umbilical hernia is recommended.

XI. CAUSATION

The findings relating to bilateral upper extremity CRPS are causally related to the work-related injury of February 9, 2018. It appears as well, that in the course of his treatment he sustained an umbilical hernia.

XII. MMI

In regards to his condition of CRPS of his upper extremities, he is at MMI and does not require further active medical treatment and/or diagnostics. Similarly, he is at MMI for his complaints of low back pain.

In regards to his umbilical hernia, after further assessment if he chooses not to proceed with further treatment for this condition, he would be at MMI. Otherwise, if he chooses to undergo surgical repair, he would not be at MMI at this time.

(Ex. AAA). [However, upon Claimant's Motion at the 10/14/2021 prehearing conference, what is now Respondents' Exhibit AAA was stricken and not to be used in this case. That applies to Claimant as well, so the ALJ will not consider the contents of that Exhibit *supra*, despite Claimant referencing it in his Position Statement. Sufficient evidence of the contents of this 6/21/2021 IME report, however, were adduced by hearing testimony of Dr. Polanco. (Be careful what you ask for)].

Dr. Finn Requests Additional Treatment

26. On July 5, 2021, Claimant returned to Dr. Finn, who recommended Claimant undergo bilateral upper extremity EMGs. He also referred Claimant to an orthopedic surgeon. Dr. Finn noted that Claimant had not had an EMG in a couple of years. On physical examination, Dr. Finn noted left, more than right, hand intrinsic atrophy and weakness. (Ex. 4, pp. 27-28). Dr. Finn's *Review of Symptoms* noted, among other things, Numbness/Tingling, Tremor, Weakness, and Decreased Coordination. *Id* at 29.

27. On August 2, 2021, Respondents denied Dr. Finn's referral for bilateral upper extremity EMGs with Dr. Ales. *(Ex. CCC, p. 234)*. Respondents also denied Dr. Finn's referral to Colorado Springs Orthopedic Group. *Id* at 235.

Treatment Continues with Dr. Finn

28. On October 5, 2021, Claimant again treated with Dr. Finn, who maintained Claimant's treatment plan. (Ex. 4, pp. 24-25).

Dr. Polanco Issues a Supplemental Report

29. Also on October 5, 2021, Dr. Polanco issued a supplemental report. (Ex. EEE). Dr. Polanco noted he reviewed additional medical records, specifically Dr. Baptist's December 29, 2020 report, Dr. Hall's Division IME report, and Dr. Finn's July 20, 2021 report. Dr. Polanco then opined:

> e. Thus, while Mr. [Claimant, redacted] has ongoing complaints of pain, there is no clear indication of a substantial change or worsening of his condition, or consideration of surgical intervention and thus bilateral EMG testing is not supported.

30. Dr. Polanco elaborated, in summary:

> The medical treatment guidelines note that MMI should be declared when the patient's condition has plateaued to the point where the authorizing treating physician no longer believes further medical intervention is likely to result in improved function. The guidelines, in general, support retesting (EMG) when an individual's condition and clinical findings have substantially changed and deteriorated, as well as when surgical in the intervention is being considered While both Dr. Baptist and Dr. Hall have indicated that ongoing maintenance care is required, their statements of unlimited care is not consistent with the Colorado medical treatment guidelines. Ongoing medical treatment should meet criteria of the guidelines and should be oriented towards improving the individual's pain and function. In general, pain management should be goal oriented and time-limited. The guidelines do not support routine testing or routine

> bilateral extremity testing. Thus, while Mr. [Claimant, redacted] has ongoing complaints of pain, there is no clear indication of a substantial change or worsening of his condition, or consideration of surgical intervention and thus bilateral EMG testing is not supported.

31. Regarding Claimant's hernia, Dr. Polanco opined, "It is a standard of practice and physical therapy to report any injuries or significant abnormalities that have occurred or reported." Dr. Polanco added, "It would be highly unlikely that tensing up would cause/create a hernia condition. More likely than not Mr. [Claimant, redacted] had a pre-existing hernia that was asymptomatic." *Id* at 242-245.

32. On November 2, 2021, Dr. Polanco issued another supplemental report. This report did not address the hernia or the denied medical treatment. (Ex. GGG, pp.210-215).

Claimant continues his Treatment Plan with Dr. Finn

33. On November 4, 2021, Claimant returned yet again to Dr. Finn, who maintained Claimant's treatment plan and work restrictions. (Ex. 4, pp. 22-23).

Claimant Testifies at Hearing

34. Claimant testified his bilateral upper extremity symptoms have worsened since he was placed at MMI. Claimant testified he is now having issues remembering words and speaking. He stated that he continues to lose strength in his hands, and he is now dropping things. Claimant testified he can't type on a computer because the tremors in his hands are so bad. Claimant testified he started grinding his teeth and now has severe insomnia. He testified some nights he does not sleep at all and then ends up having to take a few naps during the day. He also testified his hands are now getting deformed and that he is losing mass in both hands and arms.

35. Claimant explained he can no longer play the guitar or ride dirt bikes. He lives on a farm, and as a result of the injury, can no longer perform his duties as a farmer. Claimant used to have approximately 50 goats on his farm. He is down to just 10 goats. Claimant stated his wife is now primarily in charge of looking after the goats. Claimant opined that he is about 50% worse since he was placed at MMI.

36. Claimant testified that the CRPS spread to his right arm, and that this arm and hand have worsened since he was placed at MMI. He stated that he relies on his medications to keep his symptoms under control. On one occasion, he had to go 72 hours with no medications, due to an authorization issue. He ended up having severe anxiety, a panic attack, and experienced incredible pain.

37. Since he was placed at MMI, Claimant testified that he underwent physical therapy at Strive with Anthony, a physical therapist. Claimant testified that in May 2021, Anthony 'gave him a hernia'. He described it thusly:

A I was laying on my stomach, and he was applying a lot of force to my lower back. And, as he traveled up the back -- I think he was trying to stretch it would be my best guess. But he was pushing down real hard. And, as he was moving up my spine, as soon as he got to about mid-back is when I felt the pop.
Q Okay. And where -- and where did you feel the pop?
A In my stomach, right where my belly button is. It's on the top side.
Q And is it on the left or right side of your belly button?
A Well, if I'm reaching on it, it's on the right side.
Q Can you feel it?
A Yes, I can….(Transcript, p. 27).

38. Claimant testified he never had a hernia before. Claimant testified he contacted Anthony the next day to report the hernia. Claimant testified Anthony told him that he would put it in his notes that Claimant reported getting a hernia during the last physical therapy session. Claimant testified that subsequently, Dr. Finn told him Anthony did not note the hernia, so Claimant reached out to him again to discuss the hernia and asked him to put it in his notes.

Dr. Polanco Testifies at Hearing

39. Dr. Polanco testified as an expert in occupational medicine. He confirmed that Claimant has bilateral CRPS. He testified that he reviewed Claimant's physical therapy notes, and that he does not see any reference to Claimant sustaining or reporting a hernia. Dr. Polanco testified an umbilical hernia would be mid-line on a person's abdomen, not in the left upper quadrant, which refers to the upper left side of the abdomen. Dr. Polanco testified that it is unlikely Anthony's manipulation on May 14, 2021, caused Claimant's hernia. He opined that is more likely that Claimant had a pre-existing, undiagnosed, non-symptomatic hernia that then became symptomatic.

40. Dr. Polanco opined that while EMGs are commendable diagnostic tools, Claimant shows no clinical findings of progressive neurological changes. He testified that Claimant's symptoms are getting worse. Dr. Polanco testified Claimant does not need the proposed EMGs, because the results will not change the treatment plan. When asked about the worsening of Claimants symptoms, this exchange took place:

Q Okay. And you'd agree with me that between -- from -- June of 2021 to November of 2021, those bilateral upper extremity tremors that he -- that he was experiencing worsened?
A I believe he reported that they worsened, but I -- I don't recall that I clinically noted a worsening of the tremors.
Q Okay. You would agree with me that *lack of sensation* in your upper extremity *<u>that results in</u> you dropping things* is

22 -- has a neurological component, right?
23 A *Dropping things* is usually a *strength* component.
24 Q Okay. So his -- his *inability to grasp or grip* is a
25 *strength* component?

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1 A Yes, more likely than not.
2 Q Okay. And it -- the tremors -- the *neurological*
3 tremors have nothing to do with that?
4 A Unlikely. (Transcript, pp. 86-87) (emphasis added).

41. Dr. Polanco testified that the proposed orthopedic referral is not reasonable or necessary, because Claimant does not have progressive clinical findings to support ongoing diagnostic testing.

42. Dr. Polanco testified regarding the Colorado *Medical Treatment Guidelines*-specifically the section that deals with chronic pain. He stated that the *Guidelines*, under the Maintenance Management section of the chronic pain guidelines, state:

> **3b** b p25. Electrodiagnostic studies *may be useful* in the evaluation of patients with suspected myopathic or neuropathic disease and may include Nerve Conduction Studies (NCS), Standard Needle Electromyography, or Somatosensory Evoked Potential (SSEP). The evaluation of electrical studies is complex and should be performed by specialists who are well trained in the use of this diagnostic procedure. c. Special testing procedures *may be considered* when attempting to confirm the current diagnosis **or** *reveal alternative diagnosis*. *Additional special tests may be performed at the discretion of the physician.* d. Testing for Complex Regional Pain Syndrome (CRPS I) or Sympathetically Maintained Pain (SMP) is described in the Division's Complex Regional Pain. (Ex. III, 252) (emphasis added).

43. Dr. Polanco testified Claimant never had a post-surgery left upper extremity EMG or a right upper extremity EMG. Regarding Claimant's hernia, Dr. Polanco stated that he initially authored a report in which he opined Claimant sustained a work-related hernia. Then, after reviewing additional medical records, he changed his opinion. He admitted that this subsequent report itself, [Ex. EEE, in which he changed his opinion regarding the causal relatedness of the hernia], makes no mention of any medical records, including physical therapy records, regarding the hernia.

44. At hearing, Dr. Polanco also referenced his Supplemental Exhibit III, whereupon he cites certain pertinent portions of the CRPS guidelines from the *Medical Treatment Guidelines,* and placed his analysis underneath each passage in red. The ALJ has read this exhibit in its entirety (along with all Exhibits), and will not repeat its contents here.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. In this instance, the ALJ finds that Claimant has experienced a cascade of unexpected complications from what might otherwise be considered a fairly routine injury to treat. All parties agree that he now has bilateral upper extremity CRPS from an injury only to this left arm. Since that time, the ALJ finds that Claimant, who wishes to lead a more active lifestyle, has accurately reported his symptoms to his treating providers, as

well as the IME in this case. The ALJ further finds that Claimant has testified truthfully at hearing.

E. It is further noted that the ALJ takes Dr. Polanco at his word that, were this his patient, he would not proceed as Dr. Finn is recommending. As duly noted, the practice of medicine can often be an inexact science. The mere fact that other practitioners would proceed differently does not make them *wrong.* And as will be noted, *infra*, the ALJ does not find his ultimate conclusions to be sufficiently persuasive.

Medical Benefits, Reasonable and Necessary, Generally

F. Claimant bears the burden of establishing entitlement to any specific medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Medical Benefits, Related to Work Injury, Generally

G. Further, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Preexisting Condition, Generally

H. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation *or medical benefits* if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability

or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Quasi-Course of Employment, Generally

I. Under the quasi-course of employment doctrine, injuries sustained during treatment of the industrial injury have been held compensable as a consequence of the industrial injury. *Excel Corp. v. Indus Claim Apps. Office*, 860 P.2d 1393 (Colo. App. 1993). The doctrine is restricted to injuries arising out of authorized treatment. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274, 278 (Colo. App. 1993). Nevertheless, the doctrine is not limited to injuries sustained while actually engaged in a particular medical treatment explicitly "prescribed" by the authorized treating physician. To the contrary, the quasi-course of employment doctrine applies to post-injury activities undertaken by the employee, which, although they take place outside the time and space limits of the employment and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *See Excel Corp v. Indus. Claim Apps. Office*, 860 P.2d at 1394; *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

The Referral to a Surgeon for the Hernia, as Applied

J. There can be little dispute that seeing a surgeon for such condition is *reasonable and necessary* to treat a symptomatic hernia. There is also little argument from Respondents that, if this hernia indeed arose during the physical therapy session as alleged, then the quasi-scope doctrine would apply. Dr. Polanco clearly agreed with this at the outset. At a later point, he changed his mind, stating his revised opinion based upon additional medical records he later reviewed. He is really basing his revised opinion upon the *absence* of entries in the *SOAP* notes one might normally expect to see from the physical therapist, had this been reported to the PT in real time by Claimant. There is a certain logic to what Dr. Polanco is saying; however, Claimant has now explained that he later requested that the PT update his notes to reflect the contemporaneous complaint. The ALJ finds this explanation plausible. Additionally, there is every reason to believe that the upper quadrant, without further clarification vis-à-vis 'midline', referenced what could indeed include the situs of the hernia.

K. Additionally, there is an absence of evidence in the record that this could have occurred in any *other* setting around this time period which might involve even more strenuous exertion. Claimant did not have a hernia before he had this PT session; he

did right afterwards. He felt pain during the maneuver. Dr. Polanco might well be correct that Claimant may well have brought a weak abdominal wall with him to PT that day. Maybe the hernia was indeed preexisting all along, but asymptomatic. It was not palpable to Claimant until the PT session, and it was not painful until then, and the ALJ so finds. And if it was preexisting, it became symptomatic, requiring medical treatment, as a result of the PT. The surgical referral for the hernia is reasonable, necessary, and related (via the quasi-scope doctrine) to the original work injury.

Referral to Orthopedist and EMG, as Applied

L. While presented as separate and distinct issues for adjudication, the two are closely related to one another. These two issues were presented for referral at the same time by Dr. Finn, and for essentially the same reason; Claimant was continuing to report pain and potentially neurologic symptoms that have hampered his activities of daily living. He was dropping things when he did not formerly do so. Dr. Polanco at hearing (*see* Finding of Fact # 40, *supra*) seemingly dodged [or did not understand] the question posed about the *lack of sensation*, and appeared to conclude that [merely] *dropping* things [without more] is usually a *strength* component. The ALJ is not convinced that neurological tremors are *unlikely* to 'have anything to do with it.' But if Dr. Polanco is right, and it really is solely a *strength* issue, then it sounds like a job for the orthopedist after all. At this point, no alternative non-work-related explanation for Claimant's symptoms has been put forth. And mind you, this is merely a *referral* to see what the problem is. Once the issue is identified (if it can be), then a treatment modality can be recommended by the orthopedist. The ATP will still be responsible to decide if any proposed treatment is *related* to the work injury, and whether it is *reasonable and necessary*. And Respondents, if they wish, may still challenge those ATP opinions. At this juncture, however, the ALJ finds, by a preponderance of the evidence, that the referral to an orthopedist is *reasonable, necessary, and related* to the work injury.

M. The DIME physician, Dr. Hall, has opined that Dr. Finn should be 'provided with just about anything' he feels necessary to control Claimant's chronic condition. Such opinion is not binding in this case, but it carries some value. More importantly, Dr. Finn thinks that the EMG is reasonable and necessary (and related) to Claimant's condition. He has spent hours with hands-on treatment, and consulted face-to-face on numerous occasions. His obligation is to try to get the best result for his patient, and the ALJ finds that he is fulfilling that obligation in good faith. Dr. Finn has treated Claimant, with incomplete success, for years. And, as was pointed out by Respondents, 'doing more of the same and still no improvement is the definition of insanity'. So now, Dr. Finn wants to try something new, and is now being told 'No'.

N. Dr. Polanco relies heavily on the *Guidelines* for his conclusions. And while the ALJ may countenance a deviation therefrom if the facts warrant it, the *Guidelines* exist for a good reason, and should not be lightly dismissed. However, in this instance, a plain reading of said *Guidelines* (*see* Finding of Fact #42, *supra*) states that: "Special testing procedures *may* be considered when attempting to confirm the current diagnosis **or reveal alternative diagnosis".** Because the usual regimen Dr. Finn has provided has

not yielded totally satisfactory results, he is seeking a possible *alternative diagnosis.* This is not only medically reasonable; it is seeking to avoid the very insanity that Respondents are warning us of. An *alternative diagnosis* does not have to be *mutually exclusive* of the agreed-upon CRPS diagnosis-it might show something *in addition thereto*. And, once again, any actual recommended *treatment* might not be deemed reasonable and necessary by the ATP. Claimant might even turn it down himself. And depending upon the diagnosis, it might not ultimately prove to be *related* to the work injury. Respondents retain their right to challenge specific future treatments. But Claimant is entitled to a thorough diagnosis.

O. A reading of the *Guidelines* appears to show that additional special tests may be performed at the discretion of 'the physician'. The ALJ interprets this to mean the ATP, or his designee. In this case, Dr. Finn has used his discretion to request this EMG test. The ALJ reads the *Guidelines* to permit exactly that. However, to the extent the ALJ might be mistaken in his interpretation, the ALJ finds that moving forward with this EMG is a reasonable deviation therefrom, and for the reasons previously stated. By a preponderance of the evidence, Claimant has shown that the EMG as recommended by Dr. Finn is reasonable, necessary, and related to his industrial injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the surgical consultation for possible hernia repair.

2. Respondents shall pay for the orthopedic consultation as requested by Dr. Finn.

3. Respondents shall pay for the bilateral upper extremity EMG as requested by Dr. Finn.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and

Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 17, 2022

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a work related injury on April 9, 2021 within the course and scope of her employment.

II. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that she is entitled to authorized medical benefits that are reasonably necessary and related to the injury.

PROCEDURAL ISSUES

Claimant filed an Application for Hearing on December 21, 2021 listing the issues of compensability and medical benefits. The Certificate of Mailing listed Employer and Employer representative and listed the address on file as well as the email for Employer. Claimant also filed a Case Information Sheet on March 9, 2022.

A Notice of Hearing was sent to Employer on February 18, 2022 by the Office of Administrative Courts, listing Employers' address and email. The notice advised Respondent Employer that the hearing would take place on March 15, 2022 at 1:30 p.m. and stated that Respondent "must be prepared to present your evidence concerning the issues to be heard at that time."

Employer failed to file a Response to Application for Hearing. Employer failed to appear at the hearing. Claimant's counsel indicated that they had provided all documents and pleadings by email and by ground mail and had not received any responses to any inquiries or requests.

This ALJ took administrative notice that the Employer is registered with the Secretary of State and was in good standing. It is also noted that the Notice of Hearing was sent to the same address and individual representative as listed on the business documents from the Secretary of State. Notice was deemed proper and appropriate. The hearing proceeded ahead without the Employer representative.

Counsel for Claimant also indicated he had contact with the Division, who indicated that no insurance policy was registered for this employer, and that a copy of this order should be forwarded to the Colorado Uninsured Employer Fund administrator.

FINDINGS OF FACT

Based on the evidence presented, the Judge enters the following findings of fact:

1. Claimant was 45 years old at the time of the hearing in this matter. Claimant filed a Workers' Claim for Compensation (WCC) on April 28, 2021 for an injury suffered in the course and scope of her employment with Employer on April 9, 2021. Claimant was a landscaper and would pick up heavy rocks, roll sod, load tree limbs onto trailers, as part of her job. On April 9, 2021 at approximately noon, Claimant was lifting a wheelbarrow loaded with heavy sod when she injured her low back.

2. She noted on the WCC that she was seen at UCHealth/Poudre Valley Hospital for emergency care and reported the work related incident to Edward Binnall, who was also a witness to the incident. She further noted that her average weekly wage was $720.00 and that she did not return to work after the date of the accident.

3. UCHealth EMS noted on April 9, 2021 that Claimant was evaluated by the EMS staff in her home. She was sitting on a couch in obvious distress. Claimant reported that she had an onset of low back pain while pushing a wheelbarrow up a hill and was in severe pain. On exam, EMS noted that she had tenderness in the paraspinal musculature, and provided her with pain medication. She was transported by ambulance to UCHealth/Poudre Valley Hospital.

4. On April 9, 2021 Claimant was attended at the UCHealth emergency department by Mollie Wolf, PA-C. Claimant reported that she was pushing a wheelbarrow up a driveway at work when she felt something pull in her lower back. She developed lower back pain that radiated down to the right foot with right foot numbness. She denied a prior history of lumbar spine conditions. Upon exam, Ms. Wolf noted that Claimant appeared to have weakness with plantar and dorsiflexion. Claimant also reported some inguinal numbness bilaterally. Ms. Wolf noted no history of IV drug use and that Claimant drove herself home and then called EMS who came to her home and transported her to the ED. Claimant was given IV fentanyl in route with some resolution of pain. Ms. Wolf's clinical impressions were of lumbar back pain and lumbosacral disc herniation with a differential diagnosis of lumbar strain, disc herniation, fracture, cauda equina. She provided Claimant with Toradol and dexamethasone and ordered an MRI. Robert Mosiman, M.D. was the supervising physician. Claimant was released with cyclopenzaprine and hydrocodone and was instructed to contact physical therapy and the orthopedic surgeon, providing the contact information.

5. The MRI results were read by Isaac Jones, M.D. as follows: 1) Multilevel neural foraminal narrowing greatest on the right at L5-S1. 2) Facet hypertrophy, disc bulge, and a small disc extrusion contributing to the right L5-S1 neural foraminal stenosis. 3) Mild multilevel spinal canal narrowing in the lumbar spine, greatest at the L3-4 level.

6. While in the ED, Claimant was assessed by Katherine Coonley, P.T. They completed education on the role of emergency PT, providing education on lumbar spine anatomy and disc herniations, and provided reassurance, explaining that lumbar spine problems usually self-resolved. Claimant verbalized that she was quite anxious that she could not use her right leg or feel it properly. She was inconsistently able to demonstrate normal gait with full heel strike bilaterally and normal strides, and did not require an assistive device to walk safely. Ms. Coonley explained that Claimant would have improved outcomes if she was to have outpatient physical therapy.

7. On April 21, 2021 Claimant was seen at the WCHealth Walk-in Clinic/Family Medicine Center for lumbosacral disc herniation, radiculopathy and, foot and leg pain. Family Nurse Practitioner Denah Inzinna examined Claimant and found some weakness with right dorsi flexion, normal dorsi extension, numbness to the top of the right foot that extended to the lateral calf and then to the posterior thigh. She noted that recommendations for lumbosacral radiculopathy was, initially, conservative therapy with NSAIDs and Tylenol, physical therapy, and if she had no improvement in 6 weeks, referral to pain management specialist for epidural steroid injections. If symptoms did not improve or worsened, referral to a specialist for surgical intervention. Ms. Inzinna recommended activity modifications.

8. Claimant was first attended at Colorado in Motion on May 3, 2021 pursuant to Ms. Inzinna's referral. Notes indicate that Claimant was pushing a wheelbarrow full of sod on April 9, 2021 when she felt intense pain and spasms. Mr. John Zapanta, PT, DPT, stated that Claimant presented with a right L4-L5 probable radiculopathy with sensory/motor changes.

9. On July 6, 2021 Pam Showman, PT, DPT, noted Claimant's pain with right lumbar side bend, lateral right lower leg hypersensitivity, hyposensitivity of the right medial lower leg. Subjectively Ms. Showman documented Claimant had recently been through a serious bout of depression and was not feeling up for therapy until recently. Claimant reported that her right leg sensitivity was going up and all of her toes felt number except for the middle toe. Aggravating factors included bending, being on the floor, the mornings were worse, and sitting to long, though massage and hot bath helped.

10. Claimant returned to see Ms. Showman on July 20, 2021 and was still complaining of right lower back and extremity symptoms. She was provided with reeducation and instructions for exercise and down time.

11. As found, Claimant was injured in the course and scope of her employment with Employer on April 9, 2021 while pushing a wheelbarrow, injuring her lumbar spine, causing radicular symptoms down her right lower extremity into her foot.

12. As further found, Claimant has shown that the treatment she sought from UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion were reasonably necessary medical care and related to the April 9, 2021 work related injury.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which she seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee

from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of her employment with Employer on April 9, 2021 when she was pushing a wheelbarrow full of sod or lawn clippings. Claimant specifically strained her low back, which in turn caused symptoms going down and into her right lower extremity, including pain, weakness and numbness into her right foot. Claimant has proven by a preponderance of the evidence that she sustained a compensable work related injury on April 9, 2021 in the course and scope of her employment working for Employer.

C. Medical benefits:

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury

...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo.App. 1995). Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 11 (Colo. App. 2004). A Claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's preexisting condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). An injury, nevertheless, must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability. See *Colorado Fuel & Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). A claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

Here, Claimant was initially seen in the emergency room and diagnosed with lumbar back pain and strain with a differential diagnosis of lumbar strain, disc herniation, or cauda equina. Claimant provided medical providers a history consistent with the one provided on her Workers' Claim for Compensation. Claimant has shown by a preponderance of the evidence that the work related accident of straining her low back while lifting or pushing the wheelbarrow was the direct causal event that precipitated the need for medical care in this matter. Claimant has shown that the medical care that she obtained from UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion were reasonably necessary medical care and related to the April 9, 2021 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for an injury to her low back and right lower extremity on April 9, 2021 is compensable.

2. Employer shall cover reasonably necessary and related medical treatment from authorized providers, including UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 21st day of March, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury on July 24, 2021?

II. If compensable, should Heart Centered Counseling be deemed an Authorized Treating Provider?

III. If compensable, have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for her own termination from employment, and thus not entitled to temporary disability benefits after September 11, 2021?

STIPULATIONS

The parties agreed to an Average Weekly Wage of $632. It was further agreed that UCHealth/Memorial Hospital, Colorado Occupational Medical Partners, Accelerated Recovery Specialists, and Absolute Health Center are authorized providers.

The parties further agreed that, if temporary disability benefits are to be ordered, the calculation of said benefits are reserved for future determination, or by possible agreement of the parties.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background / The Work Incident

1. Claimant was hired by [Employer, Redacted] on July 11, 2021 as a warehouse 'stower'. She attended orientation on July 12, 2021 and worked her first day on or about July 14, 2021. Claimant did not work for several days after July 16, 2021 due to taking both bereavement leave and personal time. (Ex. N, p. 227).

2. On July 24, 2021, at approximately 3:00 a.m., Claimant alleges that she lifted a tote and twisted, which resulted in a "pop" in her low back, and then felt pain in her back, which went down her legs and up to her shoulders. At the time of this reported incident, Claimant had only worked approximately 3 prior shifts for [Employer, Redacted]. (Ex. N, pp. 227-228).

3. Claimant reported her injury immediately to her supervisor, EP[Redacted], who in turn reported the injury to safety member "Chris" from AmCare, which is an in-house medical facility. Because of her reported pain, Claimant remained seated in a

wheelchair at work until the end of her shift. She did not perform any labor for the period from the time of injury to the end of her shift.

Claimant's Initial ER Visit

4. Following her injury, Claimant first went home, but due to her reported pain, Claimant self-reported to the UC Health emergency room the following day. Her intake notes by PAC Kristina Sanfilippo at 16:42 hours state:

> The patient is a 32 y.o. female who presents to the ED today with complaint of back pain onset last night. Pt states she works at [Employer redacted] and was picking up a bin and was turning to put it back down when her sx {symptoms} arose Notes her pain worsened this morning……States that it hurts to ambulate and that the pain is radiating to her BLE. Denies falls, trauma." (Ex. B, pp. 23-25).

5. The reports indicate that Claimant was administered a 30 mg toradol injection, a 700 mg patch of 5% lidocaine, and one 750 mg Robaxin tablet by PAC Sanfilippo at this visit. *Id* at 24.

6. [Respondents have contested liability in this case, but have authorized medical care, to include physical therapy, chiropractic care, imaging, injections, and massage therapy to date].

Claimant's Treatment with an ATP

7. Claimant initially treated with her primary care provider at Peak Vista Community Health Centers; however, she was ultimately referred to Colorado Occupational Medical Partners ("COMP") on July 29, 2021. At that initial visit, she was seen by Erik Ritch, MD. At intake her pain was reported at 10/10, in "right lower legs and left top." (Ex. D, p. 45). Dr. Ritch's intake notes state:

> She reports she was seen by hand care [?] and ended up going back home. She then went to the emergency room due to the severity of her pain, waited about 4 hours, *but was not actually seen by any provider and left.* She subsequently arrange[d] for an appointment with her primary care doctor 2 days ago. …She denies any history of back injuries. Id at 46. (emphasis added).

8. At the time of this initial visit, Claimant reported severe low back pain that radiated into both legs, down the back of her legs and down to her feet. Claimant reported ibuprofen and Flexeril had not been helpful. She also noted that she had been working at [Employer, Redacted] "for some time now." *Id* at 46.

9. Dr. Ritch noted that Claimant had moderate to severe tenderness through her entire low back both midline and off midline. It was also documented that Claimant was "extremely guarded with any movements that involve movement of her low back."

However, Claimant was able to sit and rise without help, her reflexes were normal and her strength was 5/5. *Id* at 47.

10. Dr. Ritch had initially provided work restrictions of sitting for 4 hours per shift. However, Claimant returned the following day (July 30, 2020), and reported that she could not sit for 4 hours, even though [Employer, Redacted] had found a position that would allow her to remain seated. (Ex. D, p. 50). At this visit, Dr. Ritch noted that Claimant had "very little AROM [active range of motion] of her back" and that Claimant "tolerated palpation of her back very poorly," so he was unable to determine the degree of muscle spasm actually present. Dr. Ritch further noted that even palpation in the soft tissue superficial to the muscle caused Claimant to express significant pain. Her restrictions were updated to allow for breaks to stretch. *Id* at 52.

11. Even as of the latest available entry by Dr. Ritch (January 4, 2022), he continues to state that this is a work-related injury. (Ex. D, p. 99).

Imaging

12. Claimant underwent x-rays and MRIs of the lumbar and thoracic spine. The 8/2/2021 x-rays were normal. (Ex. H, p. 168). The 9/10/2021 lumbar MRI's Opinion stated: At L5-S1 there is a tear in the disc margin and there is a *small* associated disc protrusion in the midline and left paramedian location *without nerve impingement or stenosis*. No other significant abnormality. *Id* at 165, (emphasis added). [On 3/2/2021 Claimant had undergone a CT scan performed on her abdomen, which noted, as an incidental finding, "Small disc protrusion L5-S1 centrally". No treatment was prescribed for this finding. (Ex. H, p. 32)].

Concerns Arise with Claimant's Subjective Complaints vs. Physiological Findings

13. Throughout the claim, there have been references by Claimant's providers that Claimant's subjective symptoms do not correlate to objective findings, or that her pain appears to be out-of-proportion to the mechanism of injury. Further, Claimant consistently reported significant pain without any relief from multiple treatment modalities. Some of these references include:

- August 5, 2021 – COMP: Claimant reports no change in her back…still hurting constantly. It is made worse by remaining seated too long…made worse by standing…movement does make it worse as well. She has been taking ibuprofen and using heat and ice without improvement. Claimant was noted to move "extremely gingerly" and was not twisting or bending within a normal range. (Ex. D, p. 54).

- August 11, 2021 – PT: Noted that claimant is vague about her symptoms when pressed for details. Further documented that claimant's possible subjective symptoms greater than objective findings with extreme guarding, which made assessment difficult. While she reported reduction in symptoms, she reported 10/10 pain to the physician directly after treatment. (Ex. E, p. 105).

- August 17, 2021 – PT: The therapist noted that Claimant's subjective complaints of pain were much higher than observed movements. It was further documented that Claimant has poor subjective description of symptoms. (Ex. E, p. 107).

- August 25, 2021 – COMP: Claimant reports her back has been worsening since her last visit. Physical therapy has been no help. She continues to have 10/10 pain all up and down her back and neck, that radiates into her right arm and back of her right leg with numbness and tingling. No medications have been helpful. Claimant reported that she had not gone in to work because she says her back is hurting too badly and she needs to remain lying down with an ice pack on her back. It was noted that Claimant does not tolerate anything other than very light touch without wincing. Claimant was noted to be guarded getting out of a chair, but walked without difficulty. Range of motion was very diminished and claimant reporting pain with most movements.

- Dr. Ritch noted that Claimant's "responses to even fairly light touch in her low back seem to be quite exaggerated based on both her mechanism of injury and the general response of such injuries to conservative care." It was noted that claimant wanted to be taken out of work, however, Dr. Ritch was unable to identify any diagnosis that would be permanently worsened by working. He noted that "the mere presence of reported back pain does not indicate an inability to work." Dr. Ritch further noted that "claimant's new complaints of numbness in her right arm were puzzling… and the evolution of her symptoms to something that has no anatomical/physiologic explanation along with the relatively exaggerated response to light tactile stimulus was a concerning aspect of this case." Dr. Ritch recommended an MRI to rule out a significant disc herniation. (Ex. D, p. 62-63, 65).

- September 1, 2021 – COMP: Claimant reported worsening, 10/10 constant pain. (Ex. D, p. 67).

- September 15, 2021 – COMP: Claimant reported ongoing 10/10 pain. It was noted that Claimant's MRI showed mild disc pathology at the L5-S1 level with reported symptoms significantly more severe than imaging would suggest. (Ex. D, p. 72, 74).

- October 8, 2021 – Accelerated Recovery Specialists: Claimant reported 0% decrease in pain since her injury and reported her pain was 10/10 at all times. It was noted that Claimant reported diffuse thoracic and lumbosacral pain from her upper thoracic region through the belt line. It was noted that Claimant walked with a very slow cautious gait pattern during direct observation; however, Claimant had a normal gait pattern during casual observation. Claimant was noted to be exquisitely tender in the lower lumbar paraspinals, but also diffusely tender throughout the thoracic and lumbar regions. Range of motion was profoundly limited. Dr. Sparr opined that Claimant's diffuse pain was not easily explained by

a 1 level disc tear. Despite this, a lumbar epidural steroid injection was recommended. (Ex. F, p. 115-116).

- October 13, 2021 – COMP: Claimant reported 9-10/10 pain throughout her entire low back with no change from her initial injury state. She had not noticed any improvement with chiropractic care. Dr. Ritch noted that Claimant's "symptoms appear to be out of proportion to actual hard physical findings." He further noted that Claimant was not responding the way he would expect with manual therapy. Dr. Ritch noted that he was concerned that Claimant's symptoms may not be explained by a physical pathological finding. (Ex. D, p. 85-87).

- November 12, 2021 – COMP: Claimant reported a 1/10 improvement on the pain scale based on her lumbar epidural steroid injection. She continued to report 7/10 pain throughout her entire low back. It was noted that there may not be any further treatment to offer. (Ex. D, p. 90, 92).

- November 12, 2021 – COMP: Claimant reported no change since her prior examination and that massage therapy caused "extreme pain." Claimant reported that her pre-injection ESI pain score was 8/10, which increased to 10/10 following the injection for 3 hours and then wavered between 8/10 and 10/10 since that time. Dr. Sparr opined that this was a poor diagnostic and therapeutic response to the injection which indicated the L5-S1 disc level was not the cause of her pain. Claimant continued to be exquisitely tender over left low back. Dr. Sparr noted that she was previously diffusely tender. It was also noted that Claimant now had limited range of motion in the cervical spine due to central back pain. Dr. Sparr noted that Claimant continued to report severe pain without response to physical therapy, chiropractic treatment or massage, along with poor response to lumbar ESI. Dr. Sparr opined that because Claimant's pain had suddenly become less diffuse, a left facet injection at L4-5 and L5-S1 was indicated. (Ex. F, pp. 120-121).

Claimant's Mental Health Issues and Treatment

14. Prior to, and after, her work injury, Claimant had been undergoing psychological counseling with Lifestance Health (aka Heart Centered Counseling) and treatment for personal issues starting on December 9, 2020. Claimant's history was significant for prior psychological issues. Assessment and treatment focused around chronic depressed mood and post-traumatic stress disorder and associated symptoms. (Ex. I).

15. At hearing, Claimant testified that this was her personal provider and that she had not been referred to this provider through the workers' compensation claim.

16. While Claimant did mention her back injury in one visit, Claimant sought treatment with this provider prior to her injury for personal reasons and that treatment continued following the work injury for ongoing treatment related to Claimant's personal mental health care. There is no evidence that any providers from COMP or Accelerated Recovery Specialists referred Claimant to Lifestance Health for treatment.

IME Performed by Dr. Lesnak, and Hearing Testimony

17. An IME was conducted by Dr. Lawrence Lesnak. Dr. Lesnak also testified at hearing as a Level II accredited expert who is board-certified in the field of physical medicine and rehabilitation.

18. Dr. Lesnak performed his IME on December 15, 2021. During his examination, Dr. Lesnak noted that Claimant exhibited numerous and diffuse pain behaviors along with non-physiologic findings, including 2/5 positive *Waddell* signs. Dr. Lesnak did not note any reproducible objective findings on examination. (Resp. Ex. A, p. 11).

19. Dr. Lesnak also documented that Claimant had a flattened affect and somewhat depressed mood. (Resp. Ex. A, p. 11). A Computerized Outcome Assessment was performed as part of the IME and Claimant's testing placed her in the category of "At-Risk" in regard to psychosocial dysfunction. Claimant reported a moderate to high level of somatic pain complaints, which strongly suggest the presence of an underlying symptom somatic disorder/somatoform disorder. Dr. Lesnak noted that patients with these types of diagnoses frequently embellish/exaggerate their symptoms, causing their reported subjective complaints to be unreliable at best. As a result, he opined that healthcare providers must rely primarily, if not solely, on reproducible objective findings in order to provide accurate medical diagnoses and treatment recommendations. (Ex. A, p. 15).

20. Dr. Lesnak noted that, although Claimant reported a "pop" in her low back followed by severe diffuse pain, the medical records evidence that Claimant exhibited diffuse pain behaviors and reported pain levels that were out of proportion to any reproducible objective findings on exam, which were minimal to none. Dr. Lesnak testified that these inconsistencies were documented by both Dr. Rich and Dr. Sparr. Further, the initial emergency room treatment did not include diagnostic imaging studies, which Dr. Lesnak opined indicated that there was not even a low suspicion that there were any structural abnormalities.

21. Lumbar x-rays showed no abnormalities. The thoracic MRI was completely normal. The lumbar MRI showed a small disc protrusion, but this did not correlate to symptoms. Further, Dr. Lesnak testified that Claimant had a pre-injury pelvic CT scan on March 2, 2021, which showed mild disc pathology at the same level. Dr. Lesnak opined that this was similar to what was identified on the post-injury MRI. (Resp. Ex. A, p. 13). He further testified that the most common symptoms for this type of MRI finding are "none". However, symptoms that could be associated with a mild disc bulge include mild low back or leg symptoms. Dr. Lesnak opined that Claimant's subjective reports of severe 10/10 pain would not be expected based on the MRI findings. He agreed with Dr. Sparr that Claimant's symptoms were not explained by a one level disc tear.

Dr. Lesnak's Opinion re: Injections

22. Regarding Claimant's lack of reported benefit with virtually all treatment, Dr. Lesnak opined that this was not surprising because it was evidence that Claimant's subjective complaints were not related to any structural abnormality. Dr. Lesnak also disagreed with Dr. Sparr's recommendation for an epidural steroid injection. He testified that Claimant reported pain through her entire back, which was not specific to the mild disc pathology noted on MRI. Further, Claimant had no specific reproducible objective findings to correlate with radiculitis or radiculopathy. Because of this, Claimant did not meet the criteria in the Medical Treatment Guidelines to proceed with an epidural injection. Further, the fact that Claimant reported no relief from the injection was evidence that the disc pathology at L5-S1 was not causing any of Claimant's symptomatology.

23. Dr. Lesnak also testified that Dr. Sparr's recommendation for a facet injection was also not reasonable, necessary or related. He opined that Dr. Sparr had previously commented that claimant was not a candidate for any facet injections. Additionally, Claimant had never demonstrated any reproducible objective findings to correlate with any symptomatic lumbar facet pathology. Dr. Lesnak further testified that there was no indication for a lumbar medial branch block. While Claimant had reported "a little" relief following her recent injection, under the Medical Treatment Guidelines, there must be at least 80% relief to consider a medial branch block, which was not present in this case.

Dr. Lesnak's Opinion re: Compensable Work Related Injury

24. While Dr. Lesnak opined that Claimant could have sustained a mild lumbar soft tissue strain/sprain as a result of the reported lifting incident at work, he testified that when you add in her examination findings, there was no objective findings to support there was an injury. Additionally, the minor disc pathology was not related to this incident as it was pre-existing and also appeared to be completely asymptomatic. As such, Dr. Lesnak opined that while there may have been an incident at work, it did not appear there was a resulting injury.

25. Assuming, however, that an injury had occurred, Dr. Lesnak opined that, at worst, Claimant could have sustained a soft-tissue injury which would have resolved over the course of several weeks or a couple months. He further testified that most soft-tissue injuries resolve on their own without any need for medical care or interventions.

26. Dr. Lesnak testified that the treatments in this case had been largely, if not entirely, based on Claimant's subjective complaints, despite a lack of documented objective findings on examination. Dr. Lesnak further opined that there was no objective evidence to support the need for work restrictions.

27. Dr. Lesnak opined that Claimant's current diffuse subjective complaints without any reproducible objective findings did not support any current diagnosis which would be related to the July 24, 2021 occupational incident. Dr. Lesnak opined that Claimant has significant psychosocial factors that are currently affecting her symptoms and perceived function, which are not related to the July 24, 2021 work incident. Accordingly, Dr. Lesnak opined that Claimant does not require any further medical

treatment or evaluation. Further he opined that there is no medical evidence to support that Claimant requires any type of temporary or permanent work restrictions related to the work incident. (Resp. Ex. A, p. 14).

28. Dr. Lesnak acknowledged that Dr. Ritch has not placed Claimant at MMI, and had no information that Dr. Ritch had ever opined that Claimant's symptoms were *not* work related.

29. Dr. Lesnak further agreed that according to the Medical Treatment Guidelines, one would generally expect a patient in Claimant's situation to make significant progress within 6 to 12 weeks. However, he also agreed with the Guidelines that 3 to 10% of all industrial injured patients will not recover within those guidelines, despite optimal care. He agreed that such outliers may require treatment beyond the limits otherwise discussed in the Guidelines, so long as the ATP is focused on objective functional gains and impact on their prognosis. He again emphasized that there are no reproducible objective findings to explain Claimant's complaints. He did not think in Claimant's situation that she should have been referred for a WC-related psychological examination.

30. Dr. Lesnak acknowledged that Claimant might have suffered a soft tissue strain/sprain in her back while at work, but there is no evidence of injury to lumbar discs, ligaments, or facet joints. While stopping short of accusing Claimant of consciously manufacturing her symptoms, he did indicate that some degree of somatic disorder might be at play. While repeating that there is no medical evidence of any injury, he acknowledged:

> Did she possibly feel a pop in her back? It's possible. And then all of a sudden her brain just kind of explodes and manifests all this pain throughout her body? Sure. (Transcript, p. 137).

Claimant Testifies at Hearing re: Work Injury

31. Claimant was hired as a 'stower', with a lifting requirement of 25 pounds. She began her shift at 6:00 p.m. on July 23, and was injured at 3:00 a.m. that following morning. She described her injury thusly:

> I picked up the storage bin, I turned to put it down to move all the other bins down, and then when I picked it back up, I heard a pop in my back and it went all the way up my back, all the way down to my legs, and the pain was mostly in my belt line area of my lower back. (Transcript, p. 25).

32. She stated she had never felt pain like that in her life. It was similar to kidney stones, but worse. She had suffered a whiplash-type neck injury in a car accident in 2014, but received chiropractic care, but was not treated for her back.

33. Once she was seen by 'Safety', she understood them to say to go home, but if pain persisted, to go to the ER. She went home initially, but the pain was so bad that she took herself to the ER at Memorial South {aka UC Health}. At the UC Health ER, she was told to see her PCP, but also an Occupational specialist. She was later assigned Dr. Ritch.

34. Once she saw Dr. Ritch, she has undergone injections by Dr. Ford, the first of which did not help, the second of which offered "a little." She has had physical therapy (but none since her injections), massage therapy, and chiropractic care. She has taken all prescribed medications. Treatment to date has provided little to no relief, except as noted. [Claimant apparently referenced two more injections that were recommended, but not provided].

Claimant Testifies re: Termination

35. Following the work injury, Claimant was offered temporary work duty, but only worked sporadically, and for a short period at Respondent-Employer performing light-duty tasks, which included asset tagging. This job involves sitting at a computer and drive squares or circles around objects to help robots identify objects. At one point, she just sat and handed out masks to workers who needed one. The job does not require any lifting.

36. The last shift Clamant worked for [Employer, Redacted] was September 9, 2021. On September 10, she was in such pain that she could not come in to work. However, she did not 'call in sick.' Instead, she assumed that by not showing up, the system would simply automatically deduct 'points' from her personal bank, since she did not badge in that day. She had no intention, however, of abandoning her job.

37. Claimant testified that at around 8:00 p.m. on September 11, 2021, (a regularly schedule day off, so she did not go in that day either) she received a call from an unidentified human resource representative who advised her that she was terminated for alleged timecard theft. She tried to explain that she had discussed a discrepancy in her time records with human resources previously, but the human resources representative told her that she remained terminated. No one from [Employer, Redacted] ever met with her to discuss this. She never received anything in writing explaining the reasons for her termination. She was aware of [Employer, Redacted]'s progressive discipline system {warning, written warning, termination}, but was never provided any warnings.

38. Claimant stated that prior to September 11, she has never been accused of time theft, nor had she been disciplined for alleged time theft. Claimant testified that she noticed in advance of her paycheck that she was going to be paid for August 27, 2021-a day when she had not worked. She stated that she contacted human resources to report that she was not entitled to pay for that day. She does not know why her time records reflected that she worked on August 27. She believes that human resources erroneously noted that she worked that day. She also testified that she believed that human resources received her message about the discrepancy because "they opened the case and then

they closed the case with nothing." She knows this because she would get an alert of such opening and closing activities (presumably to her phone).

39. Claimant unequivocally denied any time theft while working at Respondent-Employer, and she testified that she advised human resources about this discrepancy in her timecards and that the time was not correct and needed to be deleted.

40. Claimant described the clock-in-and out process as having two acceptable options. She could use the company-supplied smartphone app, but had to be within the building to get within range to use it. Alternatively, she could use her work badge to clock in while waiting to enter her work station. She was aware that cameras record the movement of employees, and she would never attempt to abuse the timecard system.

41. On cross-examination, Claimant provided more detail on the clock-in-clock-out process. There is only one way into the facility, and only one different way out, and there is security. Regardless of whether you use the *app* to clock in or clock out, you still must use your *badge* to physically enter and exit the building.

42. Claimant then described what occurred on August 27, which is the date she can only speculate that her termination was based upon:

Q. Okay. So on that date, did you clock in
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1 and clock out on your phone or what happened?

2 A. No. So, I badged in using my badge, I was
3 about to walk in but I didn't walk in at all. I ended up
4 walking back out because my back was in too much pain.
5 So I was going to work, but the way my
6 back was feeling, I didn't go all the way in. I looked
7 at the desk, because you can see the desk from the --
8 before you -- before you badge in, you can see the desk
9 where the people who are hurt sit.
10 So when I looked over, my safety person --
11 my manager -- my safety manager wasn't there and she
12 usually gets there around 6:30. So I badged in and I
13 turned around and went back out the door. I didn't go
14 all the way in the building. (Transcript, pp. 57-58)

43. She explained that once she badged in, she would normally have to badge out at a different location, after entering and walking "all the way around" before badging out and exiting. She later explained that "all the way around" was about half a basketball court. So she just turned around and left before fully entering the building.

44. Claimant explained why the time was not accurate on August 27 as follows:

> At the time I didn't have a schedule, meaning --the reason why I didn't have a schedule is because I was on leave of absence. So when you are on a leave of absence you don't have a schedule. HR has to--- you have to be manually put in-- clocked in by going to AmCare, so they have to write down you being there and then they have to write down when you're leaving…. I don't know what happened." (Hg. Tr., p. 54).

45. Claimant was also asked about Exhibit O, p. 233 ([Employer, Redacted]'s 'Supportive Feedback Document'). She did not have it in her possession, but does not recall having seen it [although it was a listed Respondent's Exhibit]. Claimant explained that she did not work on August 27, but reiterated that she did work on July 16, but left early due to the death of a family member. She did, however, put in her 'PTO time' when this occurred.

46. Claimant did not deny that she clocked in, but did not actually work on August 27, 2021. Nor did she deny that she failed to actually report to anyone *that day* that she had left without working. She did, however, indicate that she tried to report to her safety manager that she was leaving, but that person was not there at the time. She also acknowledged that she worked the day before, and the day after August 27. [The ALJ notes that these were apparently the four-hour shifts permissible under then-extant work restrictions.]

47. After her termination, Claimant went to work for Door Dash for two days per week, from September to November, 2021. She quit working at Door Dash because her back was hurting too much.

48. Claimant then went to work for Kum & Go as a cashier, working between 20 and 30 hours per week at an hourly wage of $14.45. She testified that she worked an average of 23 hours per week.

[Redacted, hereinafter EP] Testifies at Hearing

49. Claimant reported the work injury to her supervisor EP[Redacted], between approximately 3:30 and 3:45 A.M, towards the end of Claimant's shift. Ms. EP[Redacted] is a Level 5 Area Manager who has worked for [Employer redacted] since 2013. Ms. EP[Redacted] was working with Claimant at the time of her reported injury. Ms. EP[Redacted]testified that Claimant reported the injury directly via the "hands-on system" and that Ms. EP[Redacted] reported to Claimant's workstation personally.

50. Ms. EP[Redacted] stated that Claimant reported that she was in pain and unable to walk; because of this, a wheelchair was provided. She testified that a standard investigation was conducted regarding how the injury occurred. Claimant told her that she injured herself while stowing. Ms. EP[Redacted] was able to pull video from the station number, but was unable to identify any event on the footage that showed an injury had occurred, or that matched with the description Claimant had provided.

51. Despite this, Ms. EP[Redacted] testified that basic first aid, including an ice pack, was provided. Due to the time the injury occurred, HR was not on site. Ms. EP[Redacted] testified that Claimant did not have any accrued personal time and that if she left prior to her shift being over, it was possible she would be terminated. As a result, Claimant remained on site until her shift was over.

52. Ms. EP[Redacted] clarified that she has no information about the allegation of time theft lodged against Claimant by [Employer, Redacted]. She had no involvement in her termination. She is unaware of any of the procedures used by HR for termination under these circumstances. She has no knowledge of the various symbols which appear on Claimant's time records.

Employer's Records re: Termination for 'Time Theft' – Exhibit O

53. Claimant was then terminated on September 10, 2021 for 'Time Theft' by allegedly clocking in and out on her personal cellphone, but failing to badge in and out of the building. (Ex. O, p. 233). The 'Details of Concern' outlined in this 'Supportive Feedback Document' state:

> July 16, 2021 and August 27, 2021 you were using your mobile device to clock in and out. During this time you did not use your badge to enter or exit the facility… A seek to understand conversation took place with you where you state that on August 27, 2021 you did not work. *Id.*

54. On the same document, it notes, under 'Areas of Improvement':

> [Employer, Redacted]'s NAFC Standards of Conduct specifically prohibits &quot(sic) *intentionally* making entries on associate's time cardsheet or *falsely altering* a timekeeping document when the associate is not in the [Employer, Redacted] facility &quot(sic). *Id* (emphasis added).

This document then stated that this is a Category 1 security infraction, subjecting the associate to immediate termination. *Id.*

55. Under 'Associate Comments', it notes:

> AA was terminated via phone on 9/10 at approximately 19:40. AA stated she is being wrongfully terminated and will be contacting her lawyer. *Id.*

Under Associate's Signature, it states: Davis Tee (sic) REFUSED TO SIGN. *Id.*

56. Under the multi-page employment agreement that Claimant was subject to, it was noted, under 'Employment at Will':

> If you accept our offer of employment, you will be an employee-at-will, meaning that either you or the Company may terminate our relationship at any time for any reason, *with <u>or without cause.</u>* Any statement to the

contrary that may have been made to you, or that may be made to you, by the Company, its agents, or representatives are superceded by the offer letter. *Id* at 240. (emphasis added).

[Employer, Redacted] Timesheet Records -- Exhibit N

57. [The ALJ notes that no person from [Employer, Redacted] testified about the contents of this Exhibit. No interpretation was provided. There are various symbols accompanying the clock-in-clock-out entries, which plainly bear some meaning, but which would leave the finder of fact to speculate. The only conclusions the ALJ is willing to draw with this limited information is that there is nothing within these records that is inconsistent with Claimant's own testimony and explanations for what occurred.]

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo.

1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

D. In this instance, starting with EP[Redacted], the ALJ finds her to be sincere and credible in her observations and testimony. The ALJ also finds that Dr. Lesnak makes a very sound argument that Claimant's reported symptoms are not supported by objective evidence in the record, and that her reported symptoms are out of proportion to any injuries she may have received. The ALJ finds that Claimant leaves much to be desired as an accurate medical historian, but does not find her to be incredible *per se.* Further, as will be noted, Claimant's explanation for her timecard discrepancies seem plausible enough, and there is nothing in the record, of a testimonial nature, or in the way of discernable records, which contradict her. More on that later.

Compensability, Generally

E. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *See*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

F. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

G. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

Compensability, as Applied

H. There is considerable record support that Claimant's reported symptoms are out of proportion to any reproducible objective findings. She has effectively confounded her own ATPs with her lack of progress. However, her ATP, Dr. Ritch has consistently opined that her injuries are work-related. Dr. Lesnak conceded that she may have suffered a soft tissue injury (but no structural damage to the spine, facets, or ligaments). He also stopped short of accusing Claimant of manufacturing the incident or her symptoms. And, as was acknowledged, Claimant may well have felt a pop in her back and then, however objectively unsupported, reported exaggerated symptoms. All quite plausible. However, based upon the entire record, the ALJ does find, by a preponderance of the evidence, that Claimant did suffer a compensable work injury, as defined, which caused the need for medical treatment. And it is noted that Claimant's ATP, despite some apparent misgivings, has yet to place her at MMI. Just how much medical treatment might be reasonably necessary moving forward will wait for another day.

Authorized Medical Treatment, Generally

I. Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010).

Authorized Treatment by Heart Centered Counseling, as Applied

J. As noted, Claimant was not referred to Heart Centered Counseling by any ATP. She had already sought this treatment through her own PCP, and well prior to the work injury at issue herein. Claimant had already experienced a number of personal mental health issues, and the mere fact that during her ongoing mental health treatment she mentioned her ongoing back issues does not bootstrap this condition into an authorized treatment, unless it comes from her ATP. The ALJ declined to designate Heart Centered Counseling as an Authorized Treating Provider.

Claimant's Responsibility for Termination, Generally

K. An award of Temporary Total Disability or Temporary Partial Disability benefits is payable if the following conditions exist: (1) the injury or occupational disease causes disability, (2) the injured employee leaves work as a result of the injury, and (3) the temporary disability is total and lasts more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). TTD continues until the first occurrence of any one of the following: (a) the employee reaches MMI; (b) the employee returns to regular or modified employment; (c) the attending physician gives the employee a written release to return to regular employment; or (d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. C.R.S. § 8-42-105(3).

L. However, in cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on the job injury. C.R.S. § 8-42-103(1)(g). Thus, if a Claimant is responsible for her termination, she is not entitled to recover temporary disability benefits for wage loss. *Padilla v. Digital Equip. Corp.*, 902 P.2d 414, 416 (Colo. App. 1994). A Claimant is responsible for her termination where she is "at fault" for causing a separation in her employment. "A finding of fault requires a volitional act or the exercise of a degree of control by a Claimant over the circumstances leading up to the termination." *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008) (citing *Padilla*, 902 P.2d at 416). This is a factual determination for a judge. *Padilla*, 902 P.2d at 416.

M. A Claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

Did [Employer, Redacted] have the Legal Right to Terminate Claimant's Employment?

N. Of course they did. As is made clear in Ex. O, p. 240, *supra*, Colorado is an at-will employer state. So long as they don't run afoul of any anti-discrimination statutes, the ADA, and the like (of which there is no evidence in this record, but which is also beyond the purview of this case), they can quite possibly terminate someone for wearing ugly shoes if they want. [Employer, Redacted] has made it quite clear that they are not even bound by their own due process disciplinary procedures if they don't wish to be. Employees can either accept the terms of employment, or go elsewhere. If anything, [Employer, Redacted] has shown that it is a marvel of efficiency, automation, and information technology. So efficient, it appears, that they have largely eliminated the human element in HR decisions, and now have algorithms that do it all for them. They only use an HR rep-with no apparent discretion-to make that final phone call. Such is [Employer, Redacted]'s business model, and its prerogative. However, such trial-by-algorithm does not, *ipso facto,* serve to terminate temporary disability payments to an injured worker.

Was Claimant Responsible for her own Termination?

O. [Employer, Redacted] - or more precisely, its algorithm - has accused Claimant of 'Timecard Theft', thus subjecting her to termination, without the usual niceties of progressive discipline and the warnings it would entail. Apparently, during some undefined 'seek to understand' process, Claimant acknowledged that she did not work on August 27, but was paid for her services anyway. Game over. Claimant has now offered a plausible explanation for not completing her shift on August 27 (such explanation also implicating her inability to do so *due to the effects of her work injury*). She has also offered a plausible explanation that she called HR upon discovery of her pay stub, but someone on the other end, either: 1) didn't document it, or 2) did document it, but the algorithm didn't get the memo. Also plausible is that 3) none of this happened the way Claimant has alleged; however, the algorithm did not come and testify at the hearing that no such record of this alleged phone call exists. Nor was an intelligible record of [Employer, Redacted] admitted into evidence to this effect. The burden lies on the Employer in such circumstances, and for good reason: The Employer retains access to all the video, payroll records, internal memos, co-workers, etc. - essentially all the data in existence. A fired employee has nothing but their word.

P. [Employer, Redacted] has cameras everywhere, apparently running 24/7. For good reason, lest certain employees find a way to steal them blind. Claimant was aware of that fact. [Employer, Redacted] had access to the film of Claimant's comings and goings on August 27, but there is no evidence that anyone at [Employer, Redacted] ever bothered to look at it-much less bring it into the hearing to refute what Claimant has said. That would detract from the efficiency of the trial-by-algorithm model, and [Employer, Redacted] has long since moved on from Claimant. [The ALJ duly notes that Claimant was hardly a model of productivity, taking bereavement leave only a few days into the job, then getting hurt and being placed on restrictions shortly thereafter. Even thereafter, Claimant had a spotty attendance record. It is unclear whether the algorithm factored all

that in while making its firing decision, versus, say, an otherwise reliable 10-year employee]. No matter. [Employer, Redacted] has accused Claimant of acting *intentionally* or *falsely* regarding her timecard. (*see* Ex. O, p. 233). They have to, since they must show that Claimant acted *volitionally.*

Q. Suffice it to say, the ALJ does not find Claimant's version of events to be *incredible per se.* In fact, there is a certain ring of truth to it, since truth is often stranger than fiction. And, to put it bluntly, Clamant (to her credit) does not appear to have the guile to pull this one off. [Employer, Redacted] has offered essentially nothing in rebuttal, and it was their burden from the get-go. Claimant stated that she had no clue that [Employer, Redacted] even harbored concerns about July 16. From what can be ascertained from the Exhibits, Claimant left early that day-*for the exact reasons that she stated*-and the records appear to reflect exactly that. If [Employer, Redacted]'s algorithm got all confused by this, that hardly makes a case for acting *intentionally* or *falsely.* And we're all still waiting to see how Claimant, by all accounts, was fired via a phone call from HR - yet [Employer, Redacted]'s records reflect that she *REFUSED TO SIGN* her termination letter - *over the phone* (?!). [Employer, Redacted]'s system may work for [Employer, Redacted], but it does not work for the ALJ in this case. Employer has failed to show that Claimant acted **volitionally** in the events leading to her termination.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on July 24, 2021.

2. Heart Centered Counseling is not an authorized Treating Provider for this claim.

3. Respondents have not shown that Claimant was responsible for her own termination of employment; therefore, temporary disability benefits shall be paid in an amount to be determined by future hearing or agreement of the parties.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your

Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 14, 2022

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove the admitted 13% scheduled lower extremity rating assigned by the DIME should be "converted" to the 5% whole person equivalent?
- Did Claimant prove his condition worsened and he is no longer at MMI?
- Did Claimant prove a left ankle surgery recommended by Dr. Michael Simpson is reasonably necessary?
- If Claimant is no longer at MMI, is he entitled to additional TTD benefits?
- If Claimant remains at MMI, did he prove he is permanently totally disabled?
- Disfigurement.
- Overpayment.

FINDINGS OF FACT

1. Claimant worked for Employer as a concrete truck driver. He suffered an admitted injury to his left ankle on July 5, 2018 when he stepped on a rock while exiting his truck. Claimant was initially diagnosed with an ankle sprain but an MRI later showed an anterior talofibular ligament tear and probable calcaneofibular ligament tear.

2. Claimant had left ankle surgery performed by Dr. Michael Simpson on October 11, 2018. The procedure included an ankle debridement with excision of the os trigonum and modified Brostrom lateral ligament reconstruction.

3. Shortly after the first surgery, Claimant reported back pain related to prolonged alteration of his gait. On January 16, 2019, an ATP documented sciatica-type symptoms because of altered gait. Claimant received some physical therapy for his low back pain.

4. Claimant continued to have problems with the ankle related to scar tissue buildup. Dr. Simpson eventually performed a second procedure on August 8, 2019 consisting of a debridement and scar tissue removal.

5. He saw Dr. Leggett on May 13, 2020 for ongoing ankle issues. Dr. Leggett thought Claimant's continued pain was from injury to the superficial peroneal nerve, in combination with persistent mechanical irritation affecting the ankle joint and adjacent soft tissue. Dr. Leggett recommended hydrodissection of the superficial peroneal nerve, and a compound cream for neuropathic pain. He also suggested PRP injections for the ankle. Additionally, Dr. Leggett observed "significant antalgia" in Claimant's gait and noted

Claimant had been told his back pain was caused by "changes in his walking and limping for such a long time." He opined, "With the substantial nature of his injury, and with the 2 surgeries, I do not believe getting back to 'normal' is realistic."

6. Dr. Leggett performed the hydrodissection injection on June 5, 2020.

7. Claimant started treating with Dr. Robert Graham, a chiropractor, on June 23, 2020. Dr. Graham noted Claimant developed mid- and low back pain with the gait changes following his surgery. PT had not been very helpful. Physical examination showed myofascial tenderness and tightness in the low back, mid back, and over the SI joints. Dr. Graham diagnosed segmental and somatic function of the thoracic and lumbar areas. He recommended chiropractic manipulation and myofascial release techniques. Claimant treated with Dr. Graham through January 2021. He repeatedly reported that his back pain was aggravated by prolonged standing and walking. Dr. Graham observed altered gait mechanics on multiple occasions. Claimant's pain complaints were corroborated by exam findings showing myofascial tenderness, hypertonicity, and reduced lumbar range of motion. Claimant was discharged on January 27, 2021 because he had completed all authorized sessions, although Dr. Graham thought he could benefit from additional chiropractic treatment as maintenance care.

8. Claimant followed up with Dr. Leggett on June 24, 2020. The hydrodissection injection had provided significant pain relief, but only for the duration of the short-acting anesthetic. Claimant's foot and ankle were hypersensitive to touch around the superficial peroneal nerve, but there were no dystrophic changes, mottling, or other signs suggesting CRPS. Dr. Leggett opined the temporary response to the injection provided a "clear diagnostic response," but unfortunately no long-term therapeutic benefit. Dr. Leggett suggested a PRP injection.

9. Dr. Leggett performed the PRP injection on July 16, 2020.

10. Claimant followed up with Dr. Leggett on August 5, 2020. Claimant reported increased limping because of soreness after the injection, which "seemed to have a negative effect on his back."

11. On August 26, 2020, Dr. Leggett documented a recent MR arthrogram of the left ankle had aggravated Claimant's ankle pain. In addition, "with the increased ankle pain, he feels his left buttock and low back pain also intensified." Examination of Claimant's low back showed myofascial tightness throughout the lumbar paraspinals, and pain with deep palpation of the left SI joint. Dr. Leggett opined the SI joint pain was caused by increased limping since the arthrogram. He recommended an SI joint injection.

12. The SI joint injection was performed on September 16, 2020.

13. Claimant returned to Dr. Leggett on September 29, 2020. The injection had been very helpful for approximately five days. Unfortunately, on the fifth day, his ankle gave way and he fell down some stairs. This aggravated the pain in Claimant's back, buttock, and left foot. Claimant told Dr. Leggett he had fallen several times because of "instability" in his left ankle. Examination showed "clear" pain with palpation of Claimant's

back and SI joints. Dr. Leggett encouraged Claimant to continue the chiropractic treatment and pain cream and hoped the exacerbation would settle down in a few weeks.

14. Claimant had a second opinion with Dr. Scott Primack on October 5, 2020. Dr. Primack recommended a lumbar MRI and possibly permanent work restrictions if the MRI showed no acute problems.

15. Dr. Thomas Centi at CCOM put Claimant at MMI on October 8, 2020. Dr. Centi provided an 11% scheduled rating for the left ankle, which converts to 4% whole person. He recommended orthopedic follow-up for the next two years under maintenance care. Dr. Centi assigned permanent work restrictions of sitting 50% of the time, no standing/walking greater than 30 minutes in an hour, minimal stair climbing, and no squatting, kneeling, or climbing ladders.

16. Dr. Simpson re-evaluated Claimant on December 14, 2020. Claimant said he "continued" to struggle with pain and giving way of his ankle. Dr. Simpson wrote, "I do not have a really good explanation for this. It is possible that he has pain-inhibited giving way of his ankle. Clinically his stability seems very good." Dr. Simpson recommended a repeat MRI to see if there was any significant interval change.

17. Respondents filed a Final Admission of Liability based on Dr. Centi's rating and Claimant requested a DIME. The DIME was performed by Dr. Douglas Scott on March 2, 2021. Dr. Scott agreed Claimant had reached MMI on October 8, 2020. He assigned a 13% lower extremity rating for the left ankle/foot, which converts to 5% whole person. Dr. Scott opined Claimant had no ratable lumbar impairment because he suffered no structural injury to his lumbar spine on July 5, 2018 and has no objective lumbar pathology to support a rating. He did not comment on whether Claimant's documented low back symptoms and treatment warranted conversion to whole person. Regarding work restrictions, Dr. Scott agreed with Dr. Centi that Claimant avoid should standing/walking for greater than 30 minutes at a time, minimize stair climbing, and avoid climbing ladders, kneeling, and squatting. He imposed no limitations on sitting.

18. At a March 8, 2021 appointment with Dr. Simpson, Claimant stated his symptoms were "unchanged." He was still having issues with the ankle rolling in and giving way. Examination showed "good stability," negative anterior drawer, only a "trace" of inversion laxity, and "maybe a little hypermobility in the subtalar joint." Dr. Simpson reiterated his request for an updated MRI.

19. The MRI was completed on April 2, 2021. It was "unremarkable" aside from postsurgical changes at the anterior talofibular ligament level.

20. Claimant followed up with Dr. Simpson on April 6, 2021. Dr. Simpson noted Claimant "continues" to struggle with ankle symptoms and limitations. Clinically there was no evidence of gross laxity. Dr. Simpson was not sure why the ankle was giving way and wondered if it was from a ligamentous issue or possibly neurogenic pain. Dr. Simpson discussed Claimant's options with him including simply living with the condition. However, Claimant reported that he could not pass his CDL which was quite "concerning." The other

option would be an arthroscopic exploration and possible lateral ligament reconstruction. Dr. Simpson concluded, “otherwise there is really not much else we can do for him at this time.”

21. Claimant had another appointment with Dr. Simpson on May 13, 2021, at which time he stated his ankle was “feeling the same.”

22. Insurer filed a new FAL on May 17, 2021 admitting for the 13% scheduled rating assigned by Dr. Scott. The FAL also claimed a TTD overpayment of $2,495.08, which was to be credited against the permanency award. Claimant timely objected to the FAL and requested a hearing.

23. On June 11, 2021, Dr. Simpson submitted an authorization request regarding the proposed surgery.

24. Claimant returned to Dr. Simpson on August 23, 2021 to discuss the surgery in more detail. Dr. Simpson wrote, “Again clinically he does not have significant laxity. He seems to have a solid ankle with good subtalar motion. Continues to have episode with his nerve giving out. I really think it is unlikely that revision reconstruction would be necessary or really be of any great benefit to him.” Dr. Simpson also stated arthroscopic exploration of the ankle “may” give some relief and allow him determine if there was any previously unidentified pathology causing the ankle to give way.

25. Dr. Marc Steinmetz performed an IME for Respondents on September 16, 2021. Claimant told Dr. Steinmetz he had had persistent back and left leg and ankle pain since the first surgery. Claimant’s low back was tender to palpation and lumbar range of motion was slightly reduced. The ankle had no instability and minimal swelling. Dr. Steinmetz found no lower extremity atrophy or allodynia. He had good sensation and deep tendon reflexes. Dr. Steinmetz agreed with Dr. Centi and Dr. Scott that Claimant reached MMI as of October 8, 2020. He opined Claimant’s back pain was not related to the work injury because there was no significant mention of any back problems until after the first surgery and no mechanism in the initial accident that would have injured Claimant’s back. For work restrictions, he opined that Claimant should be limited to a maximum of 30 minutes standing or walking and otherwise perform sedentary duties. Dr. Steinmetz also recommended that Claimant minimize stair climbing and avoid ladders, kneeling, and squatting. Dr. Steinmetz assigned a 14% lower extremity rating for the left ankle, which converts to 6% whole person. Dr. Steinmetz did not recommend any maintenance care because he thought no further interventions would be helpful. He considered it unlikely Claimant would need another surgery “within a month of being placed at MMI by the DIME without an intervening incident.”

26. The Respondents obtained surveillance of Claimant the morning of the IME with Dr. Steinmetz. At 8:51 a.m., the video shows Claimant working on his truck. Claimant is shown bending and twisting repeatedly at the waist, laying on his back, using hand tools, walking without a limp, crouching and moving in a fluid manner, using his left ankle to leverage his body weight when changing positions, and twisting and rotating his left ankle, all with no apparent difficulty or pain behaviors. Claimant visited a taco restaurant

approximately one hour later. He was seen walking without a limp, climbing in and out of his truck, and moving in a fluid motion with no pain behaviors. According to the investigator's report, Claimant departed the taco restaurant at 10:09 and drove to his scheduled appointment in Denver. The investigator next observed Claimant's vehicle parked at Midtown Occupational Health at 11:50 a.m., but Claimant had already entered the building. After the appointment with Dr. Steinmetz, the investigator observed Claimant walking in the parking lot with a mild limp.

27. Dr. Steinmetz issued an addendum report on September 27, 2021 after reviewing the surveillance video. Dr. Steinmetz noted Claimant was lying directly on the asphalt while working on his truck. He was twisting and bending his back normally and using his left leg to stabilize his position. Claimant also raised his legs in the air and then flipped himself to an upright position. In Dr. Steinmetz's opinion, the video showed Claimant as fully functional with no limitations in the back or ankle. He noted Claimant had presented to his office that same day complaining of pain and functional limitations that were directly contradicted by the surveillance video. As a result, Dr. Steinmetz concluded Claimant's reported symptoms and associated functional limitations were unreliable. Based on the video, he opined Claimant required no work restrictions. He deferred to the DIME on permanency.

28. Katie Montoya completed a vocational evaluation at the request of Respondents and issued a report dated December 16, 2021. Claimant told Ms. Montoya he had shooting pain in his left ankle up to his hip. He complained there were times that his ankle will swell and he could not move. He reported only being able to sit for 15 to 20 minutes and to stand for no more than 30 minutes. Claimant old Ms. Montoya he spent his days trying not to hurt and looking for jobs. He reported that he might do dishes and laundry if his wife brought it down to him. He would occasionally cook a small meal but did no grocery shopping because he could not push a grocery cart. He reported that he could not sit long to watch TV and reported that he may play on the computer or look online for jobs.

29. Ms. Montoya noted Claimant has a relatively limited education, with no high school diploma or GED. His work history consists primarily of physically demanding jobs in the concrete industry. Claimant told Ms. Montoya he had been looking for work since November of 2020 but "every single job" required more sitting and standing than he could not tolerate. Claimant said he looked for work at AutoZone, O'Reilly's, Big R, and Lowes. He did not actually submit any applications but instead spoke to a friend about the requirements. Claimant did tell say he thought he could work if there was something within his restrictions but did not believe any work fit his restrictions because of "how bad they were".

30. Ms. Montoya described Claimant as a younger worker with limited education, limited work history, and limited transferable skills. Despite those factors, she still identified numerous job opportunities suitable for Claimant. She initially noted that Dr. Steinmetz's updated opinion that Claimant has no work restrictions would allow him to perform any of his past relevant work. But even with the restrictions assigned by Dr. Centi and the DIME, she believes Claimant is employable. She identified suitable occupations

such as driving-related positions, cashier positions, customer service positions, forklift operation, and production work. Ms. Montoya also recommended that Claimant pursue a GED and renewal of his CDL to further improve his options and earning capacity. She also provided him with information regarding the Workforce Center and The Division of Vocational Rehabilitation.

31. At hearing, Claimant described significant pain in both his ankle and low back. He stated he had difficulty being on his feet for prolonged periods because of pain, weakness, and giving out. He also reported having constant pain in his low back that was aggravated by walking and being unable to sit longer than 20 to 30 minutes.

32. Claimant testified he unsuccessfully looked for work in October and/or November of 2020 shortly after being placed at MMI. He has not actively looked for work recently. He did not recall Ms. Montoya advising him to follow up with the Workforce Center or DVR had not contacted either agency. He said he occasionally called potential employers and inquired about their "restrictions" but did not follow through with applications because he "knew [his] restrictions wouldn't allow [him] to work." Claimant conceded he engaged in the activities on the surveillance video but insisted that he performed no activities outside his permanent restrictions.

33. Claimant's testimony is only partially credible. It is reasonable to conclude he still has some ankle and foot pain in light of the significant injury that necessitated two surgeries. Additionally, his complaints of low back pain are supported by records of multiple providers. However, Claimant's testimony is not credible to the extent it suggests he is more limited than the permanent restrictions outlined by Dr. Centi and the DIME.

34. Ms. Montoya testified at hearing consistent with her report. She clarified her interpretation of Claimant's work restrictions is that he is limited to standing no over 50% of the time but has no actual limitations on sitting. Ms. Montoya conducted labor market research using the standing and walking restrictions imposed by Dr. Centi and Dr. Scott, and narrowed her search to automotive/delivery, forklift, and production type work because it was in line with the type of work Claimant had previously performed. But this did not exclude other entry level work such as customer service, cashier work, and counter attendant type work.

35. Ms. Montoya explained that employers are accommodating work restrictions more liberally than in the past because of the persistent labor shortage since the pandemic. She also discussed the changing nature of the labor market and specifically referenced the increasing availability of work-from-home positions. Ms. Montoya gave Claimant information about the Workforce Center and DVR because she thought he would benefit from guidance on how and where to look for work given young age and lack of work experience. While she does not believe he requires formal vocational rehabilitation to be employable, she thought he would benefit from some direction and encouragement since he did not appear to be actively looking on his own. She was disappointed Claimant had not followed through with her recommendations. Ms. Montoya was also "surprised" by the level of functionality Claimant demonstrated on the surveillance video, given the significant limitations he described during their interview.

She explained that obtaining his GED and possibly renewing his CDL would help in his job search particularly with wages. Ultimately, she believes that Claimant will find a job if he diligently looks for work.

36. Ms. Montoya's vocational analysis and opinions are highly credible and persuasive.

37. Dr. Steinmetz testified for Respondents via post-hearing deposition. He opined that Claimant remains at MMI as determined by the DIME. He explained that the recommended surgery was based upon Claimant's subjective reports rather than objective findings. Dr. Steinmetz noted the April 2, 2021 MRI was unremarkable and Dr. Simpson had opined that claimant was not likely to benefit from further reconstruction. As of August 23, 2021, physical examination did not reveal significant laxity and he had a solid ankle and subtalar motion. Claimant had good range of motion and negative anterior drawer. There was no anatomic reason to perform any additional procedure, which was being considered entirely based on Claimant's subjective reports of pain and perception of instability in the ankle.

38. Regarding the surveillance video, Dr. Steinmetz explained that even though it was only a few minutes long, it showed Claimant engaging in activities without apparent limitation or difficulty while moving in a fluid, uninhibited manner. He thought the video shows Claimant has functional capacity greater than he has otherwise described to providers and at hearing. As a result, he does not believe Claimant requires any work restrictions.

39. Dr. Steinmetz's opinions are partially credible. His opinions regarding the proposed surgery are credible and persuasive. However, Dr. Centi and Dr. Scott's opinions are more persuasive regarding Claimant's work restrictions. Dr. Steinmetz's opinions regarding causation of Claimant's low back symptoms are not persuasive.

40. Claimant failed to prove his condition worsened after MMI. Claimant had similar problems with his ankle before and after MMI. The MRI showed no new pathology. There is no persuasive evidence of any significant change to support a determination Claimant is no longer at MMI.

41. Claimant failed to prove the third surgery proposed by Dr. Simpson is reasonably necessary.

42. Because Claimant remains at MMI, there is no basis for additional TTD benefits.

43. Claimant failed to prove he is permanently and totally disabled. Ms. Montoya persuasively opined Claimant can work and earn wages in numerous occupations consistent with the permanent restrictions assigned by Dr. Centi.

44. Claimant proved by a preponderance of the evidence he suffered permanent impairment not listed on the schedule of disabilities.

45. Claimant has injury-related surgical scarring on his left foot and ankle, consisting of: (1) a ½ inch diameter discolored, irregularly shaped, partially indented portal scar on the anteromedial aspect of the left ankle, and (2) a 2-inch by ¼-inch scar on the anterolateral aspect of the left ankle. The ALJ finds Claimant should be awarded $1,000 for disfigurement.

CONCLUSIONS OF LAW

A. Claimant remains at MMI and the proposed surgery is not reasonably necessary.

Claimant was placed at MMI by an ATP and the DIME as of October 8, 2020. A DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III). However, a previous determination of MMI is not given presumptive weight where a claimant is alleging a change of condition after MMI. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The question of whether a claimant's condition has changed after MMI is evaluated under the preponderance of the evidence standard. *Id*.

Here, Claimant does not contest the original MMI date, but argues his condition worsened such that he was no longer at MMI.[1] Claimant's position is predicated on the surgical recommendation submitted by Dr. Simpson on June 11, 2021. Claimant's argument fails for two reasons. First, there is no persuasive evidence of any change in Claimant's condition that would affect his MMI status. Claimant had similar problems with his ankle before and after MMI. The MRI showed no new pathology, nor was there any significant change in Claimant's clinical presentation or findings. Dr. Simpson's records reflect relatively stable symptomology and limitations with notations such as "he continues to struggle," "symptoms are unchanged," "the ankle is feeling the same," and "his ankle still hurts." The current condition of Claimant's ankle is not appreciably different than when he was put at MMI. Accordingly, Claimant failed to prove he was no longer at MMI at any time after October 8, 2020.

Second, Claimant failed to prove the surgery recommended by Dr. Simpson is reasonably necessary. Dr. Steinmetz's opinions regarding the reasonable necessity of additional surgery are persuasive and supported by Dr. Scott's conclusions. Even Dr. Simpson does not seem enthusiastic about the prospects for additional surgery. He opined the surgery is "unlikely" to be of benefit, but "may" help his symptoms or reveal a previously undiscovered problem. Despite the poor prospects of success, he is willing to try it because of the negative impact the ankle is having on Claimant's ability to return to his regular work. While Dr. Simpson's desire to help his patient is commendable, that rationale is insufficient to prove additional surgery is reasonably likely to improve Claimant's condition.

[1] Although Claimant's Application for Hearing couched the issue as one of "reopening," the claim was never closed because Claimant timely objected to the FAL. Accordingly, Claimant need not reopen the claim to obtain additional benefits.

B. TTD benefits

Respondents appropriately terminated Claimant's TTD benefits in October 2020 because he reached MMI. Section 8-42-105(3)(a). To obtain additional TTD benefits after MMI, a claimant must show a worsened condition has caused a greater impact on their earning capacity. *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). Because Claimant failed to prove a change in his MMI status, he is ineligible for additional TTD benefits.

C. Permanent total disability

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

As found, Claimant failed to prove he is permanently and totally disabled. As Ms. Montoya persuasively explained, Claimant can sustain employment in a variety of unskilled and semi-skilled occupations. Although Claimant's permanent restrictions, education, and work experience narrow the range of work he can perform, there are still numerous jobs in the competitive economy consistent with Claimant's limitations.

D. Whole person impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "a leg at the hip joint." Section 8-42-107(2)(w). If the claimant has a functional impairment to part(s) of his body other than the "leg at the hip joint," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000). A DIME's opinions regarding "conversion" to whole person impairment are not entitled to special weight, but are merely another piece of evidence to be considered when evaluating the preponderance of evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Low back pain from an altered gait can functionally impair an individual beyond the leg. *E.g*., *Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (September 16, 2004) (altered gait from claimant's knee injury caused in back pain that resulted in difficulty with sitting, standing, or walking); *Webb v. Circuit City Stores, Inc*., W.C. No. 4-467-005 (August 16, 2002) (upholding conversion of lower extremity impairment to whole person based on back pain resulting from limping). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered permanent impairment not listed on the schedule. Claimant developed low back pain from altered gait shortly after the first surgery. He received multiple types of treatment for back pain including PT, chiropractic, and an SI joint injection. Multiple providers referenced the connection between Claimant's back pain and his gait. This pain caused reduced range of motion and interferes with Claimant's ability to perform activities involving prolonged standing and walking. Additionally, the low back issues were deemed insufficient to support a separate lumbar spine rating, which further supports the determination they are merely an extension of Claimant's ankle injury. *E.g., Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Abeyta v. Wackenhut Services, supra*.

E. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on the DIME's 5% whole person rating.

2. Insurer may take credit for any PPD benefits previously paid to Claimant in this matter.

3. Insurer may also take credit for any overpaid TTD benefits, to the extent not already recouped.

4. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

5. Claimant remains at MMI.

6. Claimant's request for ankle surgery is denied and dismissed.

7. Claimant's claim for permanent total disability benefits is denied and dismissed.

8. Insurer shall pay Claimant $1,000 for disfigurement.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 22, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Wallace Larson regarding causation and maximum medical improvement (MMI).

II. If Claimant established that Dr. Larson's causality and MMI opinions are clearly erroneous, whether Claimant established, by a preponderance of the evidence, that he is entitled to additional reasonable, necessary, and related medical care.

III. If Claimant overcame Dr. Larson's MMI determination, whether Claimant has established, by a preponderance of the evidence, that he is entitled to Temporary Partial Disability (TPD) benefits beginning February 25, 2021 and ongoing.

IV. Whether Respondents established, by a preponderance of the evidence that Claimant received an overpayment in Temporary Total Disability (TTD) and Permanent Partial Disability (PPD) benefits totaling $17,900.30

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Paz, the ALJ enters the following findings of fact:

Background and Claimant's Prior Injury History

1. Claimant is a "roll off" trash truck driver for Employer. He services a route that requires pick up of trash placed in large "roll off" containers. These dumpsters can contain a sundry of materials from construction debris to discarded appliances, which frequently require removal from the container before loading the dumpster onto the truck.

2. Claimant injured his low back while lifting and dropping some discarded tires over the side of a dumpster on September 19, 2018. (Clmt's. Ex. 3, p. 43). Claimant slipped off the container and fell on some rocks below. Claimant experienced severe low back pain and sought treatment through his primary care provider (PCP) who prescribed pain medication and ordered an MRI. MR imaging demonstrated disc pathology at L4 and S1. (Id. at p. 43-44). After some initial confusion regarding the compensable nature of the injuries stemming the this incident, Claimant came under the care of Dr. Cynthia Schafer who referred him to Dr. Paul Stanton who performed an L5 micro-discectomy/laminotomy to address an L4-5 extraforaminal disc protrusion abutting the L4 nerve root on October 15, 2018 (Id. at p. 43).

3. Claimant was placed at MMI for his September 19, 2018, low back injury by Dr. Schafer on May 31, 2019. Dr. Schafer assigned 21% whole person impairment of the lumbar spine based on a Table 53 rating, loss of range of motion, and sensory disturbances. (Resp. Ex., p. 167). At the time of MMI, Claimant reported had ongoing symptoms, including increased pain and numbness in his left foot and toes. (Id. at p. 166).

Claimant's January 17, 2020 Work-Related Injury

4. Approximately eight months after being placed at MMI and returning to work in full duty capacity, Claimant sustained an injury to his left shoulder while working for the Employer on January 17, 2020[1]. Liability for this injury was admitted and Claimant was referred UC Health where he was evaluated initially by Physician Assistant (PA-C), Zoe Call. (Clmt's. Ex. 4, p. 48). PA-C Call documented the mechanism of injury simply as "yanking/pulling cardboard from a compactor earlier this morning . . . with what sounds like poor body mechanics." (Id.). PA-C Call noted that there were "no other symptoms to report at this time." (Id. at p. 49). At this visit, Claimant completed a pain diagram depicting 4/10 hot burning/hammering pain in his left shoulder. (Id. at p. 53). He made no marks to depict pain anywhere in/on the low back or lower extremities. (Id.). Claimant would later assert that in addition to his left shoulder, he injured his low back as a consequence of the January 17, 2020 incident.

5. Concerning his current back symptoms, Claimant testified he developed low back and left leg pain on January 17, 2020 while attempting to loosen and pull compacted cardboard from a commercial trash dumpster equipped with a hydraulic ram that was used to compress cardboard at the end of the container. According to Claimant, he had to bend down to pull and hold a trap door open at the end of the dumpster with his left arm as he reached into the opening with his right hand/arm to forcefully yank the compacted cardboard from the trap door opening. As noted, Claimant asserts that he injured his low back in the process.

6. Claimant was evaluated by Dr. Schafer on January 21, 2020. (Clmt's. Ex. 4, p. 58). She noted that Claimant was "well-known" to her because of his previous low back injury. (Id.). She noted that four days after his January 17, 2020 accident that Claimant was reporting that he was feeling worse. (Id. at p. 59). Nonetheless, Claimant still did not make any markings on his pain chart depicting any symptoms in the low back. (Id. at p. 61). Because she was familiar with Claimant's low back condition, Dr. Schafer made a point to examine his lumbar spine, noting that "[h]is lumbar exam is more consistent with a sprain rather than a new herniated disc which was his fear." (Id. at p. 60). Dr. Schafer assessed Claimant with a lumbar sprain and referred him to physical therapy (Id.).

[1] There is some discrepancy concerning the date of injury. While Dr. Schafer and Dr. Wallace Larson, among others, report the date of injury as January 15, 2020, Respondent's Final Admissions of Liability filed March 18, 2021 and August 12, 2021 reflect that the injury occurred January 17, 2020. For purposes of this order, the ALJ adopts January 17, 2020 as the date of injury in this case.

7. Claimant completed a pain diagram on February 11, 2020 during a follow-up visit to Dr. Schafer. In this diagram, Claimant made markings depicting symptoms in the low back and bilateral legs. He specifically noted that he had right and left thigh cramping. He complained of cramping in the left calf and noted that his left toes were numb. (Clmt's. Ex. 4, p. 67).

8. Claimant returned to Dr. Schafer, earlier than scheduled, on February 20, 2020, due to worsening symptoms in his back. (Clmt's. Ex. 4, p. 71). He had been sick with an upper respiratory infection and had been coughing a lot, which was aggravating his low back symptoms. (Id.). Claimant reported 7/10 pain in the back with spasms. (Id.). Physical examination revealed "very decreased range of motion" in the lumbar spine with "[i]ncreased tone and tenderness [in the] bilateral paraspinous musculature as well as into the left gluteus medius." (Id. at p. 72). Dr. Schafer assessed lumbar sprain and left lumbar radiculitis which had been exacerbated by his upper respiratory illness and coughing (Id.).

9. Respondents challenged the relatedness of Claimant's low back symptoms and need for treatment to the January 17, 2020 incident. Consequently, the matter was scheduled for a hearing, which subsequently took place before ALJ William Edie on September 16, 2020.

10. Prior to hearing, Respondents sought the opinions of Dr. Mark Paz regarding the cause of Claimant's asserted low back pain. Dr. Paz completed an independent medical examination (IME) on May 26, 2020. As part of his IME, Dr. Paz took a history from Claimant, reviewed medical records and completed a physical examination. Following his IME, Dr. Paz issued a report dated June 15, 2020, outlining his opinions. (Resp. Ex. J, pp. 79-99). Dr. Paz concluded that Claimant's "L5-S1 broad-based posterior disc bulge with facet hypertrophy was not likely caused by the January 15, (sic) 2020, incident." Moreover, Dr. Paz concluded that this condition was not aggravated or accelerated by the cardboard pulling incident. Rather, Dr. Paz explained that the initial evaluations following the incident referenced symptomatology reported by Claimant that was limited to the left shoulder. (Resp. Ex. J, p. 87). He also noted that Dr. Schafer documented a familiarity with Claimant when the low back symptoms were first documented, suggesting that she was somehow influenced to conclude that the January 17, 2020 incident aggravated Claimant low back pain. (Id.). Finally, he notes that Dr. Schafer did not document a mechanism of injury that would support a causal link between a new or aggravated pre-existing low back condition and the January 17, 2020 work incident. Indeed, he interpreted Dr. Schafer's report to "confirm" that all of Claimant's post January 17, 2020 symptoms, including his neurological findings were related to the prior 2018 L5-S1 lumbar spine injury.

11. On August 3, 2020, Dr. Jack Rook performed an IME at the Claimant's request. Dr. Rook reviewed medical records related to Claimant's 2018 low back injury and 2020 low back injury to assess causation. Dr. Rook concluded that Claimant developed a new and distinct injury while at work on January 15, 2020, resulting in

worsening low back pain and the onset of radiculopathy symptoms in both lower extremities. (Clmt's. Ex. 15, p. 367).

12. Dr. Rook based his conclusion on the following factors:

- Claimant developed low back pain radiating down his left lower extremity while performing a physically demanding job on January 15, 2020;
- From a pathophysiological perspective, Claimant's body motions associated with pulling forces are known to place significant stress on low back spinal structures including muscles, discs, facet joints, and ligament/joint capsules;
- Claimant was able to perform his regular job duties without the need for physical restrictions before the January 15, 2020 injury;
- Claimant has not been able to return to his regular job since the January 15, 2020 injury;
- The lumbar discectomy surgery in 2018 was a success;
- The physicians that know Claimant best, Dr. Schafer and Dr. Stanton, both opine that Claimant's current increased low back pain that radiates into his lower extremities is related to the January 15, 2020 injury;
- Claimant's clinical objective examination has changed consistent with his complaints that are associated with the January 2020 injury;
- Claimant had an abnormal EMG indicating Claimant had an acute injury to his left L5 and S1 nerve roots;
- Claimant's physical examination demonstrated atrophy in his left calf, left extensor digitorum brevis, and absence of left ankle jerk.

(Clmt's. Ex. 15, p. 368).

13. Dr. Rook opined that Claimant did not demonstrate exaggerated pain behaviors. Rather, Claimant's presentation is consistent with his objective abnormalities (MRI and EMG) and physical examination. Dr. Rook opined that he did not believe Dr. Paz's conclusions are compatible with Claimant's history and review of the medical records. (Clmt's. Ex. 15, p. 368).

14. Dr. Paz performed an additional Rule 16 record review on August 11, 2020 to determine whether a request for prior authorization for an epidural steroid injection at the L5-S1 level was reasonable, necessary, and related to the work injury. (Resp. Ex. J, p. 101). Dr. Paz reiterated his opinion that the L5-S1 broad-based disc bulge and facet hypertrophy was not causally related to the January 17, 2020 incident. (Id. at p. 102). He noted that during the May 26, 2020 IME that Claimant demonstrated non-physiologic physical examination findings that were inconsistent with a lumbar

radiculopathy. (Id.). Accordingly, he concluded that Claimant's low back symptoms were non-organic in nature. (Id.). He recommended against authorization of the L5-S1 epidural steroid injection. (Id.).

The September 16, 2020 Hearing Before ALJ Edie

15. As noted, the question of whether Claimant's low back symptoms and need for treatment was related to the January 17, 2020, cardboard pulling incident was litigated before ALJ Edie on September 16, 2020. At the September 16, 2020 hearing, Claimant testified similarly regarding the mechanism of injury (MOI) and his low back complaints as he did during the instant matter.

16. At the September 16, 2020 hearing, Dr. Schafer testified Claimant was reporting a level one out of ten pain when she placed him at MMI on May 31, 2019 for his 2018 work injury. (Clmt's. Ex. 14, p. 332). She assigned no restrictions or maintenance care, and did not see Claimant again until after his January 2021 work injury. *Id.* at 332-33. When asked if Claimant reported back pain at the initial visit, Dr. Schafer stated, "Yes." (Id. at pp. 333-334). She did not examine Claimant on this date; however, she clearly cited in *her* first report that Claimant reported having back pain at the first visit. (Id. at p. 334).

17. Following the September 16, 2020 hearing, ALJ Edie determined that Claimant had sustained a compensable low back injury. He issued his Findings of Fact and Conclusions of Law on October 28, 2020 and ordered Respondents to pay for all reasonable, necessary, and related medical treatment, to include the lumbar epidural steroid injections recommended by Claimant's authorized treating provider (ATP) to cure and relieve Claimant from the effects of his low back injury. (Clmt's. Ex. 15, p. 373). As part of his order, ALJ Edie found the opinions and analyses of Claimant's ATP, Dr. Cynthia Schafer, Dr. Scott Primack and Claimant's independent medical examiner, Dr. Jack Rook, more persuasive than those of Respondents medical examiner, Dr. Mark Paz. (Id.).

18. In support of his order, ALJ Edie noted:

> Claimant had a good recovery from his 2018 back injury. Dr. Stanton's records reflect that the surgery was a success. This is corroborated by Claimant. Dr. Schafer released Claimant at MMI in May 2019 without permanent restrictions. Although Claimant had residual symptoms at MMI and beyond (hence his 21% impairment rating) Claimant returned to work and was able to perform his job duties without limitation between May of 2019 through January 14, 2020. Claimant's mechanism of injury is consistent with the symptoms he is now experiencing. To the extent that Dr. Paz differs with Dr. Schafer and Dr. Rook in this regard, the ALJ finds Drs. Schafer, Primack, and Rook more persuasive.

> Dr. Paz (and not entirely without reason) relies heavily on the timing of Claimant's belated reporting and documentation of his back symptoms in 2020. However, the ALJ does find Claimant's explanation therefor to be satisfactory – as does Dr. Schafer. The ALJ finds that Claimant did indeed suffer significant pain in his lumber region shortly after the work incident, which was temporarily overshadowed by pain in the shoulder, and confusion about the process of reporting his back issues.
>
> Of great significance is that Claimant has now had an abnormal EMG, indicating that he has an acute injury to his left side L5/S1 nerve roots. His clinically objective examination is now different as noted by Dr. Rook, and the ALJ finds it is due to this new work injury, and not merely from a natural degenerative process. Claimant no doubt went to work with a compromised lumbar region on January 15, 2020. However, he has now shown that, at a minimum, his work activities on that date aggravated his back to the point of becoming symptomatic. He now requires medical treatment to bring him back to (it is hoped) MMI. Hopefully the injections will do the trick, but he has waited long enough to find out. The ALJ finds that Claimant has shown that the need for the proposed injections is *causally related* to his work injury.

19. Following the September 16, 2020 hearing, Claimant underwent additional treatment to include an epidural steroid injection directed to the low back by Dr. Primack. (Clmt's. Ex. 1, pp. 11-12).

20. Dr. Schafer placed Claimant at MMI on February 25, 2021 for his January 17, 2021 injury. (Clmt's. Ex. 4, pp. 165-74). She assigned 12% upper extremity impairment for Claimant's left shoulder injury, which converts to 7% whole person impairment. She also provided an apportioned impairment rating for the lumbar spine. Dr. Schafer's spinal impairment included a 7% rating for Table 53 Specific Disorders, 14% impairment for abnormal range of motion and a total combined whole person impairment of 6% for neurologic dysfunction in the left lower extremity. Claimant's spinal and lower extremity (neurologic) impairments combined to yield a non-apportioned 25% whole person impairment. Dr. Schafer then apportioned Claimant's previous 21% spinal/neurologic impairment due to his 2018 low back injury from the current 25% spinal/neurologic impairment rating to reach an apportioned spinal/neurologic of 7%. Dr. Schafer then combined Claimant's 7% spinal/neurologic rating with the converted 7% whole person impairment for the left shoulder to reach a final rating of 14% whole person impairment. (Clmt's. Ex. 1, p. 12). Other than the need to continue with his home exercise/stretching program, Dr. Schafer did not recommend maintenance treatment. (Id.).

21. Respondents filed a Final Admission of Liability (FAL) admitting to the 14% impairment assigned by Dr. Schafer on March 18, 2021. (Clmt's. Ex. 1, p. 1).

Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

22. Claimant underwent the requested DIME with Dr. Wallace Larson on July 27, 2021. (Clmt's. Ex. 2, p. 32). Dr. Larson took a history, completed review of a "large" number of records and performed a physical examination. He noted that among the issues listed for determination was "whether or not the lumbar spine condition is a work-related disorder relative to the 1/15/2020 work-related injury." (Id. at p. 35). Dr. Larson diagnosed Claimant with a left shoulder strain with subsequent need for left shoulder arthroscopy, subacromial decompression and biceps tenodesis. (Id. at p. 37). Dr. Larson agreed that Claimant had reached MMI on February 25, 2021. (Id.). He then assigned 18% scheduled impairment of the left upper extremity based on loss of range of motion. (Id. at pp. 37-38).

23. Although he indicated that a determination of whether Claimant's low back condition was related to the January 17, 2020 work incident was part of the DIME, Dr. Larson provided scant analysis as to why he determined Claimant's back condition was unrelated to the cardboard pulling incident. Rather, Dr. Larson stated simply, "The opinion from Dr. Paz that the lumbar spine is unrelated to the occupational injury is likely correct." (Clmt's. Ex. 2, p. 37). Under the "Rationale for Your Decision" portion of his DIME report, Dr. Larson is similarly cursory. He simply notes, "[Claimant] did not initially report low back pain" before adding that "[e]ven if the spinal condition where (sic) determined, for administrative purposes, to be [part of the] 1/17/2020 incident at work, no additional impairment would be assigned." Indeed, while he conducted an examination of Claimant's lower extremities and performed range of motion measurements of the lumbar spine for "documentation" purposes, Dr. Larson concluded that Claimant did not have any "ratable impairment relative to the lumbar spine as a result of the 1/17/2020 injury."

24. Based upon the evidence presented, the ALJ is persuaded that Dr. Larson relied solely on the opinion of Dr. Paz to conclude that Claimant's low back condition was not related to the January 17, 2020, cardboard pulling incident.

Respondents' August 12, 2021 Final Admission of Liability and Alleged Overpayment

25. Respondents filed a FAL admitting to Dr. Larson's opinions concerning MMI and impairment on August 12, 2021. (Clmt's. Ex. 2, p. 19). In this FAL, Respondents admitted to $3,579.97 in TTD benefits; $2,679.09 in TPD benefits; and $9,344.61 in PPD benefits. (Id.). Claimant did not challenge these amounts. In total, Respondents admitted to a combined $15,603.67 in indemnity benefits.

26. Based on the indemnity payment log, Claimant cashed checks totaling $33,503.97 in TTD benefits, TPD benefits, and PPD benefits. (Resp. Ex. P, p. 197). Based on the August 12, 2021 FAL, Respondents admitted to a combined total of $15,603.67 ($3,579.97 + $2,679.09 + $9344.61 = $15,603.67) in TTD benefits, TPD benefits, and PPD benefits. (Clmt's. Ex. 2, p. 19). The Third-Party Administrator (TPA),

Gallagher Bassett, stopped payment or voided checks totaling $6,467.04. (Resp. Ex. P, p. 197). Prior to Gallagher Bassett's time as TPA, ESIS was the assigned TPA of the claim. (Hrg.Tr. p. 66, ll. 4-9). Claimant returned checks from ESIS totaling $8,083.80. (Resp. Ex. Q). Accounting for the $33,503.97 in cashed checks minus $15,603.67 in admitted combined benefits prompted Adjuster Anderson to prepare an Amended FAL reflecting an overpayment of $17,900.30 based on TTD benefits that were paid after Claimant returned to work and PPD benefits paid beyond the rating provided by the DIME physician. (Hrg.Tr. p. 71, ll. 13-24).

27. Claimant objected to Respondents' August 12, 2021 FAL. He filed an Application for Hearing on September 9, 2021, notifying Respondents that he intended to challenge the claimed overpayment and overcome the DIME causation, MMI and impairment. As noted, the matter proceeded to hearing before this ALJ on December 28, 2021.

Dr. Paz' Subsequent Records Review

28. Prior to the December 28, 2021 hearing, Respondents requested that Dr. Paz review additional records and provide an updated report supplementing his prior opinions. Dr. Paz issued his supplemental report on November 23, 2021. (Resp. Ex. J, p. 104). In this supplemental report, Dr. Paz is critical of Dr. Schafer's conclusion that Claimant's low back condition is related to the January 17, 2020 cardboard pulling incident. Dr. Paz concluded that Dr. Schafer's "record [did] not document that the mechanism of injury, diagnosis/diagnoses, and need for treatment, [were] causally related to the January 17, 2020 incident", Accordingly, Dr. Paz opined that she did not follow the Level II Accreditation "Causation Analysis method." (Id. at p. 105). Because there is a lack of medical documentation to support low back symptoms at Claimant's initial assessment by PA Call and Dr. Schafer, Dr. Paz opined that both Dr. Schafer and Dr. Rook both erred in concluding that Claimant's low back symptoms were related to the industrial event occurred January 17, 2020. (Id.). Dr. Paz asserted that he applied the Causation Analysis method consistent with the Level II training curriculum and maintained that it was "not medically probably that the lumbar spine L5-S1 broad-based posterior disc bulge with facet hypertrophy is causally related to the January 15, 2020, incident." Nor did he believe the incident aggravated the condition. (Id. at 106).

Dr. Rook's Second IME

29. Dr. Rook performed a second IME of Claimant at the request of his counsel on November 24, 2021, to address whether the DIME had erred in the opinions expressed in his report. (Clmt's. Ex. 13, p. 311). Dr. Rook summarized his previous IME and obtained an updated medical history from Claimant. Of significance is the April 20, 2021 note from Dr. Paul Stanton, Claimant's treating surgeon. (Id. at p. 314; See also, Clmt's. Ex. 7, pp. 219-222). Dr. Stanton stated that Claimant would be a reasonable candidate for an L3 to S1 reconstruction surgery. (Clmt's. Ex. 7, p. 221).

30. After summarizing the content of Dr. Larson's DIME report, Dr. Rook opined it was clear that Dr. Larson erred regarding both causation and MMI. (Clmt's. Ex.

13, p. 317). Dr. Rook explained that, since the date of the injury, Claimant has continued to struggle with severe low back pain and left more than right lower extremity pain, distinctly different from what he experienced prior to the occupational injury. (Id.). Claimant had no problems performing his job prior to this work injury and had no restrictions performing his activities of daily living. The opposite has been true since January 15, 2020. (Id.). Moreover, Dr. Rook points out the objective changes between Claimant's 2018 pre-surgical MRI and his 2020 post-injury MRI. (Id.). The September 20, 2018 lumbar MRI showed L5-S1 disc extrusion resulting in severe left lateral recess stenosis, which would affect the left S1 nerve root. It also revealed L4-5 left extra foraminal disc protrusion abutting the exiting L4 nerve root. (Resp. Ex. N, p. 190). The February 14, 2020 MRI revealed a mild broad-based posterior disc bulge combining with facet hypertrophy to cause mild *right* and marked *left* neural foraminal narrowing and *no* stenosis. (Id.)(Emphasis added). Finally, Dr. Rook noted that Claimant had an "abnormal electrodiagnostic study consistent with [an] acute lumbar radiculopathy in [the] L5 and S1 distributions [of] the left lower extremity. (Id. at p. 318).

31. The results of Claimant's November 24, 2021 physical examination, including visible atrophy of the left calf and an absent left ankle jerk reflex response, combined with his abnormal EMG testing result, lead Dr. Rook to conclude that Claimant was not at MMI. Indeed, Dr. Rook noted, "[p]lacing a patient with an acute radiculopathy at MMI when not allowing him to follow up with his spine surgeon[2] is inappropriate and quite frankly would constitute substandard medical care." (Clmt's. Ex. 13, p. 318). Accordingly, Dr. Rook determined that Claimant was not at MMI because he had not received the "treatment recommended by his orthopedic spine surgeon for a condition that was determined to be work related by an Administrative Law Judge" (ALJ Edie) per his order of October 28, 2020.

Claimant's December 28, 2021 Hearing Testimony

32. Claimant testified at hearing on December 28, 2021 on his own behalf. He explained that his job duties required him to drive his trash truck around town and pick up dumpsters and containers with the hydraulic lift on the truck. However, before the truck could lift the dumpster, Claimant had to ensure it only contained items they were supposed to take. For example, if people had dumped televisions or refrigerators, he would have to physically remove them in order to "level out" the container in preparation for loading it onto the truck. Claimant explained the prior work-related back injury he sustained, the treatment he underwent, and his ultimate recovery. He noted that Dr. Schafer was his ATP for that claim and Dr. Stanton was his surgeon. He noted that following a fall from a dumpster in 2018, he had severe low back pain until undergoing surgery with Dr. Stanton.

33. Claimant testified that following his low back surgery, his symptoms changes dramatically. According to Claimant, he was able to sleep and was substantially more functional following his back surgery. Indeed, he testified that he

[2] Per Dr. Rook, at the time Claimant was placed at MMI, he had not had an opportunity to follow-up with Dr. Stanton regarding the efficacy of his treatment and future treatment options. (Clmt's. Ex. 13, p. 318).

was able to return to full duty work. Nonetheless, Claimant testified that he did have some residual symptoms when he was released from care, including some numbness in his left foot/toes.

34. Claimant testified that while twisting his body in an effort to forcefully yank the compressed cardboard from the dumpster, he injured his low back. According to Claimant, he told PA Call during his initial appointment that he had back pain and she told him to wait to talk to Dr. Schafer about it. Per Claimant, the only reason he did not mark that he had pain in the back on the pain diagram at that time was because he thought it would be considered "pre-existing."

The December 28, 2021 Testimony of Dr. Jack Rook

35. Dr. Rook testified at hearing in his capacity as an expert in the fields of physical medicine and rehabilitation (PM&R), pain management, and electrodiagnostic medicine. He has substantial experience performing DIMEs. Dr. Rook testified that he read the updated report from Dr. Paz and the DIME report from Dr. Larson neither of which changed the opinion he originally formed after completing his first IME on August 30, 2020. Dr. Rook agreed with the determination of ALJ Edie regarding the cause of Claimant's low back pain and the need for low back treatment. In reviewing Dr. Larson's DIME, Dr. Rook noted that Dr. Larson failed to perform a causation analysis. Rather Dr. Rook testified, "[Dr. Larson] relied, basically, on a report that was already used in litigation [that] did not sway the administrative law judge." Regardless of the prior determination, he felt Dr. Larson still did not perform the necessary causation analysis. He also felt Dr. Paz's causation analysis was severely lacking due to his overreliance on the absence of a pain diagram depicting back pain, which absence was reasonably explained by Claimant. (Hrg. Tr. 49:3 – 50:6).

36. Dr. Rook elaborated on how the EMG performed confirmed that Claimant sustained an acute injury and that this injury was not a continuation or natural progression of his prior 2018 injury. (Hrg. Tr. p. 51, ll. 3-17). Dr. Rook noted that Dr. Larson felt that Claimant's current low back symptoms and need for treatment was not related to the January 17, 2020 incident, stating simply that he would agree with the causation opinions expressed by Dr. Paz in his IME report. Accordingly, Dr. Rook opined that Dr. Larson did not perform his own causation analysis. (Hrg. Tr. p. 55, ll. 14-25).

37. Respondents contend that Dr. Rook's testimony was not credible and inconsistent with the principles of the Level II accreditation materials and the AMA Guides to the Evaluation of Permanent Impairment. According to Respondents, Dr. Rook incorrectly testified that when performing DIMEs, if an area of the body is already deemed to be part of the claim, a causation analysis is not performed. In contrast, Dr. Paz testified that when selected as a DIME physician, a causation analysis should be performed on any relevant body parts. (Depo.Tr. Dr. Paz, p. 7, ll. 23-25 and p. 8, ll. 1-15). Respondents also assert that Dr. Rook erroneously declared that Dr. Larson erred

in his causation analysis because the low back condition had already been found by ALJ Edie to be related to the work injury.

The Post-Hearing Deposition Testimony of Dr. Paz

38. Respondents took the post hearing deposition of Dr. Mark Paz who testified as a board eligible, Level II Accredited physician in internal medicine on January 14, 2022. (Depo.Tr. Dr. Paz, p. 5, ll. 13-25). Dr. Paz testified consistently with his previously authored reports on direct examination. He reiterated that "[t]he medical opinion which [he] offered was that based on the mechanism of injury, the diagnosis both preexisting and current, and the need for treatment, it was not medically probable that the lumbar spine condition was causally related to the January 17th, 2020, incident." (Depo. Tr. Dr. Paz, p. 10, ll. 1-6). Dr. Paz was asked to explain the Level II training for performing a causation analysis, to which he responded:

> So the causation analysis is fundamentally based on collecting direct history, determining the mechanism of injury. For -- as an aside, the causation analysis is referenced in each of -- most all but one of the treatment guidelines, and so that's the actual description within the treatment guidelines and in this case for the low back which establishes the approach to determining causation analysis. So it's establishing what -- the mechanism of injury, more often than not based upon the direct history provided by the patient, physical examination findings regarding the focus of discomfort, pain, injury, and then the need for treatment of those -- of that body part or parts.

(Depo. Tr. 14:2-18).

39. Dr. Paz opined that considering the direct history provided by Claimant combined with the physical examination findings and his opinion that there was no load across the lumbar spine which would have aggravated a disc bulge at L5-S1, it was not medically probable that the lumbar spine condition was causally related to or aggravated/accelerated by the work incident. (Depo.Tr. Dr. Paz, p. 9, ll. 9-25, p. 10, ll. 1-6 and p. 11, ll. 4-9).

Additional Findings of Fact

40. Based upon the evidence presented, the ALJ finds that Claimant has overcome the DIME opinions of Dr. Larson with respect to the cause of Claimant's low back pain/symptoms. Here, the totality of the evidence presented persuades the ALJ that Dr. Larson erred in concluding that Claimant's low back condition was unrelated to Claimant's January 17, 2020 industrial accident.

41. While this ALJ finds Claimant's low back pain/symptoms causally related to the January 17, 2020 work-related incident involving the removal of compressed

cardboard from the dumpster in question, the evidence presented supports a finding that Claimant was properly placed at MMI with an apportioned and converted impairment totaling 14% of the whole person and no need for maintenance medical treatment as opined by Dr. Schafer on February 25, 2021. The evidence presented persuades the ALJ that Claimant remains at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ agrees with the prior decision of ALJ Edie to find and conclude that the medical opinions and analyses of Drs. Rook, Schafer, Stanton, and Primack are credible and more persuasive than those

of Dr. Paz and Dr. Larson. Indeed, substantial evidence was presented to support a conclusion that Dr. Paz erred in concluding that Claimant's low back pain and need for treatment is unrelated to the January 17, 2020 incident. Because the ALJ concludes that Dr. Paz incorrectly concluded that Claimant's low back condition is not related to the January 17, 2020 incident and Dr. Larson simply parroted those opinions, it is highly probable and free from serious doubt that Dr. Larson's causality opinion is similarly erroneous.

Overcoming Dr. Larson's Division IME Regarding Causation and MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. The question of whether the Claimant has overcome the DIME physicians findings regarding causality, MMI or permanent impairment, is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc.,* W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (ICAO, May 20, 2003). Moreover, there is no requirement that the ALJ identify the precise scientific mechanism of causation if the evidence, as a whole, demonstrates causation to a reasonable degree of medical probability. *See Industrial Commission v. Riley,* 165 Colo. 586, 441 P.2d 3 (1968)(court has often sustained finding of causation where medical causes remained "shrouded in mystery.").

F. Based upon the evidence presented, the ALJ finds and concludes that, in addition to his left shoulder injury, Claimant probably aggravated the condition of his previously weakened low back while forcefully twisting from a bent over and crouched position in an effort to yank the compressed cardboard from the dumpster in question. Consistent with the determination of ALJ Edie, this ALJ is persuaded that Claimant's need for treatment, including physical therapy and the injection directed to the low back are related to this MOI. Although Dr. Paz disagrees on the basis that the described MOI

in this case placed no load across the lumbar spine, the ALJ finds this opinion and the suggestion that Claimant's low back pain/symptoms represent the natural and probable progression of a pre-existing condition unconvincing. In this case, the ALJ credits Claimant's testimony to conclude that his need to vigorously twist his entire body in order to yank/jerk material from the dumpster involved sufficient force across the low back to injure and otherwise aggravate his pre-existing lumbar spine condition. Indeed, Dr. Rook testified that the results of Claimant's MRI and electrodiagnostic study supported his conclusion that he sustained an acute and distinct injury as a consequence of the January 17, 2020 incident. (Hrg. Tr. p. 47, ll. 8-22; See also, Clmt's. Ex. 15, p. 373, ¶ 13). Moreover, the evidence presented supports a conclusion that Claimant's 2018 surgery was a success. He enjoyed a good recovery and was placed at MMI by Dr. Schafer without permanent restrictions. He returned to full duty work and was able to perform the full range of his job responsibilities between May 19, 2019 and January 17, 2020 without limitation. While he had persistent numbness in his left foot and toes following his 2018 surgery, the evidence presented is devoid of any persuasive indication that the condition of Claimant's low back was symptomatic and/or deteriorating leading up to the 2020 cardboard pulling incident. Thus, this ALJ concludes that Dr. Paz' suggestion that Claimant's back pain is related to the natural progression of a pre-existing condition is overstated. As noted by ALJ Edie, "Claimant no doubt went to work with a compromised lumbar region on January 15 (sic), 2020. However, he has now shown that, at a minimum, his work activities on that date aggravated his back to the point of becoming symptomatic." As did ALJ Edie, this ALJ has considered the remaining opinions of Dr. Paz regarding causation, including Claimant's belated reporting and documentation of symptoms. This ALJ finds Dr. Paz' concerns regarding the alleged tardy reporting of symptoms to have been addressed by Dr. Schafer and Claimant himself. Similar to ALJ Edie, this ALJ "accepts Claimant's explanation for the delay in reporting his back issues", which were "temporarily overshadowed by pain in the shoulder, and confusion about the process of reporting his back issues." Accordingly, the ALJ finds/concludes that Dr. Paz erred in concluding that Claimant's current low back pain/symptoms along with his need for low back treatment were not causally related to the January 17, 2020 work incident.

G. Based upon the evidence presented, the ALJ agrees with Claimant that regarding the cause of Claimant's back pain, Dr. Larson failed to address the objective differences observed in the multiple MRI reports or account for the acute findings on Claimant's recent electrodiagnostic study that support Dr. Rook's conclusion that Claimant suffered an acute injury to his low back. Rather, Dr. Larson, without any explanation, other than indicating that Claimant did not initially report low back pain, concluded that Dr. Paz's causation opinion was "likely" correct. Because this ALJ concludes that Dr. Paz' opinions concerning the cause of Claimant's low back pain are mistaken and highly probably incorrect and Dr. Larson simply and unmistakably adopted Dr. Paz' causality opinions without performing an independent analysis of his own, his causality opinion is equally errenous. The purpose of a DIME pursuant to § 8-42-107(8)(b) C.R.S. is for the physician to make an *independent* determination as to MMI based on their own analysis. Dr. Larson failed to provide such an analysis and

therefore erred in the completion of his DIME. Accordingly, Claimant has presented clear and convincing evidence to overcome Dr. Larson's opinions concerning causation.

H. While Dr. Larson's opinions regarding the causal relatedness of Claimant's low back pain to the January 17, 2020 incident have been overcome, the ALJ is persuaded that Claimant was properly placed at MMI by Dr. Schafer on February 25, 2021. Moreover, the evidence presented supports a finding that Claimant failed to present clear and convincing evidence that Dr. Larson's date of MMI, as adopted from Dr. Schafer, is highly probably incorrect.

I. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo.App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998).

J. Maximum Medical Improvement is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. In this case, the evidence supports a conclusion that Dr. Schafer placed Claimant at MMI on February 25, 2021. In her MMI report, Dr. Schafer outlined the treatment Claimant completed including left shoulder surgery, physical therapy, an epidural steroid injection and two orthopedic evaluations directed to his low back. Consequently, the ALJ is convinced that Claimant exhausted his treatment options and reached a point of maximum medical improvement. While Claimant alleged that Dr. Schafer placed him at MMI because the insurer would not pay for surgery, this is not documented anywhere in Dr. Schafer's medical records nor was any surgery ever pursued by Claimant or his providers, including Dr. Stanton. In addition, Dr. Schafer was aware of the outcome of the prior hearing and knew Respondents were ordered to pay for treatment of the low back. She noted in her medical records that the judge's order had been reviewed. Thus, the ALJ concludes that Claimant's testimony regarding the reason that Dr. Schafer placed him at MMI is, incredible, unpersuasive and highly probably incorrect.

K. Dr. Rook agreed that Claimant's left shoulder condition had reached MMI; nonetheless, he opined that the ATP and DIME physician erred in determining that the low back condition was at MMI. According to Dr. Rook, Dr. Schafer erred in placing Claimant at MMI before he returned to Dr. Stanton for follow-up. Given that, Claimant had an acute radiculopathy; Dr. Rook concluded that Dr. Schafer erred because Claimant had not been afforded the treatment, i.e. the surgery recommended by Dr. Stanton. Careful review of the record fails to support that Dr. Stanton actually requested authorization to proceed with an L3-S1 surgery as referenced by Dr. Rook as the basis for his opinion that Claimant is not at MMI. Rather, the records indicate that on April 20, 2021, Dr. Stanton sought authorization for bilateral L4-5 transforaminal

epidural steroid injection. (Clmt's. Ex. 7, p. 219). Although Dr. Stanton indicated that Claimant "would be a reasonable candidate for an L3-S1 reconstruction", he did not, contrary to Dr. Rook's suggestion, request authorization for surgery. After considering the totality of the evidence presented, including the reports of Dr. Schafer, the DIME report of Dr. Larson and the IME reports of Dr. Rook, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that Dr. Larson's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented supports a conclusion that by February 25, 2021, Claimant had exhausted the treatment options to cure and relieve him of the effects of his low back injury. The record submitted supports a conclusion that Claimant's medical progress had plateaued and that no further treatment was reasonably expected to improve his condition. Accordingly, Dr. Schafer placed Claimant at MMI and Dr. Larson agreed with this date. To the extent that Dr. Rook disagrees, this ALJ concludes that his deductions constitute a difference of opinion which does not rise to the level of clear and convincing evidence that is required to overcome Dr. Larson's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado,* W.C. No. 4-350-356 (ICAO, March 22, 2000). In this regard, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). Based upon the evidence presented, Claimant has failed to meet his required legal burden to set Dr. Larson's MMI determination aside. Because Claimant failed to overcome Dr. Larson's DIME opinion regarding MMI, this order does not address his entitlement to additional medical treatment or temporary partial disability benefits. Nonetheless, Claimant's entitlement to additional impairment must be determined because Dr. Larson's causality determination concerning the relatedness of Claimant's low back condition to the January 17, 2020 incident has been overcome.

Claimant's Entitlement to Additional Impairment

L. Where, as in this case, the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome. Rather, when the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct impairment rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAO, Sept. 16, 2002); *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). Because the evidence presented supports a conclusion that Claimant's low back condition is related to the January 17, 2020 work incident, the ALJ concludes that Dr. Larson erred in failing to rate Claimant's lumbar spine. Consequently, Dr. Larson's impairment rating has similarly been overcome.

M. Careful review of Dr. Schafer's impairment rating supports a conclusion that she properly considered and correctly apportioned Claimant's spinal impairment in this case. Indeed, the results of Claimant's imaging (MRI) and electrodiagnostic study support Dr. Schafer's conclusions that Claimant suffered impairment for specific disorders of the lumbar spine and neurologic disturbance of the left lower extremity related to the January 17, 2020 incident above that he had sustained as a consequence of his 2018 work-related injury. (Clmt's. Ex. 1, p. 12). The ALJ adopts Dr. Schafer's impairment rating to find and conclude that Claimant's overall permanent impairment related to his January 17, 2020, left shoulder and low back injuries is 12% upper extremity impairment or 7% whole person impairment combined with 2% whole person impairment for specific disorders of the lumbar spine and 15% left lower extremity, which equals 6% whole person impairment pre-apportionment. Apportioning 1% whole person impairment due to Claimant 2018 work injury from the 6% impairment for neurologic disturbance related to the January 17, 2020 work injury leaves 5% whole person impairment. Combining the various apportioned whole person impairment components of Claimant's rating related to the January 17, 2020 injuries equals a combined whole person impairment of 14% (7% whole person impairment for the left upper extremity + 2% whole person impairment for specific disorders of the lumbar spine + 5% whole person impairment for left lower sensory and motor nerve disturbance = 14% whole person impairment).

Respondents' Claimed Overpayment

N. For claims arising before January 1, 2022, "overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. Section 8-40-201(15.5), C.R.S. *See also Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo.App. 2009). Respondent has the burden to prove that Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo.App. 2002).

O. As noted, Respondents filed a FAL admitting to the 14% whole person impairment assigned by Dr. Schafer on March 18, 2021. (Clmt's. Ex. 1, p. 1). At the time this admission was filed, Claimant an overpayment of TTD existed in the amount of $1,270.31. (Id.). After his left shoulder surgery, Claimant was unable to return to work and Respondents began paying TTD benefits as of August 24, 2020 at a rate of $808.38 per week. (Id.; See also, Resp. Ex. P).

P. The claim was initially administered by ESIS but halfway through the claim it transferred to Gallagher Bassett. After the transfer, Gallagher Bassett was unable to stop payment on checks issued by ESIS. Thus, on the indemnity payment log, all checks issued by ESIS are marked as "cleared." There were three ESIS/CHUBB TTD checks returned to Respondents by Claimant and marked "void" that totaled $8,083.80. Though these three checks are noted as "cleared," they were not cashed by Claimant.

Q. Once Claimant returned to work, Respondents terminated TTD benefits and initiated Temporary Partial Disability (TPD) benefits. Respondents paid Claimant $2,679.09 in TPD benefits from September 24, 2020 through February 24, 2021 because Claimant was placed at MMI on February 25, 2021. (Clmt's. Ex. 1, p. 1; See also, Clmt's. Ex. P).

R. As noted above, Respondents admitted to Dr. Schafer's MMI and 14% whole person impairment rating determinations and began paying PPD benefits. After the DIME with Dr. Larson, Respondents admitted to the lower rating of 14% scheduled impairment and $9,344.61 in PPD benefits calculated as 14% x 208 x $320.90. After consideration of the checks that were returned by Claimant and stopped/voided by Respondents, Claimant was paid a total amount of $33,503.97 in combined TTD benefits, TPD benefits, and PPD benefits. *See* RHE P and Q. Based on the August 12, 2021 FAL, Respondents admitted to $15,603.67 in TTD benefits, TPD benefits, and PPD benefits. (Clmt's. Ex. 2, p. 19). Accordingly, Respondents contend that they have proven that Claimant has been overpaid in the amount of $17,900.30 ($33,503.97 paid - $15,603.67 owed equals an overpayment of $17,900.30).

S. Because Dr. Larson erred in failing to calculate Claimant's lumbar spine impairment based upon his erroneous conclusion that Claimant's low back condition was unrelated to the January 17, 2020 incident and the ALJ has adopted Dr. Schafer's February 25, 2021 apportioned impairment rating, the ALJ concludes that Respondents asserted $17,900.30 overpayment is incorrect. Based upon the evidence presented, the ALJ concludes that Respondents have proven that Claimant was overpaid $1,270.31 in TTD benefits at the time he was placed at MMI on February 25, 2021 by Dr. Schafer. (Clmt's. Ex. P). Respondents are entitled to recoup this and may offset $1,270.31 against the remaining PPD award based on Dr. Schafer's 14% whole person impairment rating as previously reflected in the March 18, 2021 FAL. (Clmt's. Ex. 1, p. 1).

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinions of Dr. Larson regarding causation is GRANTED. Claimant has proven, by clear and convincing evidence that Dr. Larson erred when he concluded that Claimant's low back condition was unrelated to Claimant's January 17, 2020 industrial accident.

2. Respondents shall pay PPD benefits consistent with the rating calculated by Dr. Schafer as part of her February 25, 2021 report of MMI and impairment.

3. Claimant's request to set aside the MMI determination of Dr. Larson is denied and dismissed.

4. Claimant's request for additional medical treatment, including the request for surgery is denied and dismissed. Claimant has failed to establish that he needs additional treatment to reach maximum medical improvement.

5. Claimant was properly placed at MMI by Dr. Schafer on February 25, 2021. Consequently, his request for additional TTD beginning February 25, 2021 and ongoing is denied and dismissed.

6. Respondents request to recoup the asserted overpayment in this case is amended from $17,900.30 to $1,270.31 as Dr. Larson erred in failing to rate the impairment associated with the January 17, 2020 injury to Claimant's lumbar spine. Respondents may offset the overpayment of $1,270.31 against the remaining PPD award as calculated from Dr. Schafer's February 25, 2021 impairment rating.

7. All matters not determined herein are reserved for future determination.

DATED: March 22, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he was an employee of the putative Employer as defined by the Workers' Compensation Act at the time of his injury, and

II. Whether Respondents proved by a preponderance of the evidence that Claimant was an independent contractor.

IF CLAIMANT WAS AN EMPLOYEE, THEN:

III. Whether Claimant proved by a preponderance of the evidence that he suffered compensable injuries on July 8, 2021 while in the course and scope of his employment for Employer.

IV. Whether Claimant proved by a preponderance of the evidence that he is entitled to select his medical provider.

V. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the injury.

VI. What is Claimant's average weekly wage?

VII. Whether Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability benefits.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on October 25, 2021 on issues that included compensability, medical benefits, authorized provider, average weekly wage and temporary disability benefits.

Respondents' filed a Response to Application for Hearing on November 3, 2021 listing additional issues of independent contractor, not an employee, causation and denial of authorized treating physician.

Respondents conceded that Respondents failed to issue a designated physician list in this matter.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the ALJ enters the following findings of fact:

1. Claimant was 35 years of age at the time of the hearing, born on January 21, 1987. Claimant has been employed as a sheet rock/dry wall and frame worker for the past nine to ten years, and was knowledgeable and experienced in performing the job. Prior to working for Employer, Claimant was an employee of two other framing and dry wall companies performing the same kind of work he performed for Employer. Claimant did not need training when he started the job with Employer.

2. Claimant stated that he was hired to work for Employer by the foreman, who lived in the same apartment complex. However, Claimant knew the owner of the Employer business from working with him while they both worked for a prior employer.

3. When he was hired in March 2021, he was advised to show up to work at the site of a hospital by the foreman. Claimant did not meet up with the employer until a few days after he started working under the foreman's direction, who instructed him when to show up for work (at around 6:00 a.m.) and when the day was over. If they required Claimant to show up at a different time, the foreman would call him the prior evening, and would give him instructions about the change in time. The foreman would also instruct him which rooms or areas needed to be done and Claimant was not free to choose the sequence of the work or which projects to start on first. He was advised he would be paid $23.00 per hour and would work a minimum of 40 hours a week. Claimant did request from the owner an increase in wages and his hourly pay was raised to $24.00 per hour.

4. Claimant brought some of his own tools to perform the work but Employer also provided tools such as saws, sawzalls and robo saws. Employer had a tool chest where they could get the tools they needed to perform the job.

5. Claimant never owned his own company, had his own business cards and always worked for an employer who paid him hourly. He was never responsible to solicit jobs or obtain contracts. That was always Employer's responsibility. He also remembered that when he was hired, Employer asked him to fill out some paperwork, which he never did and his Employer never followed up to obtain the completed paperwork. Claimant never worked for any other employer while he was working for Employer but knew he could go work for another employer if he wished.

6. On July 8, 2021 Claimant was working on a hospital project for Employer when he was placing a corner piece in the room where he was working. He fell off a ladder, on his left side, hurting his left shoulder, arm, elbow and wrist, as well as hit his head. Claimant stated that the foreman saw him fall. He spoke with the foreman about the accident, and later that day, he spoke with the owner. Claimant advised that he was not feeling well. The owner advised him to go seek some chiropractic care or go to the hospital to seek medical attention and that Employer would pay for the costs of the medical care. Claimant was never able to communicate with Employer again as his calls went unanswered. Claimant has continued with problems with his left shoulder, elbow and wrist that have gone untreated.

7. Claimant was attended at Denver Health Medical Center/Federico Pena Family Health Center Urgent Care on July 8, 2021 by Mi Tran, M.D. with shoulder and arm pain as well as neck pain, since he hit the back of his head. Claimant reported was having pain on the later neck and left distal arm with some numbness and tingling. Dr. Tran documented that Claimant fell from a ladder at work from the height of 2.5 feet at

approximately 8:00 a.m. Upon exam, Dr. Tran found mild bony prominence of the left clavicle without dislocation or scapular winging, diffuse tenderness to palpation of left clavicle without step off, left upper extremity weakness, likely secondary to pain and limited abduction and internal rotation of left shoulder with pain elicited during both passive and active ROM. Claimant was neurovascularly intact with sensation symmetric. However he was positive for empty can test[1] and Neer's test.[2] X-ray of the left shoulder showed no fracture or dislocation. Dr. Tran stated that clinical history and exam were most likely consistent with left shoulder sprain. Dr. Tran recommended use of ice, tylenol/ibuprofen as needed and twice daily range of motion exercises. He advised that if Claimant had no improvement after 4-6 weeks, he should consider additional imaging studies such as MRI and a PT referral.

8. Dr. Tran issued a July 8, 2021 letter stating that Claimant could return to work modified duty with no lifting or vigorous activities to avoid re-injury to the left shoulder.

9. Claimant returned to DHMC Urgent Care on July 9, 2021 as a result of developing left wrist pain due to the fall the prior day. Claimant reported that he heard a crack/pop when he fell onto his left wrist when he fell. Examination by Nurse Ashley Randall showed no focal deficits but tenderness of the left ulnar wrist though no effusion or swelling and full range of motion. The x-rays showed moderate positive ulnar variance with the ulnar styloid nearly abutting the pisiform, with carpal joint spaces maintained.

10. On July 23, 2021 Claimant completed a Workers' Claim for Compensation, which stated that Claimant sustained injuries to his left elbow, wrist, shoulder, and left ankle on July 8, 2021 when he fell off a ladder, falling on his left side.

11. Claimant returned to Urgent Care on August 13, 2021 and was attended by Angela Smith, PA-C for his shoulder and left wrist injuries as Claimant reported he was not feeling better. Claimant reported he had a fall approximately one month ago from approximately two and half foot height while he was on a ladder at work. He stated since being see he had continued to wear his wrist splint without relief of his pain. He also had some type pain in his shoulder and some crepitus. He stated that his boss offered to help him with the bills for his evaluations but has not helped financially to that point. He stated he was trying to find help with Workers' Compensation. He denied any new injuries. He stated he had not had any numbness or tingling in his left upper extremity. He stated that it hurt to lift his shoulder. He stated he only periodically takes off the wrist splint. Ms. Smith obtained further wrist x-rays which did not change the prior assessment.

12. On August 16, 2021 Respondents filed an Employers' First Report of Injury noting that Claimant reported falling off a ladder and injuring his elbow, wrist, shoulder and ankle. They noted Claimant's date of hire as February 1, 2021 as a construction worker for Employer. The time of injury was 7:50 a.m. on July 8, 2021 and stated that Claimant's last day of employment was July 8, 2021. Finally, it disclosed that owner was advised of the accident on the date of the accident.

[1] Empty can test assesses the integrity of the supraspinatus muscle and tendon.
[2] Neer's test identifies possible subacromial impingement syndrome in the shoulder.

13. Respondents sent a Notice of Contest to Division and to Claimant on October 21, 2021, denying liability.

14. Claimant was evaluated by Dr. Tashof Bernton on January 6, 2022 at Respondents' request. Dr. Bernton reviewed the available medical records, took a history and performed a physical exam. On exam he found no evidence of pain behavior, tenderness over the anterior left shoulder, and limited range of motion. He had a negative empty beer can test, good strength within the range of motion demonstrated with intact sensation. With regard to the left wrist, Dr. Bernton found limitations of range of motion and pain with extension as well as over the ulnar aspect of the wrist. With regard to the left elbow,[3] Dr. Bernton stated that there was a palpable subluxation in the ulnar groove with flexion and extension of the elbow. He noted that Claimant had some diffuse tenderness to palpation of the left ankle but otherwise had a normal exam. Dr. Bernton stated that based on exam of the left shoulder, the differential diagnosis could possibly be rotator cuff tear as evidenced by the tenderness and loss of range of motion. He recommended an MRI to better assess the diagnosis. He also stated that further diagnostic testing was needed for the left wrist as TFCC or ligamentous tear were also possible but could not be detected upon exam or x-rays. He related both the left wrist and left shoulder injuries to the July 8, 2021 work related accident. He opined that the left elbow and ankle conditions were not related. He specifically cited to lack of documentation in the urgent care records for the latter mentioned conditions.

15. Employer's owner testified that he owned the business including in July 2021. Employer was a construction company specifically contracting work dry walling and framing, specifically involving commercial projects. He stated that he obtained contracts and obtained workers to perform the work that was required, but that he did not have any employees. Owner further testified that he had owned the business for four years and had always had workers' compensation insurance because the businesses that contracted with his company required the insurance despite not having any employees.

16. Owner testified that he contracted multiple workers on his project at the hospital. They were all paid though a 1099. He testified that he provided Claimant with a W-9 as he intended to send Claimant a 1099 as an independent contractor but he never received the form back from Claimant and he did not follow up to obtain the form. He stated that he never gave Claimant an employment application or an employment agreement and did not sign an exclusivity agreement. He stated that each individual was responsible to bring their own personal tools but that he provided the more expensive tools, especially the kinds of saws that cut hard materials, and hand saws. He stated that he only had experienced workers on his jobs so he did not have to provide any specific training as the workers knew their jobs.

17. Employer paid Claimant with Employer account checks in Claimant's own name but did not withdraw taxes. Owner did not know if Claimant had his own company. He did several favors for Claimant. He confirmed that he wrote the letter dated April 23, 2021 at Claimant's request, stating that Claimant was employed by Employer. He finally

[3] It is inferred that Dr. Bernton misstated the shoulder, but since he references the ulnar groove, which is at the elbow, it is assumed he simply made a clerical error, especially in light of the fact that he addressed the left shoulder first in his report.

stated that he had other workers that worked for the company and he paid them in the same manner that he paid Claimant, and all were responsible for paying their own taxes. During the period of March through July 2021 he had eight workers on his team and would tell them when to show up to work, would give them a schedule from 6 a.m. to 2:30 p.m., though sometimes would have to go in earlier. He oversaw the work being performed because he wanted his company to produce a good product but he was not concerned as he only had skilled workers that knew what they were doing. Owner agreed that he would direct workers where to show up and when, what job had to be done, in what order and the workers were not free to come and go as they pleased.

18. From the paychecks provided it is determined that the first two pay periods ending March 26, 2021 and April 2, 2021, Claimant was earning $23.00 per hour. Beginning April 3, 2021 Claimant started to earn $24.00 per hour. In calculating the fair approximation of Claimant's average weekly wage, wages from April 3, 2021 through July 2, 2021 were considered for a period of thirteen weeks and total wages earned of $12,272.00. By dividing the total earned by 13 weeks provides an average weekly wage of $944.00. As found, the fair approximation of Claimant's average weekly wage is $944.00 per week.

19. Claimant was able to return to modified work in October and November 2021 installing Christmas lights. Claimant testified that he worked with approximately 20 other workers. He was only obliged to pass the lights to his coworkers and the job did not involve any overhead activity.

20. Dr. Bernton testified by deposition regarding causation and his opinions based on his understanding of the *AMA Guides* as well as the accreditation materials. He stated that he presumed, if you have a traumatic injury like a fracture, that the ulnar nerve injury could change the structure of the ulnar nerve in the groove at the elbow, and that a subluxing ulnar nerve is generally caused by repetitive motion problems. He further testified that he saw no evidence in the record that Claimant had injured his left ankle but that Claimant has a probable Morton's neuroma of the left foot.

21. Claimant was an employee of employer, despite owner's understanding regarding his employees' employment. Claimant performed services for Employer. Claimant was under Employer's control, who determined his hours and wages, which work he was to be performed, when and where, and Employer was specifically required to hold insurance that covered his employees. As found, Claimant has shown that Claimant was an employee.

22. The totality of the evidence shows that Claimant was called in by Employers' foreman, and was hired to perform work at Employer's discretion. Hours were changed at the whim of Employer, who set the terms of the employment contract, as evidenced by Employer's determining Claimant's hourly pay rate and had the discretion to change that rate, upon Claimant's request. Claimant did not set his pay rate. Employer operated a drywall business, obtained contracts and employees to carry out the contracts. Claimant did not hold himself out as an independent contractor nor did he sign an independent contractor agreement. Claimant did not have cards or a business name or company and had always worked for other employers for the last nine to ten year prior to the injury. There was no evidence that Claimant had his own liability insurance nor that he took on

any particular risk in acquiring the work. He was not responsible for the work and Employer acknowledged that Claimant was supervised, could not come and go as he pleased and that Claimant was assigned the work he performed. While there are some factors that might tend to indicate that Claimant could be an independent contractor, such as his ability to seek other work or limited training, they were not persuasive. As found, Respondents have failed to show that Claimant was an independent contractor.

23. On July 8, 2021 Claimant fell off a ladder onto his left side, injuring himself. Claimant reported the injury to his employer and Employer recommended Claimant seek medical attention and Employer would take care of the costs of the medical care. As found, Claimant has shown by a preponderance of the evidence that Claimant was injured within the course and scope of his employment with Employer on July 8, 2021 when he fell off a ladder onto his left side.

24. Claimant reported to the Denver Health Medical Center/Federico Pena Family Health Center Urgent Care staff on July 8, 2021 with complaints of shoulder, arm and neck pain. While the urgent care staff concentrated on only the shoulder symptoms, the records note that Claimant made the complaints and the DHMC staff differentiated the shoulder from the arm. Claimant was immediately placed in a wrist brace the following day, which he continued to utilize for over a month subsequent to the work related injury. It is found that Claimant has shown that the neck, left shoulder, left arm, elbow and wrist conditions are proximately caused by the July 8, 2021 fall from the ladder while at work. Further, Claimant has failed to show that the left ankle was injured during the fall. As found, Claimant has shown by a preponderance of the evidence that the July 8, 2021 fall caused Claimant's injuries to his neck and left upper extremity including his shoulder, elbow and wrist.

25. Claimant stated that his employer designated no provider. As found, the right to select an authorized treating physician has passed to Claimant.

26. As found, Dr. Tran released Claimant to modified work on July 8, 2021 with restrictions of no lifting or vigorous activities. Nothing in the records indicates that Claimant has been released to full duty. In fact, Dr. Bernton stated that he would not know what restrictions, if any, were appropriate until the diagnostic testing took place to assess the extent of the injuries.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Employee or Independent Contractor Status

Pursuant to Sec. 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for

performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Whether a worker is an independent contractor "is a factual determination for resolution by the ALJ." *Nelson v. Indus. Claim Appeals Office,* 981 P.2d 210, 213 (Colo. App. 1998). If a claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant has established by a preponderance of the evidence that he provided services to Employer working as a framer and drywall worker as hired by Employer and was paid hourly for his services. Thus, Claimant is presumed to be an employee of Employer under Sec. 8-40-202 (2)(a), C.R.S.

Nonetheless, a putative employer may establish a presumed employee is an independent contractor by proving the presence of some or all of the nine criteria enumerated in Sec. 8-40-202(2)(b)(II), C.R.S. *See* Nelson *v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in Sec. 8-40-202(2)(a), C.R.S.; see *Indus. Claim Apps. Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2014). Section 8-40-202 (2)(b)(II), identifies the following nine criteria that must be shown "to prove independence." These nine criteria are that the putative employer must not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
>
> (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
>
> (H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession, or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

As found, the evidence at hearing established that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed." Claimant's testimony credibly established he had no prior experience in obtaining contracts, working for himself or performing any business related matters. Claimant persuasively testified that he was called in by Employer's foreman, was told where to show up, the time and how much he would be paid. Employer supervised Claimant's work and oversaw the actual work and instructed Claimant as to how the work should be performed, including in what order. While, as an experience dry wall worker, he may have required no training, Claimant was still advised where to begin, what work would be performed any given day and what the quality of the work he was required to accomplish. Employer established "quality standards" for Claimant. Claimant did not set the quality standards.

Employer maintained the right to terminate Claimant's work at any time, without a violation and without cause or liability. Employer paid Claimant personally instead of making checks payable to a trade or business name. Although Employer did not require Claimant to work exclusively for Employer and provided only some of the tools needed to accomplish the job, the ALJ finds that these factors are significantly outweighed by the existence of other factors enumerated in § 8-40-202(2)(b)(II), C.R.S.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed" and was not ""free from control and direction in the performance of the services, both under the contract for performance of service and in fact" as required by § 8-40-202 (2)(a), C.R.S. As found, Employer dictated the time and location of performance, the type of performance, the quality of the work, and work hours. The evidence established Claimant's work hours were not negotiated. Instead, Employer dictated the days and hours Claimant worked, and Employer was at liberty to change them at a moment's notice. Respondents have failed to prove by a preponderance of the evidence that Claimant was not an "employee" within the meaning of the Colorado Workers' Compensation Act. The ALJ finds that the above facts indicate that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed" and was not ""free from control

and direction in the performance of the services, both under the contract for performance of service and in fact" as set by § 8-40-202 (2)(a), C.R.S.

The analysis in *Softrock* reflects that the ALJ must look not only at the nine factors to discern customary engagement in an independent business but must also examine other factors involving "the nature of the working relationship." *Id*. Also see *Pella Windows & Doors, Inc. v. Indus. Claim Apps. Office*, 458 P.3d 128 (Colo. App. 2020). The above factors were expanded in *Industrial Claim Appeals Office v. Softrock Geological Services, Inc., supra*, to include whether the individual had an independent business card, listing, address, or telephone; whether there was a financial investment at risk of suffering a loss on the project; whether the individual used his or her own equipment; whether the individual set the price for performing the project; whether the individual employed others to complete the project; and whether the individual carried liability insurance. These factors, along with any other information relevant to the nature of the work and the relationship between the alleged employer and the individual, expand the ways to consider whether an individual is an employee or an independent contractor. As found, a significant number (but not all) of these factors existed in the relationship between Employer and Claimant. Specifically, Claimant did not own a business, nor did Claimant have a financial investment at risk, he did not set the price for performing the work, nor employed others to complete the work, and he did not carry liability insurance. To the contrary, it was employer that had the business, carried insurance, had control over the negotiated price of the project and controlled how much Claimant would be paid for the hourly work performed and Employer paid Claimant under his own name by company checks. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business. As found, Respondents failed to show that Claimant was an independent contractor by a preponderance of the evidence and Claimant is found to be an employee of Employer. Therefore, Respondents are liable for any compensable work related injuries flowing as a consequent of the employment.

C. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is

narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of his employment with Employer on July 8, 2021 when he was installing a metal corner piece while standing on a ladder, and fell off, landing on his left side, hitting his head, proximately causing neck, left shoulder, left arm/elbow and left wrist injuries. While there is evidence to the contrary, this ALJ finds persuasive that both Claimant and Employer reported in the initial claim reports that Claimant injured his left elbow. Further, there is no credible evidence that Claimant had a preexisting left elbow injury. Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on July 8, 2021 in the course and scope of his employment working for Employer.

D. Right to select a treating physician

Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Since Claimant was not provide a list of providers, he was seen only by DHMC Urgent care. As found, Employer never referred Claimant to a medical

provider to treat the injuries. Accordingly, the right of selection passed to Claimant. Because Claimant has not yet designated a physician regarding his injuries, he may now see a doctor of his choice.

E. Medical Benefits

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc*., W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). As found, Claimant has proven by a preponderance of the evidence that Claimant had no access to medical care other than through DHMC Urgent Care. Claimant was attended by the urgent care staff with regard to the multiple injuries but no continuing treatment was established. Claimant has shown that DHMC providers were authorized as emergent care in his matter. Further, Dr. Bernton recommended MRIs of the shoulder and wrist, both of which are shown to be reasonably necessary and related to the July 8, 2021 work related injury. Finally, Dr. Tran stated if Claimant had no improvement after 4-6 weeks, he should consider additional imaging studies such as MRI and a PT referral. As found, Claimant has continued with complaints regarding the upper extremity and is entitled to ongoing medical care. Claimant has shown by a preponderance of the evidence that he is entitled to a general award of reasonably necessary medical care flowing a natural consequence from the compensable injuries of July 8, 2021.

F. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from April 3, 2021 through July 2, 2021, a period of thirteen weeks, giving total wages earned of $12,272.00. By

dividing the total earned by the 13 weeks provides an average weekly wage of $944.00. As found, the fair approximation of Claimant's average weekly wage is $944.00 per week.

G. Temporary disability benefits

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. If a work-related injury contributes "to some degree" to a claimant's wage loss, the claimant is entitled to temporary total disability benefits. *Id*. at 548. "Temporary disability benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. Therefore, if the injury contributed in part to the wage loss, temporary total disability benefits can be denied, suspended, or terminated only if one of the four statutory factors in § 8-42-105(3) is satisfied." *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210-11 (Colo. App. 1996). Returning to work is one criteria for terminating TTD benefits. Section 8-42-105(3)(b), C.R.S. The persuasive evidence shows Claimant was disabled by the injury because he could not use his left upper extremity without work limitations for work tasks pursuant to Dr. Tran's restriction letter. As found, Claimant is entitled to TTD benefits beginning July 9, 2021.

However, there was credible evidence that Claimant performed some level of work in October and November, 2021. Therefore, Claimant may only be entitled to temporary partial disability benefits for those periods of time he worked. The record is incomplete and the wages for this period were not in evidence. Therefore, for those time periods Claimant worked, he would not be entitled to TTD.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is an employee of Employer.

2. Claimant sustained compensable work related injuries on July 8, 2021 in the course and scope of his employment with Employer.

3. Claimant sustained injuries to his neck and left upper extremity including his shoulder, elbow and wrist on July 8, 2021 or as a sequelae of the injuries.

4. Selection of the authorized treating provider passed to the Claimant. Within 30 days of this order Claimant shall provide notice to Respondents of Claimant's choice of physician.

5. Respondents are liable for authorized, reasonably necessary and related medical care for Claimant's neck and upper extremity injuries to cure and relieve Claimant from the effects of his July 8, 2021 work related injury, including the DHMC Urgent Care visits.

6. Claimant's average weekly wage is $944.00 per week, providing a temporary total disability benefits rate of $629.33.

7. Respondents shall file an admission of liability paying Claimant temporary total disability benefits beginning as of July 9, 2021 until terminated by law. Respondents may take credit for any periods of time when Claimant was working a modified job.

8. Within 20 days of the date of this order, Claimant shall provide wage records detailing his wages for any time periods worked, if any exist, or an affidavit summarizing earned wages for any periods subsequent to July, 2021 to the present.

9. Respondents shall pay interests at the statutory rate of eight percent on all benefits that were not paid when due.

10. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 23rd day of March, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-170-976-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Dr. Eric Young is an authorized treating physician.

II. Whether Claimant has proven by a preponderance of the evidence that the right knee surgery underwent by Claimant on October 15, 2021, is medically reasonable, necessary, and causally related to the work injury on April 12, 2021.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On April 12, 2021, Claimant was kneeling or squatting down to work on a screen door. When he rose from that position to stand up, he felt two pops in his right knee. Claimant's knee continued to be painful, and the issues did not go away.
2. Respondents ultimately admitted liability for the claim.
3. Claimant had prior knee surgery on his right knee in 2007. *Tr*. at 20, ¶10-13. But Claimant has had no discomfort or problems involving his right knee from 2007 up until his work injury. *Id*., ¶19-21.
4. Claimant was referred to Concentra by Respondents. *Id*., ¶7-8.
5. On April 13, 2021, Claimant was seen at Concentra by Keith Meier, NP. NP Meier checked 'yes,' that his objective findings were consistent with history and/or work-related mechanism of injury/illness. Exhibit 1, page 159. Claimant reported that he was squatting to fix a screen at work, and when he stood up, he felt a pop in his right knee accompanied by pain. NP Meier noted Claimant was limping and had positive findings to a lateral Apley's Grind test and lateral McMurray test. Claimant was assessed with a strain of his right knee, and an MRI was ordered.
6. On April 16, 2021, Claimant was seen at Concentra by Linda Young, M.D. Dr. Young noted that 'yes,' her objective findings were consistent with history and/or work-related mechanism of injury/illness. Exhibit 1, page 148. Claimant had not yet had an MRI and was still complaining of tightness and pain in his right knee. Dr. Young's physical examination noted tenderness, pain, decreased range of motion, and positive lateral Apley's grind test and lateral McMurray test. Claimant was to be seen after his MRI.
7. On April 23, 2021, Claimant was seen at Concentra by NP Meier who continued to believe that Claimant's injury was work related. Exhibit 1, page 136. It was noted that NP Meier was requesting an MRI of the right knee after Respondents had

denied his first request for a right knee MRI. Claimant was continuing to complain of pain and stiffness in his right knee, with an increase in swelling.

8. On May 3, 2021, Claimant was seen at Concentra by NP Meier. No MRI had occurred yet, and Claimant was referred for physical therapy. Exhibit 1, page 126.

9. On May 13, 2021, Claimant was seen at Concentra by Dr. Jeffrey Baker. Dr. Baker believed that Claimant's injury was work related. Exhibit 1, page 103. Claimant reported no improvement in his knee. Claimant's MRI continued to be denied.

10. On June 3, 2021, after failing conservative care, Claimant underwent an MRI of his right knee. The impression of the MRI was: Complex medial and lateral meniscal tears and tricompartmental partial-thickness chondral loss. Exhibit 1, page 92-93.

11. On June 3, 2021, Claimant was seen at Concentra by Dr. Baker. Dr. Baker continued to believe Claimant's injury was work related. Exhibit 1, page 90. It would seem Dr. Baker did not yet have the MRI results from that day.

12. On June 4, 2021, Claimant was seen at Concentra by PA Toth, who also concluded that Claimant's injury was work related. Exhibit 1, page 76. Claimant's MRI results were reviewed, and Claimant was referred to an orthopedic specialist, Dr. Schnell.

13. On June 7, 2021, Claimant was seen at Concentra by Dr. Lucas Schnell. Dr. Schnell noted that it was his opinion that Claimant's injury was work related. Exhibit 1, page 71. Claimant noted his history of past knee injuries, but that he had been doing well before this work injury. Dr. Schnell reviewed Claimant's recent MRI results, and Dr. Schnell noted Claimant's complex multidirectional posterior horn medial meniscus tear, and undersurface tear of the lateral meniscus body with lateral extrusion. It was Dr. Schnell's recommendation that Claimant undergo right knee arthroscopic partial medial and lateral meniscectomies and chondroplasty.

14. On June 15, 2021, Aaron Morgenstein, M.D., reviewed the surgery recommendation made by Dr. Schnell. Dr. Morgenstein concluded that the surgery was not reasonable and necessary because in his opinion, surgery was not indicated under the Colorado Medical Treatment Guidelines. Dr. Morgenstein concluded that the surgery was not reasonable and necessary because Claimant had not undergone any injections and Claimant had significant degeneration and no clear mechanical symptoms. As a result, Dr. Morgenstein concluded the surgery was not reasonable and necessary for medical reasons. See Exhibit G, pages 76-77.

15. On June 30, 2021, Claimant was seen by Dr. Baker at Concentra. Dr. Baker continued to believe that Claimant's injury was work related. Exhibit 1, page 60. Claimant noted that the surgery recommended by Dr. Schnell was denied by Respondents and continued to complain of right knee symptoms. It was suggested that Claimant go back to Dr. Schnell for consideration of a right knee injection.

16. On July 19, 2021, Claimant was again evaluated by Dr. Schnell. Dr. Schnell noted that "I discussed with [Claimant] that I think it is unfortunate that this surgery has been denied. He has failed all conservative measures and I think he would benefit from arthroscopic partial medial and lateral meniscectomies with chondroplasty." Since surgery was denied, Dr. Schell did not provide the surgery, but did provide an intra-articular steroid injection. Exhibit 1, page 42 and Exhibit M, page 249.

17. On July 26, 2021, Claimant was seen at Concentra by Dr. Baker. Dr. Baker continued to believe that Claimant's injury was work-related. Exhibit 1, page 32. Claimant complained that his right knee was getting worse. It was noted that it was recommended Claimant undergo surgery, but the surgery was denied. Claimant was released from care by Dr. Schnell because the surgery continued to be denied. Claimant was referred for additional physical therapy, but Dr. Baker noted that Claimant continued to need surgery for his knee. Exhibit 1, pages 32-36.

18. On August 17, 2021, Claimant was seen by Dr. Baker at Concentra. Dr. Baker referred Claimant for an impairment rating and case closure but noted "the patient does need surgery but it has been denied." Exhibit 1, page 23.

19. On August 24, 2021, Claimant was seen at Concentra by Dr. Baker. It was noted that since the surgery was denied, there was nothing further that could be done for Claimant. Therefore, he placed Claimant at MMI and provided him an impairment rating. Exhibit 1, pages 3-7.

20. Because of the denial of surgery, Drs. Baker and Schnell refused to continue treating Claimant based on non-medical reasons.

21. On September 28, 2021, and because Dr. Schnell refused to operate on Claimant and provide additional medical treatment for non-medical reasons – the denial of surgery - Claimant chose to treat with Dr. Eric Young – a surgeon. Claimant was seen by Dr. Young and he obtained a history, performed a physical examination, and reviewed Claimant's MRI. Dr. Young concluded that Claimant would benefit from a right knee arthroscopy anticipating medial and lateral meniscectomy. He also indicated that evaluation of the joint surfaces could also be made at that time. Exhibit 2, page 173. As a result, surgery was scheduled.

22. On October 11, 2021, Claimant requested to change his authorized treating physician to Dr. Eric Young and Dr. Young requested the proposed knee surgery be authorized. *Resp. Ex.* N at 0001.

23. On October 15, 2021, before Claimant or Dr. Young received the denial of changing physicians and the denial of the proposed knee surgery from Respondents, Claimant underwent the surgery without prior authorization by Respondents. *Tr*. at 17, ¶9.

24. On October 19, 2021, Respondents denied the request for surgery and Claimant's request to change physicians to Dr. Young. The request for surgery was denied for non-medical reasons because Dr. Young was not an authorized provider. Exhibit N, pages 296-299.

25. Since the knee surgery, Claimant's pain and disability have abated and Claimant has been able to return to work and perform his regular job duties. Thus, the October 15, 2021, knee surgery cured and relieved Claimant from the effects of his work injury.

26. On December 14, 2021, Respondents had Dr. O'Brien perform a medical records review. *Resp. Ex*. D at 0001

27. In his report, he concluded that there was no mechanism of injury substantial enough to cause new tissue breakage or yielding, i.e., an injury, to Claimant's

meniscus. *Id*. at 0004. Instead, he concluded that Claimant's knee pain is due to Claimant's underlying arthritis that just happened to start hurting while Claimant was at work. Despite such conclusion, he fails to adequately and persuasively explain why Claimant did not have disabling pain before the accident and after the accident had disabling pain that did not abate until Claimant had surgery. Overall, the ALJ does not find Dr. O'Brien's opinion that Claimant did not suffer a compensable injury to be persuasive.

28. Dr. O'Brien also stated that the MRI was overinterpreted by Dr. Young and Dr. Schnell and that there was no evidence of an acute injury to the medial or lateral meniscus. *Id*. at 0005. The ALJ finds that Dr. O'Brien's attempt to negate the MRI findings - which shows a meniscal injury – is an attempt to disregard evidence that does not support his conclusions. As a result, the ALJ finds that Dr. O'Brien's rejection of the MRI findings shows a genuine bias against finding Claimant suffered a compensable injury for which Claimant requires medical treatment.

29. Dr. O'Brien also concluded that the surgery recommended by Dr. Young would fail because the meniscal findings on which they are basing their recommendation to proceed with surgery is not the pain generator. Thus, according to Dr. O'Brien, removing a portion of the damaged meniscal tissue will not relive Claimant's pain. However, despite Dr. O'Brien's opinion that the meniscus was not the pain generator, Claimant underwent the surgery to repair his meniscus and such surgery did relieve Claimant's pain. As result, the ALJ finds that Dr. O'Brien's premise that Claimant did not suffer a meniscal injury during the accident is negated by the positive outcome of Claimant's surgery.

30. Dr. O'Brien discussed several sources of orthopedic literature that show that osteoarthritic knee pain should not be treated with arthroscopic intervention. *Id*. at 0007. He did not, however, provide copies of the literature on which he based his opinion. Plus, despite the citation of such literature, the ALJ finds that Claimant had the surgery to relieve him from the effects of an acute injury to his meniscus and not to treat his arthritis.

31. Through his testimony, Dr. O'Brien also elaborated on his expert medical opinions. He stated that in his practice, he would not recommend a knee arthroscopy in patients 45-years-old or older with underlying arthritis as the surgery would likely be more harmful than beneficial. *Tr*. at 25, ¶19-23. He explained that in this group of patients, he would recommend other modalities while waiting on a total knee replacement. *Tr*. at 26, ¶1. Despite this testimony, Claimant had the surgery in October of 2021, and such surgery has provided pain relief thus showing that at least at this time, the surgery was reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

32. Dr. O'Brien also testified that he understood the mechanism of injury in this claim to be the act of kneeling and arising with associated pain and popping. *Tr*. at 27, ¶18-20. He then testified that arthritis is a preexisting condition and that it was clearly evident that Claimant had arthritis in his knees in his initial x-rays. *Tr.* at 29, ¶3-6. The arthritis caused diseased cartilage which resulted in bone approaching bone. *Id.*, ¶12-15. Despite Claimant having arthritis in his knee, Claimant's underlying

condition was asymptomatic before the accident and symptomatic and in need of treatment after the accident which caused Claimant's symptoms to develop at that time and necessitated the need for medical treatment.

33. Dr. O'Brien also testified that Claimant's injury was a natural progression of his preexisting degenerative arthritic condition. *Tr*. at 30, ¶5-10. He stated that this is the way arthritic knees act when a simple activity such as kneeling and arising is associated with noises like popping or symptoms of pain. *Id*., ¶10-12. He said that these activities are simply not traumatic enough to result in new tearing of tissue, and it just the way an arthritic knee expresses itself. *Id*., ¶14-18. The ALJ, however, also does not find this conclusion to be persuasive. Again, Claimant was asymptomatic before the work incident and became symptomatic immediately after the work incident – and the symptoms never abated until he had the surgery recommend and performed by Dr. Young.

34. Dr. O'Brien also testified that the noise of popping by itself does not signify that an injury occurred. *Id*., ¶22-23. He stated that arthritic joints have irregular surfaces that rub against each other that can cause a popping noise as an expression of the arthritis itself. *Tr*. at 31, ¶2-11. He added that arthritic joints, in almost all cases, make noise. *Id*., ¶13 and that its absence would be unusual. *Id*., ¶13, ¶16. Again, as for this conclusion, Dr. O'Brien appears to dismiss the fact that Claimant did not just experience popping due to the work accident, he experienced popping with the immediate onset of disabling pain which did not stop until he had surgery.

35. Based on the findings above, the ALJ does not find the opinions of Dr. O'Brien to be persuasive.

36. The ALJ does, however, find the opinions of Claimant's treating providers that his condition is work related and that he needs surgery to be persuasive because their opinions are supported by Claimant's statements to his providers, their physical findings, Claimant's medical records, and his improvement after the surgery.

Ultimate Findings

37. Claimant suffered an acute injury to his meniscus that is causally related to his work duties.

38. Due to his work injury – a torn meniscus - Claimant underwent conservative medical treatment that failed to relieve him from the effects of his work injury.

39. Dr. Schnell recommended surgery that was reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

40. The surgery recommended by Dr. Schnell, an authorized treating physician, was denied based on the medical reasons outlined by Dr. Morgenstein. Based on the denial, Dr. Schnell refused to perform the surgery. Thus, he refused to provide additional medical treatment for non-medical reasons.

41. Because Dr. Schnell refused to provide additional medical treatment for non-medical reasons, the right of selection passed to Claimant and Claimant selected Dr. Young to treat him for his work-related injury. As a result, Dr. Young is an authorized provider. After Claimant selected to treat with Dr. Young, Claimant underwent knee

surgery with Dr. Young.

42. The surgery recommended and performed by Dr. Young was reasonably necessary and causally related to treat Claimant from the effects of his work injury.

43. The surgery performed by Dr. Young cured and relieved Claimant from the effects of his work injury.

44. Because the surgery was reasonably necessary and causally related to the industrial injury, and performed by an authorized provider, Respondents are liable for the surgery and associated medical treatment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that Dr. Eric Young is an authorized treating physician.

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

If the designated physician refuses to treat for non-medical reasons, such as compensability has not been established, the right of selection passes to Claimant. Section 8-43-404(5)(a)(I)(A) implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. See *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). If Respondents timely designate a physician and the physician provides medical treatment in a timely manner in the first instance, the right of selection passes to the Claimant if the physician refuses to treat the Claimant for non-medical reasons. Whether an authorized physician has refused to provide treatment for non-medical reasons is a question of fact for the ALJ. *Ruybal v. University of Colorado Health Sciences Ctr*., 768 P.2d 1259 (Colo. App. 1988); *Lesso v. McDonalds*, W.C. No. 4-915-708-01 (ICAO, Apr. 21, 2014).

Drs. Baker and Schnell refused to continue treating Claimant because authorization for the knee surgery was denied. Therefore, they refused to treat Claimant for non-medical reasons. As a result, the right to select a treating physician passed to Claimant and Claimant chose Dr. Young.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the right of selection passed to Claimant and that he had the right to select Dr. Young as an authorized treating physician and did so. As a result, Dr. Young is an authorized treating physician.

II. Whether Claimant has proven by a preponderance of the evidence that the right knee surgery underwent by Claimant on October 15, 2021, is medically reasonable, necessary, and causally related to the work injury on April 12, 2021.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

Immediately prior to squatting down to work on a screen, Claimant's knee was asymptomatic. He was having no problems with his knee, and it was pain free. Claimant, however, bent over to perform a work function, and when standing up felt two

pops in his knee and then had the immediate onset of pain and disability. Thereafter, an MRI demonstrated a torn meniscus.

Every treating provider that issued an opinion on relatedness all said the same thing- they believed the injury was work related. Dr. Baker, Dr. Schnell, PA Toth, and NP Meier all believed and affirmatively stated that the injury was work related. No treating doctor in this claim contested that Claimant's knee symptoms and need for treatment was work related. The only doctor that had a negative opinion or issue with the injury and proposed surgery was Respondents' expert, Dr. O'Brien. However, as found, the ALJ did not find Dr. O'Brien's opinions to be persuasive. The ALJ does, however, credit the opinions of the other medical providers who concluded that Claimant's torn meniscus was work related. As a result, the ALJ finds that Claimant's torn meniscus was caused by his work activities.

As found, the onset of Claimant's knee pain and need for medical treatment was his work incident when he suffered a torn meniscus. Drs. Schnell and Young recommended knee surgery to repair Claimant's torn meniscus to decrease his pain and increase his function. Claimant ultimately had the surgery. The surgery decreased Claimant's pain and allowed Claimant to return to full duty. At no point until after the knee surgery did Claimant's knee pain and disability go away. While Claimant did have preexisting arthritis in his right knee, it was the work accident that caused Claimant to tear his meniscus and develop knee pain and necessitated the need for medical treatment in the form of surgery – which successfully reduced his pain and allowed Claimant to return to work. As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the knee surgery performed by Dr. Young was reasonable, necessary, and causally related to his industrial injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Dr. Young is an authorized treating provider.
2. The surgery performed by Dr. Young is reasonably necessary and causally related to Claimant's work injury. Therefore, Respondents shall pay for the surgery performed by Dr. Young – subject to the Colorado medical fee schedule.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, an entitlement to temporary disability benefits.

2. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of his employment on September 2, 2021, and the wage loss resulting from his termination.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 39-year-old man who was employed by Employer as a night fleet fueler. Claimant's job duties included driving a fuel truck to various job sites and fueling vehicles at those sites. Claimant's job required him to carry a fueling hose from the fuel truck to other vehicles, climb ladders while carrying a fueling hose to reach the other vehicle's fuel tank. The fuel hose weighs more than ten pounds, and in performing his job, Claimant was required to drag or carry the hose up a ladder, and reach overhead with the hose, and reach his arm away from his body. Claimant's regular work hours were Tuesday through Saturday, from approximately 3:00 to 4:00 p.m. until after midnight.

2. During the night of August 24, 2021, Claimant sustained a compensable injury arising out of the course of his employment with Employer when he fell from a ladder while working to refuel a vehicle.

3. Claimant reported his injury to Employer that night and was advised to contact his supervisor, [Redacted, hereinafter RB]. Claimant contacted Mr. RB[Redacted] the following morning and was advised to go to Concentra for evaluation.

4. On August 25, 2021, at approximately 9:50 a.m., Claimant was evaluated at Concentra by Barry Nelson, D.O. Claimant reported a mild headache, jaw pain, neck pain and upper back pain. Dr. Nelson examined Claimant and diagnosed him with an acute neck strain and contusion of the jaw. Dr. Nelson assigned written work restrictions of ten pounds for lifting, repetitive lifting, and carrying, pushing/pulling of twenty pounds, no reaching overhead, and no reaching away from the body. Dr. Nelson indicated Claimant could return to modified duty on August 26, 2021, and that the restrictions would remain in place until Claimant's scheduled follow-up visit on August 30, 2021. (Ex. A). Claimant's restrictions remained unchanged until December 2, 2021. On December 2, 2021, Dr. Nelson changed Claimant's restrictions to include lifting, repetitive lifting, and carrying limits of twenty pounds, pushing/pulling of forty pounds, and no overhead reaching. These work restrictions remained in place through Claimant's last documented visit with Dr.

Nelson on December 23, 2021. No medical records were admitted demonstrating that Claimant's restrictions have been lifted. (Ex. A).

5. On August 25, 2021, Claimant provided his supervisor, RB[Redacted], with a copy of the written work restrictions via text message. The work restrictions imposed by Dr. Nelson were such that Claimant could not fully perform his job duties, which required lifting, carrying, pulling, and pushing in excess of the assigned weights, and required Claimant to reach away from his body and above his head. (Ex. C).

6. Claimant testified that during their phone call on August 25, 2021, Mr. RB[Redacted] indicated that another employee would take over Claimant's route, and that Claimant should be available by telephone to provide the replacement driver with information and assistance. Claimant testified that he was available and did speak with his replacement sometime during the week.

7. Claimant further testified that Mr. RB[Redacted] did not instruct Claimant to return to work, and Claimant's impression was that he was to keep Mr. RB[Redacted] updated with his medical restrictions. Claimant testified that he spoke to Mr. RB[Redacted] two to three times following his injury, which is consistent with Mr. RB[Redacted] 's testimony.

8. In internal emails on Friday, August 27, 2021, Mr. RB[Redacted] and others discussed assigning Claimant a limited duty position, including having Claimant ride with his replacement driver and provide instructions. No credible evidence was admitted indicating that this limited duty position was communicated to Claimant in writing or otherwise. Moreover, after receiving Claimant's written work restrictions on August 25, 2021, Employer did not provide Claimant with a written offer of modified employment pursuant to §8-42-105(3), C.R.S

9. Mr. RB[Redacted] testified that he texted and called Claimant several times on August 25, 2021, to ask Claimant to complete an "incident report" for Employer. Both Mr. RB[Redacted] and Claimant testified they exchanged text messages between August 25, 2021 and Friday, August 27, 2021. The text messages were not offered into evidence. Mr. RB[Redacted] characterized his messages to Claimant as instruction Claimant to "call me, and we still need to fill out the accident report, so we know what happened." Claimant testified that Mr. RB[Redacted] did request the incident report be completed. Although Claimant was aware that Employer was requesting the Incident Report, no credible evidence was submitted to indicate that Employer advised Claimant of the timeframe for returning the Incident Report, that Employer placed any urgency on returning the report, or that the failure to return it within any specific timeframe could result in termination or other disciplinary action.

10. On the morning of Monday, August 30, 2021, Claimant spoke with Mr. RB[Redacted] on the phone and also sent Mr. RB[Redacted] a copy of the doctor's report. In an email dated August 30, 2021 at 10:41 a.m., Mr. RB[Redacted] wrote: "[Claimant] just now contacted me, he was under the impression is not able to work at all. [Claimant] thought the light duty didn't start until 8/30. I told [Claimant] we had training

courses we could have had him doing and he was on light duty since he was seen by Concentra. He is currently filling out injury report." (Ex. C).

11. Mr. RB[Redacted] testified that he sent Claimant an email to permit Claimant to perform light duty work in the form of online "Safety Training," on August 30, 2021. He further testified that Claimant completed one night of safety training on August 30, 2021, and that Claimant performed the training for "one night and then he stopped doing it." Mr. [Redacted, hereinafter EB] testified that after August 30, 2021, the Claimant was "unreachable" and did not communicate with Employer until Wednesday, September 1, 2021, when Mr. B[Redacted] contacted Claimant by phone.

12. Mr. RB[Redacted]'s testimony on this issue is inconsistent with the documentary evidence. Exhibit C, p. 70, is an email from [Redacted, hereinafter TS], Employer's HSSE Manager, which shows Claimant was not set up to do online "Safety Training" until August 31, 2021 at 4:33 p.m. At that time, Mr. TS[Redacted] sent Claimant information to access the online training. (Ex. C). On the evening of August 31, 2021, Claimant performed on-line training as requested by Employer. (Ex. C). The email to Claimant communicating the online Safety Training instructions was not admitted into evidence, and no credible evidence was admitted regarding the specific instructions Employer provided to Claimant with respect to the online "Safety Training." Other than the August 31, 2021 email from Mr. TS[Redacted], no credible evidence was admitted demonstrating Employer attempted to contact Claimant on August 31, 2021.

13. On September 1, 2021, Employer's EB[Redacted] emailed Mr. RB[Redacted] asking if Claimant had performed light duty work. Mr. RB[Redacted] responded that Claimant was doing "a light duty course." (Ex. C).

14. At approximately 4:00 p.m., on September 1, 2021, Ms. EB[Redacted] indicated in an email that she had called Claimant and requested that Claimant return the "incident report" "ASAP." (Ex. C). Mr. RB[Redacted] testified that Claimant did return Ms. EB[Redacted] 's call and returned the incident report. The report contained in Exhibit C is undated. Mr. RB[Redacted] testified he did not know when Claimant returned the incident report, but also that Claimant returned the incident report on September 1, 2021.

15. Mr. RB[Redacted] testified that Employer made the decision to terminate Claimant on September 1, 2021, because Claimant had returned the incident report, was non-communicative and had stopped doing online training. On September 2, 2021, Employer's terminated Claimant's employment. (Ex. C). The termination letter authored by EB[Redacted] (Senior HR Manager), identified the reasons for termination as: "no call no shows, poor communication with your manager and not completing assigned work." (Ex. C). The termination letter does not reference the incident report.

16. On October 19, 2021, Respondents filed a General Admission of Liability, admitted for an average weekly wage of $100.00. (Ex. D).

17. Claimant began working for Employer in April 2021, at an initial pay rate of $21.00 per hour. After June 13, 2021, Claimant earned $27.50 per hour, and received a "shift

premium" of $2.50 per hour. Claimant also received overtime pay at the rate of $41.25 per hour, and a shift premium of $1.25, during this time. During the five full pay periods before his injury and after Claimant's raise to $27/50 per hour, (i.e., June 13, 2021 – August 21, 2021), Claimant worked an average of 95 hours per two-week period and earned an average of $1,451.35 per week, which included overtime pay and shift premiums. (Ex. B). The ALJ finds Claimant's average weekly wage at the time of injury was $1,451.35.

18. Claimant testified that he applied for and received unemployment benefits for approximately two months following his injury, ending in November 2021.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant suffered admitted injuries on August 24, 2021, and was under work restrictions through at least December 23, 2021. Notwithstanding that the Employer did not provide Claimant with a written offer of modified employment, Claimant returned to modified employment on August 31, 2021, when he performed online safety training. Accordingly, Claimant's right to TTD benefits terminated on August 31, 2021. However, upon termination of his employment on September 2, 2021, Claimant sustained actual wage loss due to his industrial injury and resulting disability. On and after September 2, 2021, Claimant remained under work restrictions that prevented him from resuming his pre-injury employment. Through at least December 23, 2021, Claimant was medically incapacitated with restrictions of bodily function that caused him to have work restrictions and impairment of his wage-earning capacity. His wage-earning capacity is thus impaired due to his industrial injury and resulting disability. No evidence was presented that Claimant has reached MMI or that his ATP has provided a written release to return to regular employment after September 2, 2021. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from August 25, 2021 to August 30, 2021, and beginning again on September 2, 2021.

Responsibility For Termination

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). "Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011).

Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for his termination. Employer's stated reason for terminating Claimant's employment was "due to no call no shows, poor communication with your manager and not completing assigned work."

No credible evidence was admitted that Employer had a specific "no call/no show" policy or that Claimant violated any such policy even if one existed. Claimant was assigned work restrictions on the morning August 25, 2021, which did not permit Claimant to perform his regular job duties, and Employer was aware of these restrictions. Nonetheless, Employer did not provide Claimant a written offer of modified employment. It was not until 4:33 p.m., on August 31, 2021, that Employer provided Claimant with access to the online training program. Thus, between August 25, 2021 and August 31, 2021, Employer did not assign Claimant work, and Claimant was under no obligation to contact Employer to advise he would be a "no show." Respondents have failed to establish by a preponderance of the evidence that Claimant violated any purported "no call/no show" policy.

Respondents have also failed to establish that Claimant volitionally failed to complete assigned work. Employer did not provide Claimant access to the online training until the late afternoon of August 31, 2021, and Claimant performed the work that evening. The evidence indicates that Employer's expectation was that Claimant would complete the online training during his normal shift, during the evenings. As found, Employer decided to terminate Claimant on September 1, 2021, before Claimant would have had the opportunity to continue with the online training that evening. Thus, Employer decided to terminate after Claimant had completed the only work Employer assigned following his injury, and before he had the opportunity to complete the training on a second day. Although Claimant did not perform the online training on September 1, 2021, this was after Employer's termination decision and was not the reason for termination. Other than the online training assignment on August 31, 2021, no credible evidence was presented

that Employer "assigned" any other work that Claimant could have completed prior Employer deciding to terminate him on September 1, 2021. Accordingly, the ALJ finds that Claimant did not volitionally fail to complete "assigned work," prior to his termination.

With respect to the alleged "poor communication," the evidence was insufficient to establish by a preponderance of the evidence that Claimant's alleged poor communication was volitional. Claimant immediately reported his injury to Employer. Although Mr. RB[Redacted] testified that he left voice and text messages for Claimant, the evidence was insufficient to establish the content of those messages, other than Mr. RB[Redacted] testifying that he left messages to "call me" and to return an incident report. Thus, the ALJ is unable to determine whether Mr. RB[Redacted]'s communications to Claimant informed Claimant of the apparent urgency Employer placed on returning the incident report or returning Mr. RB[Redacted]'s calls within any set period of time. Nor was Claimant informed his failure to immediately return the incident report would result in termination. Mr. RB[Redacted]'s testimony that Claimant refused to communicate with Employer from August 30, 2021 to September 1, 2021, is not persuasive. The only evidence that Employer attempted to communicate with Claimant during that timeframe was Mr. ST[Redacted] sending Claimant the online training at the end of the day on August 31, 2021. The ALJ finds that Respondents have failed to meet their burden of establishing that Claimant's communication issues with Mr. RB[Redacted], were volitional acts rendering the Claimant responsible for his termination.

Although Claimant was capable of the modified work that Employer assigned to him post-injury (i.e., the online training), Claimant was not "responsible" for his termination by Employer during his period of temporary disability. As such, a causal link between Claimant's industrial injury and his post-termination wage loss is established, and Claimant is entitled to temporary total disability benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, continuing until one of the criteria of § 8-42-105(3)(a)-(d), C.R.S, is met.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's average weekly wage at the time of injury was $1,451.35.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, 2020, until terminated by law is GRANTED. Insurer shall pay Claimant TTD benefit during the relevant time period, until terminated by law, subject to any applicable offsets.

2. Claimant's average weekly wage at the time of injury was $1,451.35

3. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he suffered a compensable industrial injury on December 18, 2020.

II. If Claimant sustained a compensable industrial injury, whether the medical treatment by Dr. Higgins and Dr. Zublin was reasonable, necessary and causally related to the injury.

III. Whether Claimant proved Insurer is subject to penalties under Section 8-43-304(1), C.R.S. for an alleged violation of Section 8-43-203(4), C.R.S.

The parties agreed to hold the issues of Average Weekly Wage, Temporary Total Disability, and Temporary Partial Disability benefits in abeyance.

FINDINGS OF FACT

1. Claimant is the owner-operator of Employer, a granite installation company. Claimant personally obtained workers' compensation insurance for Employer. Claimant performed work for Employer installing and repairing granite countertops at various commercial and residential locations throughout Colorado, Wyoming and Nebraska. Claimant's regular job duties included carrying heavy granite slabs from his work truck into the locations of installation.

2. On December 17, 2020 Claimant performed two installation jobs in Grand Junction, Colorado. Claimant spent the night of December 17, 2020 in nearby Montrose, Colorado, where he was scheduled to perform additional installation and repair jobs the following day. Claimant was in Montrose, Colorado for the specific purpose of performing his regular granite installation and repair duties.

3. On December 18, 2020 Claimant completed his first granite installation job of the day in Montrose, Colorado. While en route to the location of his next granite installation, Claimant was involved in a motor vehicle accident ("MVA"). As Claimant was driving through an intersection, a truck T-boned Claimant's vehicle, striking his work truck on the driver's side. Claimant was restrained by a seatbelt at the time of the MVA and the airbags did not deploy. Police subsequently arrived at the scene and filed an accident report. Claimant did not report any injury to the police.

4. Claimant testified he experienced pain in his neck, upper back and left wrist as a result of the MVA. Claimant testified did not seek medical attention at the time because he thought he could handle the pain and hoped the pain would soon subside. Claimant completed his remaining installation and repair jobs on December 18, 2020. He testified he had difficulties carrying the granite slabs. Claimant drove back to Denver, Colorado in

pain that same evening and experienced trouble sleeping. The following morning Claimant experienced worsened pain in his neck and upper back.

5. Claimant subsequently called the insurance carrier of the driver that struck his vehicle. Claimant's understanding was that no further action could take place until that insurance company received a copy of the police report. Claimant testified he continued to attempt to follow up with that insurance company to no avail.

6. Claimant ultimately sought chiropractic treatment on his own accord on January 5, 2021 with Christopher Higgins, D.C. at Metro Denver Accident & Injury Centers. Claimant reported being involved in a MVA in December 2020 with complaints of pain in his neck, upper back, shoulder, mid back, left lateral hip, left wrist and left elbow. Dr. Higgins noted cervical and thoracic x-rays did not show any pathology. Lipping/spurring degeneration of the joint was noted at T7-8 and T8-9, as well as spinal instability at C4, and retrolisthesis at C4-5. Dr. Higgins diagnosed Claimant with acute post-traumatic cervical acceleration/deceleration injury Grade III, cervical and thoracic vertebral segmental dysfunction, acute post-traumatic cervical and thoracic reflexogenic muscle spasm, and acute post-traumatic cervicogenic headache. He recommended Claimant undergo chiropractic adjustments, interferential/electrotherapy, and massage therapy.

7. Claimant testified he sought treatment with Dr. Higgins because he could no longer withstand his worsening pain and he was having difficulty sleeping and performing his regular job duties.

8. Claimant attended follow-up appointments with Dr. Higgins on January 6, 19, and 20, 2021. Claimant reported working long hours as a co-worker had recently contracted COVID-19.

9. Claimant filed an Employer's First Report of Injury on January 20, 2021, noting the December 18, 2020 MVA. Claimant testified he did not file the form or contact Insurer prior to such time because he was unaware he had a potential claim for worker's compensation.

10. Insurer filed a Claim Acknowledgment on January 20, 2021, documenting receipt of Claimant's notice of injury.

11. Insurer did not provide Claimant a list of designated physicians or send Claimant to any physician for medical evaluation and treatment.

12. Claimant subsequently sought treatment on his own with Guy Zublin, M.D. at HR Pain Management, Inc. Claimant first presented to Dr. Zublin on January 21, 2021 at a virtual appointment with complaints of neck, low back, and left wrist pain after a December 2020 MVA. Claimant reported that he had continued working his regular job duties up until three days prior, at which time he took time off due to pain and inability to lift the heavy granite slabs. Dr. Zublin observed restricted cervical range of motion. Dr. Zublin opined Claimant sustained a cervical spine and lumbar spine strain/sprain and left wrist

strain status post motor vehicle accident. He prescribed Claimant Flexeril and recommended physical therapy and spinal manipulation.

13. On February 16, 2021, Claimant's counsel submitted a letter to Insurer requesting a copy of Claimant's claim file. Claimant's counsel cited Section 8-43-203(4), C.R.S. in the request, and specifically noting Insurer had 15 days to provide Claimant the adjuster file. Claimant's counsel received a fax confirmation indicating the fax had been successfully transmitted.

14. Insurer did argue nor produce any evidence suggesting it did not receive Claimant's February 16, 2021 written request.

15. Insurer filed a Notice of Contest on February 24, 2021.

16. Due to an inability to perform his regular work duties of lifting and carrying heavy granite slabs, Claimant began working as a commercial truck driver for an unspecified period of time. Claimant subsequently returned to working for Employer in a different capacity. Claimant performed fabrication duties in a shop which required operating a forklift and using a small tool to polish granite.

17. Claimant continued to treat with Dr. Higgins on February 25, 2021 and March 2, 5, 9, 11 and 17, 2021. Claimant last saw Dr. Higgins on March 30, 2021. Claimant testified that he ceased treatment with Dr. Higgins as he felt the treatment worsened his condition.

18. Claimant did not seek or undergo any further medical treatment from March 30, 2021 to October 4, 2021. Claimant testified that the gaps in treatment were because he felt the treatment had not improved his condition.

19. On October 4, 2021 Claimant saw Dr. Zublin for an in-person evaluation. Dr. Zublin noted Claimant had not attended any follow-up appointments with his office since his initial evaluation. Claimant complained of continued neck pain and dysfunction and thoracic pain. Claimant reported to Dr. Zublin that he ceased chiropractic treatment as it made him worse. Dr. Zublin referred Claimant for a cervical MRI.

20. Claimant underwent a cervical spine MRI on October 15, 2021. Radiologist Michael Seymour, M.D.'s impression was: "Multilevel degenerative disc disease and facet arthrosis. Mild spinal canal stenosis at C4-C5 and C6-C7. Mild left foraminal narrowing at C3-C4 and C4-C5." (Cl. Ex. 15, p. 75).

21. Claimant filed an Application for Hearing on August 4, 2021 endorsing, *inter alia*, compensability and penalties for Insurer's failure to produce the adjuster file requested by Claimant on February 16, 2021.

22. On August 17, 2021 Insurer produced a privilege log and copy of the claim file to Claimant. Insurer did not offer any explanation or evidence regarding its delay in producing the claim file.

23. Respondents filed a Response to Application for Hearing on September 3, 2021.

24. On October 25, 2021, J. Tashof Bernton, M.D. performed an Independent Medical Examination ("IME") at the request of Insurer. Dr. Bernton noted Claimant reported to him that he did not experience any pain from the MVA until a few days after the accident. Claimant reported to Dr. Bernton being able to do pretty much everything with respect to activities. Claimant complained of 5-6/10 pain in his neck and upper back. On examination, Dr. Bernton noted Claimant had decreased cervical range of motion on a "voluntary basis." He opined that his review of Claimant's medical records noted no clearly objective abnormalities, including examinations and the cervical MRI, which demonstrated multilevel degenerative changes unrelated to the MVA. Dr. Bernton concluded Claimant did not have any objective abnormalities correlating with his subjective complaints. Dr. Bernton further noted Claimant had not been working under any restrictions and did not seek medical care for several months.

25. Dr. Bernton opined that, at the most, the MVA resulted in minor and self-limited muscular strains. Dr. Bernton concluded that the initial four chiropractic visits and one telemedicine visits was sufficient care for Claimant. He found Claimant to be at maximum medical improvement ("MMI") as of January 21, 2021. He noted an injury that did not cause symptoms until days later would not be expected to cause symptomatology that persists for 10 months. Dr. Bernton subsequently reviewed Dr. Higgins' February and March 2021 records. Dr. Bernton continued to opine Claimant reached MMI on January 21, 2021, and that his subsequent chiropractic treatment could be considered medical maintenance care.

26. Claimant testified he does not have issues lifting items, but that he continues to experience 6/10 neck and upper back pain. Claimant testified that his wrist pain resolved four or five months prior to the hearing. Claimant testified that he is still treating with Dr. Zublin and that he would like to continue his care with HR Pain Management.

27. The ALJ credits Claimant's testimony, as supported by the medical records and opinions of Drs. Higgins, Zublin and Bernton, and finds that Claimant proved it is more probable than not he sustained a compensable industrial injury as a result of the MVA on December 18, 2021.

28. Claimant proved it is more probable than not the medical treatment provided by Dr. Higgins and Dr. Zublin is reasonably necessary and causally related to his work injury.

29. The right of selection of an ATP passed to Claimant. Claimant selected Dr. Higgins as his treating physician. Dr. Higgins is an authorized provider.

30. Claimant made a proper showing to support his request to change physicians from Dr. Higgins to Dr. Zublin.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an

employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See Id.* at 865.

Claimant's injury arose out of the course and scope of employment with Employer. Travel was a substantial part of service to Employer and a requirement of Claimant's work duties. At the time the MVA occurred, Claimant was performing his regular work duties, which required driving from one job site to another job site to perform installations. It is not alleged, nor is there any evidence, Claimant was on a substantial personal deviation at the time of the MVA such that he was removed from the course and scope of employment.

Respondents note Claimant's delay in seeking medical treatment, delay in filing a claim, and his inconsistent pursuit of medical treatment as evidence that Claimant did not sustain a work injury. Such factors, in light of the totality of the evidence, do not convince the ALJ Claimant did not sustain a compensable work injury.

Claimant credibly testified he did not initially seek medical treatment because he hoped his symptoms would subside and that he subsequently sought medical treatment when his symptoms progressively worsened. Upon seeking medical treatment, Claimant consistently reported back and neck symptoms in connection with the December 2020 MVA. There is no evidence Claimant was experiencing similar symptoms or undergoing

treatment leading up to the work injury. Claimant's physicians opined that Claimant sustained injuries as a result of the MVA. Dr. Higgins credibly opined Claimant sustained acute post-traumatic cervical and thoracic conditions, while Dr. Zublin credibly opined Claimant suffered cervical and lumbar strains. Respondents' IME physician, Dr. Bernton, credibly concluded that, while minor, Claimant did sustain a muscular strain as a result of the MVA and that certain treatment was reasonably necessary and related. As a result of the work injury, Claimant was no longer able to perform his regular job duties. Here, the preponderant evidence establishes that Claimant sustained a work injury as a result of the MVA that caused disability and the need for medical treatment.

Medical Treatment

A claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. See § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury, or suggest a course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000); *Walker v. Life Care Centers of America*, W.C. No. 4-953-561-02 (March 30, 2017); *Jacobson v. American Industrial Service/Steiner Corp.,* W.C. No. 4-487-349 (April 24, 2007).

As Claimant proved he sustained a compensable industrial injury, Claimant is entitled to reasonably necessary treatment to cure and relieve the effects related to the injury. As evidenced by the medical records, Claimant sought treatment with Dr. Higgins and Dr. Zublin for neck and back symptoms as a result of the work injury. The preponderant evidence establishes that such treatment was reasonably necessary to identify Claimant's condition and to relieve his symptoms.

Respondents argue that any additional treatment Claimant may require for his back and neck are not due to any work incident. Respondents contend that Claimant's current complaints cannot be related to the MVA as he has no objective findings and he personally caused a significant period of non-treatment. It is noted that Dr. Bernton opined Claimant's symptomatology would not be expected to persist for several months, and that Claimant reached MMI on January 21, 2021.

A finding here that no future medical treatment is reasonably necessary or related to the work injury would effectively constitute a determination by the ALJ that Claimant has reached MMI. The ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, WC's 4-947-316-01 & 4-935-813-03 (ICAO, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had

reached MMI and was thus erroneous). While Respondents' IME physician opined Claimant has reached MMI, neither an ATP or DIME has done so. Respondents' obligation to provide related medical benefits to cure or relieve the effects of Claimant's industrial injury continues until Claimant reaches MMI. Respondents retain the right to contest the reasonableness and necessity of specific treatment.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

It is undisputed Claimant sought treatment on his own accord with Dr. Higgins prior to notifying Insurer of his industrial injury. Claimant subsequently notified Insurer of his injury by filing Employer's First Report of Injury on January 20, 2021. Insurer received such notice, as indicated by their acknowledgment on January 20, 2021. At that time it

became Insurer's obligation to appoint an ATP. Claimant credibly testified, and no evidence was offered to the contrary, that Insurer did not subsequently provide Claimant with list of designated treatment providers or otherwise designate an ATP. Accordingly, the right of selection of an ATP passed to Claimant. Claimant selected Dr. Higgins as his ATP by undergoing evaluation and treatment with Dr. Higgins from January 2021 through March 2021. Dr. Higgins is thus an authorized provider in this claim.

Change of Physician

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

Claimant subsequently ceased treatment with Dr. Higgins and underwent evaluation and treatment with Dr. Zublin. Claimant requests a change of ATP from Dr. Higgins to Dr. Zublin. Insurer made no argument regarding Claimant's request to select Dr. Zublin as his treating physician. Dr. Zublin has been treating Claimant and is familiar with his condition. The ALJ has considered Claimant's need for medical treatment while protecting Respondents' interest under the circumstances. Claimant has made a proper showing to support his request to change his ATP from Dr. Higgins to Dr. Zublin.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo.

App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Claimant alleges Insurer is subject to penalties for its' failure to timely produce the claim file in violation of §8-43-203(4), C.R.S.

Section 8-43-203(4), C.R.S. provides,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

Claimant's counsel submitted a written request to Insurer for a copy of Claimant's claim file on February 16, 2021. Insurer does not contend, nor is there any evidence indicating, Insurer did not receive Claimant's written request. Pursuant to Section 8-43-203(4), Insurer was required to provide the claim file to Claimant by March 3, 2021. It is undisputed Insurer did not provide a copy of the claim file to Claimant until August 17, 2021, a period of 166 days. Insurer's failure to provide the claim file to Claimant within the required time frame constitutes a violation of Section 8-43-203(4), C.R.S.

As Claimant established Insurer violated the Act, it is Insurer's burden to prove its conduct was reasonable. Insurer provided no rational argument justifying its violation of Section 8-43-203(4), C.R.S. As found, Insurer provided no explanation or evidence at all regarding its failure to provide the claim file to Claimant within the time period required. There is no evidence nor does Insurer contend that it did not receive Claimant's request, that there was some miscommunication, or that Insurer did, in fact, make an attempt to send the claim file to Claimant prior to August 17, 2021. Without explanation, Insurer's failure to timely provide the claim file to Claimant does not constitute the action of an objectively reasonable insurance carrier.

As Insurer committed a violation of the Act and its inaction was objectively unreasonable, imposition of penalties is appropriate.

Curing a Violation

Section 8-43-304(4), C.R.S. permits an alleged violator 20 days from the date of mailing of an Application for Hearing that asserts penalties to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716 (ICAO, May 16, 2007).

Insurer argues that no penalty should be assessed because Insurer cured the violation within the 20 days permitted under Section 8-43-304(4), C.R.S. It is undisputed Insurer provided the claim file and privilege log to Claimant on August 17, 2021, within 20 days of Claimant's August 4, 2021 Application for Hearing. As Insurer cured the violation, Claimant is required to prove by clear and convincing evidence Insurer knew or reasonably should have known Insurer was in violation.

Claimant submitted a written request to Insurer on February 16, 2021 requesting the claim file. The written request specifically cited Section 8-43-203(4), C.R.S., noting the 15-day time frame for producing the file. As discussed, Insurer provided no explanation or evidence regarding their failure to provide the claim file to Claimant prior to August 17, 2021. The evidence indicates Insurer did receive Claimant's written request at the time it was submitted. While Insurer filed a Notice of Contest on February 24, 2021, there is no evidence Insurer made any attempt to produce the requested claim file prior to August 2020. Here, Respondents reasonably should have known they were in violation of Section 8-43-203(4), C.R.S. when they received a written request from Claimant citing the applicable statute and time period and took no action to comply until several months later. As Insurer had constructive knowledge of its violation, assessment of penalties is appropriate in this case.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the

ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

The evidence does not establish more than minimal harm to Claimant resulting from Insurer's violation. Despite Insurer's delay in producing the claim file, Claimant continued to undergo medical treatment. No evidence was presented as to any financial strain caused to Claimant due to Insurer's violation. Claimant did not file an Application for Hearing on compensability and penalties until approximately six months after the Notice of Contest was filed. There is no evidence Claimant repeatedly followed-up with Insurer regarding the written request or that there was any pattern of misconduct on behalf of Insurer. Absent evidence of the Insurer's ability to pay a fine, considering the de minimis amount of the fine imposed herein, the ALJ determines that a penalty of $5.00/day for 166, totaling $830.00, is appropriate. *See In re Claim of Lange*, WC 4-907-620-002 (ICAO, January 18, 2019) (the ALJ's assessment of a $2.00/day penalty was a reasonable exercise of discretion aimed at penalizing the claimant's disobedient conduct while acknowledging the minimal harm to the respondents).

ORDER

1. Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury on December 18, 2020.

2. The medical treatment provided by Dr. Higgins and Dr. Zublin was reasonably, necessary and related to Claimant's December 18, 2020 industrial injury. Respondents are liable for the treatment Claimant has received from Dr. Higgins and Dr. Zublin, as well as other reasonably necessary and causally related medical treatment.

3. The right of selection of an ATP passed to Claimant. Dr. Higgins is an authorized provider.

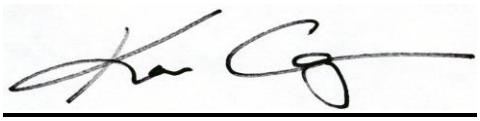
4. Claimant's request to change treating physicians from Dr. Higgins to Dr. Zublin is granted.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits as a result of his August 17, 2020 work injury.

II. Determination of Claimant's average weekly wage ("AWW").

STIPULATIONS

The parties stipulated to the compensability of the claim and Respondents' liability for reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a machine operator. Claimant's job involves frequent walking, climbing stairs and ladders, and cleaning.

2. On September 11, 2015 Claimant sustained a work injury to multiple body parts, including his left lower extremity, which resulted in complaints of pain and instability in his left knee. Claimant continued to work without restrictions and was able to perform his regular job duties leading up to the work injury at issue.

3. Claimant sustained an industrial injury while working for Employer on August 17, 2020.

4. Claimant presented to Employer's health service clinic on August 17, 2020 reporting left knee and right shoulder pain. Claimant reported he slipped and fell forward, striking his knee and elbow. No objective findings were noted for the knee, other than tenderness on the anterior aspect of the knee. Redness, swelling and an abrasion was noted on the right shoulder. Claimant continued to report right shoulder and left knee symptoms at a follow-up evaluation at Employer's clinic on August 18, 2020. Employer subsequently sent Claimant for evaluation at UCHealth.

5. Claimant presented to Oscar Sanders, M.D. at UCHealth on August 19, 2020 with right shoulder and left knee pain. Claimant reported that he slipped and fell at work, striking his right shoulder on the base of the machine and striking his left knee on the floor. Claimant reported he also hit his head during the incident but did not lose consciousness. Claimant further reported a history of a prior left knee injury in 2006, managed with physical therapy and injections. On examination, Dr. Sanders noted ecchymosis diffusely about the proximal aspect of the right upper extremity with no effusion or ecchymosis in the left knee. Dr. Sanders diagnosed Claimant with a contusion

of multiple sites of the right shoulder as well as a left knee contusion. He placed Claimant on modified duty with work restrictions of: lifting a maximum of 1-2 pounds right extremity; no repetitive lifting; carrying a maximum of 1-2 pounds; pushing/pulling a maximum of 5 pounds; no reaching overhead, reaching away from the body, or repetitive motion with the right arm; and no crawling, kneeling, squatting, or climbing. Dr. Sanders recommended Claimant perform seated duties only.

6. On August 19, 2020, Claimant underwent x-rays of the right shoulder and left knee, which were normal.

7. Dr. Sanders continued Claimant's same restrictions on August 25, 2020.

8. On August 26, 2020, Claimant presented to Kurt Dallow, M.D. at Orthopaedic & Spine Center of the Rockies. Claimant reported slipping and falling from a machine and striking his right shoulder on the edge of the machine and hitting his left knee, head and neck. The record contains no documentation of a prior left knee injury or left knee complaints. Dr. Dallow diagnosed Claimant with a right shoulder hematoma, right shoulder contusion, likely concussion, and left knee pain.

9. On August 31, 2020, Claimant underwent a left knee MRI which produced the following impression: (1) medial meniscal tear; (2) chondral irregularity and evidence of prominent marrow edema within the underlying medial tibial plateau; and (3) high-grade fissuring involving the median ridge patella cartilage with underlying subchondral edema.

10. Dr. Sanders reexamined Claimant on September 2, 2020. Dr. Sanders noted Claimant's MRI evidenced medial meniscus tearing as well as chondral damage that was likely secondary to his fall at work. Claimant reported experiencing recurrent headaches and dizziness and now indicated he likely had a brief period of loss of consciousness during the August 17, 2020 incident. Dr. Sanders noted a normal neurological examination. He opined Claimant' right shoulder hematoma had markedly improved. Dr. Sanders recommended a CT scan of the spine and referred Claimant to Dr. Snyder for an orthopedic surgery evaluation of his left knee. Dr. Sanders continued to restrict Claimant from crawling, kneeling, squatting and climbing. He no longer restricted Claimant to performing only seated duties. Claimant was to be allowed to transition from sitting to standing as needed, was restricted from high impact activities, and advised to avoid stair climbing or work on uneven surfaces.

11. On September 9, 2020, Claimant presented to Dr. Dallow for a follow-up evaluation. Dr. Dallow noted Claimant's right shoulder hematoma had markedly reduced in size. Dr. Dallow released Claimant from further treatment for his right shoulder.

12. Claimant underwent a CT scan of his brain on September 15, 2020, which was unremarkable.

13. Claimant presented to Joshua Snyder, M.D. on September 17, 2020. Claimant reported a previous injury to his left knee that occurred about five years prior. Claimant reported that on August 17, 2020 he slipped and fell, twisting his knee and hitting the

floor. Dr. Snyder reviewed the left knee MRI and opined that no meniscal tear was present. He noted there was severe body edema along the medial tibial plateau, some chondromalacia patella, and opined that Claimant appeared to have a potentially chronic MCL strain or acute on chronic MCL strain. Claimant also underwent an x-ray of his bilateral knees, of which Dr. Snyder opined Claimant had good overall alignment, no significant joint space narrowing, and some squaring of the femoral condyles and a small osteophyte medially.

14. On October 7, 2020, Dr. Sanders referred Claimant for a physiatry consultation and recommended Claimant start physical therapy and vestibular rehabilitation. He continued Claimant's restrictions. Dr. Sanders again continued Claimant's restrictions on November 16, 2020.

15. On November 16, 2020, Claimant returned to Dr. Snyder for a follow-up evaluation. Dr. Snyder noted Claimant continued to experience left knee pain. He thought the medial collateral ligament improved considerably, but that Claimant was having more arthritic-type discomfort and bony edema discomfort. Dr. Snyder performed a cortisone injection in the left knee and recommended physical therapy.

16. Claimant returned to Dr. Sanders on December 15, 2020. Dr. Sanders noted that it appeared Claimant's right shoulder, neck/back pain, and post-concussion symptoms had resolved. Dr. Sanders noted Claimant was counseled regarding continued physical therapy, but that Claimant felt comfortable with only his home exercise program. Dr. Sanders began Claimant on an anti-inflammatory medication and advised Claimant to use his knee brace as needed. He recommended Claimant follow-up with Dr. Snyder for reconsideration of surgical options in the event his symptoms did not improve with continued conservative measures. Dr. Sanders continued Claimant on his current restrictions, which were: crawling/kneeling/squatting/climbing as tolerated; and "Allow transition from sit to stand as needed by employee. No high impact activities (i.e. running, jumping). Avoid work on uneven surfaces, terrain." (R. Ex. E, p. 98). Dr. Sanders opined Claimant would be approaching maximum medical improvement and would be ready for a trial of full duty work.

17. On February 4, 2021, Lawrence Lesnak, D.O. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported having chronic diffuse left leg symptoms dating back to an injury sustained in September 2015 and that his symptoms had been constant in nature since such time. Claimant reported that his pre-existing left leg symptoms had worsened since the August 2020 work injury. Regarding the mechanism of injury, Dr. Lesnak noted that Claimant reported he must have fallen backwards when he slipped and fell but somehow struck his knee. Dr. Lesnak concluded there is no evidence supporting Claimant's claim that he sustained a left knee injury on August 17, 2020, noting Claimant's chronic pre-existing diffuse left leg symptoms. Dr. Lesnak opined that no acute injury or trauma-related pathology of the left knee or left leg was identified on Dr. Sanders' August 17, 2020 evaluation or imaging. He remarked that Claimant's reported mechanism of injury changed over time, and that the mechanism of injury reported at his evaluation was inconsistent with any left knee injury.

18. Dr. Lesnak opined that Claimant possibly sustained a mild posterior scalp contusion as a result of the August 17, 2020, with no evidence of mild closed head injury. He concluded that there was no reproducible objective findings on clinical examination supporting any type of symptomatic cervical spine pathology. Dr. Lesnak ultimately opined that Claimant most likely sustained a contusion injury to his right scapular/shoulder girdle region and possibly to the posterior occiput and neck soft tissues as a result of the August 17, 2020 work incident. He concluded that these potential injuries would have completely resolved within several days to several weeks following the incident. Dr. Lesnak opined that Claimant's current subjective complaints were without any reproducible objective findings. He noted that he administered a psychosocial screening test to Claimant that found a high level of somatic pain complaints. Dr. Lesnak opined that there appeared to be significant psychosocial/psychologic factors influencing Claimant's symptoms, recovery and perceived function. He opined that Claimant had reached maximum medical improvement ("MMI") without permanent impairment, and did not require any further medical care or restrictions.

19. At Claimant's request, Sander Orent, M.D. was present via video during Dr. Lesnak's IME and virtually observed the examination. Dr. Orent issued a report dated February 18, 2021, noting what he believed to be various omissions and issues in Dr. Lesnak's IME report and performance of the IME.

20. On February 18, 2021, Employer placed Claimant on a medical leave of absence. Employer's letter to Claimant dated February 19, 2021 noted Claimant was subject to the following restrictions: "Crawling, kneeling, squatting, and climbing as tolerated. Allow transition from sit to stand as needed by employee. No high impact activities (i.e. running, jumping). Avoid work on uneven surfaces, terrain." (Cl. Ex. 1, p. 2).

21. Employer was unable to accommodate Claimant's work restrictions. Claimant has not worked since February 19, 2021 due to his work restrictions and continued left knee symptoms.

22. Dr. Lesnak testified by prehearing deposition on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report. He explained that, per his review of the medical records, Claimant's reported medical history appeared inconsistent. He opined that many of Claimant's subjective complaints were not supported by reproducible, objective findings, noting pain behaviors and nonphysiologic responses on his examination. Dr. Lesnak testified that Claimant reported experiencing left leg and left knee symptoms in the same areas as his chronic, pre-existing symptoms, only worsened. Dr. Lesnak reiterated that Dr. Sanders' initial exam and the imaging showed no evidence acute trauma to Claimant's left lower extremity. He explained that nothing on his examination showed any evidence of specific symptomatic pathology related to the August 17, 2020 incident. Dr. Lesnak testified that the medical records or imaging studies did not reveal any evidence of acute trauma to Claimant's left knee or left leg, neck or brain.

23. Dr. Lesnak testified that it appears Claimant may have sustained a contusion of his right scapula and that he had bruising on his upper right arm, which he noted would

typically resolve within several days to two weeks. He testified that no work restrictions would be related to bruising of the upper right extremity. Dr. Lesnak testified that, without any reproducible objective findings on exam, Claimant does not require any type of permanent or even temporary work restrictions related to the reported occupational injury. Dr. Lesnak addressed Dr. Orent's report, disagreeing with Dr. Orent's characterization of his examination and his IME report.

24. Dr. Orent testified at hearing as a Level II accredited expert in occupational medicine. Dr. Orent reviewed Dr. Lesnak's deposition testimony and the audio recording of Dr. Lesnak's IME. Dr. Orent testified to his belief that Dr. Lesnak did not accurately document Claimant's reports of the mechanism of injury and his symptomatology. Dr. Lesnak testified to his belief that there were discrepancies in Dr. Lesnak's documentation regarding the physical exam findings and what Dr. Orent observed.

25. Claimant credibly testified at hearing that he has not worked since February 19, 2021 due to Employer's inability to accommodate his restrictions, as well as due to his continued left knee symptoms.

26. The ALJ credits the opinion of Dr. Sanders, as supported by Claimant's testimony and the medical records, over the opinion of Dr. Lesnak.

27. Claimant proved it is more probable than not he is entitled to TTD from February 19, 2021 and ongoing. Due to the August 17, 2020 work injury, Claimant was no longer able to perform his regular work duties. As a result, Claimant has not worked or earned wages since February 19, 2021.

28. Claimant earns an hourly wage. Claimant wage records reflect Claimant's weekly earnings varied on hours worked and if he earned any overtime pay, penalty pay or specialty COVID pay. From August 12, 2019 to August 16, 2020, Claimant earned a total of $66,316.27 in wages, averaging $1,251,25 weekly. For the week-long pay period ending August 16, 2020, Claimant earned $1,215.48. Considering the variation in Claimant's wages, the ALJ finds that an AWW of $1,215.48 is a fair approximation of the claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case

must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release

to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved it is more likely than not he is entitled to TTD benefits for the requested time period. Claimant has consistently reported left knee symptoms since his August 17, 2020 work injury. Despite a prior left knee injury and pre-existing left knee complaints there is no evidence that, leading up to the August 17, 2020 work injury, Claimant's symptoms necessitated treatment or rendered him unable to perform his regular job duties. While Dr. Lesnak noted Claimant did not complain of any different or new left leg symptoms after the August 2020 injury, Dr. Lesnak did acknowledge Claimant's report of worsened symptoms after the August 17, 2020 work injury. Claimant's pre-existing knee condition does not preclude a determination that the August 17, 2020 work incident aggravated his condition.

Claimant has been on medical restrictions since sustaining the August 17, 2020 work injury. Claimant's restrictions initially applied to both his upper and lower extremities (i.e. lifting restrictions and seated duties only). While Dr. Sanders noted that it appeared Claimant's neck, back and head issues had resolved, he noted ongoing left knee issues and continued restrictions of no crawling, kneeling, squatting, or climbing. These restrictions impaired Claimant's ability to effectively perform his regular work duties. As Respondents were unable to accommodate these restrictions as of February 19, 2021, Claimant missed work and suffered actual wage loss. Claimant credibly testified he has not work since February 19, 2021 due to his restrictions and ongoing left knee problems. The preponderant evidence establishes the work injury produced a disability that resulted in Claimant leaving work for more than three work shifts and suffering actual wage loss. Accordingly, Claimant is entitled to TTD benefits from February 19, 2021 and ongoing, until terminable by law.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given

period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, Claimant's weekly earnings varied. Based on review of the wage records, an average weekly wage of $1,215.48 is a fair approximately of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant sustained a compensable industrial injury on August 17, 2020.

2. Respondents shall pay Claimant TTD benefits from February 19, 2021 and ongoing, until terminated by statute.

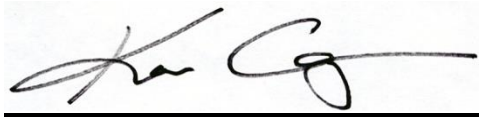
3. Claimant's AWW is $1,215.48.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-491-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD from the date of his termination of employment on September 9, 2021.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits following his right shoulder surgery on February 15, 2022 until terminated by law.

III. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination warranting a denial of TTD benefits.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on the issue of compensability, medical benefits that were authorized, reasonably necessary and related to the injury, average weekly wage and temporary disability benefits on November 5, 2021.

Respondents filed a General Admission of Liability on December 3, 2021 for medical benefits only. No average weekly wage is declared.

Respondents filed a Response to Claimant's November 15, 2021 Application for Hearing on December 17, 2021 on issues of "Offsets. Wages. Whether Claimant left work because of the injury."

STIPULATIONS

The parties stipulated to an AWW of $840.00 per week at time of the hearing.

Respondents also stipulated that Respondents never denied the surgery recommended by Dr. Marc Failinger on August 26, 2021 or formally requested on September 2, 2021 and the surgery and medical care regarding Claimant's right shoulder surgery is reasonably necessary and related to the July 21, 2021 work related injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

a. The injury and report

1. Claimant was 51 years of age at the time of the hearing. He was hired by Employer as of February 11, 2020 and was promoted to Warehouse and Delivery Associate on September 7, 2020, earning $20.50 per hour and employed full time.

Claimant's Workers' Claim for Compensation noted he earned $21.00 per hour for a total wage of $840.00 per week.

2. Claimant was injured in the course and scope of his employment on July 21, 2021 while lifting steel pipes from a broken shipment.

3. The Employer's First Report of Injury was completed by Claimant on July 22, 2021 stating that Claimant notified William Klumb of the work related injury to his right arm, shoulder and wrist. He stated that there were onsite cameras to witness his accident.

b. Medical records

4. Claimant was first seen at Concentra on July 28, 2021 by Tanya Manning. Claimant was referred to physical therapy (PT), provided medications and hot/cold compresses for home use as well as restricted from use of the right upper extremity. Claimant started PT on the same day.

5. On August 9, 2021 physician assistant Nathan Adams of Concentra continued the order of therapy, stated that Claimant's objective findings were consistent with Claimant's report of his work related mechanism of injury, and continued to limit Claimant's work to no use of the right upper extremity.

6. Claimant underwent an MRI of the right shoulder on August 19, 2021 on referral from Mr. Adams. Dr. Brian Cox read the diagnostic testing as showing a complete supraspinatus tendon tear with retraction of the tendon stump to the medial humeral heard (3 cm), tendonitis of the infraspinatus (moderate) and of the subscapularis (mild) as well as no evidence of cuff muscle atrophy or edema and mild to moderate acromioclavicular degenerative joint disease.

7. On August 20, 2021 Mr. Adams changed Claimant's work restrictions to lifting 5 lbs. to chest or shoulder level with the right arm, no use of the right hand above the shoulder level, which were repeated on September 17, 2021 and October 1, 2021.

8. Claimant was evaluated by Dr. Mark Failinger on August 26, 2021 pursuant to a referral from Mr. Adams and was seen in the Concentra Medical Center office. Dr. Failinger noted that Claimant was working for Employer as a warehouse worker since February 2020. He documented Claimant was picking up 24 foot pipes, weighing up to 100 lbs. Claimant attempted to lift them up to his shoulder level, tried to stack them and then tried to push them and as he was doing so Claimant noted pain in his right shoulder. Dr. Failinger stated that Claimant reported the incident and was sent to Concentra. He documented Claimant had some improvement with physical therapy but not significantly with either pain or range of motion. Claimant reported to Dr. Failinger weakness and loss of strength with loss of range of motion. Claimant reported right sided neck discomfort that migrated down to the right elbow. On exam of the right shoulder, Dr. Failinger found discomfort in the AC joint, greater tuberosity with palpation but no swelling, warmth or redness. He found loss of range of motion with discomfort, though no instability, and 4/5 strength with external rotation and abduction. He reviewed the MRI films and noted that there was a large supraspinatus tear with maceration and moderate infraspinatus tendinosis and AC joint arthritis. He also noted some mild irregularity of the labrum. Dr. Failinger recommended surgical repair and for Claimant to quit smoking in order to have

any chance of healing following surgical repair as the repair would be difficult and the odds of healing were not great. Dr. Failinger also stated that Claimant would have to remain without active range of motion of the right shoulder, other than passive range of motion, for at least six weeks following surgery.

9. On September 2, 2021 Dr. Failinger's office sent the request for prior authorization for right shoulder scope, rotator cuff repair, decompression and possible biceps tenodesis vs. tenolysis to the Insurer's adjuster.

10. Claimant was seen by Dr. Scott Richardson (Concentra) on November 19, 2021. He noted that they still did not have approval of the right, dominant, shoulder surgery, explaining that Claimant's pain came on suddenly with lifting pipes at work on July 21, 2021. Dr. Richardson noted Claimant was seen by Dr. Mark Failinger on August 26, 2021, who recommended surgery of the right shoulder and requested approval. On exam, Dr. Richardson noted diffuse glenohumeral joint tenderness and limited range of motion with tenderness in the right paraspinal and right trapezius muscle. He assessed traumatic complete tear of the right rotator cuff with right shoulder strain and tendinosis of the shoulder. He dispensed medications and ordered further therapy for reduction of pain, inflammation, swelling and spasm. He insisted that there was a need to obtain approval for the surgery and scheduling. He stated that the objective findings were consistent with the history and mechanism of injury. He provided Claimant with modified duty restrictions of lifting to 5 lbs. to mid chest level with the right arm, and no reaching above shoulder height with the right arm. Dr. Richardson stated that MMI and impairment were unknown at that time.

11. Claimant had a preoperative evaluation on February 4, 2022 with Dr. Failinger. Claimant reported he had moderate to severe pain of the right shoulder, including throbbing that was frequent, exacerbated by elevation of the arm and lifting. Dr. Failinger noted moderated tenderness of the supraspinatus, positive Hawkins-Kennedy and impingement tests and that Claimant was ready to proceed with surgery.

c. Termination

12. On September 3, 2021 the Director of Operations and HR Manager (hereinafter the HR Manager or MS) authored Personnel Documentation, from an oral report by the Office Manager (LP). The Office Manager stated that Claimant had left the worksite for approximately one hour without advising where he was going. She also advised that the day before, claimant had smelled and had left early as he was not feeling well. She also reported that Claimant had hit her behind with his hat, then exclaimed that "[I]t wasn't my hand!" The Director asked Claimant if he had done this and Claimant denied it. The Director advised in the Personnel Documentation that

> *[h]e had a long talk with [Claimant] and it's becoming increasingly difficult to reason with him while he's so emotionally frustrated with his lame arm.* I was not able to accomplish much during our conversation other than to tell him that I am helping him through this WC injury as swiftly as possible. I have emailed Trevor from [Insurer] and will follow-up with [Claimant] when I have answers. (*Emphasis added.)*

13. The end of the Personnel Documentation indicated an addendum with the Office Manager's email which stated that Claimant had previously made an inappropriate comment about her body to her, and that Claimant had apologized for the comment.

14. On September 9, 2021 at 9:00 a.m. the HR Manager sent Claimant an email terminating his employment with Employer due to allegations of sexual harassment and Insubordination. The notice provided no other explanation and requested the keys and uniforms be returned and that his final paycheck would be handed over if the uniforms were returned. It further advised not to access the building as the alarm code had been changed.

15. Claimant responded to the email the following morning questioning the termination. He stated that he had never sexually harassed anyone in his life. He also advised he did not know what insubordination employer was alleging. He was under the impression that Employer was finally going to adjust his work to comply with the work restrictions imposed by his providers. He advised that unloading the trucks was continuing to injure his right shoulder. He advised that he struggled to lift chemicals that he struggled to squeeze into the chemical warehouse. He requested that the Director reconsider his decision. He recognized he had not been very easy to work with as he was in pain and trying to cope with his injury and loss of strength in his arm. Claimant stated that ["T]hat's why I was asking if you had heard anything back from Workers' Comp." Claimant further stated:

> *Friday you mentioned that you honestly shouldn't have me there if you were following the doctor's restrictions*. …
>
> So, I am asking pleadingly, Please reconsider. After my shoulder recovers, I promise that I will not disappoint. I am sorry that I got injured and that everyone was having to do a lot of my duties. Just having these few days have helped me realize that I haven't been very pleasant to be around, and for that, I'm very sorry to everyone. (*Emphasis added*).

d. Claimant's testimony

16. Claimant testified that the providers taking care of his right shoulder attempted multiple times to obtain authorization for the surgery without success. It was not until approximately February 2022 when he finally received confirmation from his attorney's office that the surgery could proceed. He immediately scheduled the pre-op and surgery, which was performed on February 15, 2022 by Dr. Failinger.

17. Claimant testified that he continued to work full duty after the work injury as there was no modified duty work. He was still required to perform his regular job unloading semis, moving 50 to 500 lb. containers, despite his restrictions. He further testified that he advised both his supervisors (WK and MS) that he had trouble with the unloading of the chemicals and did not think he was capable of performing the job. He was under a 5 lbs. restriction at the time and every job he performed required him to lift in excess of that amount. He stated his employer advised that since he was using a forklift to move the chemicals, his restrictions did not matter. Claimant interpreted this to mean he had to continue doing the job despite his restrictions.

18. Claimant stated that the Install Manager (JS) texted Claimant multiple times requiring Claimant to load chemicals on another truck that did not have a tailgate lift, so he had to lift the 150 lb. chemical containers with a pallet jack and from the wooden pallet to the bed of the truck as well as lift the wooden pallets which weighed over 10 lbs. Claimant complied with the request that he continue to perform his job. He stated that

90% of the job was not in the warehouse itself, but delivering the chemicals throughout the state. He stated he engaged with female customers frequently.

19. Claimant stated that the Office Manager (LP) was the one giving him instructions about what he was to do during the day. She never stated that Claimant had sexually harassed her at any time, that he had been insubordinate, or that he was not doing his job correctly.

20. Claimant stated that he received the September 9, 2021 email but that he did not know anything about a claim of sexual harassment or insubordination. Nor did Claimant have any discussions with the Office Manager (LP) or the HR Manager regarding the claims of sexual misconduct or insubordination. At no time did Claimant receive any warnings regarding either type of conduct.

21. Claimant stated that his termination really had to do with his workers' compensation claim, his work restrictions, his complaints that he was unable to do the work without hurting himself, the request for surgery and nothing to do with any inappropriate behavior on his behalf. He stated that if any such conduct was happening, that his employer had multiple video recorders working in all areas of the warehouse that would have caught any inappropriate conduct, and none had been produced. (No videos were submitted as exhibits to the hearing.)

22. Claimant was not released from medical care or placed at maximum medical improvement by his providers from Concentra by the time of the hearing.

23. Lastly, while Employer requested multiple items be returned following the formal termination, Claimant stated that he returned all items except the phone as it contained multiple pictures and texts of his family members, which he was not able to erase because the company turned off the phone before he was able to delete them. The Office Manager (LP) showed up to Claimant's home, approximately one month after the termination, to retrieve the items.

e. Testimony of Office Manager (LP)

24. The Office Manager reported that she had worked for employer for approximately two years as the Office Manager. The Office Manager alleged that Claimant had sexually harassed her in at least one event which had occurred a little after she started, well prior to the Claimant's termination. The last time was when Claimant hit her with his hat on the behind. She stated that Claimant apologized to her and that he immediately stated it was not his hand but his hat.

25. She orally reported the last incident about Claimant touching her with his hat to the Human Resource Manager (MS). On September 3, 2021 she emailed the HR Manager about another incident. She asked the HR Manager to request that Claimant stop any inappropriate behavior. She also stated that statements in the HR Manager's Personnel Document were incorrect, specifically the fact about the timing of the incident and the amount of times it had occurred. September 3, 2021 was the first instance when she reported any untoward behavior to the HR Manager.

26. The Office Manager stated that Claimant was a good employee that worked well with her initially but later his behaviour towards her changed. She also stated that,

to her knowledge, Claimant was terminated for sexual harassment as well as insubordination but she was not aware of all the incidents of insubordination.

27. The Office Manager stated that she was frequently bantering with Claimant either in the warehouse or in her personal office, as Claimant would have to pick up his work orders from a basket in her office. She stated that there were video cameras both in her office as well as the warehouse but she was not aware of any recordings of any of the incidents.

28. She also testified that Claimant was no terminated until September 9, 2021, almost a week after she reported the incident to the HR Manager.

f. Testimony of Director of Operations/HR Manager

29. The Director of Operations/HR Manager stated that he first heard of any incidents with regard to Claimant and the Office Manager from the Office Manager on September 3, 2021, which he documented in the Personnel Documentation of the same date.

30. He was aware of the hat incident on September 3, 2021 and asked that any incidents prior be documented by the Office Manager. The first part of the document was the HR Manager's interpretation after the oral report by the Office Manager on September 3, 2021. The second part is the Office Manager's email of the same date documenting a second incident. He stated that he had not received any prior reports before September 3, 2021. A third incident was not documented by either the Office Manager or the HR Manager.

31. The HR Manager was initially concerned about the veracity of the report of the Office Manager but now believed her. He failed to establish any reason for a change in his opinion.

32. The HR Manager stated that despite receiving the information on September 3, 2021 that he did not take steps to terminate Claimant until September 9, 2021. He stated that the only incident he had witnessed was when Claimant left for one hour without telling anyone. He confirmed he received Claimant's denial of the incidents on September 10, 2021.

g. Credibility Determinations

33. At hearing Claimant was shown to wear a right shoulder immobilizer sling that limited his right shoulder movement of his arm and was appropriately masked as he was in his attorney's office testifying at the time of the hearing.

34. As found, Mr. Adam, Dr. Failinger and Dr. Richardson are authorized treating physicians. As further found, the August 9, 2021, August 20, 2021, September 17, 2021,October 1, 2021 and November 16, 2021 work restrictions by Mr. Adams and Dr. Richardson are credible and persuasive. It is further persuasive that Dr. Failinger formally requested prior authorization to proceed with the right shoulder surgery on September 2, 2021 and this had been communicated to Insurer.

35. Claimant's testimony is found credible. As found, Claimant was terminated because of the work related injury and because Claimant could no longer perform the assigned duties within his limitations.

36. The HR Manager is found not to be persuasive regarding his reasons for terminating Claimant. He specifically documented on September 3, 2021 that he had a long conversation with Claimant about his work, yet, at no time did he document that it was his intention to terminated Claimant. It is clear, and it is so found, that the HR Manager knew or should have known that Claimant was proceeding with right shoulder surgery as he specifically disclosed that he had been communicating with the insurer and would be following up. He specifically mentioned the adjuster by name, which is the same name as is found on the request for prior authorization.

37. The HR Manager is also found to not be credible with regard to whether he knew that Claimant's work restrictions were being violated. It is clear from the response email sent by Claimant that the HR Manager had actually acknowledged that the prior Friday he had mentioned that Claimant should not honestly be at work if they were following the doctor's restrictions. He did not deny that Claimant's statements were true.

38. The HR Manager is specifically found not credible in regard to his denial of the status of Claimant's workers' compensation claim when he formally terminated Claimant or that Employer was violating Claimant's work restrictions.

39. Lastly, as found, if Respondent Employer truly believed that Claimant acted inappropriately, they would not have sent the Office Manager, who was alleging the inappropriate acts, to Claimant's personal abode to retrieve the Employer's property, including the uniforms and keys. This fact alone, has great weight in the mind of this ALJ and is found persuasive and compelling as to the veracity of the Office Manager and the HR Manager's statements during the hearing, whom are found not credible.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more

probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Termination for Cause and Temporary Disability Benefits

Entitlement to temporary disability benefits is conditioned on whether Claimant is entitled to benefits or has been terminated for cause so these issues are interlinked and must be addressed together.

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. Sec. 8-43-105, C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J.*

Murphy & Co., 964 P.2d 595 (Colo. App. 1998). Claimant alleges temporary total disability benefits from September 10, 2022 through the present. Here, there is no doubt or question that Claimant was under work restrictions as provided by his authorized treating physician. On August 9, 2021 Nathan Adams, PAC of Concentra limited Claimant's work to no use of the right upper extremity. On August 20, 2021 Mr. Adams changed Claimant's work restrictions to lifting 5 lbs. to chest or shoulder level with the right arm, no use of the right hand above the shoulder level on, which were repeated on September 17, 2021 and October 1, 2021. Dr. Richardson also echoed the same restrictions on November 16, 2021. By this action, this ALJ infers that Dr. Richardson was the supervising physician and agreed with the physician assistant's prior work restrictions.

However, Claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. If a work-related injury contributes "to some degree" to a claimant's wage loss, the claimant is entitled to temporary total disability benefits. *Id*. at 548. "Temporary disability benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. Therefore, if the injury contributed in part to the wage loss, temporary total disability benefits can be denied, suspended, or terminated only if one of the four statutory factors in Sec. 8-42-105(3) is satisfied." *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210-11 (Colo. App. 1996). Returning to work is one criteria for terminating TTD benefits. Section 8-42-105(3)(b), C.R.S. The persuasive evidence shows that Claimant did return to work though he was under restrictions. The persuasive evidence is that Claimant was exceeding those restrictions in order to comply with order from his supervisors to continue working loading and unloading chemicals. While the majority of loading and unloading was accomplished with forklifts and pallet jacks, this ALJ finds that there were some duties Claimant had to perform without the assistance of the forklifts and jacks, such as following the Install Manager (JS) instructions that Claimant load chemicals on another truck that did not have a tailgate lift, so he had to lift the 150 lb. chemical containers with a pallet jack and from the wooden pallet to the bed of the truck as well as lift the wooden pallets which weighed over 10 lbs., all outside of Claimant's restrictions. Here, Claimant clearly had a wage loss due to his work restrictions and would normally be entitled to temporary total disability benefits upon termination, if Claimant was not found responsible for the termination.

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The burden shifts to the employer, who bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo.App. 2008). However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, *supra.*

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, I.C.A.O., W.C. No. 4-608-836 (April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for the termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over the termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

While Claimant was purportedly terminated for other issues as reflected in the HR Manager's email to Claimant, notifying Claimant of the termination, including "sexual harassment and insobordination", no credible evidence was presented at hearing to establish an evidentiary foundation of the behavioral issues and whether those behavioral issues constituted a volitional act on the part of Claimant. Here, it is clear from the HR Manager's September 3, 2021 Personnel Documentation that the HR Manager documented that he had had a long conversation with Claimant and that Claimant was *"emotionally frustrated with his lame arm*." Nowhere in the document does the HR Manager comment that it was his intention to terminated Claimant based on the reported behavioral issues. This ALJ finds and concludes that, from the totality of the evidence Claimant did not commit any volitional act that resulted in his termination of employment. Claimant's testimony is found persuasive over the contrary evidence tendered by the HR

Manager and the Office Manager. As further found, Claimant was experiencing extreme pressure to perform a job which clearly exceeded his limitation and he was emotionally frustrated by Employer's failure to accommodate those restrictions. In this ALJ's estimation, even the job of forklift operator would require Claimant to utilize his arm above the shoulder to reach up and get on the forklift, thereby violating his work restrictions. As found, from the totality of the evidence, Claimant is credible in his denial that he was neither insubordinate nor that he acted in any way inappropriately with the Office Manager. This is supported by Employer's decision to send said Office Manager to speak with Claimant at his own home and retrieve Employer's properly. As found and concluded, Employer's decision to terminate Claimant on September 9, 2021, was based on Claimant's work related injury and surgery, and the decision to terminate cannot be attributed to the Claimant or any volitional act of Claimant. Respondents have failed to show that Claimant was responsible for his termination.

Claimant has shown, by a preponderance of the evidence that Claimant is entitled to temporary total disability benefits as his provider restricted Claimant and those restrictions were not complied with. From the totality of the evidence, Claimant is entitled to temporary total disability benefits from September 10, 2021 through the date of surgery. It is further found that Claimant has proven by a preponderance of the evidence he proceeded with surgery, Claimant's right shoulder was immobilized following the February 15, 2022 surgery by Dr. Failinger and was not to do any active range of motion of the shoulder after surgery for at least six weeks. It is found that there is a direct causal link between the work related injury and the Claimant's inability to return to work following surgery. Therefore, the ALJ orders Respondents to provide Claimant with temporary total disability benefits beginning September 10, 2021 and continuing until terminated by law or statute.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by a preponderance of the evidence Claimant is responsible for his termination.

2. Respondents shall pay Claimant temporary total disability benefits from September 10, 2021 at the rate of $560.00 per week. For the period of September 10, 2021 through the date of the hearing on March 3, 2022, Claimant shall be paid $14,000.00. Respondents shall continue to pay temporary disability benefits until terminated by law.

3. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 29th day of March, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove she suffered a compensable injury to her left ankle on March 5, 2021?

- If Claimant proved a compensable injury, did she prove the November 23, 2021 surgery by Dr. Eric Lewis was causally related to the work injury?

- The parties stipulated that Dr. Lewis and Arkansas Valley Family Practice are authorized providers.

FINDINGS OF FACT

1. Claimant works for Employer as a Life Skills Facilitator, Child Welfare Case Aide, and Visitation Supervisor.

2. Claimant injured her left ankle on March 9, 2021 while exiting Employer's building. She had a misstep on an uneven surface and rolled her left ankle. She experienced severe pain in the posterolateral aspect of her left ankle.

3. Claimant continued working for a short time but could not continue because of the severe ankle pain. She reported the injury to her supervisor, but at that time she was "not planning of filing workman's comp."

4. Claimant saw her existing podiatrist, Dr. Eric Lewis at Pueblo Ankle & Foot Care, on March 11, 2021. Dr. Lewis wrote that Claimant was having "most pain along the outside aspect of her left ankle going up to her knee." He noted edema around the lateral ankle, crepitus, and painful range of motion. X-rays showed osteophyte formation localized to the anterior distal tibia but no fracture. Dr. Lewis diagnosed an ankle sprain. He advised Claimant to immobilize the ankle and follow the "RICE" protocol. He also ordered an MRI.

5. The MRI was completed on May 3, 2021. It showed capsular thickening and edema over the posterior tibiotalar and subtalar joint, an ununited os trigonum with associated bone marrow edema and interosseous cysts, and edema in the posterior capsule and pericapsular soft tissues overlying the os trigonum and extending to the distal fibula. The radiologist indicated os trigonum syndrome should be considered, if correlated clinically.

6. Claimant had a telemedicine follow-up with Dr. Lewis on May 20, 2021. She stated she "still has pain mainly located along the back and outer aspect of her ankle." Although Claimant specifically reported posterolateral ankle pain, another section of the report simply refers to "lateral" ankle pain. Dr. Lewis reviewed the MRI images, and noted avulsed bone fragments off the posterior tibia and increased update of the os trigonum.

He prescribed a Medrol Dosepak and 800mg ibuprofen TID. He stated he would recommend surgery if the symptoms did not resolve.

7. After the appointment with Dr. Lewis, Claimant realized the injury was more serious than she originally thought, so she notified her supervisor "I was going to need to pursue workers' comp at that point." Employer gave Claimant a designated provider list, from which she selected Arkansas Valley Family Practice.

8. Claimant saw Dr. Richard Book at Arkansas Valley Family Practice on May 27, 2021. Her ankle remained severely symptomatic despite immobilization, the steroid taper, and ibuprofen. Examination showed tenderness to palpation and swelling in the posterior ankle. Dr. Book advised Claimant to continue follow up with Dr. Lewis.

9. Claimant called Dr. Lewis' office on June 29, 2021 to report nothing had changed and she still could not put any weight on the left ankle without the boot.

10. Claimant saw Dr. Lewis on July 1, 2021. The report indicates she was continuing to have aching and burning pain "along the outer aspect of her left ankle." Dr. Lewis noted the MRI showed "separated os trigonum with increased uptake to posterior talar body and os trigonum consistent with acute trauma." He recommended surgery to remove the os trigonum.

11. Dr. Lewis performed os trigonum excision surgery on November 23, 2021. Later records show Claimant had a good result, with significant reduction in pain and improvement in function. By the time of the hearing, Claimant testified to approximately 75% improvement since the surgery.

12. Claimant proved she suffered a compensable injury to her left ankle on March 9, 2021. Claimant's credible description of the accident is supported by records from multiple medical providers and the Employer's First Report. The injury interfered with her ability to continue working and reasonably prompted her to seek treatment. These facts are sufficient to establish a compensable injury.

13. The more difficult question is whether the November 23, 2021 surgery was causally related to the work accident.

14. Claimant first had problems with her left ankle in 2019. The pain was localized to the anteromedial aspect of the left ankle. She saw a chiropractor, who treated her for a presumed stress fracture of the distal fibula. She was advised to stay off the foot or use a walking boot for 3-4 weeks. When the symptoms failed to respond, she was referred for an MRI.

15. An MRI on August 30, 2019 showed an os trigonum with edema in the os, mild arthritis and effusion in the posterior subtalar joint, and mild tendinopathy in the posterior tibialis tendon. The radiologist "suspected" os trigonum syndrome.

16. Claimant saw Dr. Sarah Thompson, a podiatrist, at Pueblo Ankle and Foot Care on September 20, 2019. She reported anterior ankle pain for several months. On

examination, pain was localized to the anteromedial aspect of the ankle. Dr. Thompson gave Claimant a steroid injection. If the ankle did not improve, she would consider a CT scan because the MRI and previous x-rays showed “no findings” to explain the source of her pain.

17. Claimant followed up with Dr. Thompson on October 4, 2019. The injection had not helped and she was still having pain in the anteromedial ankle. Dr. Thompson obtained weightbearing “charger view” x-rays, which showed a tibial osteophyte contacting the talus with dorsiflexion. Dr. Thompson noted, “This is exactly where she is having all her pain. I advised her it is ankle impingement and I will have her follow up with Dr. Pfau for possible surgery discussions. Pt is very relieved that we now know what is causing her pain.”

18. Dr. Zeno Pfau performed arthroscopic surgery on December 27, 2019. He performed a tibial osteotomy and debridement of impinging soft tissue.

19. Claimant recovered from surgery relatively quickly. By February 10, 2020, she reported “minimal pain.” Dr. Pfau released her from regular follow up and advised her to return “as needed.” Claimant returned to regular duty at work.

20. Claimant sought no further treatment for the ankle for almost a year. On January 19, 2021, she saw Dr. Eric Lewis Pueblo Ankle and Foot.[1] She reported a deep ache in the ankle. Examination showed pain with dorsiflexion of the left ankle. Dr. Lewis diagnosed osteoarthritis and ordered an MRI.

21. At hearing, Claimant explained she had returned to the podiatrist in January 2021 because she started having recurrent impingement symptoms in her left ankle. This occurred over a three-month period before the appointment. Claimant testified the symptoms were in the exact same location—over the anteromedial ankle—as in 2019. She was not having any pain or other symptoms in the posterior ankle.

22. As noted above, the work accident that gave rise to the current claim occurred on March 9, 2019. When asked at hearing where she experienced pain the accident, Claimant pointed to the posterolateral aspect of her left ankle. She testified she never had pain or other symptoms in this location before March 9, 2021.

23. Dr. Nicholas Olsen performed an IME for Respondents on September 12, 2021. He issued an initial report after the IME, and an addendum report dated October 7, 2021. Dr. Olsen opined Claimant suffered a work-related ankle sprain on March 9, 2021, which was appropriately treated conservatively with rest, ice, and immobilization. He opined the surgery recommended by Dr. Lewis was related to Claimant’s documented pre-existing history of left ankle problems rather than the work accident.

24. Dr. Lewis authored a report regarding causation of the os trigonum surgery on October 14, 2021. He stated,

[1] Dr. Pfau had left the practice since Claimant’s last post-op appointment.

> I have reviewed all medical records not only from Pueblo Ankle & Foot Care, but that as well of Dr. Olsen's (IME) visit and findings and all additional medical records which are scanned into the patient's chart. [Claimant] initially presented to Dr. Thompson and had surgery by Dr. Pfau for anterior ankle impingement syndrome. She never had symptoms of posterior ankle pain exacerbated with plantar flexion of her big toe prior to her work injury. The MRI after injury also showed increased T2 signal at the os trigonum, which showed a recent trauma. It is my opinion that the misstep at work on two uneven ground with a decline is consistent with her symptoms currently.

25. Dr. Olsen testified at hearing consistent with his reports. He explained that an os trigonum is a congenital malformation at the back of the ankle. It is not necessarily painful, but if it becomes symptomatic, it is referred to as os trigonum syndrome. He opined both the 2019 and 2021 MRIs showed edema around the os trigonum. As a result, he considers Claimant's os trigonum syndrome to be a chronic condition. Dr. Olsen agreed Claimant sprained her ankle on March 9, 2021, but opined the injury did not cause, aggravate, or accelerate the os trigonum syndrome. He emphasized that Dr. Lewis' March 11, 2021 report only references "lateral" ankle pain, whereas posterior ankle pain was noted in the May 20, 2021 report. Dr. Olsen opined Claimant was a candidate for os trigonum removal before the work accident because she had persistent pain in her ankle that did not resolve after the 2019 surgery.

26. Claimant's testimony was credible and persuasive.

27. Dr. Lewis' opinions regarding causation of the os trigonum removal surgery are credible and more persuasive than the contrary opinions offered by Dr. Olsen.

28. Claimant proved by a preponderance of the evidence the November 23, 2021 surgery performed by Dr. Lewis was reasonably necessary and causally related to the March 9, 2021 work accident.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved she suffered a compensable injury to her left ankle on March 9, 2021. Claimant's description of the accident is credible and supported by records from multiple medical providers and the Employer's First Report. The injury interfered with her ability to continue working and reasonably prompted her to seek treatment. These facts are sufficient to establish a compensable injury.

B. Causation of the os trigonum removal surgery

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Claimant proved the November 23, 2021 surgery performed by Dr. Lewis was reasonably necessary and causally related to the March 9, 2021 work accident. Claimant's testimony she experienced posterior ankle pain immediately after the accident is credible. Admittedly, Dr. Lewis' March 11 report does not explicitly mention posterior ankle pain. But the statement that "most" of her pain was on the outside of the left ankle supports an inference that "some" of her pain was posterior, consistent with her credible testimony. This inference buttressed by the May 20 notation that Claimant was "still" having pain in the "back and outer" aspect of her left ankle. Dr. Olson's opinion that Claimant was already candidate for os trigonum surgery before the work accident is not persuasive. Claimant had no posterior ankle symptoms before the work accident. The edema shown on the 2019 MRI was probably an incidental finding given the lack of corresponding symptoms. Aside from the radiologist's "suspicion" of os trigonum syndrome, none of Claimant's treating providers thought the finding was pertinent to the issues for which she was being treated. Dr. Thompson previously commented there were "no findings" on 2019 MRI to account for Claimant's symptoms. Charger view x-rays subsequently pinpointed the "exact" source of her pain, which was addressed surgically by Dr. Pfau in December 2019. The surgery relieved the symptoms with no attention being directed to the os trigonum. Claimant sought further treatment in January 2021 for recurrent *anterior* ankle pain. The os trigonum only became symptomatic after the work accident, and there is no persuasive evidence of any alternate cause or trigger. Crediting Claimant's testimony regarding the onset, progression, nature, and location of her symptoms, coupled with Dr. Lewis' persuasive opinions, the ALJ concludes the os trigonum removal surgery was causally related to the March 9, 2021 work accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left ankle injury on March 9, 2021 is compensable.

2. Insurer shall cover the November 23, 2021 os trigonum excision surgery performed by Dr. Eric Lewis.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 29, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained an injury arising out of and in the course and scope of his employment with the employer on August 3, 2021.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left shoulder (including surgery recommended by Dr. Mitch Copeland) is reasonable, necessary, and related to the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning August 4, 2021 and ongoing.

4. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

5. If the claim is found compensable, and the claimant is entitled to TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant willfully misled the employer regarding his ability to perform the job and pursuant to Section 8-42-112(1)(d) C.R.S., the claimant's TTD benefits are subject to a reduction of 50 percent.

FINDINGS OF FACT

1. The claimant began working for the employer on February 25, 2019 as a mechanic. As part of the employment process, the claimant was required to submit to a medical evaluation. The claimant "passed" that evaluation in the sense that he was deemed to be physically able to perform his job duties.

2. The claimant's job duties involved diagnosing, repairing, reconditioning, and maintaining heavy equipment. As a result, the claimant's job duties included heavy lifting. Specifically, the claimant's written job description identified lifting and moving objects weighing up to 96 pounds. The claimant was able to perform all of these job duties.

3. On August 3, 2021, the claimant was working to disassemble and inspect a large engine. This process involved removing cylinder heads from the engine. To do this, six cylinder heads are connected to a bar, and lifted together using a chain and crane. Each cylinder head weighs approximately 90 pounds. This specific engine was quite rusty, and the claimant used both a pry bar and the lifting crane to remove the

cylinder heads. When the connected cylinder heads broke free, the suspended cylinder heads began to rotate. The claimant estimates that the entire suspended unit weighed between 650 and 750 pounds. The claimant was concerned that a coworker would be struck by the rotating load, and reached out with his left hand to stop the rotation. In doing so, the claimant felt a pull and then a pop in his left shoulder.

4. After the pop in his left shoulder, the claimant had shooting pain down into his left armpit and burning pain across his shoulder. In addition, he felt tingling into his left fourth and fifth fingers.

5. The claimant reported this incident to his supervisor, [Redacted, hereinafter AO], Branch Service Manager. Mr. AO[Redacted] assisted the claimant in completing paperwork regarding the incident. Mr. AO[Redacted] testified that when the claimant reported the August 3, 2021 incident to him, the claimant stated that he had prior left shoulder issues, including possible surgery.

6. The claimant has not returned to work for the employer since the August 3, 2021 incident.

7. On August 4, 2021, the employer attempted to recreate the August 3, 2021 incident. Mr. AO[Redacted] was involved in the reenactment. Mr. AO[Redacted] testified that he and other employees attempted to recreate the incident as closely as they could. Mr. AO[Redacted] further testified that during the reenactment, the rotation of the suspended materials was "not very fast" and he did not have to use much force to stop the materials from rotating.

Medical Treatment Prior to August 3, 2021

8. Prior to August 3, 2021, the claimant reported left shoulder issues to his medical providers. The claimant's left upper extremity issues seem to have started after he suffered a fall in February 2009 and injured his back, neck, left shoulder, and left arm. Thereafter, the claimant suffered a left arm injury on January 25, 2018 while employed in California.

9. On May 24, 2019, the claimant underwent an Panel Qualified Medical Examination related to the January 25, 2018 California injury with Dr. Paul Sandu. In his June 21, 2019 report[1], Dr. Sandu noted that on examination the claimant had normal range of motion for his left shoulder in flexion, extension, abduction, and adduction. Dr. Sandu opined that the claimant could continue to work without any reactions.

10. In 2019, the claimant relocated from California to Colorado. At that time, he established care with Plateau Valley Medical Clinic. The claimant was first seen at that practice on June 30, 2018 by Dr. Erin Arthur. On that date, the claimant reported

[1] Dr. Sandu authored an extensive report and the ALJ does not recite all observations and opinions he expressed. The ALJ includes only information that is relevant to the present matter.

that he had undergone treatment with a pain specialist in California due to prior injuries. The claimant also reported that his left elbow was his primary concern.

11. Thereafter, the claimant's primary provider at Plateau Valley Medical Clinic was Dr. Scott Rollins. During his treatment with Dr. Rollins, the claimant reported various issues, including back pain and bilateral shoulder pain. In early 2020, Dr. Rollins ordered magnetic resonance imaging (MRI) of the claimant's left shoulder. On February 7, 2020, a left shoulder MRI showed severe acromioclavicular degenerative joint disease with inflammation and vacuum phenomenon in the joint, a chronic appearing SLAP[2] tear, and a moderate paralabral cyst.

12. After review of the February 2020 MRI, Dr. Rollins referred the claimant to Dr. Mitch Copeland for an orthopedic evaluation. The claimant was seen by Dr. Copeland on March 6, 2020. At that time, Dr. Copeland recommended surgical intervention. Specifically, Dr. Copeland recommended a left shoulder arthroscopy with rotator cuff repair, a Mumford procedure, and biceps tenotomy.

13. The claimant testified that he did not pursue the surgery recommended by Dr. Copeland in 2020 because he was still able to work. He did not want to be off of work for a lengthy recovery period if he was able to work full duty. The claimant credibly testified that prior to the August 3, 2021 incident, his left shoulder did not cause him any difficulties at work.

14. The claimant further testified that prior to the August 3, 2021 incident he was able to engage in a number of physically demanding activities. These activities included snowboarding, restoring classic cars, chopping wood, and maintaining his 30 acre residential property. Since the August 3, 2021 incident, he is unable to engage in these activities. The claimant also testified that since August 3, 2021, he has experienced new left shoulder symptoms including a constant aching, burning and shooting pain, and an increase in numbness in his left hand and fingers.

Medical Treatment After August 3, 2021

15. The claimant's authorized threatening provider (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on August 4, 2021. At that time, the claimant described his mechanism of injury as "had a load on a crane, the crane started to rotate, [the claimant] reached up to grab the load so it would not hit a coworker". The claimant also reported significant pain and a pop in his left shoulder. Dr. Stagg restricted the claimant from use of his left upper extremity and made a referral for an orthopedic consultation.

16. The claimant was seen by Dr. Copeland on August 23, 2021. At that time, the claimant described the mechanism of injury as "his arm was pulled forward by a suspended load". Dr. Copeland opined that the claimant had a torn rotator cuff and ordered an MRI.

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[2] Superior labrum anterior posterior tear.

17. An MRI of the claimant's left shoulder was performed on September 8, 2021. The MRI showed a small labrum tear, grade 2 chondral change in the glenohumeral joint, and moderate acromioclavicular arthrosis.

18. On September 8, 2021, Dr. Copeland reviewed the MRI and opined that the claimant could benefit from six weeks of physical therapy. Dr. Copeland also noted that if the claimant did not improve with therapy, surgical options would be addressed.

19. The claimant returned to Dr. Copeland on October 18, 2021. At that time, the claimant reported some improvement with physical therapy. Dr Copeland reviewed the claimant's 2020 MRI and noted that it was "largely similar" to the recent September 2021 MRI. Dr. Copeland recommended the claimant undergo left shoulder surgery, which would include arthroscopy with glenoid labrum debridement, distal clavicle resection, biceps tenotomy, and possible lysis of the paralabral cyst.

20. In early 2022, the claimant attended an independent medical examination (IME) with Dr. Kathleen D'Angelo. In connection with the IME, D'Angelo reviewed the claimant's medical records, obtained a history from the claimant, and performed a physician examination. In her February 4, 2022 IME report, Dr. D'Angelo opined that the claimant did not suffer an injury to his left shoulder on August 3, 2021. It is also Dr. D'Angelo's opinion that the events of August 3, 2021 did not aggravate, or worsen the claimant's pre-existing left shoulder condition. In support of her opinions, Dr. D'Angelo noted that the claimant has a history of chronic left shoulder pain. Dr. D'Angelo further noted that this issue began in 2007 as a result of a work injury that was then exacerbated by an additional injury in 2015. In addition, Dr. D'Angelo noted that the February 7, 2020 and September 8, 2021 MRI results do not differ. Dr. D'Angelo further notes that in 2020, the claimant was complaining of moderate to severe left shoulder pain that was constant and throbbing. Dr. D'Angelo further opined that the claimant's need for surgery is not work related and he reached MMI on August 4, 2021.

21. Dr. D'Angelo's deposition testimony was consistent with her written report. During her testimony, Dr. D'Angelo reiterated her opinion that the claimant did not suffer a left shoulder injury at work on August 3, 2021. Dr. D'Angelo noted in her testimony that when Dr. Rollins reviewed the March 2020 MRI, he noted that the claimant had a chronic SLAP tear in the left shoulder. Dr. D'Angelo further testified that Dr. Copeland's surgical recommendations in 2020 and 2021 are the same. Dr. D'Angelo explained that individuals with chronic degenerative injuries will experience a waxing and waning of their symptoms. It is Dr. D'Angelo's opinion that the medical records indicate that the claimant has this waxing and waning of his symptoms. Dr. D'Angelo further testified that while the recommended left shoulder surgery may be reasonable and necessary to treat the condition of the claimant's left shoulder, the need for surgery is not related to the claimant's work.

22. [Redacted, hereinafter SH] , Claim and Risk Management Supervisor for the employer testified by deposition. Ms. SH[Redacted] testified that she learned about the claimant's August 3, 2021 incident on that same date. Ms. SH[Redacted] also testified that the claimant

has not returned to work for the employer. She confirmed that at this time, the employer is not able to accommodate the claimant's work restrictions.

23. Dr. Stagg testified that it is his opinion that the August 3, 2021 work incident exacerbated the chronic condition in the claimant's left shoulder. In support of this opinion, Dr. Stagg noted that prior to the August 3, 2021 incident, the claimant was working full duty in a physically demanding job. Dr. Stagg also testified that the claimant's mechanism of injury is consistent with a shoulder injury.

24. The payroll records entered into evidence demonstrate that the claimant was paid $27.81 per hour while employed with the employer. However, the claimant's hours varied throughout his employment. The payroll records further demonstrate that between the work week ending August 15, 2020 and the work week ending August 7, 2021[3], the claimant had gross earnings of $61,998.46. When this amount is divided by 51 weeks it results in an average of $1,215.66.

25. The ALJ credits the medical records and the claimant's testimony regarding the nature and onset of his left shoulder symptoms. The ALJ specifically finds as true that prior to the Augusts 3, 2021 incident, the claimant was able to fully perform his job duties, despite having sought prior treatment of his left shoulder. The ALJ also credits the opinions of Dr. Stagg over the contrary opinions of Dr. D'Angelo. The ALJ specifically credits the opinion of Dr. Stagg that the August 3, 2021 incident exacerbated the claimant's chronic left shoulder condition.

26. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on August 3, 2021, he suffered an injury to his left shoulder while in the course and scope of his employment with the employer. In addition, the ALJ finds that the claimant's act of reaching with his left arm to stop the suspended load from rotating resulted in an aggravation and acceleration of his pre-existing left shoulder condition. This aggravation and acceleration of the claimant's pre-existing left shoulder condition resulted in the need for medical treatment.

27. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that treatment of his left shoulder is reasonable, necessary, and related to the August 3, 2021 work injury. In addition, the claimant has successfully demonstrated that it is more likely than not that the recommended left shoulder surgery is reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

28. The ALJ credits the testimony of the claimant and Ms. SH[Redacted] and finds that the claimant has not returned to work for the employer because of his work restrictions. The ALJ further finds that the claimant has successfully demonstrated that it is more likely than not that his inability to return to work is the result of the August 3, 2021 injury.

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[3] This was a 51 week period.

29. The respondents assert that the claimant's TTD benefits should be reduced by 50 percent because the respondents believe that the claimant willfully misled the employer regarding his physical ability to perform his job duties. The ALJ is not persuaded by this argument. As found, prior to his August 3, 2021 injury, the claimant was able to fully perform his job duties. The ALJ declines to apply any reduction to the claimant's TTD benefits in this case.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on August 3, 2021 he sustained an injury arising out of and in the course

and scope of his employment with the employer. As found, the claimant has demonstrated, by a preponderance of the evidence, that the pre-existing condition in this left shoulder was aggravated and accelerated by the August 3, 2021 incident. As found, the medical records, the claimant's testimony, and the opinions of Dr. Stagg are credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated by a preponderance of the evidence, that treatment of his left shoulder, including the surgery recommended by Dr. Copeland, is reasonable, necessary, and related to the August 3, 2021 work injury. As found, the medical records, the claimant's testimony, and the opinions of Dr. Stagg are credible and persuasive.

8. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

9. As found, the claimant has demonstrated by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning August 3, 2021 and ongoing until terminated by law. As found, the testimony of Ms. SH[Redacted] and the claimant is credible and persuasive on this issue.

10. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, the claimant's average weekly wage (AWW) is $1,215.66.

ORDER

It is therefore ordered:

1. The respondents shall pay for reasonable and necessary treatment of the claimant's left shoulder, including the surgery recommended by Dr. Copeland, pursuant to the Colorado Medical Fee Schedule.

2. The claimant is entitled to temporary total disability (TTD) benefits beginning August 3, 2021 and ongoing until terminated by law.

3. The claimant's average weekly wage (AWW) is $1,215.66.

Dated this 30th day of March 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant overcame Dr. Stephen Lindenbaum's DIME opinions on causation and MMI regarding his right shoulder by clear and convincing evidence.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonable and necessary medical benefits for his right shoulder.

Whether Claimant overcame Dr. Lindenbaum's causation and MMI opinion on Claimant's cervical/thoracic spine was initially identified as an issue; however Claimant subsequently withdrew the issue in his position statement.

STIPULATIONS

The parties agreed that if Claimant overcomes the DIME opinions of Dr. Lindenbaum regarding causation and MMI, then Claimant is entitled to $1 of temporary partial disability benefits for May 21, 2019. The parties further agreed that the issue of temporary partial and/or temporary total disability benefits after May 21, 2019 are reserved, as are the issues of overpayment, offsets, and applicable defenses. The parties further stipulated that if Claimant fails to overcome the DIME opinion of Dr. Lindenbaum regarding causation and MMI, Claimant accepts Dr. Lindenbaum's opinions regarding permanent impairment for his right elbow and low back as admitted to by Respondents, as well as Respondents' denial of maintenance care for causally related body parts.

FINDINGS OF FACT

1. Claimant is the owner-operator of Employer, an HVAC company.

2. Claimant sustained an admitted industrial injury on Friday, August 17, 2018. While climbing a ladder to a 12-foot high roof, the ladder slipped, causing Claimant to begin to fall. Claimant caught himself by grabbing the gutter of the home with his right arm. His body swung sideways in the air to an almost horizontal position. Claimant then lost his grip and fell approximately five to eight feet to the ground. Claimant testified he landed on the ladder across his right side and back of his right lower torso.

3. Claimant testified he was dazed and shocked at the time and noticed right arm numbness and pain. Claimant testified he decided to see if his condition would improve over the weekend. Claimant testified that, by the following Monday, he had difficulty walking, and noticed his right biceps looked abnormal.

4. On August 21, 2018, Employer filed a First Report of Injury form indicating Claimant "[f]ell off a ladder, hurt arm trying to hold on and hurt back on impact." (Resp. Ex. C, p. 9). No right shoulder or neck injuries were identified.

5. Claimant presented to authorized treating provider Charles Wenzel, D.O. on August 22, 2018 with complaints of pain in his right arm, right forearm, and low back, as well as bilateral knee pain that had resolved. The pain diagram completed by Claimant denotes lumbar and thoracic spine pain, bilateral knee pain, right elbow pain, and neck pain. Dr. Wenzel noted tenderness, decreased strength, and decreased range of motion of the right arm, as well as ecchymosis and erythema. No right shoulder complaints or examination were documented. Dr. Wenzel assessed Claimant with strains of the right long head biceps, unspecific injury of the right forearm, and muscle strain of the low back. He referred Claimant for physical therapy.

6. Claimant returned to Dr. Wenzel on August 27, 2018 with complaints of worsening pain, primarily in his low back, as well as ongoing apprehension regarding use of his right upper extremity. Claimant's pain diagram does not indicate any shoulder pain. The medical note does not document any right shoulder complaints or shoulder examination. Dr. Wenzel recommended Claimant undergo occupational therapy.

7. Between August 29, 2018 and September 11, 2018, Claimant underwent six therapy sessions. Claimant's therapists did not document any right shoulder, neck, or mid-back/upper thoracic issues during those sessions.

8. On August 31, 2018, Claimant presented to Monica Fanning Schubert, APN. Claimant's pain diagram identified right elbow, right bicep, thoracic and lumbar pain, without indication of right shoulder or neck issues. APN Fanning Schubert noted complaints of pain in the low back and right distal and mid biceps. No shoulder complaints or examination is documented at this evaluation. APN Fanning Schubert referred Claimant for MRIs of his lumbar spine and right elbow.

9. Claimant underwent a right elbow MRI on September 10, 2018, which revealed a ruptured biceps tendon.

10. APN Fanning Schubert reexamined Claimant on September 11, 2018. Claimant's pain diagram and the medical note from this examination do not document any right shoulder, neck or mid-back issues. APN Fanning Schubert diagnosed Claimant with a full-thickness tear of his distal bicep tendon and progression of L4-5 foraminal stenosis. She referred Claimant to Dr. Nicholas Olsen, D.O. for pain management, and to Sameer Lodha, M.D. for surgical evaluation of the right distal bicep rupture.

11. Claimant first presented to Dr. Olsen on September 13, 2018. Claimant completed a patient questionnaire and pain diagram in which he described his injury as falling off of a ladder causing back and right arm problems. His pain diagram identified issues at the right elbow, mid-back, and low back, but not his right shoulder or neck. Dr.

Olsen's evaluation made no mention of right shoulder, neck or mid-back issues, focusing on the lumbar spine.

12. Dr. Lodha first evaluated Claimant on September 18, 2018. No right shoulder complaints or right shoulder evaluation was documented. Dr. Lodha recommended Claimant undergo right distal bicep surgical repair, which she performed on September 24, 2018.

13. Claimant attended a follow-up evaluation with APN Fanning Schubert on September 28, 2018. Claimant did not identify right shoulder or neck issues on his pain diagram, but he circled his mid-back region that day. APN Fanning Schubert did not identify right shoulder or neck issues or complaints, and Claimant's thoracic spine exam was negative. APN Fanning Schubert referred Claimant to orthopedic surgeon Bryan Andrew Castro, M.D. for his low back pain.

14. Claimant returned to APN Fanning Schubert on October 9, 2018. He completed a pain diagram indicating pain in his right shoulder, right elbow, low back and left leg. APN Fanning Schubert did not document any right shoulder, neck or mid-back complaints.

15. Claimant presented to Dr. Castro on October 24, 2018 for examination of his low back. Claimant reported right elbow and biceps tendon pain, as well as low back and left leg pain. On examination of upper extremities, Dr. Castro noted "good function and strength to all motions of the shoulders, elbows, wrists and hand intrinsics." (R. Ex. K, p. 113). Claimant's pain diagram did not identify right shoulder issues, nor is there mention of right shoulder issues in the medical note. Dr. Castro assessed Claimant with lumbar spine pain.

16. On October 31, 2018, APN Fanning Schubert noted that Dr. Castro had referred Claimant to Dr. Olsen for consideration of lumbar injections. Claimant's pain diagram did not identify issues with his right shoulder, nor did the medical note. Similarly, on November 1, 2018, Dr. Olsen did not identify right shoulder, neck, or mid-back complaints and Claimant's pain diagram did not identify issues in those regions.

17. On November 16, 2018, APN Fanning-Schubert noted that Claimant's lumbar injections were canceled due to non-work related medical issues. Claimant had recently sought evaluation and treatment with his personal physicians for unrelated chest pains and several other unrelated medical complaints. Claimant did not report right shoulder, neck or mid-back issues and his pain diagram did not identify issues in those areas.

18. On December 10, 2018, Claimant told Dr. Olsen that he had a "host of new medical problems" resulting in multiple emergency department visits, a possible infection, a tooth being pulled, throat swelling, and a loss of 25 pounds. Dr. Olsen did not document right shoulder or mid-back issues and Claimant's pain diagram did not identify issues in those areas.

19. On December 14, 2018, APN Fanning Schubert noted Claimant had weight loss, abdominal pain, chest pain, neck and headache pain, all of which were being worked up by his primary care physician. She did not document right shoulder or mid-back complaints, and she did not relate the neck pain to the work injury. Claimant's pain diagram did not identify right shoulder, neck or mid-back issues.

20. On January 9, 2019, Dr. Olsen noted Claimant's right arm was doing better. Claimant's pain diagram identified pain in the mid-back region for the first time in more than two months, but no issues in the right shoulder or neck regions.

21. On January 15, 2019, Dr. Lohda noted Claimant was having other medical issues, including back pain, trouble swallowing, weight loss and shoulder girdle pain. Dr. Lodha opined that Claimant had healed from the standpoint of his distal biceps, but recommended Claimant undergo evaluation for his other conditions, including a rheumatology consultation, before releasing Claimant to work without restrictions. Dr. Lodha did not address any potential causal connection between Claimant's shoulder complaints and his biceps repair.

22. On January 16, 2019, APN Fanning Schubert noted Claimant's report of right shoulder pain and neck pain. She noted that Claimant's original pain diagram noted neck pain and referred Claimant for a cervical MRI. The pain diagram completed for this examination indicated right shoulder pain. APN did not address Claimant's right shoulder at this evaluation.

23. Claimant underwent the cervical MRI on January 21, 2019, which identified degenerative issues at multiple levels.

24. On February 6, 2019, Dr. Olsen reviewed the cervical MRI, noting C5 radiculopathy could explain Claimant's right arm weakness. Dr. Olsen subsequently administered an EMG on February 25, 2019, which he interpreted as normal, without any evidence of cervical radiculopathy.

25. On March 18, 2019, Dr. Olsen discussed options to treat Claimant's ongoing neck complaints. On April 4, 2019, Dr. Olsen noted Insurer had denied all neck-related care as not work-related. No right shoulder complaints or issues were addressed. Dr. Olsen further indicated that when Claimant next returned he would likely move towards MMI.

26. On March 26, 2019, Matthew Lugliani, M.D. opined Claimant was not at MMI pending cervical injections.

27. On April 30, 2019, Dr. Lugliani noted Claimant continued to report ongoing mid and low back pain. Right shoulder complaints or issues are not documented in the medical note. Claimant's pain diagram from this date does indicate right shoulder pain. Dr. Lugliani noted he reviewed Claimant's medical record and discussed Claimant's case with pain management. He opined Claimant reached MMI with permanent

restrictions of lifting 20 pounds. He recommended one-year of medical maintenance care for medication adjustment and/or injections.

28. Dr. Olsen reexamined Claimant on June 26, 2019. Claimant reported that his right arm was doing well but continued to voice complaints about his cervical spine. Right shoulder complaints are not documented nor is the right shoulder otherwise addressed in this medical note. Dr. Olsen placed Claimant at MMI. He assigned a 12% whole person lumbar rating, which he apportioned to 0% due to a prior rating. Dr. Olsen explained that he did not include a cervical impairment rating because, despite Claimant's continued cervical complaints, Insurer had denied treatment for Claimant's cervical condition. He opined Claimant did not require maintenance care.

29. On September 11, 2019, Insurer filed a Final Admission of Liability ("FAL") consistent with Dr. Olsen's opinions regarding MMI, impairment, and maintenance care. Claimant subsequently requested a DIME.

30. Dr. Lindenbaum performed the DIME on December 13, 2019, noting he was asked to address Claimant's right shoulder, cervical spine and lumbar spine. Claimant reported his belief that his providers overlooked his shoulder and neck complaints. Dr. Lindenbaum remarked,

> It should be noted that I have not been provided with any diagrams with which the claimant states were found in the chart review by Dr. Olsen. Furthermore, there was no mention of any neck and shoulder discomfort until the claimant was seen in early January 2019, roughly 5 months after the injury.

(R. Ex. W, p. 280)

31. Dr. Lindenbaum opined that Claimant reached MMI for his lumbar spine and right elbow injuries, but that he was not at MMI because of "issues concerning his right shoulder and neck." (Id. at 282). He explained,

> Although, there are some discrepancies in what the patient has stated to me and what is found in the chart notes, these issues have to be addressed. Therefore, I think that this claimant will probably need to be referred back to the OccMed doctors so they can clarify if he truly had issues with his neck and shoulder based on the notes that they have. It should be noted that the first mention of his right shoulder was by Dr. Lodha on the day that he discharged the patient from his care which was several months after the accident and the first mention of neck discomfort that I see is actually from the nurse practitioner in early January 2019. This is the reason the question comes up concerning whether or not these two areas should be considered with the original injury as part of the injury of 2018.

(Id.)

32. Dr. Lindenbaum then provided the following provisional impairment ratings: 19% whole person impairment for Claimant's cervical spine (6% impairment under Table 53(II)(C) of the AMA Guides and 14% for range of motion deficits); 12% whole person impairment for Claimant's lumbar spine (5% impairment under Table 53(II)(C) of the AMA Guides and 7% for range of motion deficits); and 8% upper extremity impairment for the right shoulder. He noted that, due to a prior 12% lumbar impairment from a previous work injury; the lumbar impairment would be apportioned to 0%. Dr. Lindenbaum opined that there was no reason for maintenance care unless the right shoulder and neck were included in the claim.

33. Regarding the rationale for his decision, Dr. Lindenbaum wrote,

> There is a lot of controversy concerning whether or not the right shoulder and neck should be included in his rating. The reasons for this statement is that this patient states that on examining him today that he told the physicians all along that he was having neck and shoulder pain and they did not work this up. However, on evaluation of the chart notes and with lack of any type of diagrams from the initial evaluation, I see no evidence that this patient complained of shoulder or neck pain up until being seen by Dr. Lodha in December of 2018 when he complained of shoulder pain for the first time on the right and also not until January of 2019 when he saw the nurse practitioner that he complained of neck pain. He himself states that he talked to Dr. Olsen about this and Dr. Olsen said he did see these notes although I have not seen them. For that reason, I do not think he is at maximum medical improvement until we can justify if there was a reason to include his right shoulder and neck in this injury. I would strongly recommend this claimant be referred back to the work comp doctors that he was seeing so that they can supply information concerning the alleged right shoulder and neck problems.

(Id. at 282-283)

34. On April 20, 2020, Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. D'Angelo examined Claimant and reviewed Claimant's medical records, including pain diagrams. Claimant reported that, when he initially sought medical treatment after the work injury, the most obvious issue was his bicep, but that at that time he explained to his provider that there were other issues all over his body. Claimant reported that he explained to the provider the areas hurting the most at the time and that his arm was the biggest focus. Dr. D'Angelo noted her examination of Claimant's right shoulder, neck and thoracic spine were normal. She provided claim-related diagnoses of (1) aggravation of preexisting lumbar degenerative spine disease, and (2) right distal bicep tendon rupture. She opined that Claimant's right shoulder and neck conditions are not work-related.

35. Dr. D'Angelo noted concerns regarding Claimant's reporting of symptoms. She opined that, although Claimant purported he informed his treating physicians of his neck and right shoulder complaints from the outset, it was improbable that his physicians ignored such complaints. She explained that her review of Claimant's intake forms did not corroborate his claim of persistent neck and/or right shoulder complaints. Dr. D'Angelo noted that, in her records review, Claimant did mark right shoulder pain in certain diagrams, but also had no complaints of right shoulder pain for several months after his injury. She further noted that Claimant's shoulder was examined by his providers and had no significant abnormalities. Dr. D'Angelo opined that Claimant reached MMI as of May 2, 2019 for his claim-related diagnoses. She agreed with the impairment ratings assigned by Dr. Olsen, noting the ratings included all of the body parts that were causally-related to Claimant's work injury. Dr. D'Angelo opined Claimant did not require maintenance medical care.

36. On May 22, 2020, Dr. Lindenbaum attended a Samms Conference with counsel for both parties. In preparation for the conference, Dr. Lindenbaum reviewed additional documentation, including several pain diagrams and Dr. D'Angelo's IME report. Dr. Lindenbaum issued an addendum DIME report updating his opinion. Dr. Lindenbaum addressed the reasoning behind his original opinion that Claimant was not at MMI, stating,

> The questions arose concerning compensability for the shoulder and neck, which I had noted there was no specific mention of these things until several months after the accident. I specifically stated that I do not have any information except from what Dr. Lodha as well as Dr. Olsen had stated and that the patient started complaining of pain in his shoulder around the 1st of January, 2019. There was also some issues about whether this patient had actually discussed his complaints with his shoulder and neck with the OccMed doctors. Apparently, there had been a change in the OccMed physicians and the original physician, Dr. Wenzel, was no longer treating the patient and with his follow-up physician, there was no mentioned (*sic*) regarding work comp compensability for the right shoulder and neck until January of 2019. It was for these reasons that I stated he was not at maximum medical improvement until I could receive some documentation that would support his claims that he was having shoulder and neck pain from the beginning of the accident and were documented.

(R. Ex. AA, p. 439)

37. Dr. Lindenbaum noted that Claimant's 8/22/18 pain diagram only showed complaints of pain in his right elbow, knees, low back and neck, and that the 8/27/18 and 8/31/18 diagrams only denoted back and right elbow pain. Dr. Lindenbaum remarked that the first mention of shoulder discomfort was on 10/9/18, two months after the work injury. He noted there was "still no evidence of any complaints." (Id.) Dr.

Lindenbaum noted the 10/28/18, 10/31/18 and 11/16/18 diagrams did not indicate shoulder or neck complaints and that,

> [u]p to this time it should be noted there was no mention on diagrams of neck discomfort and only that he had some neck discomfort initially on the first visit. I would assume that because of the paucity of findings in his neck and his lack of diagram mentioning of neck pain that there were probably myofascial type of discomforts that were experienced at the initial injury.

(Id.)

38. He further referenced diagrams dated 12/14/18, 1/16/19, 2/1/19, 2/19/19, and 3/26/19, noting that only the 1/16/19 and 2/19/19 diagrams denoted right shoulder complaints.

39. Dr. Lindenbaum concluded that Claimant's right shoulder and neck conditions are not causally-related to Claimant's work injury, specifically reasoning that there were several months that passed without any specific complaints of discomfort related to the neck or shoulder. He opined that Claimant reached MMI for his work-related conditions on May 2, 2019, which included the lumbar spine and right elbow/bicep. Dr. Lindenbaum assigned 12% whole person lumbar impairment, apportioned out to 0% for Claimant's prior injury, and a 2% upper extremity rating for Claimant's right elbow/biceps.

40. On December 7, 2020, John Hughes, M.D. conducted an IME at the request of Claimant. Dr. Hughes performed a physical examination and reviewed Claimant's medical records, including the reports of Drs. D'Angelo and Lindenbaum. His diagnoses included cervicothoracic spine sprain/strain with persistence of non-radicular cervical spine pain and progressive right shoulder pain that merited further evaluation. Dr. Hughes disagreed with Drs. D'Angelo and Lindenbaum regarding the lack of relatedness of Claimant's right shoulder and cervicothoracic conditions. He explained,

> Although right shoulder and cervicothoracic spine symptoms were secondary to the acute symptoms stemming from his right biceps tear and aggravation of his lumbar spine, I disagree that 'there were months that went by without any specific complaints of discomfort related to the neck or the shoulder' as summarized by Dr. Lindenbaum in his Samms conference report.

(R. Ex. EE, p. 455)

41. Dr. Hughes agreed with Dr. D'Angelo and Dr. Lindenbaum that Claimant did not sustain primary injuries to his right shoulder, but opined that Claimant's ruptured right biceps and subsequent surgical repair ultimately resulted in his shoulder condition. Dr. Hughes explained that the surgical repair involved traction and pulling distally on the

biceps, which put new stresses on the right biceps long head tendon that extends proximally through the shoulder. He noted that right shoulder pain was documented two weeks after the procedure, and that such pain has persisted. Dr. Hughes opined that Claimant requires diagnostic evaluation for the right shoulder and, as such, had not reached MMI for such condition.

42. Dr. Hughes further opined that there was no clear-cut evidence of a medically documented injury to Claimant's cervical spine; but that thoracic spine pain was mentioned in August 27 and August 31 reports. He concluded that the diagnosis and source of pain generation remained unclear with respect to Claimant's cervicothoracic spine. Dr. Hughes recommended that Claimant undergo further assessment of the cervicothoracic spine and right upper extremity, including an EMG to assess for cervical radiculopathy, a possible trial of osteopathic manipulative treatment to include the upper thoracic spine, and possible spinal surgical intervention.

43. On June 15, 2020, Insurer filed a FAL consistent with Dr. Lindenbaum's updated DIME opinion regarding causation, impairment and maintenance care.

44. Dr. Hughes testified at hearing on behalf of Claimant as a Level II accredited expert in occupational medicine. Dr. Hughes testified consistent with his IME report. Dr. Hughes testified that Claimant's right shoulder condition was caused by the surgical shortening of his biceps on the right side. Dr. Hughes explained that the biceps extend up into the shoulder and that Claimant's emergence of shoulder symptoms is consistent with that particular pathology. He noted Claimant's shoulder condition was not realized until a number of weeks after his surgery was completed. Referring to Dr. Lodha's operative report, Dr. Hughes described the surgical procedure which entailed extensive tenolysis and pulling on the muscle tendon that extends up into the shoulder. He explained that, based on the operative report, considerable tension was required to reapproximate the distal biceps muscle. Dr. Hughes did not identify the right shoulder problem as arising from the original injury, but from the surgical repair that was delayed for a month and a week following the original injury. He testified that the delay was significant as it allowed more atrophy and shortening of the torn segment of the biceps tendon, requiring more traction during the surgical procedure.

45. Dr. Hughes anticipates diagnostic testing to reveal internal derangement of the right shoulder, including biceps longhead tendinosis or a partial tear in the shoulder. He recommends an evaluation and workup of the right shoulder with an orthopedic surgical evaluation and a non-contrast MRI. He testified that the MTG require a diagnosis before completing a causation analysis and that his recommendations are part of that requirement from the MTG. On cross-examination, Dr. Hughes testified that his only positive right shoulder exam finding regarding the right shoulder was limitation of active motion. Dr. Hughes acknowledged that he did not include his report, that after the October 9, 2018 pain diagram, Claimant's next seven pain diagrams did not identify right shoulder issues, nor that Dr. Castro's October 24, 2018 right shoulder exam was normal. Dr. Hughes did not provide an explanation for the absence of right shoulder

complaints or findings in the reports issued by the medical providers who saw Claimant between the date of surgery and January 15, 2019.

46. Dr. Hughes testified that there is no evidence of a medically documented injury to Claimant's cervical spine such that he can relate that condition to this claim. He further opined that Claimant's thoracic spine issues are related to Claimant's work injury and necessitated osteopathic manipulation.

47. Dr. D'Angelo testified at hearing on behalf of Respondents as a Level II physician who specializes in occupational medicine and forensic causation evaluations. Since issuing her April 20, 2020 report, Dr. D'Angelo reviewed Dr. Lindenbaum's amended DIME report, Dr. Hughes' IME report, and listened to the hearing testimony of Claimant and Dr. Hughes. Dr. D'Angelo testified consistent with her IME report. She testified that Claimant reported to her that his right shoulder condition was an immediate effect of the work accident. Dr. D'Angelo testified that her review of the medical records, including pain diagrams, contained no evidence of a right shoulder injury. Dr. D'Angelo strongly disagreed with Dr. Hughes' theory that Claimant's right shoulder condition was a consequence of the bicep tendon repair, noting that in her 30-plus years of experience as a doctor, she has never seen such phenomenon. She further testified that Dr. Hughes' theory does not comport with the medical records.

48. Dr. D'Angelo agreed with Dr. Hughes and Dr. Lindenbaum that Claimant did not sustain a work-related cervical injury. Dr. D'Angelo confirmed that Dr. Lindenbaum did not relate Claimant's thoracic spine condition to this claim, and that no treating physician related that condition to this claim. She opined that Claimant does not require osteopathic manipulation of his thoracic spine. In support of these opinions, Dr. D'Angelo pointed to Claimant's intermittent identification of thoracic region issues on his pain diagrams, she explained that aching in the intrascapular region is a common complaint that without other findings or complaints means nothing, and she further explained that in this case Claimant's early complaints of upper thoracic tenderness certainly means nothing given Claimant's lack of complaints later on, and given that her own thoracic spine exam revealed no tenderness or pathology. Dr. D'Angelo testified that she agrees with Dr. Lindenbaum's ultimate DIME opinion regarding causation and MMI.

49. Claimant testified he began to notice right shoulder issues after initially recovering from the surgery. He testified that he could not fully raise his arm and that his arm would cramp if raised for an extended period. Claimant testified that, immediately following the surgery, he was not moving his arm much because it was in a sling. He stated that within a couple weeks of the surgery he began to notice problems with the shoulder once it again became usable. Claimant testified he did not suffer any outside injuries to his right shoulder after the work injury. Claimant wishes to undergo evaluation and treatment for his right shoulder.

50. Regarding Claimant's right shoulder condition, the ALJ credits the opinions of Drs. Lindenbaum and D'Angelo, as supported by the medical records, over the opinion of Dr. Hughes and Claimant's testimony.

51. Claimant failed to prove that it is highly probable Dr. Lindenbaum's DIME opinion on causation and MMI is incorrect.

52. Claimant failed to prove it is more likely than not he is entitled to an award for medical treatment for his right shoulder condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to

conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Claimant contends that Dr. Lindenbaum committed clear error when he determined Claimant's right shoulder condition is not causally-related to the work injury, thus placing Claimant at MMI. Claimant argues that Dr. Lindenbaum's focus on whether

Claimant made specific complaints regarding shoulder issues in the early medical records "misses the point" regarding the causality of Claimant's condition. Claimant relies on Dr. Hughes' opinion and purports there is a reasonable explanation for any delay in reported shoulder symptoms, as the surgical biceps tendon repair ultimately caused Claimant's shoulder condition.

Considering the totality of the evidence, Claimant failed to meet the higher evidentiary burden of proving that it is highly probable Dr. Lindenbaum's DIME opinion on causation and MMI is incorrect. Dr. Lindenbaum reviewed Claimant's medical records and performed a physical examination as part of his initial evaluation. He thoroughly discussed his concerns regarding the causality of Claimant's right shoulder condition. Based on Claimant's reports that he had initially reported shoulder and neck complaints that were overlooked, Dr. Lindenbaum initially opined that Claimant had not reached MMI for certain body parts because he required additional information to make such determination. Upon reviewing additional documentation, Dr. Lindenbaum ultimately concluded that Claimant's right shoulder condition is not related to his work injury, again explaining his rationale in a report. Nothing in the record indicates that, at the time Dr. Lindenbaum reached his ultimate opinion, he did not consider, or otherwise misread or misapplied, relevant records or information necessary to make his determination.

Dr. Hughes' opinion that any delay in reporting shoulder complaints was reasonable, as such complaints were related to Claimant's surgery, is controverted by Dr. D'Angelo's opinion. Dr. D'Angelo performed a thorough review of Claimant's records and a physical examination and agrees with Dr. Lindenbaum's ultimate opinions. To the extent Dr. Hughes disagrees with Dr. Lindenbaum and Dr. D'Angelo regarding the causality of Claimant's right shoulder condition and MMI, this is merely a difference of medical opinion that does not rise to the level of clear convincing evidence to overcome Dr. Lindenbaum's DIME opinion.

Medical Treatment

Respondents are liable for medical treatment that is casually-related and reasonably necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

The employer's obligation to provide medical treatment continues until the claimant reaches MMI. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988).

Claimant contends his right shoulder condition is causally related to his industrial injury, thus entitling him to medical treatment for his right shoulder. As discussed, DIME

physician Dr. Lindenbaum opined Claimant's right shoulder condition is not causally related to his industrial injury and Claimant failed to overcome this opinion by clear and convincing evidence. Accordingly, Respondents are not liable for medical treatment for Claimant's unrelated right shoulder condition.

ORDER

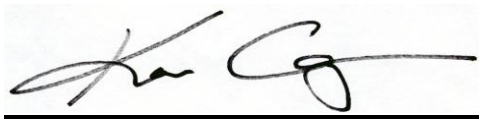
1. Claimant failed to establish by clear and convincing evidence that DIME physician Dr. Lindenbaum's opinion on MMI and causation is incorrect.

2. Claimant failed to establish by a preponderance of the evidence entitlement to medical treatment for the right shoulder.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-163-840-001

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant's average weekly wage (AWW) is $720.00 per week rather than the admitted AWW of $2,483.34 reflected on Respondents' March 8, 2021 General Admission of Liability (GAL).

II. If Claimant's AWW is determined to equal $720.00 per week, whether Respondents established, by a preponderance of the evidence, that Claimant has been overpaid in Temporary Total Disability (TTD) benefits.

III. If Respondents established that Claimant's TTD benefits have been overpaid, whether they are entitled to recoup this overpayment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant worked for Employer, an elevator installation/maintenance company, as a mechanic's helper/apprentice. Claimant's job duties included assisting a mechanic, usually [Redacted, hereinafter BJ], with installing, servicing, modernizing, and/or repairing elevators.

2. Claimant began working for Employer on October 14, 2019. His base rate of pay at the time of hire was $18 per hour. (Resp. Ex. B, bns. 066-067; Resp. Ex. A, bn. 045) Claimant was eligible for overtime pay in his position, which would be paid at 1.7x his hourly rate ($27 per hour); unless that overtime occurred on weekends or holidays, then it would be paid at 2.0x his hourly rate ($36 per hour). Claimant's hours per week would fluctuate depending on the project he was assigned to work although [Redacted, hereinafter RM], Owner and President of Employer, testified that over the approximately 15 months Claimant worked for Employer his average was 40 hours per week.

3. Shortly after beginning work for Employer, Claimant was assigned to work a project at the United States Air Force Academy ("USAFA"), in Colorado Springs. Employer had previously contracted with the USAFA to modernize 29 elevators at their facility and sent several people, including Claimant, to assist with the project.

4. When Claimant worked at the USAFA, his hourly wage increased to $28 per hour, with identical overtime increases in applicable situations (1.7x his hourly rate, 2.0x for weekends/holidays; to $47.60 per hour and $56 per hour respectively). (*See, e.g.* Resp. Ex. A, bn. 046)

5. Mr. RM[Redacted] testified at hearing. Mr. RM[Redacted] testified that Claimant, and other mechanic helpers/apprentices assigned to the USAFA project, received the aforementioned increased wages while working that project because Employer believed it was required by the Davis Bacon Act to provide this pay as the local prevailing wage.

6. The majority of Claimant's work for Employer from the time of his hire through mid-January 2021 was spent on the USAFA project. However, Claimant did not work exclusively on this project. When Claimant worked on non-federal government projects, his hourly wage would revert to his base pay of $18 per hour. (*See, e.g.* Resp. Ex. A, bn. 050) Mr. RM[Redacted] testified that Claimant was never promoted nor provided a raise by Employer. (Clmt's. Ex. 7)

7. Claimant last spent time on the USAFA project during the week of January 11-17, 2021. Mr. RM[Redacted] testified that Claimant and Mr. BJ[Redacted] had finished their portion of the USAFA project during this week and were both transferred to a non-federal government project, which was not governed by the Davis Bacon Act. Upon his transfer off the USAFA job, Claimant's base pay reverted to $18 per hour. (Resp. Ex. A, bns. 022, 023, & 005) Mr. RM[Redacted] testified that Employer had no plans to return Claimant to the USAFA project.

8. Twelve days after being transferred from the USAFA job, Claimant suffered an admitted industrial injury to his right hand on January 29, 2021, while adjusting the width of some forks on a forklift used to move elevator equipment on a job site. (Resp. Ex. C & D) This injury caused Claimant to miss work; thus, warranting the payment of ongoing TTD by Insurer beginning February 2, 2021. (Resp. Ex. D, bn. 071) As noted, Claimant's rate of pay at the time of his January 29, 2021 injury had reverted to $18 per hour. (Resp. Ex. A, bn. 022)

9. In order to file a General Admission of Liability (GAL) reflecting Claimant's lost wages, Insurer requested payroll records from Employer to calculate his AWW. Employer provided Insurer with 13 weeks of Claimant's wage records, which records included pay stubs for some of the time Claimant spent while working on the USAFA job prior to January 29, 2021. (*See* Resp. Ex. D, bns. 074-092) Mr. RM[Redacted] testified that at the time Claimant's wage records were produced, Employer was not certain how Insurer would be using the information. Moreover, Employer did not notify Insurer that Claimant had finished his portion of the work on the USAFA project and that his pay had returned to $18 per hour, for 40 hours per week.

10. Insurer averaged Claimant's wage records for his prior 13 weeks of employment to calculate an AWW of $2,483.34. This made Claimant's TTD rate $1,074.22 per week (the statutory maximum) for his date of injury. (Resp. Ex. D, bn. 073) Insurer has paid Claimant this ongoing TTD benefit since February 2, 2022. (Resp. Ex. D, bn. 071) By the time the matter proceeded to hearing, 55 weeks had past, making the total benefit paid to Claimant $59,082.10 ($1,074.22 x 55 weeks).

11. Mr. RM[Redacted] testified that in June 2021, Employer was reevaluating its employees' benefits under a new insurance plan. Because any changes in the value of employee benefits could potentially change the prevailing wages for workers on the USAFA job, Employer recalculated the prevailing wage for those mechanic helpers/apprentices still working that project. With the redetermination, Employer discovered that the prevailing wage being paid on the USAFA project for mechanic helpers/apprentices was inaccurate. Mr. RM[Redacted] testified that the wage determination under the Davis Bacon Act for elevator mechanic helpers/apprentices required a prevailing wage of $14 per hour rather than the base rate of $28 per hour it was paying. Mr. RM[Redacted] testified that five employees, including Claimant, were erroneously paid elevated wages on the USAFA project for many weeks. Employer did not attempt to recoup the overpaid wages from these employees, but the wages for those mechanic helpers/apprentices still on the USAFA project were adjusted down to base pay. The wage adjustment did not affect elevator mechanics, including Mr. BJ[Redacted] . Mr. RM[Redacted] also testified that this wage adjustment did not affect Claimant because he had already transitioned to a non-government project where he was making his base pay of $18 per hour.

12. Mr. BJ[Redacted] testified that he eventually returned to the project in September 2021. Claimant did not accompany him back to the jobsite.

13. In July 2021, Employer notified Insurer that Claimant's AWW had been inaccurately calculated.

14. Mr. RM[Redacted] testified that Claimant returned to work for Employer from August 30, 2021 through September 19, 2021. His rate of pay for this period was $18 per hour. (Resp. Ex. A, bn. 003, 004, & 009)

15. Claimant testified that he thought he would be returned to the USAFA job when the bonding process for the next two elevators in the cue had been completed and expected to be transitioned to a job at Peterson Field to complete a federal project there. While working the job at the USAFA, Claimant testified that he and Mr. BJ[Redacted] put in long hours and received substantial overtime pay. (Resp. Ex. A; Clmt's. Ex. 2)

16. BJ[Redacted] testified that Claimant was his "helper" while they worked to modernize the elevators at the USAFA. While he could not remember working 92 hours a week, Mr. BJ[Redacted] acknowledged that he and Claimant worked a significant amount of overtime and maybe put in as many as 85 hours a week while working at the USAFA.

17. Review of the wage records following Claimant's transfer from the USAFA job supports a finding that Claimant's wages dropped precipitously after January 17, 2021. In addition to the reduction in his hourly rate, the evidence presented supports a finding that the loss of the significant amount of overtime paid on the USAFA job played a key role in the reduction of Claimant's wages when he was transferred from the job.

Indeed, the average weekly wage Claimant was paid for his work on the USAFA job from December 28, 2020 through January 17, 2021 was $3,344.62 compared to $731.39 in the two weeks after his transfer and lead up to his January 29, 2021 injury.

18. The evidence presented persuades the ALJ that but for the erroneous wages paid under the Davis Bacon Act on the USAFA job and the fact that the injury occurred so close the finish of his work on the USAFA project, Claimant would have been making $18 per hour, plus limited overtime as reflected on his January 18-24 and January 25-31, 2021 pay stubs at the time he was injured.

19. Based on the above findings of fact, the ALJ finds that Respondents have proven, by a preponderance of the evidence, that they erroneously admitted to an AWW that was substantially higher than Claimant's actual earnings at the time of his injury. Clearly, at the time of Claimant's injury, he had moved to a project, which for the foreseeable future would pay him $18 per hour for approximately 40 hours per week. While it is difficult to predict the amount of overtime Claimant may have received in this new position, the evidence presented, including the payroll records supports a finding that in the week leading up to and the week of his industrial injury, Claimant was paid a limited amount of overtime, i.e. .45 and 1.20 hours respectively. Because the wage records following Claimant's transition from the USAFA job are limited and because they support a finding that overtime was paid for these two weeks, the ALJ finds that the fairest approximation of Claimant's wage loss due to his industrial injury is the total amount of wages earned, including overtime pay, for this two week period.

20. The evidence presented persuades the ALJ that Claimant's AWW at the time of his industrial injury was $731.39 (4730.89 + $731.89 = $1,462.78 ÷ 2 weeks = $731.89).

21. Based on this AWW, the ALJ finds Claimant's proper TTD rate to be $487.93 ($731.89 x .66667 = $487.93). The total benefit owed to Claimant from the start of his TTD payments (February 2, 2021) through hearing (55 weeks) is $26,836.15. Accordingly, the ALJ finds that the evidence supports a finding that Claimant has been overpaid $32,245.95 by Insurer ($59,082.10 - $26,836.15 = $32,245.95). To the extent that Claimant's TTD benefits have been ongoing since the hearing and the pendency of this order, he has continues to be overpaid by Insurer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising

out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (*Colo. App. 1993*); National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997). Further, the average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation benefits. Section 8-42-102(1), C.R.S.

D. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(d) provides that "[w]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from the daily wage in a manner set forth in paragraph (C) of subsection (2). Nonetheless, section 8-42-102(3), gives the ALJ wide discretion to "fairly" calculate the employee's AWW where the methods of computing AWW outlined in the statute will not fairly compute the AWW of an injured worker.

E. As found, the evidence in this case supports a conclusion that Claimant was transferred from the USAFA job two weeks before his admitted industrial injury. As part of his transfer to a non-government job site, Claimant's hourly wage reverted to $18 per hour for a roughly 40-hour workweek. Indeed, he earned wages consistent with this hourly rate and number of hours for approximately two weeks before his industrial injury. Further, the evidence supports a finding that Claimant probably would have made this amount for the foreseeable future as he was generally assigned to work with BJ[Redacted] , who did not return to the USAFA project until September 2021, *after* Employer had reduced wages to $18 per hour for mechanic helpers' on that project. Indeed, there a dearth of persuasive evidence in the record to support a conclusion that Claimant would have made wages above $18 per hour at any point after his work-related injury. Nonetheless, Claimant did work limited overtime after his transfer from the USAFA job, a fact that the ALJ finds/concludes would have likely continued, albeit on a limited basis, as supported by payroll records after Claimant's transfer from the USAFA job.

Because the wage records following Claimant's transfer from the USAFA job are limited and support that he worked some overtime, the ALJ concludes that simply calculating Claimant's AWW on a 40 hour work week is not a fair approximation of his wage loss and diminished earning capacity resulting from his industrial injury. Based upon the evidence presented, the ALJ concludes that totaling Claimant's actual earnings, including his overtime pay, for the two full weeks following his transfer from the USAFA job is the closest approximation of his actual wage loss and diminished earning capacity at the time of his work-related injury. As found, the ALJ concludes that Claimant's AWW is $731.89. The fact that he made elevated wages, at a previous project, does not affect this finding.

Overpayments & Respondents' Burden of Proof

F. When respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. Section 8-43-201(1), *C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> . . . a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

G. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents seek to modify and withdraw the previously admitted AWW reflected in the March 8, 2021 GAL. Accordingly, they carry the burden of proof, by a preponderance of the evidence, to justify the modification/withdrawal.

H. At the time of Claimant's injury, and the filing of the general admission that Respondents are seeking to modify in this case, C.R.S. § 8-40-201(15.5)(2021) defined an overpayment as "money received by a claimant that exceeds the amount that should

have been paid, or which the claimant was not entitled to receive[.]"[1] Citing *HLJ Management Group, Inc. v. Won Il Kim, 804 P.2d 250 (Colo. App. 1990),* Claimant contends that Respondents are not entitled to recoup any overpayment in TTD benefits paid in the event that Claimant's AWW is modified. Claimant urges the ALJ to deny such recoupment on the grounds that if the March 8, 2021 GAL is withdrawn and the AWW modified, Respondents would not entitled to a retroactive modification unless the employer was found to have been fraudulently induced by the employee's false representations. See, *HLJ Management Group, Inc. v. Kim*, supra; see also, *Rocky Mountain Cardiology v. Industrial Claim Appeals Office*, 94 P.3d 1182, 1185 (Colo. App. 2004); *Pacesetter Corp. v. Collett,* supra. Because the evidence presented in the instant case supports a conclusion that the TTD in this case was paid pursuant to a GAL and fails to support a conclusion that the mistake with regard to Claimant's average weekly wage was fraudulently induced, Claimant argues that he was entitled to receive those payments and recoupment of any overpayment caused by the Respondents' miscalculation of his AWW should be denied. The ALJ is not persuaded, concluding instead that Claimant's reliance on the holding announced in *HLJ Management Group, Inc.* is misplaced.

I. Contrary to Claimant's suggestion, erroneous payment of TTD benefits under an admission of liability may constitute an overpayment, which an insurer may retroactively recover. See, generally, *Simpson v. ICAO*, 219 P.3d 354, 358 & 361 (Colo. App. 2009) (*overruling HLM Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990)), (*rev'd in part, vacated in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010)). In *Simpson*, the Colorado Court of Appeals explained that part of the holding in *HLJ Management*, which the ALJ finds is at the heart of the dispute in the instant case, is no longer good law. The portion of the holding overruled in *HLJ Management* by *Simpson* involved the conclusion that when an employer's mistake in an admission results from its own erroneous calculation, it could not retroactively withdraw or modify the admission and is bound thereby, at least until an ALJ enters an order as to prospective payments. The Court explained in 1997, that the General Assembly amended § 8-43-303(1) & (2)(a), C.R.S. 2008, to permit reopening of an award on grounds of "overpayment," and specified that the reopening would not affect an earlier award as to money already paid "except in cases of overpayment." Accordingly, the ALJ concludes that Claimant's reliance on the holding of *HLJ Management* for the proposition that Respondents cannot retroactively recover TTD benefits erroneously paid under an admission of liability is misplaced. Contrary to Claimant's suggestion, the holding announced in *HLJ Management* is not the prevailing state of the law concerning the issue before the undersigned ALJ.

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[1] Effective January 1, 2022, the definition of overpayment was changed in section 8-40-201(15.5). This change affects an insurer/employer's ability to recoup monies paid to a claimant, and as such eliminates a right existing prior to the change. This makes the statute change substantive. *Specialty Restaurant Corp. v. Nelson*, 231 P.3d 393, 399 (Colo. 2010) (*citing In re Estate of Dewitt*, 54 P.3d 849 (Colo. 2002)). "Substantive rights and liabilities of the parties to a workers' compensation case are determined by the statute in effect at the time of an employee's injury . . . " *Specialty Restaurant Corp.*, 231 P.3d at 400 (*citing City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006), and *American Compensation Ins. Co. v. McBride*, 107 P.3d 973 (Colo. App. 2004)).

J. In concluding that Respondents are entitled to retroactively recover the asserted overpayment of TTD benefits paid in this case, the ALJ also finds the claim of *Josue v. Anheuser-Busch, Inc.,* W.C. 4-954-271-04 (ICAO, June 17, 2016), instructive. Similar to the instant case, the respondents in *Josue* sought to recover an overpayment in TTD benefits paid to claimant. Also similar to the instant case, claimant, Mr. Josue argued that there was no overpayment is his case "because the payment of temporary disability was made pursuant to a general admission of liability, [that he] was entitled to receive those payment when they were received and [could not] be characterized as an overpayment as described by § 8-40-201(15). The Panel noted that the Court in *Simpson* was faced with both a question of whether benefits erroneously paid under an admission could constitute an "overpayment" and if so, whether respondents could retroactively recoup that overpayment. Noting that the 1997 amendments to § 8-43-203 (1) & (2)(a) which allowed for the "reopening of an award, regardless of whether the award is through an admission or an order, and provides that money 'already paid' through such an award may be affected if that payment qualifies as an 'overpayment' would be rendered useless, the Panel affirmed the determination that Mr. Josue had "received an overpayment in the amount of $16,222.32 and was required to repay that sum."

K. As found, Respondents have proven that Claimant received an overpayment in TTD benefits based on an erroneously calculated AWW. See Finding of Fact, ¶ 21. As noted, Claimant's AWW in this claim is $731.89, making his TTD benefit rate $487.93 Based on this finding, Claimant's total owed TTD benefit from the date of issuance (February 2, 2021) through the date of hearing (55 weeks) is $26,836.15. Per the findings above, Claimant has received $59,082.10 in TTD benefits from insurer over this applicable 55 weeks period, creating a $32,245.95 overpayment to Claimant at the time of hearing. To the extent that Claimant's benefits are ongoing at the erroneous TTD rate, as found in this order, the ALJ finds a continuing overpayment to Claimant. Respondents may recoup, offset and/or credit against future benefits, all overpayments of TTD made to Claimant, pursuant to applicable law.

ORDER

It is therefore ordered that:

1. Claimant's AWW in this claim is $731.89, making his TTD benefit rate $487.93.

2. Claimant has received an overpayment of TTD benefits from Respondents in the amount of $32,245.95. Respondents may recoup, offset and/or credit against future benefits, all overpayments of TTD made to Claimant, pursuant to applicable law.

3. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise,

the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has demonstrated, by a preponderance of the evidence, that he is entitled to an award of temporary total disability benefits for the additional time period of June 13, 2020 through July 27, 2021.

II. Whether Respondents have demonstrated, by a preponderance of the evidence, that a statutory penalty should be assessed against under Section 8-43-102, C.R.S. for the late reporting of his claim.

III. Whether Claimant has demonstrated, by a preponderance of the evidence, that medical services with Clinica Family Health, Health Images Radiology, St. Anthony North (Westminster), St. Anthony Hospital (Lakewood), and Critical Care, Pulmonary & Sleep Associates that were covered by Medicaid were reasonably necessary and related to this occupational disease claim, and whether Respondent Insurer must reimburse Medicaid for those services.

FINDINGS OF FACT

1. Claimant worked for Employer as a stone fabricator.

2. Claimant suffered an admitted occupational disease of silicosis as a result of inhalation of silica dust at work.

3. Claimant last worked for Employer on Friday, June 12, 2020. Claimant informed his supervisor, [Redacted, hereinafter ML], that he was not feeling well and that he was having trouble with his feet and hands, as well as experiencing shortness of breath.

4. Claimant left a voicemail for Mr. ML[Redacted] on the office phone on Sunday, June 14, 2020. Claimant testified he stated on the voicemail that he felt very bad, was not going to make it into the office, and that he had possibly been exposed to COVID-19. Claimant disputes that he said he would be quarantining for two weeks.

5. Claimant went into the office on Friday, June 19, 2020 to pick up his paycheck. Claimant was intoxicated and became involved in a verbal altercation with Mr. ML[Redacted] . Claimant left after Mr. ML[Redacted] threatened to call the police. A co-worker subsequently provided Claimant his paycheck on Saturday, June 20th or Sunday, June 21st.

6. Claimant did not return to work for Employer. Claimant testified he assumed he had been terminated by Mr. ML[Redacted] due to their verbal altercation on June 19, 2021. Claimant acknowledged, however, that Mr. ML[Redacted] had not terminated his employment nor did he advise Mr. ML[Redacted] that he was quitting. Claimant

confirmed that there were prior lapses in his employment with Employer due to personal issues during which Claimant would not notify Employer of his absence.

7. Claimant testified that he has not been able to physically perform his job duties as a stone fabricator since leaving work on June 12, 2020.

8. Claimant testified that at the time he did not associate his breathing problems with his work for Employer. Claimant testified he initially was unsure of what was causing his symptoms, but attributed his issues to age, being out of shape, smoking, and COVID. Claimant did not seek medical evaluation at the time because he did not have medical insurance. Claimant later applied and qualified for Medicaid and subsequently sought evaluation at Clinica Campesina ("Clinica").

9. Claimant presented to Clinica on December 3, 2020 with complaints of knee, back and joint pain. The medical record from this date contains no mention of any respiratory complaints or findings. Claimant reported that he physically could not stand and that he had not been able to work.

10. Claimant returned to Clinica on December 16, 2020, at which time Claimant's substance abuse with severe alcohol disorder was discussed. The medical record from this date contains no mention of any respiratory complaints or findings.

11. Clinica subsequently referred Claimant for a chest x-ray due to chronic cough and congestion. The chest x-ray was performed at Health Images on December 17, 2020. The x-ray revealed significant bilateral perihilar pneumonia or pulmonary edema. Clinica then referred Claimant for evaluation and treatment at the emergency department.

12. On December 18, 2020, Claimant presented to the emergency department at St. Anthony North in Westminster with complaints of shortness of breath over the last several months with acute worsening over the last four days. Claimant initially presented with tachycardia and HTN, both of which were initially attributed to concern of alcohol withdrawal.

13. Claimant was then transported by ambulance on December 18, 2020 to the Main Campus of St. Anthony Hospital. Claimant was admitted for undifferentiated pulmonology pathology. Due to concerning findings on chest x-ray and CT scan, Claimant was admitted for monitoring and a biopsy. He was discharged on December 19, 2020.

14. On December 19, 2020, Claimant presented to Critical Care, Pulmonary & Sleep Associates upon referral from the emergency department. Claimant reported that he stopped working several months ago because of difficulties breathing. It was noted Claimant's condition was highly suspicious for silicosis due to his stone dust exposure at work.

15. A diagnostic bronchoscopy was performed at St. Anthony's Central on December 23, 2020. The biopsies were compatible with silicosis in the appropriate occupational setting.

16. On December 27, 2020 Claimant was diagnosed with silicosis in the setting of occupational exposure.

17. On January 6, 2021 Claimant returned to Clinica for a follow-up evaluation. He was advised that he was diagnosed with silicosis and that he was scheduled to see a pulmonology specialist on January 14, 2021. Claimant requested that his provider complete a medical disability form in order for him to obtain financial assistance. Clinica completed paperwork indicating Claimant was "unable to work at all" right now, secondary to pulmonary disease associated with shortness of breath and weakness (R. Ex. G, p. 30). Claimant was prescribed albuterol and Advair inhalers along with prednisone.

18. Claimant presented to pulmonologist Dominic John Titone, M.D. at Critical Care, Pulmonary & Sleep Associates on January 14, 2021. Claimant reported that he began developing dyspnea, fatigue and weakness six months prior. Dr. Titone diagnosed Claimant with chronic hypoxic respiratory failure secondary to silicosis and COPD. Claimant did not currently require supplementary oxygen at rest but did require two liters of oxygen with walking. Dr. Titone restricted Claimant from any further exposure to silica, stone dust or cigarette smoke. Dr. Titone also diagnosed with COPD with mild obstruction, which he noted could be due to silicosis or smoking.

19. Claimant continued to follow up with Clinica on January 25, February 9, and May 20, 2021. Claimant's silicosis diagnosis is referenced in these records, but solely in the context of treating with other providers for that condition. The records from Claimant's treatment at Clinica from January 25, 2021 – May 20, 2021 primarily concern Claimant's substance abuse of both alcohol and tobacco. The May 20, 2021 report noted Claimant had been in detox and was planning to move to Texas to be near family.

20. Claimant filed a Worker's Claim for Compensation on May 4, 2021 alleging the occupational disease of silicosis as a result of the inhalation of silica dust while fabricating stone. Claimant reported a date of onset of May 4, 2021. It is undisputed the first written notice Claimant provided to Employer of a work-related injury or condition was the claim filed on May 4, 2021.

21. Employer's First Report of Injury indicates Employer was notified of Claimant's injury on May 7, 2021.

22. Insurer filed a Notice of Contest on May 13, 2021, denying liability for the claim as no injury was reported.

23. On July 6, 2021, Claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, and TTD.

24. Claimant presented to authorized treating physician David W. Yamamoto, M.D. on July 28, 2021. Dr. Yamamoto diagnosed Claimant with occupationally acquired silicosis. He noted that Claimant was unable to work in his regular field of work and that Claimant required oxygen when not sedentary. Dr. Yamamoto referred Claimant to a pulmonologist in Austin, Texas, where Claimant had relocated, and removed Claimant from work effective that day to October 13, 2021.

25. On August 5, 2021, Respondents filed a Response to Application for Hearing endorsing, *inter alia*, penalties against Claimant for late reporting under §8-43-102, C.R.S.

26. On September 14, 2021 pulmonologist Jeffrey Schwartz, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. Schwartz issued an IME report on October 4, 2021 in which he concurred with the diagnosis of occupational silicosis. He noted Claimant's cigarette smoking may also partly contribute to his diffusion capacity, but opined that the majority of Claimant's respiratory impairment is likely due to his silicosis. Dr. Schwartz concluded that there is no impairment from the silicosis that would prevent Claimant from work requiring sitting or walking at least 90-120 yards.

27. Insurer filed a General Admission of Liability on October 13, 2021 admitting for medical benefits and TTD beginning July 28, 2021 and ongoing at $381.81 per week. Under the "Remarks" section, it states,

> Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not. Insurer reserves the right to seek reimbursement from any other insurance carrier or self-insured employer.

(R. Ex. F, p. 12)

Further remarks included in the GAL state, "All benefits and/or penalties not admitted are specifically denied. [Insurer] accepts liability for this lost time claim. AWW per attached wages from the [Employer]." (Id. at p. 14). Respondents do not assert any penalties against Claimant in the GAL.

28. Claimant testified he did not know he had silicosis as a result of his work until he was advised of the diagnosis around Christmas 2020. Claimant confirmed that he never notified Mr. ML[Redacted] that he had been hospitalized in December 2020 or that he had been diagnosed with silicosis. Claimant contacted Employer in March 2021 to inquire about his W-2 form but did not notify Employer at that time of his work-related diagnosis. Claimant testified he did not tell Employer about his diagnosis because he figured Mr. ML[Redacted] would disregard it. Claimant testified he determined that his

best course of action would be to retain a lawyer to help him with the claim, and that it took some time to find a lawyer for assistance.

29. The ALJ finds that Claimant recognized the nature, seriousness and probable compensable nature of his occupational disease on December 27, 2020, when Claimant was made aware of his diagnosis of occupationally related silicosis.

30. Claimant acknowledged that there was a poster hanging by the time clock at work that advised employees of their responsibilities in reporting a work-related injury. Claimant used the time clock to punch in and out of work every day that he worked.

31. ML[Redacted], owner of Employer, testified that he was aware Claimant had breathing problems that Claimant associated with smoking. Prior to Claimant's filing a claim, Mr. ML[Redacted] was unaware Claimant had a potentially work-related condition. Mr. ML[Redacted] testified that no other employees had previously been diagnosed with silicosis and that he himself has never had any respiratory symptoms after performing fabrication work. Mr. ML[Redacted] told employees that if they were injured at work they should provide him with a written statement within three days. He testified that if Claimant had previously notified him about a work-related condition he would have reported the claim to Insurer.

32. Claimant proved it is more probable than not he is entitled to TTD benefits. Claimant's occupational disease caused Claimant a disability for which Claimant missed more than three work shifts, resulting in actual wage loss.

33. Claimant proved it is more probable than not the medical services provided by Clinica (from December 3, 2020 to January 6, 2021), Health Images Radiology, St. Anthony's Hospital and Critical Care, Pulmonary & Sleep Associates were reasonably necessary and related to this occupational disease.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge.

University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written

release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Respondents argue that, due to Claimant's "abandonment" of his employment in June 2020, lack of work restrictions until late December 2020, and late notice and reporting of a worker's compensation claim on May 4, 2021, Claimant has not successfully demonstrated entitlement to TTD benefits from June 13, 2020 through July 27, 2021.

The ALJ disagrees. It undisputed Claimant and Mr. ML[Redacted] were involved in a verbal altercation in June 2020, after which Clamant did not return to his employment. However, Claimant credibly testified, and the record supports, that he left work due to not feeling well, including shortness of breath. Although, at the time, Claimant was unaware of the cause of his symptoms, it was later confirmed that Claimant's the respiratory symptoms are were the result of occupationally acquired silicosis. Claimant credibly testified that his respiratory symptoms have prevented him from performing his regular job duties and that he has not earned actual wages since leaving his employment with Employer. Claimant's testimony alone is sufficient to establish disability. Once Claimant obtained medical evaluation and treatment, he was placed on medical restrictions preventing him from performing his regular job duties due to his occupational disease. Respondents have admitted liability for TTD beginning July 28, 2021 and ongoing. The preponderant evidence establishes Claimant is entitled to TTD benefits from June 13, 2020 through July 27, 2021.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020) (concluding that respondents are liable for the cost of prescriptions, as long as the cost complies with the Fee Schedule, regardless of where the claimant fills them).

When there is an occupational disease claim, the courts have routinely rejected arguments that respondents are not responsible for medical care and treatment even if it arose prior to Claimant's employment with the employer. In *Royal Globe Insurance Co. Collins*, 723 P.2d 731 (Colo. 1986), the Court held that in a claim based upon an occupational disease, the insurance carrier "on the risk" at the time medical expenses are incurred is liable for payment of those medical expenses. Further, the court later explained that "on the risk" means the employer in whose employment the need for treatment was caused. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo App. 2001).

Claimant sought medical evaluation and treatment at Clinica for multiple medical issues, including his respiratory problems. His providers at Clinica ultimately referred Claimant to Health Images for a chest x-ray, and to St. Anthony's emergency department. Claimant was subsequently admitted to the hospital, where a lung mass was visualized and a differential diagnosis of silicosis was provided. Claimant was provided with oxygen upon discharge and advised of the need for additional testing. Claimant then underwent a diagnostic bronchoscopy on December 23, 2020 at St. Anthony's Central for a determination the cause of Claimant's lung mass and respiratory issues. Claimant was also referred to Critical Care, Pulmonary and Sleep Associates for evaluation of his respiratory issues.

All of the aforementioned medical care was reasonably necessary and related to diagnosing and treating Claimant's medical condition, which was ultimately determined to be occupationally related. Respondents are liable for such treatment.

Respondents are not liable for the medical treatment Claimant received at Clinica from January 25, 2021 to May 20, 2021, as there is insufficient evidence Clinica was treating Claimant for his respiratory issues. The Clinica medical records from January 25, 2021 to May 20, 2021 indicate Claimant was being seen for management of substance abuse during that time period.

Penalties

Respondents contend Claimant should be subject to penalties for late reporting of his occupational disease pursuant to Section 8-43-102(2), C.R.S. Section 8-43-102(2) provides:

> Written notice of the contraction of an occupational disease shall be given to the employer by the affected employee or by someone on behalf of the affected employee within thirty days after the first distinct manifestation thereof. In the event of death from such occupational disease, written notice thereof shall be given to the employer within thirty days after such death. **Failure to give either of such notices shall be deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon.** Actual knowledge by an employer in whose employment an employee was last injuriously exposed to an occupational disease of the contraction of such disease by such employee and of exposure to the conditions causing it shall be deemed notice of its contraction. If the notice required in this section is not given as provided and within the time fixed, the director may reduce the compensation that would otherwise have been payable in such manner and to such extent as the director deems just, reasonable, and proper under the existing circumstances. (*Emphasis added*).

The determination of the "first distinct manifestation" is subject to the general principle that time for providing notice of an injury does not begin to run until the claimant, "as a reasonable person recognizes the nature, seriousness, and probable compensable nature of the injury. *See City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d (1967). To recognize the "probable compensable character" of any injury, the claimant must know that the injury is somewhat disabling and must appreciate a causal relationship between the employment and the condition. *City of Colorado Springs v. Industrial Claims Appeals Office*, 89 P. 3d 504 (Colo. App. 2004).

Claimant argues that Respondents waived the right to request a reduction in Claimant's compensation under Section 8-43-102(2) because Respondents filed a GAL in this matter before proceeding to hearing.

ICAO addressed waiver of penalties under Section 8-43-102(2) in *Victor Meza v. BMC West Corp.*, WC 4-651-065 (Jan. 3, 2007). In *Meza*, the matter proceeded to hearing on the respondents' April 13, 2006 petition to suspend compensation based on the claimant's alleged failure to report his injury within the time constraints of § 8-43-102(1), C.R.S. The ALJ determined that the claimant sustained an occupational disease and analyzed the matter of the suspension of benefits under subsection (2) of § 8-43-102, C.R.S. The ALJ also found that the claimant did not give notice of his occupational disease within 30 days, as required by § 8-43-102(2). Nonetheless, the ALJ found that the respondents filed a GAL for TTD benefits on April 19, 2006, which did not assert any penalty for late reporting. He also found that the respondents subsequently filed another GAL seeking to reduce the claimant's TTD rate and noting that the respondents did not waive any defenses under section 8-43-102(1). The ALJ concluded that the respondents were barred from seeking a late reporting penalty because they failed to include such a claim in the GAL filed on April 19, 2006. The ALJ construed the GAL to be an award for purposes of § 8-43-102(2), which expressly deems the claimant's failure to timely notify the employer of an occupational disease to be waived unless an objection is made prior to any corresponding award or decision.

The respondents in Meza appealed the ALJ's decision, arguing that, since they filed their petition to suspend compensation prior to filing the general admission of liability, the ALJ erred in concluding that an award was made before the respondents raised the late reporting penalty. The respondents argued that they could not be deemed to have waived their claim for a late reporting penalty in such circumstances. ICAO disagreed and affirmed the ALJ's decision, determining that the ALJ did not err in finding a waiver under the express language of the Act. ICAO reasoned that the respondents' GAL constituted an award prior to a hearing. *Id*.; *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1, 2 (Colo. App. 1994). Considering the plain language of Section 8-43-102(2), which states that a claimant's failure to give employer timely notice of his or her occupation is disease is "deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon", ICAO reasoned that the respondents' filing of a GAL before proceeding to hearing on the matter prohibited the imposition of any late reporting penalty under Section 8-43-102(2).

A similar analysis applies in the case at bench. As found, Claimant recognized the nature, seriousness and probable compensable nature of his occupational disease on December 27, 2020, the time when Claimant was made aware of his diagnosis of occupationally related silicosis. Claimant did not provide written notice to Employer of his occupational disease until filing a claim for worker's compensation on May 4, 2021, thus failing to provide timely notice to Employer pursuant to Section 8-43-102(2).

Nonetheless, Respondents in this matter waived the issue of Claimant's failure to give timely notice by filing a GAL. Although Respondents endorsed the issue of penalties under Section 8-43-102 for Claimant's late reporting in their Response to Application for Hearing filed on August 5, 2021, prior to proceeding to a hearing, Respondents filed a GAL on October 13, 2021. The GAL constitutes an award. *See Burke*, supra. The GAL did not assert penalties against Claimant. As Respondents' objection was not made at a hearing on the claim prior to any award or decision thereon, Respondents' waived its' right to reduction in penalties under Section 8-43-102, C.R.S.

ORDER

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from June 13, 2020 to July 27, 2021.

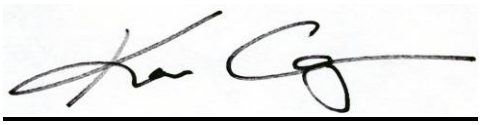
2. Respondents are liable for the medical services provided by Clinica (from December 3, 2020 to January 6, 2021), Health Images Radiology, St. Anthony's Hospital and Critical Care, Pulmonary & Sleep Associates were reasonably necessary and related to this occupational disease. Respondents are not liable for Clinica's evaluations from January 25, 2021 to May 20, 2021.

3. Respondents failed to prove Claimant is subject to a late reporting penalty pursuant to Section 8-43-102(2), C.R.S.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on June 19, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that reasonable medical treatment of his back is necessary to cure and relieve him from the effects of the work injury.

FINDINGS OF FACT

1. The claimant worked as a houseman in the housekeeping department at the employer's hotel in Aspen, Colorado. The claimant's job duties included removing all laundry/linens from the hotel rooms.

2. The claimant testified that at approximately 4:30 p.m. on Saturday, June 19, 2021 he injured his back while pulling a cart full of linen. The claimant also testified that it felt like he hit the back of his leg and he felt pain in his back and leg. The claimant further testified that he attempted to report this incident to his supervisor and Loss Prevention, but no one was available at that time. The claimant testified that the pain in his back and leg was so severe that he could not continue working and he went home. The claimant testified that due to his pain and his scheduled days off, he did not return to work until June 22, 2021.

3. The claimant testified that on June 22, 2021 he reported his back injury to [Redacted, hereinafter MM], Director of Human Resources. The claimant further testified that Ms. MM[Redacted] sent him home early on that date.

4. Payroll records entered into evidence demonstrate that although the claimant was scheduled to work until 5:30 p.m. on June 19, 2021, he worked beyond his scheduled hours until 7:19 p.m. The payroll records also demonstrate that the claimant reported for his shift on June 20, 2021 at 7:50 a.m. and worked 8.87 hours. The claimant was scheduled to be off on June 21, 2021. He returned to work on June 22, 2021 and worked from 8:50 a.m. to 5:25 p.m. On June 23, 2021, the claimant worked from 8:48 a.m. to 5:49 p.m. On June 24, 2021, the claimant worked from 8:48 a.m. to 5:30 p.m.

5. [Redacted, hereinafter DO], Housekeeper/Office Coordinator, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

6. [Redacted, hereinafter AC], Housekeeping Coordinator, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

7. [Redacted, hereinafter FP], Director of Housekeeping, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

8. The claimant was aware that the employer's procedure for reporting a work injury is to speak with Loss Prevention. The claimant properly reported a prior right shoulder injury to Loss Prevention on October 14, 2019.[1]

9. MM[Redacted], Director of Human Resources, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter. Ms. MM[Redacted] testified that on June 22, 2021, she learned that the claimant had been placed at maximum medical improvement (MMI) for his right shoulder on June 14, 2021. Ms. MM[Redacted] was also informed that the claimant had permanent work restrictions related to his right shoulder. As the Director of Human Resources, Ms. MM[Redacted] was tasked with determining if the employer could accommodate the claimant's permanent work restrictions.

10. The claimant's permanent work restrictions for his right shoulder include: no lifting, carrying, pushing, or pulling over 30 pounds; minimal overhead reaching; and minimal reaching away from the body.

11. Ms. MM[Redacted] testified that the claimant was sent home before the end of his scheduled shift on June 24, 2021 because he was observed working outside of his work restrictions related to his right shoulder.

12. Ms. MM[Redacted] and Ms. FP[Redacted] reviewed all available positions to determine if the claimant's permanent work restrictions could be accommodated. Due to the nature of the claimant's right shoulder-related work restrictions, the employer was unable to accommodate the claimant. At a meeting with Ms. MM[Redacted] and Ms. FP[Redacted] on June 30, 2021, the claimant was informed that his work restrictions could not be accommodated and his employment was terminated. The claimant did not report a back injury at that meeting.

13. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the testimony of Ms. DO[Redacted], Ms. AC[Redacted], Ms. FP[Redacted], and Ms. MM[Redacted]. The ALJ is not persuaded that the claimant suffered an injury on June 19, 2021. The claimant did not report a back injury to the employer, despite opportunities to do so. The claimant continued to work between June 19, 2021 and June 24, 2021 without issue. The claimant was sent home on July 24, 2021, because he was working outside of his shoulder-related work restrictions. The ALJ finds that the claimant has

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[1] The claimant's October 14, 2020 right shoulder injury is not currently at issue. However, the ALJ includes information regarding work restrictions for that injury as it is pertinent to the timeline regarding the present case.

failed to demonstrate that it is more likely than not that he suffered an injury to his back at work on June 19, 2021.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on June 19, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the testimony of the respondents' witnesses are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an alleged June 19, 2021 injury is denied and dismissed.

Dated this 31st day of March 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that her workers' compensation claim should be reopened based on a worsening of condition?

- If Claimant has proven a reopening should occur, whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits beginning June 29, 2020 and continuing?

FINDINGS OF FACT

1. Claimant sustained admitted injuries to her low back while employed with Employer on July 29, 2019 while lifting a box. Claimant initially sought medical treatment for her low back injury after she woke up with severe back pain on July 31, 2019 and was transported to St. Mary's Medical Center by ambulance.

2. Claimant began treating with nurse practitioner ("NP") James Harkreader at St. Mary's Occupational Health on August 1, 2019. Claimant was initially diagnosed with acute lumbosacral back strain and placed on full restrictions. On August 5, 2019, Claimant was evaluated by Dr. Craig Stagg. Dr. Stagg recorded that claimant still had a significant amount of back pain. Dr. Stagg recommended physical therapy.

3. Claimant reported to NP Harkreader that she had an aggravation of her pain on October 1, 2019 which resulted in radiating pain into the left buttocks. NP Harkreader referred Claimant for a magnetic resonance image ("MRI") of the lumbar spine which was performed on October 9, 2019. The MRI showed broad based disc extrusions at L3 – L4 and L4 – L5 causing moderate to several canal stenosis. There was also a disc protrusion at L5 – S1 and degenerative facet changes.

4. NP Harkreader referred claimant to Western Colorado Spine.

5. Claimant returned to NP Harkreader On November 12, 2019 with complaints of pain was now radiating into the left buttocks and left thigh to the knee. Claimant was tender on the left SI joint and left sciatic notch. NP Harkreader diagnosed claimant with lumbago with left leg radiculopathy. NP Harkreader noted that claimant underwent epidural steroid injections at L4 – L5 and L5 – S1 the week prior.

6. Claimant reported some improvement following the injection. Claimant continued to note she had tenderness in the left SI and left sciatic notch area. On December 31, 2019, NP Harkreader noted that injections were repeated by Dr. Clifford on December 19, 2019. Claimant reported that she was doing well following the injections with only had a slight backache.

7. By January 28, 2020, Claimant reported to NP Harkreader that she was pain free. NP Harkreader discussed releasing Claimant to return to work full duty. NP Harkreader noted that claimant did not want a functional capacity evaluation because she was not interested in permanent restrictions.

8. Dr. Stagg ultimately placed Claimant at maximum medical improvement on February 14, 2020. Claimant noted that she was doing well with full duty and that her pain had improved with only some residual stiffness. Dr. Stagg's diagnosed Claimant with andL5 – S1 disc herniation that had improved symptomatology post-injection. Claimant's gait was normal. Dr. Stagg assigned claimant a 11% whole person impairment rating for the lumbar spine, which included a 7% table 53 rating and a 4% rating for range of motion deficits. Dr. Stagg recommended maintenance medical care in the form of two to three maintenance care visits over the next year as needed. Dr. Stagg released Claimant to work without restrictions.

9. Claimant testified at hearing that after being placed at MMI, she was 75% better, but still had pain all the time. Claimant testified that on June 27, 2020, she was bent over in the shower to shave her legs when she felt a twinge in her back and stood up. Claimant denied twisting when she was shaving her legs. Claimant testified she had another incident which resulted in back spasms in September 2020. Claimant testified she has not returned to work since the shaving incident.

10. Claimant was treated at the St. Mary's Hospital Emergency Room on June 27, 2020. Dr. Christopher Bazzoli noted that Claimant was presenting with sudden onset back pain after bending over while shaving this morning. Claimant reported she had severe pain in her low back that radiated down her right leg and was worse whenever she tried to move. Claimant reported she had twinges of pain in the past, but never this severe.

11. Claimant returned to NP Harkreader on June 29, 2020. Claimant reported to NP Harkreader that she had been doing well and was working full duty, until this past Saturday morning when she bent over in the shower to shave her leg and felt some pain in her low back. NP Harkreader noted Claimant's prior MRI had shown broad based disk extrusion at L3-4 and L4-5 causing moderate to severe spinal canal and mild bilateral foraminal stenosis, with an L5-S1 broad based disk extrusion casing mass effect upon the descending S1 nerve roots. Claimant reported that she had some pain into her right hip but none down into her lower extremity. NP Harkreader noted Claimant had a positive straight leg raise test on the right along with decreased range of motion and difficulty getting up from a seated position. NP Harkreader opined that this was an aggravation of her underlying prior work-related injury and took Claimant off of work completely.

12. Claimant returned to Dr. Stagg on July 7, 2020. Dr. Stagg noted that Claimant had done fairly well until she was bending over shaving her legs several weeks ago when she had acute onset of low back pain. Dr. Stagg noted that Claimant reported

having pain radiating into both thighs with difficulty standing because of the pain. Dr. Stagg diagnosed Claimant with lumbar stenosis with aggravation with some bending at home in the shower. Dr. Stagg recommended Claimant get repeat x-rays and another MRI of the lumbar spine.

13. Respondents obtained a physicians advisory report from Dr. Brian Mathwich on July 8, 2020. Dr. Mathwich reviewed Claimant's medical records and opined that claimant's pain was not secondary to her original injury. Dr. Mathwich noted that bending over in the shower would place minimal stress on the back and opined that the minor mechanism of injury would not aggravate or exacerbate a previously healed disc protrusion.

14. Claimant returned to Dr. Clifford's office where she was evaluated by Jason Bell, PA – C on July 15, 2020. PA Bell noted that Claimant had received good relief from the prior injections and that her pain had recently returned after recurrent strain injury, sustained while shaving her legs. PA Bell noted that pain was radiating into both the left and right buttocks with a positive straight leg test bilaterally. PA Bell further noted that he had reviewed an updated MRI which showed no significant changes when compared to the MRI from October of 2019. PA Bell recommended repeat injections at L4 – L5 and L5 – S1.

15. Claimant followed up with Primary Care Partners on July 20, 2020. Dr. Welsh wrote that Claimant had been improving until 3 weeks ago when she bent over and reinjured her back. Claimant noted that the workers' compensation insurer was denying coverage for her current treatment. Dr. Welsh further noted pain which was worse on the right side on physical examination with straight leg raising test positive on the right side.

16. Respondents obtained another physicans' advisory report from Dr. Mathwich on July 22, 2020 after receiving a request for injections Dr. Mathwich again recommended denial of the treatment based on his opinion that Claimant's back complaints were the result of her bending over in the shower, are not directly and causally related to her work injury.

17. Claimant was evaluated by NP Sara Windsor on October 13, 2020. NP Windsor noted that Claimant was presenting with a re-exacerbation of lumbar back pain and radiculopathy June 2020 after a bending twisting incident. NP Windsor noted that Claimant had a bilateral positive straight leg raise test and recommended conservative and diagnostic therapies rather than urgent surgery. NP Windsor referred claimant to Dr. Lawrence Frazho.

18. Dr. Frazho evaluated claimant on November 10, 2020. Dr. Frazho noted that Claimant's back pain had been present for years without definite known inciting event. Dr. Frazho recommended bilateral L3 – L4, L4 – L5 and L5 – S1 facet injections.

19. Claimant underwent a functional capacity evaluation ("FCE") on November 17, 2020 at Colorado Canyons Hospital. Paula Falcao, PT, CFCE found that claimant demonstrated the ability to perform 31.1% of the physical demands of her regular job. Claimant was cleared to perform sedentary work for approximately two and a half hours per day.

20. Claimant underwent facet injections recommended by Dr. Frazho on December 15, 2020.

21. Claimant was subsequently evaluated by Dr. Eric Momin on December 29, 2020. Dr. Momin recorded that Claimant had oringially had a workplace accident and then in June of 2020 the pain started again after a bending – twisting incident. Dr. Momin noted that the injections performed by Dr. Frazho did not help to a significant amount and Dr. Momin recommended against surgical intervention at this time. Dr. Momin recommended that claimant continue to follow up with Dr. Frazho NP Windsor.

22. Claimant underwent medical branch blocks under the auspices of Dr. Frazho on February 1, 2021.

23. Dr. Albert Hattem performed a records review independent medical examination ("IME") on April 20, 2021. Dr. Hattem's reviewed Claimant's medical records and diagnosed Claimant with an aggravation of preexisting lumbar degenerative disc disease. Dr. Hattem opined that Claimant did not need additional treatment for her workplace injury, based on the opinion that the incident of June 27, 2020 represented and intervening accident and claimant would not have needed further care for her low back and would have continued to work full duty, if not for the intervening incident. In coming to the conclusion that Claimant sustained an intervening injury, Dr. Hattem stated that Claimant likely twisted her low back or applied a torqueing stress on the lumbar spine during this shaving activity.

24. Dr. Hattem noted in this report that several factors which supported the conclusion of an intervening injury, including the fact that claimant had a full recovery and returned to work after the initial workplace injury; Claimant had a significant increase in pain requiring EMS transport to the hospital after the intervening incident; PA Bell's records documented a new strain; Claimant's work capacity changed after the incident with Claimant shaving in the shower; and Claimant necessitated significant treatment after the shaving incident whereas she did not seek treatment for her back after MMI but prior to the intervening event.

25. Dr. Hattem testified at hearing consistent with his report. Dr. Hattem testified that Claimant's incident in the shower on July 27, 2020 constituted a new intervening injury that was caused Claimant's current condition. Dr. Hattem testified that Claimant only reported back stiffness at the time of MMI and that Claimant had been released to return to work full duty prior to being placed at MMI. Dr. Hattem testified that the records of Claimant's primary care physician, who did not document any complaint of

back pain in April of 2020, supported his conclusion that Claimant had made a full recovery from her original injury. Dr. Hattem opined that the need for EMS transport to the hospital in June of 2020 spoke to the significant nature of the bending and twisting incident. Dr. Hattem testified that Claimant told multiple providers that she was doing very well up until the intervening incident, and relayed to at least six providers that her symptoms were secondary to the shaving event. Dr. Hattem explained that claimant's functional status changed after the intervening incident, going from a full duty release to being taken completely off of work.

26. Dr. Hattem testified that claimant's MRI displayed degenerative changes that were not caused by either the original work injury or the intervening incident, and that she likely sustained an aggravation of her pre-existing degenerative back condition. Dr. Hattem opined that but for the shower incident, Claimant would have continued to do well and that the treatment that she has received since June of 2020 is related to the intervening event. Dr. Hattem further testified that but for the shower incident, Claimant would have continued to work for employer as she had prior to June of 2020. Dr. Hattem testified that Claimant would have continued to have pain to some degree due to her degenerative findings, but that the shower incident was the cause of the recurrent need for medical treatment and restrictions.

27. Dr. Hattem explained that claimant's MRI findings after the original workplace injury did not show any acute changes related to the workplace incident. Dr. Hattem further testified that the MRI obtained in July 2020 likewise showed no evidence of an acute injury and was objectively the same as her prior MRI. Dr. Hattem explained that claimant's spine was compromised due to her degenerative conditions and it was possible that neither the workplace event nor the intervening event would have caused symptoms except for claimant's pre-existing spinal and foraminal stenosis. Dr. Hattem remarked that if claimant is susceptible to injury, it is because of her pre-existing degenerative changes, not the workplace injury. Dr. Hattem testified that the vast majority of workers who sustain back injuries do not display acute findings of imaging studies. Dr. Hattem remarked that the force of a twisting or torque incident would place increased force to the spine relative to simply bending, which would increase the likelihood of injury.

28. The ALJ notes that the records from Dr. Momin and PA Windsor document Claimant twisting while in the shower. However, the ALJ finds that Claimant credibly testified at hearing that she was not twisting when she experienced the onset of back pain. The ALJ notes that the medical records from the emergency room and PA Harkreader along with the records from Dr. Stagg note that Claimant was simply bending down and not twisting at the time of the onset of pain.

29. The ALJ further notes that the MRI in this case showed no acute changes to Claimant's lumbar spine as a result of the shower incident. The ALJ notes that the onset of back pain occurred when Claimant was performing a normal activity of daily living, bending down, which resulted in the onset of low back pain. The ALJ further notes that there is no credible evidence of Claimant having ongoing back complaints prior to

her work injury, and finds that the worsening of Claimant's condition in this case is, more likely than not, related to Claimant's July 29, 2019 work injury.

30. The ALJ credits the opinions expressed by NP Harkreader in his June 29, 2020 report that Claimant's condition was related to an exacerbation of her work injury along with the medical reports of Dr. Stagg dated July 7, 2020 and finds that Claimant has established that it is more probable than not that the worsening of her low back condition on June 27, 2020 was causally related to her July 29, 2020 work injury.

31. The ALJ further finds that as a result of the worsening of condition, Claimant was unable to continue her work with Employer and is therefore entitled to an award of TTD benefits beginning June 29, 2020 and ongoing.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-43-303(1), C.R.S., provides that a workers' compensation claim may be reopened on the ground of change in condition. Claimant shoulders the burden of proving her condition has changed and her entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim*

Appeals Office, 197 P.3d 220 (Colo. App. 2008). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in her work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

4. In order to reopen a claim based on a worsened condition a claimant must prove the worsened condition is causally connected to the original industrial injury. *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). "If the worsening is the result of an intervening cause, including an intervening industrial injury, the worsened condition is not a compensable consequence of the original industrial injury, but a new injury." *Edwards v. Wal-Mart Stores, Inc.*, W.C. No. 4-478-405 (ICAO, December 13, 2002). Determination of whether a worsening of condition was proximately caused by a prior industrial injury or an intervening injury is ordinarily one of fact for the ALJ. *See, Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002) (whether condition is result of independent intervening cause is one of fact).

5. In this case, there appears to be no issue as to Claimant having a worsening of her condition on June 27, 2020. The only issue is whether the worsening of her condition is related to the July 29, 2019 work injury.

6. As found, Claimant's testimony that she experienced an acute onset of low back pain that occurred as she was bending down on June 27, 2020 is found to be credible and persuasive. Claimant's testimony that the onset of pain resulted in her needing medical treatment is also found to be credible and persuasive.

7. To prove entitlement to TTD the claimant must prove the industrial injury caused a "disability." § 8-42-103(1), C.R.S. 2007; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the claimant's inability to perform his or her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). This element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions, which impair the claimant's ability effectively to perform the duties of his or her regular job. S*ee Ortiz v. Charles J. Murphy and Co*., 964 P.2d 595 (Colo. App. 1998).

8. As found, as a result of the worsening of her condition, Claimant was taken off of work by NP Harkreader. As found, Claimant has proven by a preponderance of the evidence that as a result of the worsening of her condition, Claimant had a medical incapacity which resulted in a temporary loss of wage earning capacity as evidenced by the work restrictions set forth by NP Harkreader. As found, Claimant is entitled to an award to TTD benefits as a result of the worsening of her condition beginning June 29, 2020 when NP Harkreader took Claimant off of work due to her worsened condition.

9. Based on the foregoing, the ALJ hereby GRANTS Claimant's Petition to Reopen her workers' compensation claim based on a worsening of her condition.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is reopened based on a change of condition.

2. Respondents' are liable for TTD benefit beginning June 29, 2020 and continuing until terminated by law.

3. Respondents are entitled to an offset Claimant's unemployment benefits against any TTD benefits owed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: March 31, 2022

Keith E. Mottram

_____

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the sacroiliac injection recommended by Dr. Marshall Emig is reasonable, necessary and related to her April 15, 2018 industrial injury.

II. Whether the blood test ordered by Donald Corenman M.D., at Steadman Hawkins Clinic was reasonable, necessary and related to Claimant's admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as an attorney. Claimant suffered an admitted industrial injury during a motor vehicle accident ("MVA") on April 15, 2018. Claimant was the passenger in a rideshare vehicle that spun out on the highway, causing the passenger rear-side panel of the vehicle to strike an adjacent concrete barrier. Claimant was wearing a seatbelt at the time and the side airbag of her compartment deployed.

2. Paramedics transported Claimant to the emergency department at Saint Thomas Midtown Hospital with complaints of right shoulder pain, low back pain, and right-sided neck pain. Examination of the lumbar spine demonstrated normal range of motion with no tenderness to palpation. X-rays of the lumbar spine revealed a lumbarized S1 and transitional segment with no acute abnormality. Claimant was assessed with acute low back pain and lumbar strain and discharged with instructions to follow up with her primary care physician.

3. Claimant presented to her primary care physician, Lisa Corbin, M.D. at U.C. Health on April 17, 2018. Claimant complained of right low back and right shoulder pain. Dr. Corbin diagnosed Claimant with acute back pain. Claimant subsequently underwent multiple sessions of physical therapy and chiropractic treatment upon Dr. Corbin's referral.

4. On August 8, 2018, Claimant presented to Marshall Emig, M.D. at U.C. Health. Claimant reported that her low back pain persisted despite treatment. Dr. Emig noted on examination Claimant's pain was primarily at the lumbosacral junction. He diagnosed Claimant with L5-S1 spondylolisthesis, lumbar degenerative disc disease, and lumbar facet arthropathy. Dr. Emig referred Claimant for a lumbar MRI to evaluate acute changes resulting in low back pain on the right greater than left. He noted there may be a component of facet versus discogenic pain with overlying myofascial pain. Dr. Emig discussed the possibility of a steroid injection if Claimant's pain persisted and was indicated by the MRI.

5. Claimant underwent lumbar spine x-rays on August 8, 2018, which revealed "6 apparent lumbar-type vertebrae…likely reflecting complete lumbarization of S1." (R. Ex. E, p. 58).

6. A lumbar spine MRI was obtained on August 14, 2018. The radiologist's impression was:

> Transitional lumbosacral anatomy with six lumbar type vertebral bodies, representing complete lumbarization of the S1 vertebral body and fully formed disc at the S1-S2 disc space.
>
> Mild posterior disc bulge with annular fissure at L5-S1 without spinal canal or neuroforaminal stenosis.
>
> Edema interspersed between the spinous processes from L3-S1, which can be seen in the setting of interspinous ligament injury or spinous process impingement in the appropriate clinical settings.

(Cl. Ex. 7, p. 46).

7. Dr. Emig reviewed Claimant's MRI results at a follow-up evaluation on September 6, 2018. He noted Claimant has six lumbar type vertebrae with L5-L6 degenerative disc disease and suspected facet mediated pain on the right at L5-L6 and L6-S1. Claimant reported mild low back pain. Her plan was to discontinue the use of Celebrex and monitor for increased pain. In the event Claimant's pain increased, Dr. Emig discussed Claimant undergoing a right L5-L6 and L6-S1 facet steroid and lidocaine injection, possible medial branch blocks, and possible radiofrequency neurotomy. He remarked that if Claimant had no relief of pain, there likely was a component of discogenic pain contributing to her low back pain that would not improve with an injection.

8. Claimant subsequently sought treatment on her own accord with Donald Corenman, M.D., at Steadman Hawkins Clinic. Claimant knew Dr. Corenman from his time as an expert witness in a claim she defended while working for Employer. Claimant first presented to ATP Corenman and Eric Strauch, PA-C on January 24, 2019. PA-C Strauch noted Claimant was involved in a MVA in April 15, 2018 that caused immediate pain to her right shoulder, right lower back and neck, with persistent and worsening right low back pain localized to the superior SI region. PA-C Strauch noted Claimant had seen Dr. Emig, a spine specialized physiatrist, who performed right L5-S1 facet injections on October 22, 2018 that were not diagnostic.

9. Dr. Corenman's impression was that Claimant had right lower back/SI pain, with differential diagnoses including Bertolotti's syndrome right versus right SI syndrome versus right L5-S1 facet disease. He opined that Claimant's main pain was 80% attributed to right SI pain and 20% generalized low back pain. Dr. Corenman remarked,

> Her lowest level, at what I am calling L5-S1, has large transverse-alar articulations bilaterally, right greater than left so certainly this could be a Bertolotti's type syndrome. It would be less likely to be a facet syndrome on the right, because of the standard articulation that stabilizes this level but we cannot rule that out and finally this could be a right SI syndrome.
>
> The MRI does show some mild degeneration at L4-L5 with a normal L5-S1 disc. This is a pattern I would expect, the L4-L5 level is probably not causing her pain as typically discs do not radiate only unilaterally.

(Cl. Ex. 8, p. 66)

Dr. Corenman discussed his plan moving forward, stating,

> The next thing we need to do, once we find out she is no longer potentially pregnant, is to first do an MRI of the sacrum including coronal and sagittal reconstruction and stir images. We can determine if there is any hot articulations between the L5 and the S1 articulation. Then we need to do serial blocks, first of right L5-S1 articulation, then right L5-S1 SI, and finally right L5-S1 facet. She would have to aggravate the symptoms before, she says that is not difficult, in the office today after exam she is at 6/10 so that should be enough to make sure we have a flare-up before the injection. I told her depending upon the results, she might be a candidate for radiofrequency ablation and possibly at the very end, if nothing else works, we could consider surgery but that is currently not on the table and she understands.
>
> We will wait on her pregnancy test and start her on a program once we find out her status of MRI and injections.

(Id.)

10. Claimant returned to Dr. Emig on April 11, 2019. Dr. Emig noted Claimant underwent right L5-6 and L6-S1 intra-articular facet injections with fluoroscopic guidance on October 22, 2018. Claimant reported 20-30% improvement immediately after the procedure and 50-60% improvement overall at one week after. Claimant reported a complete return of pain at the April 11, 2019 evaluation. Dr. Emig discussed modification of activities as well as a medial branch block. He noted,

> We also discussed a right L5-L6 and L6-S1 joint medial branch block for diagnostic purposes. If she has adequate pain relief I suspect she will have similar relief with radiofrequency neurotomy of these nerves. If she has no pain relief with this procedure we discussed considering an injection of the articulation between the right L6 transverse process and ilium. She plans to proceed with 1-2 months of activity modification. If her

> pain persists she is considering proceeding with further imaging with Dr. Corenman versus medial branch blocks.

(Cl. Ex. 7, p. 55).

11. On May 20, 2019, Timothy O'Brien, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. O'Brien opined that Claimant sustained a minor lumbosacral spine strain/sprain as a result of the MVA and reached maximum medical improvement ("MMI") as of April 25, 2018. He opined that there was no objective evidence Claimant sustained a substantial injury as a result of the MVA, noting Claimant was wearing her seatbelt and the airbags deployed at the time of the accident, which minimized her exposure to coup/contrecoup forces. Dr. O'Brien noted Claimant's initial imaging studies and initial evaluation were normal. He further noted that his examination and subsequent imaging studies were also normal. Dr. O'Brien opined that Claimant's ongoing pain was not generated by an identifiable organic source. He concluded that the injections Claimant had received were contraindicated. He further concluded that the treatment Claimant received after April 25, 2018 was causally related to her pre-existing multilevel lumbosacral spondylosis, lumbar spondylolisthesis and transitional spine, and not the work-related MVA.

12. Claimant returned to Dr. Emig on June 26, 2019. He noted Claimant was currently pregnant and thus could not undergo fluoroscopic guided procedures at that time. Dr. Emig discussed proceeding with medial branch blocks at L5-L6 and L6-S1. He recommended radiofrequency neurotomy if Claimant experienced 80% pain relief. He noted that if Claimant did not experience pain relief from the medial branch blocks there was the possibility of injecting the pseudoarticulation between the right L6 transverse process and the ileum and possible removal of the pseudoarticulation.

13. Respondents filed a General Admission of Liability on June 3, 2020 admitting for medical benefits.

14. Claimant attended a telephone evaluation with Dr. Corenman on September 1, 2020. He noted further workup had been postponed due Claimant's pregnancy, but that Claimant had since given birth 8 months prior. Claimant continued to report right SI pain without pain radiating to the lower extremities. Dr. Corenman noted Claimant's pain was "[a]ll localized right at the SI joint as they say the Fortin fingertip test." (Cl. Ex. 8, p. 67). Dr. Corenman remarked,

> Since she is finally delivered and has continued pain we need to do a workup to try and figure out the source. Again, she does have transverse alar articulations at L5-S1 so the source could be the L4-L5 degenerative disc, the L5-S1 right facet, or the Bertolotti Syndrome or the SI joint. In order to deduce this, we will need new imaging. The last imaging is over 2 years old. With new imaging, we will get a pelvis MRI that hopefully will go up to the body of L4 so we can look at the L4-L5 disc. I will follow her back after the imaging is available for the recommendation.

(Id.)

15. On September 15, 2020 John Burris, M.D. performed a 24-month Division Independent Medical Examination ("DIME"). Claimant reported 4/10 pain in her right low back region without numbness or weakness in the lower extremities. She reported experiencing temporary relief with prior physical therapy and facet injections. Dr. Burris opined that Claimant had not reached MMI, noting recommendations for injections and a repeat MRI by Dr. Emig and Dr. Corenman to clarify Claimant's diagnosis. Dr. Burris recommended proceeding with a repeat MRI and six sessions of osteopathic manipulation. He noted that further treatment may be directed by the MRI and may include injections such as medial branch blocks at L5-6 and L6-S1 and articulation between the right L6 transverse process and ileum for diagnostic clarity.

16. Claimant attended a follow-up telephone evaluation with Dr. Corenman on December 28, 2020. Dr. Corenman recommended proceeding with some blood work, noting,

> The workup so far has not been as absolutely definitive as to what her pain source is. We need to get a pelvic MRI focused on the SI joints. I was reading this with Dr. Betsy Holland who agrees that there is some sacroiliitis right greater than left so this could be an inflammatory disorder triggered by a motor vehicle accident. What we have to do is to get some basic lab tests to make sure she does not have anything obvious like an HLA-27 inflammatory factor in the blood, SLE, or anything else. We will get some basic rheumatologic panels to look for that. If the next step is negative is to consider a SI joint injection.

(Cl. Ex. 8, p. 69).

17. On December 29, 2020, Dr. Corenman referred Claimant for rheumatology labs, which Claimant underwent on February 25, 2021.

18. Claimant is requesting reimbursement for the labs performed on February 25, 2021 in the amount of $366. Claimant testified that such cost was incurred due to ATP Corenman's recommendation as needed to rule out other causes for her low back pain. Claimant testified that the lab tests came back negative.

19. On May 18, 2021, John Raschbacher, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Raschbacher assessed Claimant with low back pain and opined that Claimant had reached MMI. He concluded that there was not a clear reason why Claimant continued to experience lumbar complaints as presumed related to a MVA during which Claimant was restrained and the airbags deployed. He noted that Claimant has pre-existing nonwork-related congenital lumbar findings in the form of lumbarized sacral vertebra. Dr. Raschbacher explained that Claimant already had facet injections in October 2018, which did not

resolve her pain. Dr. Raschbacher noted Claimant did undergo an August 26, 2018 lumbar MRI and a pelvis MRI on November 24, 2020. Dr. Raschbacher explained that the November 24, 2020 MRI noted that Claimant's SI joints were normal and symmetric [with] no evidence of posttraumatic osteoarthritis or sacroiliitis and no evidence of acute or subacute osseous or myotendinous injury. He opined that it was unclear why another MRI would be ordered, as Claimant did not and does not have radicular symptomatology or potentially surgical disease. He further opined it was unclear why further treatment was ordered. Dr. Raschbacher explained that Dr. Corenman's recommendation is to perform a medial branch block to the SI joint, which is a different area. He remarked that Dr. Corenman's recommendation presumes that numerous physicians failed to delineate the SI joint as a pain generator. He further noted that the DIME physician recommended considering medial branch blocks, not SI joint injections Dr. Raschbacher opined that Claimant reached MMI as of May 18, 2021, if not prior.

20. Claimant credibly testified at hearing that she have any low back or SI issues prior to the work injury. She testified that her pain has primarily been at the SI level. Claimant testified that the SI injection she received on July 12, 2021, provided her 70-75% relief. She explained that the SI injection did not resolve her pain, but rather improved the degree and frequency of the pain. Claimant personally paid the costs of the SI injection ($1,604) and the blood test ($366).

21. Dr. Raschbacher testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Raschbacher testified that he reviewed Claimant's November 24, 2020 MRI report and saw no changes. He testified that Claimant had no benefit from the facet injections performed in 2018. He explained that, according the Medical Treatment Guidelines ("MTG"), injections have very limited uses and should not be repeated to the same anatomical structure if there was no prior benefit. Dr. Raschbacher further explained that, per the MTG, 80% improvement is required for injections, and that Level II accreditation literature and the MTG also noted the need for functional improvement. Dr. Raschbacher also testified that Dr. Burris recommended more facet injections, not SI joint injections. He explained that SI joint injections can be diagnostic or therapeutic. He stated that he was not provided the medical records from the July 2021 injections documenting Claimant's response. Dr. Raschbacher opined that while it may have been reasonable and necessary to perform the injections in July 2021, they were not related to the work incident. He testified that it would be "quite unusual to somehow discover this particular diagnosis this late in the game, even with a year off for her pregnancy. It is now over three years out from injury claim date."

22. Dr. Raschbacher further testified that there was no indication of a pain generator, including at the SI joint. He explained that provocative tests performed at the emergency room shortly after the MVA were negative at the SI joint, as were they on his examination. He opined it does not make medical sense to inject the SI joint when it is not the pain generator. Dr. Raschbacher testified it is not clear, given the missing records from the most recent injections, what Claimant's actual relief was from the July

2021 injections. He acknowledged that 75% improvement would be considered significant.

23. With regard to the blood testing lab results, Dr. Raschbacher testified that previous bloodwork was recommended by Dr. Corenman to attempt to address non-work related problems including, gout, rheumatoid arthritis and lupus. Dr. Raschbacher testified that rheumatoid arthritis and lupus are auto-immune conditions and would not be exacerbated by a MVA.

24. Dr. Raschbacher testified that the SI joint was not the pain generator because Claimant did not have the appropriate responses to physical examinations which coincided with Claimant's physical examinations at UC Health. Dr. Raschbacher opined that the SI joint injections that took place in July 2021 were not related to the work incident. He also opined that claimant is at MMI at least by May 18, 2021, if not sooner, since claimant's functional status plateaued some time ago.

25. The ALJ credits the opinions of Drs. Emig and Corenman, as supported by the medical records and Claimant's testimony, over the opinion and testimony of Dr. Raschbacher.

26. Claimant proved it is more probable than not the July 2021 injection and the blood work ordered by Dr. Corenman are reasonably, necessary and related to cure and relieve Claimant from the effects of her April 15, 2018 industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). For a service to be considered a “medical benefit” it must be provided as medical or nursing treatment or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., WC 4-517-537 (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* WC 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020) (concluding that respondents are liable for the cost of prescriptions, as long as the cost complies with the Fee Schedule, regardless of where the claimant fills them).

As found, Claimant proved it is more likely than not the July 12, 2021 SI injection performed by Dr. Emig was reasonable, necessary and related to her April 15, 2018 industrial injury. Despite evidence of a pre-existing condition of lumbarization of the S1, Claimant credibly testified that she was not experiencing any low back or SI issues prior to the work injury. No evidence was offered refuting Claimant’s testimony. Since sustaining the work injury, Claimant has consistently complained of low back symptoms. Claimant’s treatment has been aimed at identifying her pain generator. Dr. Emig initially suspected Claimant was suffering from facet mediated pain, however, October 2018

facet injections proved nondiagnostic. Dr. Corenman initially opined Claimant had right lower back/SI pain with differential diagnoses, including Bertolotti's syndrome, L5-S1 facet disease, and right SI syndrome. Dr. Corenman and Dr. Emig discussed ordering a MRI and performing medial branch blocks at L5-6 and L6-S1 medial branch blocks for diagnostic purposes. Claimant's pregnancy resulted in the postponement of her treatment. Subsequent to having her child, Claimant continued to report SI pain, which Dr. Corenman credibly opined was localized to her SI joint.

Claimant's providers continued to recommend evaluation aimed at identifying her pain source. DIME physician Dr. Burris agreed with such approach, noting that Claimant was not at MMI due to the need for additional diagnostic procedures to clarify Claimant's diagnosis. Dr. Burris noted that further treatment "may" include injections such as medial branch blocks. That Dr. Burris did not specifically recommend a SI injection is inconsequential considering the context of his determination. Dr. Corenman continued to note the need for additional workup to identify Claimant's pain source, including a MRI and blood work to rule out an inflammatory disorder. He specifically noted that if such results were negative, the next step would be to consider an SI injection. Claimant credibly testified the lab results were negative per her understanding. Dr. Emig subsequently performed the SI joint injection, which Claimant credibly testified provided her some relief. The medical records indicate the SI joint injection was performed for diagnostic purposes to assist Claimant's providers in clarifying Claimant's diagnosis and pain generator. Based on a totality of the evidence, the SI injection performed by Dr. Emig in July 2012 was reasonably necessary and related to Claimant's industrial injury.

As also found, Claimant proved it is more probable than not the blood test requested by Dr. Corenman was reasonable, necessary and related to her April 15, 2018 work injury. Dr. Corenman's December 28, 2020 note explains that the workup thus far had not been absolutely definitive as to Claimant's pain source, and that there were concerns Claimant's condition could be due to an inflammatory disorder triggered by the MVA. Dr. Corenman ordered the blood tests to eliminate other potential causes for Claimant's low back pain in an attempt to further clarify Claimant's condition. The preponderant evidence establishes that the blood tests were reasonable, necessary and related to the work injury.

ORDER

1. Claimant proved by a preponderance of the evidence the SI injection performed by Dr. Emig on July 12, 2021 was reasonably necessary and causally related to Claimant's work injury. Respondents shall reimburse Claimant $1,604 for the cost of the injection.

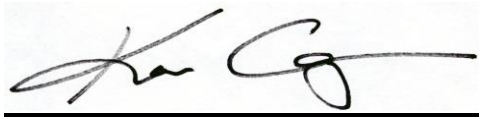
2. Claimant proved by a preponderance of the evidence the blood test ordered by Dr. Corenman was reasonably necessary and causally related to Claimant's work injury. Respondents shall reimburse Claimant $366 for the cost of the blood test.

3. Respondents shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant overcame Dr. Ginsburg's DIME opinion on MMI and permanent impairment by clear and convincing evidence.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to a change of physician.

FINDINGS OF FACT

1. Claimant is a 56-year-old male born on May 19, 1965. Claimant has worked for Employer since June 5, 2019 as a full-time supervising journeyman electrical lineman.

2. Claimant sustained an admitted industrial injury during a motor vehicle accident ("MVA") on November 19, 2019. While stopped in traffic on I-70 in Denver, Claimant's company truck was rear-ended by another vehicle. Claimant initially declined medical care, but on Employer's recommendation was taken to Midtown Occupational to be evaluated by Kirk Holmboe, D.O.

3. Employer provided Claimant with a "Designation of Medical Providers" on the date of the accident. The document lists only two providers: Midtown Occupational and Concentra.

4. Upon presenting to Dr. Holmboe on November 19, 2019, Claimant reported low-grade pain in the lower thoracic portion of his back with no neck pain or headache. On examination, Dr. Holmboe noted full cervical motion without pain or radiating symptoms as well as full lumbar flexion with slight pain in the right lower parathoracic area. There was minor tenderness to palpation to the right of the midline in the lower thoracic region and some pain with side bending to the left. Dr. Holmboe diagnosed Claimant with a mild thoracic strain and recommended Claimant ice the area and take over-the-counter ibuprofen. Claimant was released to return to work without restrictions.

5. Claimant next saw Dr. Holmboe on November 21, 2019, reporting much improvement in his symptoms with only very minor soreness. Dr. Holmboe noted Claimant felt he did not require any formal treatment and felt fully capable of performing his normal job duties. On examination, Dr. Holmboe again noted full cervical range of motion without pain. There was no pain in the area of complaint with rotational movement or with scapular protraction and retraction. Dr. Holmboe opined Claimant did not require any specific treatment measures at that time, although it may take several weeks for his symptoms to completely resolve.

6. Claimant returned to Dr. Holmboe on December 2, 2019 reporting that he experienced increased pain in the right mid thoracic area radiating up to the neck and a

brief episode of left-sided pain in the forehead and eye. Claimant also reported some pain and sharp sensation in the right intrascapular area. On examination, Dr. Holmboe noted some limitation and discomfort with cervical range of motion but no radiating pain into his extremities. There was tenderness to palpation in the paracervical musculature and crepitus with cervical range of motion and tenderness to palpation in the right intrascapular area. Dr. Holmboe diagnosed Claimant with thoracic and cervical strains. He continued to recommend that Claimant ice the areas and referred Claimant for massage therapy.

7. On December 12, 2019, Dr. Holmboe noted Claimant was having some pain in right intrascapular area with persistence of a knot in the area, with pain radiating up into his neck and a right-sided headache. On examination, Dr. Holmboe noted nearly full cervical range of motion with some discomfort in the intrascapular area and some pain with lumbar flexion. Claimant had minor cervical tenderness. Dr. Holmboe recommended that Claimant continue massage therapy and, if no improvement, begin physical therapy and chiropractic treatment.

8. On December 12 and December 19, 2019, Claimant's physical therapist documented thoracic and neck pain.

9. On January 10, 2020, Dr. Holmboe noted Claimant had some limitation of cervical motion due to pain in right upper thoracic area with side bending to the left. He also noted: pain with cervical flexion and extension; some pain with scapular protraction but more pain with scapular retraction; pain in right upper thoracic area with extremes of rotation of truck area; tenderness to palpation in right parathoracic musculature particularly around T5-T7; and tenderness in right suboccipital area when touched – elicits some symptoms around right eye. Dr. Holmboe continued to diagnose Claimant with thoracic and cervical strains related to the MVA. He ordered physical therapy twice a week for three weeks and referral for chiropractic/dry needling sessions.

10. On January 20, 2020, Dr. Holmboe noted Claimant reported at times having severe pain in the right mid thoracic area as well as some stiffness and soreness in the neck and pain around right eye. On examination he noted some limitation of cervical range of motion due to pain in the right upper thoracic area. There was pain with cervical flexion and extension. Dr. Holmboe ordered physical therapy and chiropractic/dry needling sessions.

11. From January 14, 2020 to February 20, 2020 Claimant underwent 10 chiropractic sessions with Alexa Sheppard for right sided neck, mid-back, and shoulder neck pain. At the conclusion of chiropractic care her closing diagnosis was neck and shoulder pain resolved, and thoracic sprain.

12. From January 14, 2020 to March 3, 2020 Claimant also underwent 12 sessions of physical therapy at Midtown Physical therapy for thoracic and neck pain. At the conclusion of PT care the closing diagnosis was thoracic strain.

13. At a follow-up evaluation with Dr. Holmboe on February 28, 2020, Claimant continued to complain of right-sided neck pain and pain in the right mid scapular area. Dr. Holmboe noted that Claimant's increased symptoms over the past two weeks may correspond to completion of chiropractic treatment. Claimant complained of more pain with rotational movements of his trunk than of his neck. On examination, Dr. Holmboe noted relatively normal neck range of motion with complaints of tightness with extremes of motion. There was some discomfort with cervical protraction and retraction, as well as tenderness to palpation in the upper and mid parathoracic musculature on the right. Dr. Holmboe ordered additional chiropractic treatment and referred Claimant for evaluation and treatment by physiatry.

14. From March 4, 2020 to March 25, 2020 Claimant underwent an additional six sessions of chiropractic care with Dr. Sheppard for right-sided shoulder, mid-back, and neck pain. At the conclusion of chiropractic care the closing diagnosis was thoracic sprain.

15. On March 26, 2020, Dr. Holmboe noted Claimant continued to report pain primarily in his mid-back but some also in the lower cervical area. Painful range of motion of the thoracic and limited cervical range of motion was noted on examination.

16. On March 27, 2020 Claimant attended a telemedicine visit with Samuel Chan, M.D. Claimant reported pain in his right intrascapular region. Dr. Chan noted cervical range of motion within normal limits with no tenderness with flexion or extension or rotation. There was tenderness with extension and rotation of cervical spine Dr. Chan diagnosed Claimant with thoracic spine pain and thoracic facet joint syndrome. Based on a review of Claimant's medical records, mechanism of injury, and response to treatment, he agreed with Dr. Holmboe that Claimant sustained a thoracic strain with myofascial complaints, also possibly facetogenic in origin. He recommended Claimant undergo an MRI of the thoracic spine to rule out underlying discogenic issues and prescribed Claimant Celebrex.

17. Claimant underwent a MRI of the thoracic spine on April 3, 2020, which revealed thoracic spine disc desiccation with exaggerated kyphosis of the thoracic spine. There were no contusions or fractures.

18. Dr. Chan reevaluated Claimant at a telemedicine visit on April 16, 2020. Dr. Chan noted that an April 3, 2020 thoracic MRI revealed disc dessication with exaggerated kyphosis but no other discogenic issues, no neural foraminal narrowing, and no neural element compression. Claimant reported some improvement in his symptoms since last seeing Dr. Chan. Dr. Chan noted cervical range of motion with functional limits and no tenderness, as well as tenderness with extension and rotation of the thoracic spine. He opined that Claimant was a candidate for facet injections.

19. On examination at an April 21, 2020 evaluation, Dr. Holmboe noted full neck motion without particular pain or difficulty but some pulling in the right upper and mid

thoracic area with extremes of cervical motion. Dr. Holmboe's diagnosis remained MVA with cervical/thoracic strain.

20. On April 30, 2020, Haley Burke, M.D. performed the recommended thoracic facet injections on the right at T6-7 and T-7-8.

21. On May 7, 2020, Claimant reported to Dr. Holmboe experiencing initial relief from the facet thoracic injections with increasing pain two days later.

22. Claimant also saw Dr. Chan on May 7, 2020, who noted Claimant reported reduction in pain from 3-4/10 to 2-3/10 immediately after the injections, but that four days later his pain was 6-7/10 with spasms. Dr. Chan remarked that it was unclear if Claimant had any type of diagnostic response to the injections at the time. He recommended Claimant return for follow-up in two to three weeks. If opined that if there was no diagnostic or therapeutic benefit from the facet injection, then Claimant's pain was not facetogenic. He further opined that in such event, since the MRI did not show any significant discogenic issues, he may conclude a majority of Claimant's symptoms are myofascial in origin.

23. Claimant underwent an additional six session of chiropractic care from May 5, 2020 to May 21, 2020. At the conclusion of chiropractic care, the closing diagnosis was neck and shoulder normal, and thoracic sprain. Dr. Sheppard, who is Level I Accredited also opined that, "Patient is responding slower than anticipated. At this time in the recovery process soft tissue injuries sustained in a motor vehicle accident should have improved more significantly. The mechanism of injury in my opinion does not correspond with subjective complaints." (C. Exh. 5 , p. 133).

24. Claimant returned to Dr. Chan on May 26, 2020 rating his pain at 3-8/10. He reported pain over the right-sided intrascapular region. On examination, Dr. Chan noted that Claimant's cervical range of motion was within functional limits with no tenderness with extension or rotation of the cervical spine. Shoulder and lumbar exams were normal. There was tenderness to palpation over the right intrascapular region and slight hypertonicity. Dr. Chan concluded that the thoracic facet injections provided no diagnostic or therapeutic benefit. He opined that Claimant's pain complaints were likely myofascial in origin. Dr. Chan remarked Claimant may be a good candidate for 1-month rental of a stimulator.

25. On May 28, 2020, Dr. Holmboe noted Claimant was approaching MMI. His diagnosis remained MVA with thoracic and cervical strains.

26. On July 24, 2020, Claimant reported to Dr. Chan intermittent pain and some numbness of the bilateral lower extremities and weakness of right lower extremity. Examination revealed cervical range of motion within functional limits with no tenderness with extension and rotation; normal shoulder findings; and no tenderness with extension and rotation of lumbar spine. Dr. Chan's diagnosis was thoracic spine pain and thoracic facet joint syndrome. He again opined that Claimant's pain complaints

are most likely not facetogenic in nature and are most likely myofascial in origin based on mechanism of injury and ongoing symptoms. He opined that Claimant had most likely reached MMI without impairment, restrictions or the need for maintenance care.

27. Dr. Holmboe placed Claimant at MMI on July 28, 2020. At the evaluation, Claimant reported waxing and waning symptoms with pain especially noted in the right mid thoracic area. Dr. Holmboe noted he did not perform a formal examination as Claimant's was examined by Dr. Chan on July 24, 2020. He released Claimant from care with recommendations for maintenance follow-up with Dr. Chan for six months, refills of Celebrex, and an IFC unit. Dr. Holmboe opined Claimant did not require permanent restrictions. He did not address permanent impairment.

28. Stanley Ginsburg, M.D. performed a DIME on December 3, 2020, evaluating Claimant's cervical, thoracic and lumbar spine, as well as his right hand, wrist, elbow and shoulder. Claimant reported mid-to-low back pain, numbness in his left leg, and right shoulder symptoms. Claimant asked for his spine, neck and right shoulder pain to be evaluated. Dr. Ginsburg reviewed Claimant's medical records dated November 19, 2019 through July 28, 2020. On physical examination, Dr. Ginsburg reported, "Neck movements were not measured but observed spontaneously and with requests from me and appeared normal." (Cl. Ex. B, p. 22). He noted there was no tenderness in the paracervical area, with some tenderness in the periscapular areas particularly on the right but on the left as well, and mild tenderness without spasm in the midthoracic area. He included thoracic range of motion measurements on the applicable DIME worksheet.

29. Dr. Ginsburg diagnosed Claimant with a thoracic sprain/strain with some radicular symptomatology but not myelopathic or radicular signs. He opined Claimant reached MMI on July 28, 2020 with 4% whole person impairment of the thoracic spine (2% for range of motion deficits and 2% under specific disorders of Table 53(II)(B)). Dr. Ginsburg noted there was no documentation or clinical evidence for impairment of the right hand, wrist, elbow, and shoulder, as well as no documentation or clinical evidence of cervical or lumbar impairment. He opined Claimant did not require any permanent work restrictions, and should be allowed to see Dr. Holmboe twice in next year for medication adjustments and monitoring of the stimulation device.

30. Respondents filed a Final Admission consistent with Dr. Ginsburg's opinions on January 25, 2021.

31. On May 4, 2021, Sander Orent, M.D. performed an independent medical examination ("IME") at the request of Claimant. Claimant reported continued pain in the right side of his back just below his shoulders extending into the scapular area. Dr. Orent noted that Claimant had also been complaining of cervical spine pain since his injury and that such complaints had not been addressed or examined. Dr. Orent reviewed Dr. Ginsburg's DIME report as part of his review. On examination, Dr. Orent noted tenderness in the parathoracic musculature around T12 to T6 on the right. He further noted reduced cervical range of motion and thoracic range of motion. There was no motor weakness in the upper extremities. Dr. Orent opined that Claimant was not

MMI, as he continued to experience ongoing thoracic and cervical spine symptoms. He opined that the cervical spine has not been addressed although there was an adequate mechanism of injury. Dr. Orent recommended Claimant undergo physical therapy for the cervical spine and chiropractic treatment for the cervical and thoracic spine.

32. Dr. Orent testified by pre-hearing deposition as a Level II accredited expert in occupational, environmental, and internal medicine. Dr. Orent testified consistent with his IME report and continued to opine that Claimant has not reached MMI. He explained that Claimant has ongoing symptoms and that other treatment modalities may have been helpful to treat Claimant's thoracic spine. Dr. Orent testified that Claimant sustained a significant cervical strain that had never been addressed, other than to be mentioned in the medical records. Dr. Orent testified that Claimant's records show consistent complaints of neck pain. He recommended Claimant continue chiropractic manipulation and physical therapy and, if that did not work, obtain a cervical MRI.

33. Dr. Orent explained that his provisional impairment rating was based on the assumption that there are minor or minimal degenerative changes of the cervical spine. He opined that, at minimum Claimant qualified for 4% cervical impairment under Table (53)(II)(B) and 11% impairment for range of motion deficits. He opined that Claimant has medically documented pain and rigidity with or without muscle spasm. Dr. Orent testified that Dr. Ginsburg clearly erred in not taking cervical range of motion measurements and not assigning any cervical impairment, as there was a major mechanism of injury and clear cervical complaints that have not been addressed. He opined that you are required to perform an impairment rating even if you believe the Claimant is at MMI. Dr. Orent agreed that the AMA Guides mandate that the evaluating physician is to use their independent judgment, first as to whether a particular body part or condition merits a permanent impairment rating, and second if a rating is merited then using the AMA Guides to calculate the rating.

34. The ALJ finds the opinions of the DIME physician Dr. Ginsburg and of treating physicians Drs. Holmboe and Chan, and Dr. Sheppard to be more credible and persuasive than the opinion of Dr. Orent.

35. The ALJ finds Claimant failed to provide clear and convincing evidence to show Dr. Ginsburg erred in his opinion as to MMI and impairment.

36. The ALJ finds that the right of selection of a physician passed to Claimant due to Respondents' failure to provide Claimant a list of four designated physicians as required under §8-43-404(5), C.R.S.

37. The ALJ finds that Claimant selected Dr. Holmboe as his treating physician. Claimant failed to make a proper showing justifying a change of physician to Dr. Orent.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017).

A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI and whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Claimant failed to prove it is highly probable DIME physician Ginsburg erred in his determination of MMI and permanent impairment. Claimant relies on Dr. Orent's opinion that Claimant's cervical complaints were not addressed and that Claimant continues to experience symptoms in his thoracic and cervical spine that require additional treatment.

Claimant's medical records include the history of Claimant's reported cervical and thoracic complaints, as well as treatment to those areas. Contrary to Dr. Orent's opinion that Claimant has not received any cervical treatment, the medical records indicate Claimant received treatment for both his neck and back. Around the time Claimant was placed at MMI, Dr. Chan noted that Claimant's cervical motion was within functional limits. His closing diagnosis was thoracic pain and thoracic pain syndrome. Dr. Holmboe agreed with Dr. Chan's determinations. Claimant's treating physicians and providers identified his thoracic and scapular pain as his primary conditions. Claimant's treating physician did not opine Claimant warranted any impairment rating of the cervical spine.

Dr. Ginsburg reviewed the medical records, examined Claimant and applied the AMA Guides, concluding that Claimant sustained a thoracic sprain/strain that warranted 4% whole person impairment of the thoracic spine. Dr. Ginsburg explained that the records did not support any cervical impairment, which is in line with the opinions Drs. Chan, Holmboe and Sheppard. Dr. Ginsburg's failure to take measurements of the cervical spine is not clear error considering he did not attribute any ongoing neck condition to Claimant's work injury. There is insufficient evidence Dr. Ginsburg failed to properly apply the AMA Guides and clearly erred in his DIME determinations.

Based on the totality of the evidence, Claimant failed to prove it is highly probable Dr. Ginsburg's opinion on MMI and impairment are incorrect. Dr. Orent's conflicting opinion with those of Drs. Ginsburg, Holmboe and Chan represents a mere difference of opinion that does not rise to the level of clear and convincing evidence.

Change of Physician

Claimant contends that he is entitled to a change of physician because the right of selection passed when Respondents failed to provide Claimant a list with at least four designated treatment providers.

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific

definition of a “proper showing,” the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

The term “select,” is unambiguous and should be construed to mean “the act of making a choice or picking out a preference from among several alternatives.” *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant “selects” a physician when she “demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury.” *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

The right to select a physician passed to Claimant when Employer failed to provide Claimant with a list of four designated providers as specified under §8-43-404(5)(a)(I)(A), C.R.S. Nonetheless, Claimant has already exercised his right to select a physician in his decision to treat with Dr. Holmboe over the course of two years. There is no evidence or allegation Claimant made any prior request to change physicians. As Claimant selected Dr. Holmboe as his treating physician, a request to change physicians would require a proper showing. Here, Claimant has not made a proper showing justifying a change in physician.

ORDER

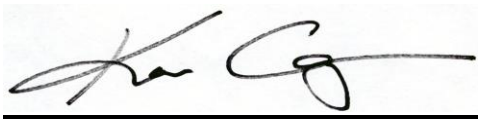
1. Claimant failed overcome Dr. Ginsburg’s DIME opinion on MMI by clear and convincing evidence. Claimant is at MMI as of July 28, 2020 with a 4% whole person impairment of the thoracic spine.

2. Claimant’s request for a change of physician is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Appeal of a May 20, 2021 Prehearing Order ("PHO") that denied an uncontested motion to add body parts to a follow-up Division Independent Medical Examination ("DIME").

FINDINGS OF FACT

1. Claimant sustained an industrial injury on May 16, 2017 and underwent medical treatment for an injury to his right knee. After requests for a knee replacement surgery were denied, Claimant was placed at maximum medical improvement ("MMI") on August 22, 2018.

2. Claimant sought a DIME, which was performed by Robert Kawasaki, M.D. at Lakewood Outpatient Clinic on May 21, 2019. Dr. Kawasaki opined Claimant was not at MMI and recommended Claimant undergo knee replacement surgery as related to the work injury.

3. Claimant underwent the recommended knee replacement surgery on January 22, 2021.

4. Authorized treating physician ("ATP") Alison Fall, M.D. placed Claimant at MMI on July 28, 2021.

5. The parties attempted to send Claimant back to Dr. Kawasaki for a follow-up DIME. Dr. Kawasaki was unable to perform the follow-up DIME due to a conflict of interest. Hearings subsequently took place before ALJ Edwin Felter to address the concerns of the parties regarding the follow-up DIME. ALJ Felter issued an order on March 22, 2021 ordering the DIME process to commence "de novo."

6. The parties selected Robert P. Mack, M.D. to perform the follow-up DIME. Dr. Mack's DIME was scheduled to take place on May 12, 2021.

7. Claimant contends that he developed additional medical conditions as a result of the knee surgery, including the neurological condition of Lewy Body dementia. Respondents deny any relationship between said neurological condition and Claimant's work injury.

8. On May 5, 2021, Claimant's counsel emailed Respondents' counsel to ask if Respondents would agree to add the following body parts to be addressed at the follow-up DIME: (1) Psychological; (2) Traumatic Brain Injury – onset of dementia; and (3) Cardiovascular – stroke.

9. Respondents' counsel was on vacation and did not see the email from Claimant's counsel at the time.

10. Records of Claimant's alleged neurological problems were in the possession of Respondents and were included in the overall medical packet sent to Dr. Mack.

11. Dr. Mack performed the follow-up DIME on May 12, 2021. He issued his DIME report on May 15, 2021.

12. In his May 15, 2021 DIME report, Dr. Mack stated that the purpose of his exam was to evaluate Claimant's knee injury. He noted that at the evaluation, Claimant, Claimant's wife, and Claimant's son,

> [b]rought up the question of [Claimant's] mental capabilities, and the question of whether he suffered a neurological injury as a consequence of his right total knee joint replacement. I explained to them at the outset that I am an orthopaedic surgeon and not qualified to pass judgment on the neurological or psychological issues. The family understood my area of expertise, and that I am not qualified to assess the neurological situation.

(Cl. Ex. 7, p.1)

13. Counsel for Respondents confirmed to the Court that Dr. Mack's accreditation is limited to orthopedic evaluations.

14. Dr. Mack ultimately assigned Claimant a 24% extremity rating converting to a 10% whole person impairment rating for the knee replacement.

15. Respondents' counsel ultimately responded to Claimant's counsel's request to add body parts to the follow-up DIME on May 17, 2021, five days after Dr. Mack conducted the follow-up DIME, and two days after Dr. Mack issued his DIME report. Respondents' counsel agreed to add the requested body parts a follow-up DIME.

16. On May 19, 2021, a prehearing conference ("PHC") took place before Prehearing ALJ ("PALJ") Susan D. Phillips to address Claimant's motion to add additional body parts for consideration at the follow-up DIME. PALJ issued an order on May 20, 2021. In the PHO order, PALJ referred to Claimant's motion as "unopposed", "agreed upon" and a "joint motion." PALJ Phillips noted that the parties reached an agreement to add body parts to be addressed in the follow-up DIME, and that the parties agreed that causality and relatedness of those conditions should be addressed in the follow-up DIME report.

17. PALJ Phillips determined that the parties did not establish good cause for their motion, and denied Claimant's unopposed motion to add body parts for the follow-up DIME. She noted that the parties have had a dispute over the addition of the body parts for some time, including at a PHC held before her on December 1, 2020, at which she urged the parties to work out an agreement or request another PHC. PALJ Phillips further

noted that the parties did not cite any rule or appellate precedence to provide guidance in the matter. She concluded that WCRP Rule 11 does not allow for body parts to be added after a follow-up DIME has taken place. PALJ Phillips reasoned that the rules concerning DIMEs are structured so that deadlines establish when each party is required to undertake specified steps before the DIME appointment, not after. PALJ Phillips determined that the parties were asking for relief that is not provided in the Act or WCRP.

18. On July 14, 2021, Claimant filed an Application for Hearing endorsing overcoming the DIME. The hearing was scheduled to take place on January 31, 2022.

19. Prior to the hearing, counsel for both parties conferred and agreed that a review/appeal of PALJ Phillip's order should be addressed at hearing. On January 20, 2022, Respondents filed a Case Information Sheet endorsing review/appeal of PALJ's Phillip's PHO. On January 25, 2022, Claimant filed a Case Information Sheet also endorsing PALJ's Phillip's PHO.

20. On January 27, 2022, Claimant submitted a brief to the Court identifying "Whether the pre-hearing ALJ erred in denying the uncontested motion to add body parts to the follow-up DIME in the Prehearing Order for Prehearing Conference Held on May 19, 2021."

21. At the onset of the hearing before ALJ Cayce on January 31, 2022, the parties requested that the ALJ address Claimant's appeal of PALJ Phillip's May 21, 2021 PHO. ALJ Cayce entered Claimant's Exhibits and heard arguments from both parties. Respondents do not object to adding the previously agreed upon body parts to a follow-up DIME.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Review of PALJ Order

A PALJ's order is properly reviewable by an ALJ pursuant to an application for hearing rather than a petition to review to the Industrial Claim Appeals Office. *Brownson-Rausin v. Valley View Hospital,* WC 3-101-431 (ICAO, Oct. 3, 2006); *Hernandez v. Safeway*, W. C. 4-630-249 (October 21, 2005).Section 8-43-207.5(2) grants the PALJs the authority to "issue interlocutory orders" and "make evidentiary rulings". Section 8-43-207.5(3) states that orders entered by PALJs are "binding on the parties," but the provision also states that "such an order shall be interlocutory." In *Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998), the Court held that a PALJ's order approving a settlement agreement is final and subject to review. However, the court also stated that orders "relating to a prehearing conference" entered by a PALJ are interlocutory and not subject to appeal. The basis for the court's holding was that orders relating to a prehearing conference are reviewable at a full hearing before the director or an ALJ. In this regard the court stated that "the propriety of the PALJ's prehearing order may be addressed at the subsequent hearing." *Orth, 965 P.2d* at 1264; *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, (Colo. App. 2003) (ALJ has authority to override the ruling of a PALJ); *Brownson-Rausin v. Valley View Hospital,* supra.

WCRP Rule 11 addresses the procedures and requirements applicable to DIMEs. WCRP Rule 11 discusses the process for agreeing upon body parts to be addressed by the DIME physician, and providing the DIME physician the requisite medical records, all prior to completion of the DIME. WCRP nor the Act specifically addresses adding body parts for consideration after a follow-up DIME has taken place. The ALJ is unaware of any provision in the Act, WCRP, or legal precedent specifically prohibiting the parties from doing in circumstances such as those in the case at bench.

The ALJ acknowledges the parties' delay in timely agreeing to and notifying the DIME of the agreed upon additional body parts for consideration. Both parties were responsible for conferring about the issue earlier to allow the requisite time to follow proper procedures for adding body parts for the DIME's consideration. Nonetheless, Claimant's counsel did make an attempt prior to the follow-up DIME to confirm that

Respondents agreed to adding certain body parts. The communication was inadvertently deleted or unseen by Respondents' counsel until a later date. The DIME physician and Respondents had been provided with the medical records addressing the additional parts.

Importantly, the parties agree that the body parts should be added for consideration by the follow-up DIME. The parties stipulated as such at the PHC. While a PALJ or ALJ is not required to grant all unopposed motions, and the efficiency of the DIME process, is important, so is allowing Claimant to undergo a complete DIME evaluation of all potentially-related conditions. Additionally, it is noted that DIME physician Dr. Mack made it clear in his report he was not qualified to opine on the alleged neurological/psychological problems of Claimant. Thus, even if the additional body parts were properly added prior to his evaluation, such conditions would require further evaluation by an another physician.

Based on the unique facts and chronology of this case the ALJ determines the parties established good cause to grant the unopposed motion and reverse PALJ Phillip's May 20, 2021 PHO.

ORDER

1. PALJ Phillip's PHO dated May 20, 2021 is reversed.

2. The parties shall reschedule a repeat follow-up DIME examination pursuant to WCRP.

3. Dr. Mack's name on the current DIME Physician Panel shall be replaced with a physician with full accreditation. Any other physician on the current DIME Physician Panel, not having full accreditation, shall be replaced with a physician with full accreditation.

4. The selected DIME physician shall address causality and relatedness of the agreed upon body parts: (1) Psychological; (2) Traumatic Brain Injury – onset of dementia; and (3) Cardiovascular – stroke.

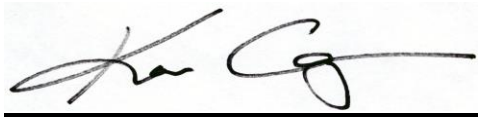
5. Upon receipt of the repeat DIME evaluation report, the parties shall proceed pursuant to WCRP.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved he is entitled to temporary total disability (TTD) benefits beginning October 23, 2020 and ongoing.

II. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for termination of his employment and thus not entitled to TTD benefits.

III. Whether Claimant proved Respondents are subjection to penalties for failure to timely admit or deny Claimant's claims.

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $1,002.95 with a TTD rate of $668.63.

FINDINGS OF FACT

1. Claimant worked for Employer as an office furniture installer from February 16, 2020 to October 23, 2020. Claimant's job involved lifting and moving heavy furniture.

2. At the time of his hire, Claimant was provided with a copy of an Employee Handbook which included a General Safety Rules Handbook. Claimant acknowledged in writing that he received, read, and agreed to abide by the handbook and that he understood the policies and procedures set forth in the handbook including that his employment could be terminated at any time. The handbook provides, *inter alia*, employment is at will; employees could be disciplined according to the nature of the offence; using common sense most accidents could be avoided and that safety was a full-time job; and failure to perform job assignments satisfactorily and efficiently or failing to report unsafe actions or conditions could be grounds for discharge.

3. Claimant testified he received but did not read the Employee Handbook.

4. Claimant previously owned a company and employed approximately 15 workers. Claimant's company carried workers' compensation insurance. Claimant testified he was unaware of the specifics of the workers' compensation system because none of his prior employees filed any workers' compensation claims.

5. Claimant was involved in a January 2020 motor vehicle accident ("MVA") that resulted in neck, back and knee complaints. Claimant underwent treatment through April

2020. Claimant testified his symptoms from the MVA had resolved by the time of his August 2020 injury.

6. On August 10, 2020 Claimant sustained an industrial injury when he twisted his back while unloading panels for Employer.

7. Claimant notified his supervisor, [Redacted, hereinafter SM], of the injury on the morning of August 11, 2020. Claimant sought treatment for his back that same day with a personal chiropractor, Dr. Matthew Romo at Chiro Now. Dr. Romo removed Claimant from work August 11-12, 2020. Claimant then called [Redacted, hereinafter GN], Project Coordinator, on August 11, 2020 informing her of his injury and that he needed to file a workers' compensation claim.

8. [Redacted, hereinafter KM], Director of Internal Operations, subsequently contacted Claimant to discuss what occurred on August 10, 2020. Ms. KM[Redacted] asked Claimant if he wanted to see a workers' compensation doctor and Claimant declined. She testified Claimant told her he had injured himself in a January 2020 MVA; that his neck and back injuries from that accident had flared up at times and that he just needed a couple of days off to rest his back.

9. On August 13, 2020, Ms. KM[Redacted] emailed Claimant a form to sign to decline workers' compensation treatment ("Declination of Treatment Form"). The form stated Claimant understood he had been offered "the service of being treated at the company's workers compensation physician; however, I am declining by these physicians. I also understand if I seek treatment by an outside physician, [Employer] takes no responsibility financially or otherwise for the injury that occurred" on August 10, 2020. (Cl. Ex. 28, p. 130). The form further stated, "I also understand, if there is further treatment needed for this injury, I am solely responsible for all treatment, financial or otherwise." (Id.) Ms. KM[Redacted] testified that Employer presents this form to all employees who decline workers' compensation treatment.

10. Claimant signed and returned the form to Ms. KM[Redacted] on August 14, 2020. Claimant testified he signed the Declination of Treatment Form because Ms. KM[Redacted] offered to pay his wages for the week and he needed the money.

11. Claimant did not work August 11-14, 2020. Employer paid Claimant his full wages for that time period. Ms. KM[Redacted] testified Employer paid Claimant's wages for those days off because times were tough due to the COVID-19 pandemic and she did not want Claimant to endure any hardship.

12. Claimant returned to full duty work on August 17, 2020 and continued to work in such capacity through October 23, 2020. Claimant testified he continued to experience pain in his back for which he saw a chiropractor and his primary care physician, Luke Beckman, M.D., at Kaiser.

13. On October 1, 2020, Claimant saw Luke Beckman, M.D. at Kaiser for chronic low back and neck pain, greater than three months, with a date of onset of August 10, 2020. Dr. Beckman placed Claimant on modified activity from October 5 through October 30, 2020. Dr. Beckman imposed the following restrictions: standing and walking, intermittently—up to 50% of shift; bending at the waist and torso/spine twisting, occasionally—up to 25% of shift; climbing ladders and use of scaffolds/working at height—not at all; and lifting/carrying/pushing/pulling no more than 20 pounds.

14. On October 20, 2020 at 7:34 a.m. Claimant emailed Ms. KM[Redacted] a copy of the Kaiser Work Status Report from October 1, 2020 detailing his work restrictions.

15. Claimant testified that he continued to work full duty despite his restrictions because he needed the money. He testified that he sent the restrictions to Employer when he did because he anticipated performing a lot of heavy lifting that day and did not want to reinjure his back.

16. At approximately 10:00 a.m. on October 20, 2020 Claimant injured his back while lifting a hutch at work. Claimant immediately notified his supervisor, [Redacted, hereinafter DN], of the incident. Claimant completed the remainder of his work shift.

17. At 10:59 a.m. on October 20, 2020, Ms. KM[Redacted] replied to Claimant's earlier email that attached his work restrictions. Ms. KM[Redacted] was unaware of Claimant's October 20, 2020 injury at the time she sent her reply. Ms. KM[Redacted] wrote,

> Thank you for sending this over however I am confused as to why you are presenting something to me on 10/20 that you received on 10/1 for something that is not work comp related. You mention that this is from when you 'got hurt on the job' (strained your back) back in August however you were offered and declined medical treatment and chose to see your own doctor resulting in this no longer being a work comp or [Employer] issue.

(Cl's Ex. 30, p.138)

18. Claimant performed his regular work duties October 21 and October 22, 2020.

19. On October 22, 2020, Mr. S[Redacted] completed a supervisor statement regarding the October 20, 2020 injury, stating Claimant's injury occurred while lifting a piece of furniture. Under a section titled "Employee Performance" Mr. S[Redacted] checked "physically not capable" "improper risk taken and/or poor judgment" and "other-improper lifting technique." (Cl. Ex. 33, p. 150). Mr. S[Redacted] wrote "pay attention to how you lift" under the preventative action plan section. (Id.)

20. On October 23, 2020, Ms. KM[Redacted] and Mr. M[Redacted] called Claimant into Employer's warehouse for a meeting. Ms. KM[Redacted] recorded the meeting without Claimant's knowledge.

21. The recording of the meeting was admitted into evidence as Claimant's Exhibit 34. During the meeting, Ms. KM[Redacted] and Mr. Miller inquired about the October 20, 2020 incident. They asked Claimant if he wanted to continue seeing his personal doctor or if he wanted to see a physician through workers' compensation. Claimant indicated he did not know what he wanted to do, and asked for time to make his decision. Ms. KM[Redacted] informed Claimant that they needed his decision at that time. Claimant inquired what would happen if he sought treatment for the injury through Employer's workers' compensation insurance. Ms. KM[Redacted] informed Claimant he would be required to see a workers' compensation doctor who would determine, along with an investigation, if Claimant's injury was work-related or if it was the result of a previous condition.

22. Claimant then indicated he continued to experience symptoms from the August 10, 2020 injury. Ms. KM[Redacted] admonished Claimant for continuing to work with a preexisting condition and failing to inform Employer of his restrictions. Claimant stated he needed to work to make money. Ms. KM[Redacted] again asked Claimant if he wanted to see a workers' compensation doctor or to decline workers' compensation treatment.

23. Claimant ultimately stated he would like to go see a workers' compensation doctor. Ms. KM[Redacted] then instructed Claimant to choose a workers' compensation doctor, and immediately informed Claimant that he would be required to submit to a mandatory drug test per Employer procedure. In response, Claimant stated that he did smoke marijuana at night. Ms. KM[Redacted] commented that Claimant would likely fail a drug test on top of everything else, and that he ran the risk of his injury not being covered by workers' compensation. Claimant then elected to decline treatment through workers' compensation and signed another Declination of Treatment Form for his October 20, 2020 injury.

24. Upon Claimant signing the second Declination of Treatment form, Mr. M[Redacted] informed Claimant that he was being terminated. Mr. M[Redacted] informed Claimant that his failure to inform Employer of his restrictions while he continued to work had put the company, himself, and other employees at risk. Mr. M[Redacted] presented Claimant a Performance Improvement Plan dated October 20, 2020. The Performance Improvement Plan stated Claimant was terminated because Claimant continued to work under restrictions and did not notify Employer of the restrictions until 20 days later. The document states Claimant violated company policies by putting others at risk because he was not physically capable of performing his job.

25. Claimant emailed Ms. KM[Redacted] after the meeting at 11:15 a.m. on October 23, 2020 requesting a list of designated providers to treat his back. Ms. KM[Redacted] replied via email later that day, sending Claimant a Designated Provider List. Ms. KM[Redacted] wrote on the list, "Employee opted to not go to worker comp doctor. He admitted he would fail drug test." (R. Ex. E, p. 20).

26. Claimant sought treatment at one of Employer's designated providers, Thornton COMP, and underwent a drug test for which he tested negative. Claimant presented to

Monica Fanning-Schubert, APN on October 30, 2020, who diagnosed Claimant with cervicalgia, low back pain, and strain of muscle, fascia, and tendons in the back. She referred Claimant for physical therapy and massage therapy and for lumbar and cervical spine MRIs. APN Fanning-Schubert placed Claimant on work restrictions including: lifting a maximum of 50 pounds; a maximum of 10 pounds for repetitive lifting, carrying, and pushing or pulling; no repetitive lifting from floor to waist; and zero hours per day crawling and no climbing of ladders.

27. On November 18, 2020, Claimant attended an evaluation with Bryan Alvarez, M.D. Dr. Alvarez's diagnoses were the same as ANP Fanning-Shubert's. Dr. Alvarez referred Claimant for chiropractic treatment and a consultation with a physiatrist. He changed Claimant's lifting, carrying, and pushing and pulling restrictions from 10 pounds to 20 pounds.

28. Claimant continued to see Dr. Alvarez. He also underwent physical therapy from November 3, 2020 through January 7, 2021, and massage therapy from November 13, 2020 through January 8, 2021. As of Claimant's March 23, 2021 evaluation with Dr. Alvarez, he remains on 10 pounds restrictions for lifting, pushing/pulling and pinching/gripping.

29. On October 27, 2020, Insurer created an Employer's First Report of Injury (E-1) for Claimant's October 20, 2020 injury. Insurer assigned a claim file number of FQV8949. The form does not specify any safety rule violation. [Redacted, hereinafter VP], Investigative Adjuster, testified this form was not filed with the Division as, per her understanding of Division guidelines, Division training, and experience, the claim was not the type of claim required to be reported to the Division. This matter gave rise to W.C. No. 5-157-564.

30. On December 7, 2020, Claimant filed a Workers' Claim for Compensation with the Division noting the date of injury as "8/10/20 aggravated on 10/20/20." (R. Ex. 7, p. 36). The Division assigned the claim W.C. # 5-155-726.

31. On December 9, 2020, the Division sent Insurer a letter advising Insurer to admit or deny liability within 20 days for WC #5-155-726.

32. Ms. VP[Redacted] handled Claimant's claims for Insurer. She testified that Insurer received Claimant's claim and the Division's December 9, 2020 letter on December 15, 2020 and put it into an "electronic file cabinet."

33. On December 12, 2020, Claimant's counsel emailed Ms. VP[Redacted] regarding FQV8949 stating that the E-1 filed on 10/27/20 was in a penalty situation as Insurer had not yet admitted or denied the claim. Ms. VP[Redacted] replied to the email on December 17, 2020 stating that the Claimant had been placed in denial with a Notice of Contest forthcoming. Claimant's counsel responded on December 19, 2020 stating the Notice of Contest would be filed late and Insurer would continue to be in violation.

34. On December 22, 2020, Insurer filed a Notice of Contest for October 20, 2020 claim.

35. On January 12, 2021, the Division sent notice to Insurer regarding W.C. #5-155-726. The letter stated that Respondents were in a potential penalty situation because they had failed to take a position within 20 days of the Division receiving notice of the claim.

36. Ms. VP[Redacted] testified that, upon receiving the Division's January 12, 2021 letter, Insurer realized there had been confusion regarding two separate claims being filed by Claimant. At that time, Insurer created a file for the August 10, 2020 claim in their system.

37. On January 14, 2021, Ms. VP[Redacted] filed a Notice of Contest for August 10, 2020 injury.

38. On April 27, 2021, Respondents filed General Admissions of Liability in the August 10, 2020 and October 20, 2020 claims admitting liability for medical benefits only. Respondents assert Claimant is not entitled to temporary indemnity benefits as Claimant is responsible for termination of his employment.

39. Claimant testified that, as a result of Respondents' delays in filing the Notice of Contests, he experienced anxiety and stress. Claimant testified he is unable to perform his regular job duties as a result of his injuries.

40. Ms. KM[Redacted] testified Employer could have accommodated the restrictions put in place by both Kaiser Permanente and COMP with modified duty work. She also testified other injured employees had returned to work under restrictions at light duty.

41. Regarding Claimant's responsibility for termination, the ALJ credits Claimant's testimony, as supported by the records, over the testimony of Ms. KM[Redacted].

42. The ALJ finds that Claimant proved it is more probable than not he is entitled to TTD benefits October 23, ongoing.

43. The ALJ finds that Respondents failed to prove it is more probable than not Claimant was responsible for his termination.

44. The ALJ finds that Claimant failed to justify imposition of penalties against Respondents based on the totality of the circumstances.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*,

971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved he is entitled to TTD benefits from October 23, 2020, ongoing. Claimant credibly testified that as a result of his work injuries and restrictions, he has been unable to perform his regular work duties and has not or earned wages since October 23, 2020. Claimant's termination from employment is addressed below.

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial*

Commission, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

Respondents assert Claimant was terminated from his employment because he failed to timely notify Employer of his work restrictions. Respondents rely on the Employee Handbook, which provides that failure to report unsafe actions or conditions could be grounds for discharge.

Ms. KM[Redacted]'s October 20, 2020 email response to Claimant undermines Respondents' contention that Claimant was terminated for failing to timely notify Employer of his restrictions. In her response, Ms. KM[Redacted] questioned why Claimant presented something he received on 10/1 to her on 10/20 **that is not work comp related.** (Emphasis added). She goes on to remind Claimant he signed a waiver regarding the injury resulting in the injury no longer being a workers' compensation or Employer issue. Thus, while Ms. KM[Redacted] did mention a delay in providing the restrictions, the crux of her response focused on admonishing Claimant for notifying Employer of restrictions Employer deemed unrelated to his work due to Claimant signing a waiver. She specifically states that it is no longer an Employer issue. It is important to note Claimant solely notified Employer of his restrictions in this email and did not indicate he was requesting additional medical treatment from Employer. Thus, Ms. KM[Redacted]'s response stating it was not an Employer issue and admonishing Claimant for sending such information undermines

the argument that Claimant was reasonably expected to promptly notify Employer of his restrictions under such circumstances.

While Employer purports that Claimant's actions put Claimant and his co-workers in potential danger, Employer continued to permit Claimant to work full duty for two days after becoming aware of the restrictions. There is no indication Claimant was placed on any sort of suspension or modified duty prior to his termination. Additionally, the E-1 form completed by Employer on October 20, 2020 does not allege any safety rule violation.

Additionally, the recording of the termination meeting provides further insight into the circumstances surrounding Claimant's termination. Immediately after Claimant affirmatively stated his desire to see a workers' compensation physician, Ms. KM[Redacted] announced that Claimant would be required to undergo a drug test, which could result in his claim being denied. The ALJ is not persuaded this statement was solely an attempt to apprise Claimant of the process for seeking workers' compensation treatment. In the context of the conversation, the statement reasonably appears to be an attempt to dissuade Claimant from pursuing treatment through Employer's workers' compensation insurance. When Claimant changed his mind based on Ms. KM[Redacted]'s statement, Ms. KM[Redacted] immediately presented Claimant yet another Declination of Treatment form, after which Mr. M[Redacted] proceeded to terminate Claimant.

Here, Employer presented Claimant with not one, but two, Declination of Treatment forms after Claimant reported separate work injuries. Claimant signed the first form because Employer paid him for his time off due to the injury, and the second form because he did not wish to undergo a drug test in connection with a worker's compensation claim. Upon notifying Employer of his work restrictions, Claimant was not suspended or placed on modified duty, but allowed to continue working his regular duties. Employer questioned why Claimant was providing evidence of work restrictions that were "not work related" and "not an Employer issue." Employer effectively terminated Claimant under the pretext of Claimant failing to timely notify Employer of his work restrictions. Considering the totality of the credible and persuasive evidence, the ALJ does not find that the Employer's stated reason for terminating Claimant was, in fact, the reason for his termination. The preponderant evidence does not establish Claimant was responsible for his termination.

Penalties

Claimant seeks penalties against Respondents in the August 10, 2020 claim (WC # 5-155-726) under Section 8-43-203(1)(a), C.R.S. and WCRP Rule 5-2(D). Claimant also seeks penalties in the October 20, 2020 claim (WC# 5-157-564) under Section 8-43-203(1)(a), C.R.S.

Section 8-43-203(1)(a) requires a Notice of Contest to be filed within 20 days after a report is or should have been filed pursuant to §8-43-101. Section 8-43-101(1) states,

> Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule. Within ten days after notice or knowledge that an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury, or fatality to the division. The report shall contain such information as shall be required by the director.

Respondents contend that no penalties apply under Section 8-43-203(1) as both claims are no lost time claims and thus did not require reporting under Section 8-43-101(1). Specifically, Respondents argue that no lost time occurred on the August 10, 2020 claim because Employer paid Claimant his full wages for the time he missed from work due to the August 10th injury. Regarding the October 20, 2020 injury, Respondents argue that no lost time occurred because Claimant was responsible for his termination.

Here, Respondents conflate the requirement for lost time referenced in §8-43-101(1) with the requirement for wage loss as related to temporary total disability benefits.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See §§8-42-(1)(g) & 8-42-105(4), C.R.S. That Respondents paid Claimant his full wages for the time he missed from work due to the August 10, 2020 injury is relevant to a consideration of whether Claimant sustained actual wage loss, entitling him to TTD benefits. Similarly, whether Claimant was responsible for his termination from employment is relevant to determining whether resulting wage loss is attributable to the industrial injury. The reporting requirements outlined in Section 8-43-101(1) do not refer to wage loss, but lost time. A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987).

Injuries without loss of pay do not exclude Respondents' obligation under Section 8-43-203(1)(a). *See Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Thus, both Claimant's August 10, 2020 and October 20, 2020 were lost time claims, as Claimant missed more than three days of work.

Nonetheless, Claimant failed to justify the imposition of a penalty under Section 8-43-203(1). The phrase "may become liable" means imposition of penalties under § 8-42-203(2)(a) is discretionary. E.g., Gebrekidan v. MKBS, LLC, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over

the claim process. Smith v. Myron Stratton Home, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter future misconduct. May v. Colorado Civil Rights Commission, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. Dami Hospitality, LLC v. Industrial Claim Appeals Office, 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under § 8-43-203(2)(a). Pioneer Hospital v. Industrial Claim Appeals Office, 114 P.3d 97 (Colo. App. 2005).

Claimant did not file a claim for compensation until December 7, 2020. At the time, Insurer was aware only aware of the October 20, 2020 injury. The Division sent a letter to Insurer on December 9, 2020 asking Insurer to take a position. Twenty days from that date would have been December 29, 2020. The NOC was filed on January 14, 2021. In December 2020, the Insurer only had one file open for Claimant and that was for his October 20, 2020 case (FQV8949) as the Employer had 'filed' that claim with them electronically. The December 12, 2020 email from Claimant's counsel requesting that Insurer file a position specifically referred to FQV8949 and the E-1 filed on 10/27/20. Ms. VP[Redacted] responded that she would be filing a NOC, which she did in a timely manner on December 22, 2020. Insurer reasonably believed they had complied under the circumstances. Upon receiving the Division's January 12, 2021 letter stating Insurer was in a penalty situation for failure to timely take a position, Insurer realized there were two separate claims requiring NOCs. Insurer then promptly filed a NOC in the August 10, 2020 matter on January 14, 2020. Insurer was reasonably confused under the circumstances and took reasonable action in an attempt to comply.

WCRP Rule 5-2(D) provides, "The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation...".

This subsection of the rule is distinct from §8-43-203(1) to the extent that it applies to any claim, but only when the claimant has filed a Claim for Compensation. Under Rule 5-2(D), a position statement is due 20 days after a Workers' Claim for Compensation was mailed to the insurer. An admission or contest was made necessary by Rule 5-2(D), solely because the claimant had filed a Claim for Compensation.

The Division mailed a copy of the Claimant's Workers' Claim for Compensation to Respondents on December 9, 2020 asking Respondents to take a position on the claim WC #5-155-726. Respondents did not file a NOC until 1/14/21, thus violating Rule 5-2(D).

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See*

Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

As discussed above, while Respondents failed to take a timely position on the August 20, 2020 claim pursuant to WCRP Rule 5-2(D), Respondents conduct was objectively reasonable. Thus, imposition of penalties is inappropriate. Accordingly, no penalty for violation of Rule 5-2(D) shall be assessed.

ORDER

1. Claimant proved he is entitled to TTD benefits beginning on October 23, 2020; Respondents shall pay Mr. Ocana TTD benefits at the rate of $668.63 per week beginning on that date and continuing until terminated by operation of law.

2. Respondents' affirmative defense of termination for cause is denied and dismissed.

3. Claimant's claim for penalties is denied and dismissed.

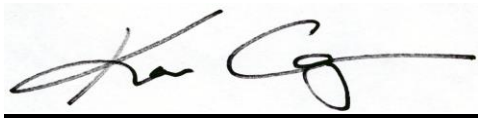
4. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable workplace injury on February 25, 2019.

II. Whether Claimant proved by a preponderance of the evidence he sustained a compensable occupational disease with a date of onset of April 21, 2019.

III. If Claimant proved he sustained a compensable workplace injury on February 25, 2019 and/or occupational disease with a date of onset of April 21, 2019, whether Claimant proved by a preponderance of the evidence he is entitled to specific reasonable, necessary, and related medical benefits.

IV. If Claimant proved he sustained a compensable workplace injury, whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability benefits from February 25, 2019 through April 23, 2019.

FINDINGS OF FACT

1. Claimant worked for Employer for nine years. Claimant initially worked for Employer in quality assurance. He worked as a microbiologist for the last six years.

2. Claimant alleges he sustained an injury to his right elbow and forearm on February 25, 2019. Claimant alleges he was injured when opening a tight cap on a Sharpie marker. Claimant frequently used Sharpies while performing his job duties. Claimant testified he forcefully gripped and twisted the cap of the marker with his right hand, causing pain in his right forearm. Claimant reported the incident to Employer but did not seek medical attention.

3. Claimant alleges that, following the February 25, 2019 incident, he experienced pain when squeezing the squeeze bottles, and difficulties with his right hand, arm and shoulder when: pouring the water samples into the funnels; carrying heavy water samples from the line to his lab; collecting and unloading supplies from the logistics department; diluting the culture media with the mechanical pipettes using a motion similar to pushing up and down on a pen.

4. Claimant testified that the bottle claimant uses to pour his water samples is glass and contains one liter of water. He stated he feels pain in his hand/arm/wrist shoulder from the repetitive motion of pouring combined with the weight of the bottle. Claimant testified that collecting and unloading supplies causes pain to his right shoulder because it requires pulling a heavy cart from the front across the entire building.

Claimant testified his work also includes unloading large boxes of supplies and placing them in the refrigerator or other storage. Claimant testified his other work requires that he reach overhead, upwards, out to the side both sides and bend over to get supplies under his workstation. He occasionally uses a step stool. Claimant stated he spends half of his day in the lab doing sampling, approximately four (4) to five (5) hours, which is when he does most of his reaching for supplies.

5. Claimant continued to work full-duty for Employer after the February 25, 2019 incident. Claimant testified that he experienced intermittent pain in his right hand, forearm and shoulder during this time period.

6. Claimant alleges he suffered an occupational disease with a date of onset of April 21, 2019.

7. Claimant testified that, on April 21, 2019, he developed pain in his right shoulder when he rolled over in bed at night. Claimant associated his right shoulder pain with his work activities and reported his symptoms to Employer the following day and requested medical evaluation.

8. Claimant presented to Jay Reinsma, M.D. at Concentra on April 23, 2019. He reported that on February 25, 2019, he felt pain in his right forearm and lateral elbow when he pulled a stuck cap off of a marker. Claimant reported using some pain cream and over the counter medication to manage his pain. Dr. Reinsma noted that 10 days prior to this evaluation Claimant began to develop severe right shoulder pain. Claimant denied any new injury. On examination of the right shoulder, Dr. Reinsma noted tenderness in the bicipital groove and in the deltoid, as well as full range of motion with pain. Examination of the right forearm was normal. Dr. Reinsma diagnosed Claimant with a right forearm strain and tendinitis of the upper biceps tendon of the right shoulder. He noted that he could not opine with greater than 51% certainty that Claimant's shoulder is a work-related issue. He opined that Claimant's forearm injury did appear to be work-related. Dr. Reinsma referred Claimant to physical therapy and released Claimant to modified duty with the following work restrictions: may lift up to 10 pounds occasionally, no reaching above shoulders with affected extremity, unable to use power/impact/vibratory tool with right upper extremity. Occasional grip squeeze pinch and no behind reaching with right arm.

9. A physical therapy record from April 23, 2019 notes that the right shoulder humeral head is slightly anterior to the acromion. This evaluation also showed radial sided wrist pain radiating up the arm. Claimant had right shoulder pain over the AC joint, causing difficulty reaching overhead and reaching behind him to put on his jacket. The pain is described as burning and sharp, onset was delayed, and symptoms occur intermittently. His pain is rated as 3/10.

10. Claimant returned to Dr. Reinsma on April 25, 2019 stating there was miscommunication regarding his injury at his first evaluation. Claimant reported that he inadvertently pointed to his shoulder when his pain was just above his right elbow. On

examination of the right elbow, Dr. Reinsma noted tenderness in the lateral epicondyle with full range of motion. Claimant resisted wrist range of motion with pain. Examination of the forearm revealed tenderness in dorsal mid forearm with full painful range of motion. Dr. Reinsma removed his shoulder diagnosis and continued Claimant on restrictions.

11. A physical therapy record dated April 30, 2019 documents that Claimant reported that he confused his body parts and misnamed the region that was bothering him and that he never had shoulder pain. He reported that the pain was always in his forearm and again related his pain to the cap twisting incident.

12. On May 13, 2019 Claimant reported to Dr. Reinsma 3/10 pain with gripping heavy objects. He reported being pain-free except when lifting. Claimant further reported that he was working regular duty but not using his right arm as he usually would. Dr. Reinsma opined that further physical therapy was not indicated. He returned Claimant to regular duty using his right arm as normal.

13. At a follow-up visit on May 20, 2019, Claimant reported to Dr. Reinsma having pain when reaching out and attempting to lift items. Dr. Reinsma noted that Claimant reported pain but appeared comfortable during his examination. He continued Claimant on regular duty. On May 28, 2019, Claimant reported worsening pain in his biceps area to Dr. Reinsma. Dr. Reinsma referred Claimant to Craig Davis, M.D. for evaluation.

14. Claimant presented to Dr. Davis on June 4, 2019. Claimant reported that he developed right forearm pain on February 25, 2019 when removing a marker cap, and right shoulder pain since rolling over in bed in April 2019. On examination of the right shoulder, Dr. Davis noted limited range of motion and strongly positive impingement signs. There was full range of motion of the elbow, wrist and hand with tenderness over the mid forearm dorsally over the extensor musculature. Claimant was nontender at the epicondyles and had pain with resisted wrist extension and supination. Dr. Davis noted that right shoulder x-rays showed type II acromion with no other abnormalities, and that x-rays of the right elbow were normal. Dr. Davis diagnosed Claimant with right shoulder subacromial bursitis and tendinitis of the right forearm. He administered a shoulder injection and injections into three trigger points of the forearm. Dr. Davis's medical note does not address causality.

15. Claimant returned to Dr. Davis on July 9, 2019 reporting no improvement in his right shoulder but "virtually complete relief" in his forearm following the trigger point injections that were done for radial tunnel syndrome. Claimant reported that he as working fully duty using a forearm strap and occasionally took anti-inflammatory medication. Dr. Davis referred Claimant for a shoulder MRI.

16. Claimant underwent a right shoulder MRI on July 19, 2019 which revealed: 1) Tendinosis-tendinopathy change rotator cuff without cuff tear, muscle atrophy or denervation change; 2) Anterolateral downsloping of the acromion and degenerative changes about the acromioclavicular joint indent and the supraspinatus myotendinous

margin. Correlation with the patient's clinical exam for any symptoms of outlet impingement is suggested; 3) Tenosynovitis change biceps tendon sheath with intra-articular tendinosis of the biceps tendon as it courses to insert on the degenerated SLAP 2 superior labrum. On further review a SLAP 3 appearance may be present. Extension of the SLAP 2 labral tearing down to almost the 10 o'clock to the 9:30 position is noted as well. Correlation with the patient's clinical exam referable to the biceps superior labral complex is recommended; 4) Synovitis change rotator interval and thickening and edematous change inferior capsular margins; 5) Grade 3 chondral loss humeral head, no subcortical bone marrow edema. (C. Ex. 00145).

17. Claimant returned to Dr. Davis on August 6, 2019. Dr. Davis noted Claimant's MRI demonstrated a Type 2 to 3 SLAP tear of the superior labrum with some biceps tendinitis and rotator cuff tendinitis, but minimal otherwise. Claimant continued to report severe activity-related pain diffusely around the shoulder. Dr. Davis noted that the trigger point injections had worn off and Claimant was now reporting significant pain over the dorsal forearm. He remarked that he was concerned that Claimant's subjective complaints seemed rather diffuse and more than he would expect given Claimant's MRI pathology. Dr. Davis recommended Claimant undergo a glenohumeral injection, which he administered on August 20, 2019.

18. At a follow-up examination with Dr. Reinsma on August 23, 2019, Dr. Reinsma noted that Claimant continued to complain of right forearm pain but that his exam appeared entirely normal. He recommended proceeding as recommended by Dr. Davis.

19. On September 24, 2019, Dr. Davis noted that Claimant's shoulder had markedly improved for two weeks following the injection but that Claimant had since returned to baseline. Claimant continued to report forearm pain. Dr. Davis opined that Claimant had an excellent temporary response to the shoulder injection and thus was a reasonable candidate for arthroscopic evaluation with possible biceps tenotomy and possible debridement or repair of the superior labrum. He further opined that Claimant's forearm pain may improve following the shoulder surgery, and recommended additional trigger point injections if it did not. Dr. Davis requested authorization for surgery.

20. Respondents filed a Notice of Contest on October 1, 2019.

21. At some point in October 2019 Claimant requested leave under the Family Medical Leave Act ("FMLA") and went on a medical leave of absence.

22. On October 23, 2019, William J. Ciccone II, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported that on February 25, 2019 he opened a tight sharpie marker cap resulting in pain in his forearm with increased pain using equipment. He confirmed that he has remained in full work duties using his left upper extremity most of the time and that he was able to return to work with full duties but did have some discomfort in the left forearm. Claimant reported that in April 2019 he experienced increased right shoulder pain when he rolled over in bed at night. Claimant was currently on medical leave from his job, noting he last

worked October 10, 2019. Claimant reported that over the last few weeks he experienced hand paresthesias into the third and fourth fingers of his right hand.

23. On examination, Dr. Ciccone noted active forward flexion of 150 degrees, external rotation of 40 degrees, internal rotation to L5; mild impingement signs; no pain at the AC or SC joints; no pain with bear hug testing; negative O'Brien's test; normal lift-off test; no pain with palpation along the anterior aspect of the shoulder; full range of motion of the elbow; some pain with palpation over the lateral epicondyle; no pain medially; negative Tinel's at the cubital tunnel; no pain with Tinel's at the carpal tunnel; some pain along the mid forearm; pain does not radiate down to the hand; palpable radial pulse; symmetrical trapezial shrug. Dr. Ciccone reviewed Claimant's medical records, including imaging.

24. Dr. Ciccone concluded that Claimant did not suffer a work-related injury to his right forearm or shoulder. He opined that the only reported mechanism of injury, removing a cap from a marker, was unlikely to cause an injury. He noted that Claimant's findings on his examination were inconsistent with findings on prior exams. Specifically regarding Claimant's right shoulder, Dr. Ciccone noted that Claimant's pain occurred at night while at home, and there was no shoulder injury or pain complaints while at work. He opined that Claimant degenerative changes in the glenohumeral joint. He explained that labral tearing is commonly found on MRI with age, in addition to the degenerative disease, which also causes degenerative labral tearing unrelated to trauma.

25. Dr. Ciccone diagnosed Claimant with right forearm pain and right shoulder pain with degenerative changes. He opined that the Slap lesion evidenced on MRI is unrelated to any work injury and was probably degenerative in nature. He noted he did not find any findings on his examination associated with symptomatic biceps. Dr. Ciccone opined Claimant was at full duty with no restrictions or impairment.

26. Claimant returned to Dr. Reinsma on November 19, 2019. Dr. Reinsma reviewed Dr. Ciccone's IME report and agreed with Dr. Ciccone's assessment that reported mechanism of injury was inconsistent with Claimant's complaints. Dr. Reinsma placed Claimant at MMI as of that day, noting any further care should be provided outside of the workers' compensation system.

27. Subsequent to being discharged from care by Dr. Reinsma, Claimant continued his treatment with Montbello Family Health Center under his private health insurance. Claimant was diagnosed with chronic right shoulder pain, referred to orthopedics, and released to full-duty on November 22, 2019.

28. On November 30, 2019, Claimant reported for a Physical Abilities Test. The form indicates that his job requires 40 pounds of lifting and that he is able to meet that goal. It states that Claimant has "normal" range of motion but it does not refer to a specific body part. There is strength testing for both hands but no mention of repetitive work activities. (C. Ex. 00289).

29. On December 4, 2019, Dr. Reinsma approved the return to work evaluation. Dr. Reinsma opined that Claimant could perform the essential functions of his job. The form indicates that no job formal description was available and the determination was based solely upon description of duties provided by the patient/applicant. (C. Ex. 00289).

30. Dr. Davis performed arthroscopic right shoulder surgery on December 18, 2019.

31. Claimant underwent an EMG of the right upper extremity on January 21, 2020, revealing ulnar nerve slowing across the cubital tunnel. There was no evidence of radial nerve injury, right cervical radiculopathy or polyneuropathy.

32. On April 30, 2020, John Hughes, M.D. performed an IME at the request of Claimant. Claimant reported that he developed right forearm pain after opening a package of markers on February 25, 2019 which required forceful gripping. He further reported that, on April 21, 2019, he turned over to his right side in bed and felt intense pain in his right shoulder. Regarding work duties, Claimant reported that he processes samples throughout the production line, requiring carrying bottles and cases of bottles, as well as buckets, that might weigh 60 pounds. Claimant further reported having to repetitively reach overheard for bottles.

33. On examination of the right shoulder Dr. Hughes noted smooth but limited motion with flexion and extension 143 and 46 degrees respectively, abduction and adduction 117 and 37 degrees, external and internal rotation 73 and 66 degrees respectively. Dr. Hughes assessed Claimant with: 1) work-related strain of the right forearm with development of symptomatic radial tunnel syndrome, improved post trigger point injections done on June 4, 2019; 2) onset of right shoulder pain with subsequent discovery of right shoulder subacromial bursitis, biceps tendinitis and a type II superior labral tear; 3) right shoulder arthritis, post arthroscopic biceps tenotomy, superior labral repair and subacromial bursectomy done on December 18, 2019; 4) postsurgical onset of right ulnar neuropathy with persistence of symptoms but without hard neurological deficits.

34. Dr. Hughes opined that Claimant's initial injury was a strain of the right forearm with development of myofascial and neurological symptoms characterized by Dr. Davis as radial tunnel syndrome. He concluded that Claimant such condition essentially resolved after the initial course of trigger point injections in June 2019. With respect to Claimant's shoulder, Dr. Hughes remarked that rolling over in bed is insufficient by itself to cause a right shoulder injury of the type sustained by Claimant. However, Dr. Hughes opined that Claimant's shoulder condition could be work-related, stating, "I strongly suspect that work place exertional factors have played a significant role in his development of right shoulder subacromial bursitis, labral tear and biceps tendinitis." (C. Ex. 00307). Dr. Hughes opined that Claimant had not reached MMI and recommended a job site analysis to assess ergonomic factors in Claimant's workplace. He further recommended that Claimant be followed closely by Dr. Davis for the next few months for any concerns for nerve damage. Dr. Hughes opined that Claimant's right shoulder

surgery was reasonable, necessary and related to his work. Dr. Hughes provided a 6% provisional impairment of the upper extremity.

35. No job site analysis was performed.

36. On May 22, 2020 Claimant presented to Simon Oh, M.D. with complaints of numbness and tingling in his right second finger. Claimant reported that two to three months ago he began having numbness and tingling in his right lateral thigh, and that today she also began having the same sensation distal to his right knee. Dr. Oh opined that Claimant met the criteria for fibromyalgia, noting he had clinical findings of a length-dependent sensory neuropathy. Dr. Oh Ordered an EMG of Claimants right upper and lower extremities to determine the extent of the polyneuropathy.

37. Claimant underwent an EMG on June 11, 2020, which revealed mild right peroneal neuropathy at the fibular head, demyelinating, and mild right ulnar neuropathy at the elbow, demyelinating.

38. Claimant returned to Dr. Davis on April 7, 2021 reporting that his symptoms had worsened over last nine months. Dr. Davis diagnosed Claimant with persistent ulnar neuropathy at the right elbow and opined that Claimant is a reasonable candidate for surgical treatment for subcutaneous transposition of the right ulnar nerve with decompression over the dorsal forearm.

39. Dr. Ciccone performed a follow-up IME on April 14, 2021 and issued a report dated May 19, 2021. Dr. Ciccone reviewed additional medical records, including Dr. Hughes' IME report. Dr. Ciccone continued to opine that Claimant did not sustain any work-related injury on February 25, 2019 or onset of April 21, 2019. Dr. Ciccone reiterated that Claimant's MRI findings were likely degenerative and atraumatic. He explained that removing a pen cap is not a mechanism of injury for developing radial tunnel syndrome. Dr. Ciccone opined that Claimant's response to injections was unrelated to the presence of any injury. He noted Claimant has pain from fibromyalgia as documented on June 11, 2020. Dr. Ciccone opined that Claimant's right ulnar neuropathy is also unrelated to any work injury. Dr. Ciccone opined that any potential need for a cubital tunnel release is unrelated to Claimant's work.

40. Dr. Hughes performed a follow-up DIME on June 23, 2021, reviewing additional medical records, including Dr. Oh's records and Dr. Ciccone's IME report. Dr. Hughes opined that Claimant was not at MMI due to a recrudescence of regional myofascial pain syndrome from the work-related sprain/strain of the right forearm, meriting further treatment. Dr. Hughes opined that this was likely related to Claimant's current occupational activities, but that he did not have a job site evaluation to assist in confirming that his work duties are injurious. Dr. Hughes opined that there was resistance in the extertional activity of opening a marker cap on February 25, 2019, which resulted in swelling and inflammation that led to radial tunnel syndrome. Dr. Hughes further opined that Claimant sustained a right shoulder injury – specifically a labral tear – that was initiated with rolling over in bed, and that the worsening of his

condition likely was accelerated by Claimant's occupational tasks. He again noted he had no job site evaluation to assist in confirming this impression. Dr. Hughes recommended that Claimant undergo a trial of physical therapy and PRP injections. He opined that the demyelinating neuropathies of Claimant's right ulnar and right peroneal nerves were not related to Claimant's work injuries and may have developed in the setting of prediabetes.

41. Dr. Ciccone testified by deposition on behalf of Respondents as Level II accredited expert in orthopedic surgery. Dr. Ciccone testified consistent with his IME reports and continued to opine Claimant did not sustain any work-related injury or occupational disease. Dr. Ciccone explained that Claimant's right shoulder MRI showed pre-existing degenerative pathology. He testified that there was no medical documentation indicating Claimant's job duties substantially and permanently aggravated, accelerated or exacerbated his right shoulder pathology. Dr. Ciccone testified that it is unlikely anyone would sustain an injury removing a pen cap from a pen, and that such mechanism of injury is not known to cause radial tunnel syndrome. He opined that there is no medical evidence that Claimant required treatment for his right forearm pain as related to any work injury.

42. Dr. Ciccone explained that Claimant's nerve condition is not the result of any occupational injury or occupational disease, noting Claimant's condition was more likely related to some early diabetes or some other internal genetic disorder. He testified that the symptoms from the demyelinating neuropathies of the right peroneal and right ulnar nerve can include right forearm pain, and that would be a reasonable explanation for Claimant's complaints of right forearm pain. Dr. Ciccone further testified that there is no objective medical evidence Claimant's Type 2 superior labral tear or resultant surgery was caused by an occupational injury or occupational disease. He reiterated his opinion that Claimant's experience of shoulder pain while rolling over in bed is unrelated to Claimant's work. Dr. Ciccone stated that there is no objective medical evidence supporting Dr. Hughes' opinion that workplace exertional factors played role in Claimant's shoulder condition. Dr. Ciccone further opined that PRP injections and PT for his right forearm are not reasonably necessary or causally related to any work injury. Dr. Ciccone testified that he reviewed Claimant's job description and that there is no evidence any of the diagnosed pathology was a result of the alleged February 25, 2019 incident or Claimant's job duties. He further testified that the description Claimant gave in his testimony of the repetitiveness and awkward posture required by his job duties was insufficient to determine causation from a cumulative trauma standpoint.

43. Claimant's job description from Human Resources reads, "[a]bility to move/handle fifty pounds, stand on your feet for long periods throughout the day," in addition to, "able and willing to work 12 hour shifts including the potential for nights, weekends, and holidays." (C. Ex. 00342). Claimant's job description proffered by Respondents does not include any exertional requirements.

44. The ALJ finds the opinion of Dr. Ciccone, as supported by the opinion of Dr. Reinsma and the medical records, more credible and persuasive than the opinion of Dr. Hughes and Claimant's testimony.

45. Claimant failed to prove it is more probable than not he sustained a compensable occupational injury on February 25, 2019.

46. Claimant failed to prove it is more probable than not he sustained a compensable occupational disease with a date of onset of April 21, 2019.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Alleged February 25, 2019 Industrial Injury

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove he sustained a compensable industrial injury on February 25, 2019. While Claimant may have felt pain while removing a pen cap off

of a marker on such date, the ALJ is not persuaded Claimant sustained a work injury. Claimant did not seek medical treatment for several months after the alleged injury and continued performing his full duties. Dr. Ciccone credibly testified the mechanism of injury reported by Claimant would not result in Claimant's purported symptoms or his objective pathology. While Dr. Reinsma initially opined Claimant sustained a right forearm strain, he ultimately agreed with Dr. Ciccone's assessment that the reported mechanism of injury was inconsistent with Claimant's complaints. Dr. Ciccone credibly opined that Claimant's right forearm findings and diagnosis are not related to the February 25, 2019 work incident or Claimant's other work duties. Although Claimant experienced pain while at work, the preponderant evidence does not establish that the work incident caused, aggravated or accelerated a condition resulting in disability or the need for medical treatment. While Claimant may require additional medical treatment for his right forearm, as credibly opined by Dr. Ciccone, such treatment in unrelated to Claimant's employment.

Alleged Occupational Disease April 21, 2019

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The "rights and liabilities for occupational diseases are governed by

the law in effect at the onset of disability." *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when "the occupational disease impairs the claimant's ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity." *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

Claimant failed to prove it is more probable than not he suffered a compensable occupational disease. Claimant argues that his experience of pain while rolling over in bed at night at home represented the date of onset of an occupational disease caused by his work duties. When Claimant sought medical treatment in April 2019, he initially denied having any pain in his right shoulder, reporting to his providers that he had misnamed the alleged body part he injured. Dr. Ciccone credibly opined that Claimant's right shoulder pathology did not result from Claimant's work duties. Claimant's shoulder MRI revealed a labral tear and other degenerative changes. While Dr. Hughes suspects Claimant's condition is due to his work duties, Dr. Hughes did not have a job site analysis upon which to base his conclusion. The job description provided does not establish that Claimant met the risk factors for cumulative trauma under the Medical Treatment Guidelines, nor does Claimant's testimony.

ORDER

1. Claimant failed to prove he suffered a compensable industrial injury on February 25, 2019.

2. Claimant failed to prove he suffered a compensable occupation disease with a date of onset of April 21, 2019.

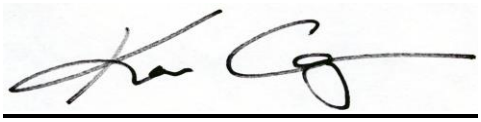
3. Claimant's claim for benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the following treatment modalities are reasonably necessary to relieve the effects, or prevent further deterioration of Claimant's industrial injury:

    a. Belbuca;

    b. Tens Unit;

    c. Massage therapy; and

    d. Physical therapy.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his back on August 13, 2010. As a result of the back injury, Claimant underwent five work-related spinal surgeries over a period of approximately eight years. The surgeries have included lumbar fusion procedures from L3-S1, with the most recent surgery being performed in November 2018.

2. On January 21, 2020, Claimant's authorized treating physician (ATP), Elizabeth Bisgard, M.D., at UC Health Occupational Medicine, placed Claimant at maximum medical improvement (MMI). Dr. Bisgard recommended maintenance care to include medication management with Dr. Huser, 12 physical therapy sessions and 12 massage therapy sessions. (Ex. 4).

3. On June 12, 2020, Caroline Gellrick, M.D., performed a Division Independent Medical Examination (DIME). Dr. Gellrick opined that Claimant was at MMI effective January 21, 2021. With respect to maintenance care, Dr. Gellrick recommended that Claimant continue with an active exercise program with swimming and land therapy, and using an elliptical to build up core stabilization and strengthening for a period of two years. She also indicated Claimant required ongoing pain management in the form of buprenorphine (*i.e.*, Belbuca), muscle relaxers and Tramadol, as needed. She indicated that should continue unless Dr. Huser found Claimant stable long-term. With respect to physical therapy, she recommended two years of physical therapy and massage therapy. Dr. Gellrick did not make recommendations regarding the use of a TENS unit. (Ex. 4).

4. Claimant has been followed by Christopher Huser, M.D., at Metro Denver Pain since at least 2017 for pain control. Claimant's treatment regimen has included multiple medications for pain control, generally including opioid pain medication, and a muscle relaxant. In early 2019, Claimant overused opioids and unilaterally stopped taking opioids in April 2019 without tapering off the medication. Subsequently, Claimant began taking opioids again under Dr. Huser's care. From approximately February 2020, Claimant's

medication regimen prescribed by Dr. Huser or other providers at Metro Denver Pain included buprenorphine, another opioid for breakthrough pain, and a muscle relaxant. In December 2021, Dr. Huser changed Claimant's prescription from Belbuca to Suboxone, another form of buprenorphine. (Ex. 3).

5. On October 14, 2020, Dr. Bisgard prescribed Claimant an "E-Stim" unit for pain management. The ALJ infers from the totality of the evidence that the E-Stim unit recommended is a TENS unit.

6. At various times between July 2019 and May 2021, Insurer submitted Claimant's requests for authorization of Belbuca to outside consultants. On July 16, 2019, the outside reviewer approved Claimant's prescription for Belbuca. (Ex. K). On February 25, 2020, a different outsider reviewer denied approval for Belbuca. (Ex. K). Three subsequent reviews were performed on October 15, 2020, November 10, 2020, and May 5, 2021, by two different providers. Each of the reviews conducted in 2021 indicated that Belbuca was not medically necessary, primarily based on the opinion that Dr. Huser's records did not record "specific, objective, functional gains, attributable to ongoing use." One such peer reviewer noted: "However, despite that the injured worker's medication regimen (including ongoing Belbuca, Oxycodone, Flexeril, and Gabapentin) decreased the injured worker's pain and improved activities, there is no clear evidence of functional benefit specific to the use of Belbuca film." (Ex. K). The rationale stated by the peer reviewers for the proposition that Claimant's use of Belbuca is not reasonably necessary to improve function or prevent deterioration of Claimant's work-related condition is not persuasive, given the recognition that Claimant's medication regimen (which included Belbuca) improved Claimant's activities (*i.e.*, improved function). (Ex. K).

7. On November 29, 2021, Eric Shoemaker, D.O., at Respondents' request, issued a report based on his review of Claimant's medical records. Dr. Shoemaker is board-certified in sports medicine and pain management. Respondents presented Dr. Shoemaker's testimony through deposition, and he was admitted to testify as an expert in pain management. Dr. Shoemaker opined that massage therapy, physical therapy, and opioid medications were not reasonable or appropriate for Claimant's condition, and indicated insufficient documentation existed to support the use of a TENS unit. (Ex. H).

8. With respect to opioid management, Dr. Shoemaker's opined that Claimant is "an extremely poor candidate for ongoing opiate therapy." Dr. Shoemaker noted Claimant's overuse of medications in early 2019, and Claimant's providers' concerns expressed at that time concerning ongoing opioid use. Dr. Shoemaker expressed concern that a urine toxicology screen performed on May 24, 2018 was positive for a non-prescribed medication -- hydromorphone. He was also concerned a urine toxicology screen performed on January 15, 2020 was positive for a non-prescribed benzodiazepine, and non-prescribed opiates, and negative for tramadol. Ultimately, Dr. Shoemaker opined that Claimant should not be prescribed any ongoing opiates for chronic pain. (Ex. H).

9. Dr. Shoemaker testified he does not believe physical therapy is appropriate for Claimant at this point because Claimant should be independent in a home exercise program. Dr. Shoemaker noted that the "role of physical therapy is to instruct the patient

in an appropriate home exercise program," and that Claimant "should remain active with his home exercise program on a daily basis." Dr. Shoemaker opined the requested physical therapy exceeds that recommended by the Colorado Medical Treatment Guidelines, WCRP Rule 17, Ex., 9, G.18 and 19. Dr. Shoemaker did not credibly address whether a limited annual course of physical therapy to keep Claimant current on his home exercise program would be reasonable or appropriate. (Ex. H).

10. With respect to massage therapy, Dr. Shoemaker testified that ongoing massage therapy is not typically beneficial in the "chronic phase" of an injury and can be counterproductive. He also opined that ongoing massage therapy is not supported by the medical treatment guidelines, Rule 17, Ex. 1, Section F.13 and Ex. 9, Section G.19.g. (Ex. H).

11. Finally, Dr. Shoemaker opined that Claimant's medical records did not contain sufficient information to justify a TENS unit, but If documentation commenting on the "use, efficacy, or any instructions sessions" existed, a TENS unit would be reasonable and appropriate. (Ex. H).

12. Claimant submitted Dr. Huser's deposition In lieu of live testimony. Dr. Huser is double board-certified in anesthesiology and chronic pain management, and he was admitted to testify as an expert in pain management. Dr. Huser has treated Claimant since at least 2017, and is providing ongoing treatment to Claimant. As of January 2022, Dr. Huser was prescribing Claimant buprenorphine (Suboxone) as a long long-acting pain medication, oxycodone 10 mg for breakthrough pain, and cyclobenzaprine as a muscle relaxant.

13. Dr. Huser testified that Suboxone is a "partial opioid" that is "a little bit safer, long-acting medicine to be on for someone who's going to be on opioids long term" and "one of the safest opioids there is." Claimant was previously prescribed Belbuca which is also buprenorphine but was recently switched to Suboxone due to higher doses of buprenorphine being available with Suboxone. He testified that Claimant has an opioid contract with his office, that his office routinely performs lab tests and urine screens for patients who are on opioids or controlled substances, and that his office checks the Prescription Drug Monitoring Program (PDMP) on a monthly basis. Dr. Huser testified that Claimant's medications decrease his pain levels and improve his ability to function.

14. He further testified that the Claimant's past urine drug screens did not raise concerns for abuse of opioid medications, and Claimant's potential for misusing or selling medications is extremely low. With respect to Claimant's May 24, 2018 urine toxicology screen, Dr. Huser noted the positive hydromorphone test was explained by the Claimant's transition to hydrocodone from hydromorphone on that date. With respect to the January 15, 2020 urine toxicology screen, Dr. Huser explained that Claimant's positive benzodiazepine test was consistent with a prescription for Xanax. Dr. Gellrick's IME report also indicates that Claimant was prescribed Xanax by his primary care provider in 2019. Dr. Huser explained that Claimant's negative test for tramadol was not concerning, given tramadol's 48-hour half-life and that Claimant was using tramadol on an "as-needed" basis at the time. Thus, it would not be unusual for Claimant to test negative for

Tramadol if he had not taken it within two days of the test. Given his long-standing physician-patient relationship with Claimant, the ALJ finds Dr. Huser's opinions concerning Claimant's use of buprenorphine credible.

15. With respect to massage therapy, Dr. Huser opined that Claimant would benefit from ongoing massage therapy two to four times per month to assist with chronic pain control. He testified that massage would activate muscles, improve blood flow and stretch muscles.

16. He testified that the ongoing use of a TENS unit was reasonable and necessary to maintain Claimant's condition, and that a TENS unit would activate and relax muscles, improve blood flow, and decrease pain. Claimant testified that he currently uses a TENS unit and that it improves his pain and helps him sleep at night.

17. Finally, Dr. Huser testified that Claimant would benefit from an annual course of physical therapy to instruct Claimant and keep him current on exercise and techniques to incorporate into Claimant's home exercise program. Dr. Huser recommended four to six weeks of physical therapy per year, indefinitely. The ALJ infers from Dr. Huser's testimony that the physical therapy recommended is not passive, but rather active therapy to help Claimant maintain, indefinitely, a home exercise program. Dr. Huser's opinion was credible and persuasive.

18. Claimant testified at hearing that the physical therapy and massage therapy he received improved his pain and ability to function. He testified he is no longer receiving either massage or physical therapy, and that he is vigilant about performing his home exercise program. Claimant is currently using a TENS unit which he indicated decreases his muscle tension and allows him to sleep at night. Claimant testified that that using buprenorphine had increased his level of function and decreased his pain. Claimant testified that Respondents since Insurer stopped authorizing buprenorphine, he has paid for the medications out of pocket. Exhibits 6 and I include demonstrate Claimant self-paid for seven Belbuca prescriptions from April 2021 to October 2021, in the total amount of $1,291.91.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Here, Claimant seeks specific care in the form of reimbursement for past prescriptions and ongoing use of buprenorphine (i.e., Belbuca or Suboxone), two-to-four massage therapy sessions per month; an annual course of four to six weeks of physical therapy; and use of a TENS Unit.

Buprenorphine Prescription

Claimant has established by a preponderance of the evidence that use of buprenorphine prescribed by Dr. Huser is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. The Claimant persuasively testified that use of buprenorphine permits him to function by reducing his pain. Dr. Huser credibly testified that Claimant is currently at a low risk for abuse or misuse of pain medication, and that buprenorphine, as a partial opioid, is a safe form of pain relief for Claimant. The Claimant is also subject to a opioid contract, regular lab tests and urine drug screens and PDMP monitoring for aberrant use or behavior. Dr. Shoemaker's opinion regarding the suitability of opioid prescriptions are not persuasive, given that Claimant has been taking buprenorphine for more than two years without incident. Claimant's request for current authorization of buprenorphine and reimbursement of past buprenorphine prescriptions is granted.

Physical Therapy

Claimant has established by a preponderance of the evidence that a limited, annual course of physical therapy is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. The ALJ has considered the Medical Treatment Guidelines recommendations regarding physical therapy. W.C.R.P. Rule 17, Exhibit 1, Section F, 12,G. of the Medical Treatment Guidelines for Low Back Pain indicates that "Patients should be instructed in and receive a home exercise program that is progressed as their functional status improves," and also that "Home exercise should continue indefinitely." Both Exhibit 1 and W.C.R.P. Rule 17, Exhibit 9, Section G. 18, cited by Dr. Shoemaker, recommend a maximum of 8 to 12 weeks of therapeutic oversight for therapeutic exercise, with 4 to 8 weeks being the optimum duration. Exhibit 9, Section G. 18 also indicates: "Additional sessions may be warranted during periods of exacerbation of symptoms."

Dr. Huser persuasively testified that the goal of the recommended physical therapy is to allow Claimant to stay current on his home exercise program. Dr. Shoemaker noted that the "role of physical therapy is to instruct the patient in an appropriate home exercise program," and that Claimant "should remain active with his home exercise program on a daily basis." The ALJ finds this rationale consistent with the Medical Treatment Guidelines to permit Claimant to receive instruction to progress his home exercise program as his functional status improves over time. Given the purpose of the physical therapy recommendation, Dr. Shoemaker's opinion that physical therapy is not reasonable and appropriate is not persuasive.

Because the recommended physical therapy is to permit a physical therapist to provide instruction and direction to permit Claimant to remain active in a home exercise

program, the ALJ finds that a short, annual course of physical therapy is reasonably necessary to permit Claimant to learn new techniques and adjust his home exercise program thereby relieving the effects of Claimant's work-related injury or preventing further deterioration of Claimant's work-related condition. Because the recommended course of physical therapy is instructional in nature, the ALJ finds that four weeks of physical therapy per year is reasonable.

TENS UNIT

Claimant has established by a preponderance of the evidence that the use of a TENS unit is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. Claimant persuasively testified that the use of a TENS unit helps him function. Dr. Huser persuasively testified that a TENS unit would activate and release muscles, improve blood flow and decrease Claimant's pain. Dr. Shoemaker's opined that Claimant's medical documentation was insufficient to support a TENS unit, but if documentation on the efficacy or instructions sessions were present the unit would be reasonable and appropriate. Given the testimony of Dr. Huser and Claimant, the ALJ finds a TENS unit to be reasonably necessary medical maintenance treatment.

MASSAGE THERAPY

Claimant has failed to establish by a preponderance of the evidence that ongoing massage therapy at the frequency of two-to-four sessions per month is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. Dr. Huser testified that the goal of massage therapy was to increase blood flow, activate muscles and stretch muscles. No credible evidence was offered to demonstrate how these benefits differ significantly from the benefits offered by the use of a TENS unit, physical therapy or a home exercise program. The ALJ finds credible Dr. Shoemaker's opinion that ongoing massage therapy is not reasonable or appropriate at this stage of Claimant's condition. Claimant's request for authorization of ongoing massage therapy is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of prescriptions for buprenorphine is granted.

2. Respondents shall reimburse Claimant for prescriptions for Belbuca from April 2021 through October 2021 in the amount of $1,291.91.

3. Claimant's request for authorization of an annual course of physical therapy, not to exceed four weeks per year, is granted.

4. Claimant's request for authorization of a TENS unit is granted

5. Claimant's request for authorization of massage therapy is denied.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 1, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Whether Claimant has overcome the opinion of the Division-sponsored Independent Medical Examination ("DIME") physician with regard to the opinion of maximum medical improvement ("MMI") by clear and convincing evidence?

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to a scheduled rating of 32% of the upper extremity?

- Whether Claimant has proven by a preponderance of the evidence that she sustained an impairment to a part of the body beyond the schedule of impairment set forth at Section 8-42-107(2), C.R.S.?

- Whether Claimant has proven by a preponderance of the evidence that she is incapable of earning wages in the same or other employment and entitled to an award of permanent total disability ("PTD") benefits?

- Whether Claimant has proven by a preponderance of the evidence that as a result of the injury she has a disfigurement that is normally exposed to public view and entitled to additional compensation pursuant to Section 8-42-108(1), C.R.S.

- Whether Respondents have proven by a preponderance of the evidence that Claimant was overpaid workers' compensation benefits in the amount of $9,139.10?

FINDINGS OF FACT

1. Claimant was employed with employer as a road supervisor beginning in February 2017. Claimant sustained an admitted industrial injury on December 7, 2017 when she was fueling a bus and the fuel line became twisted and pulled tightly. Claimant testified the fuel line became twisted and when she pulled back on the fuel line to unhook it, the nozzle flipped and struck her on the dorsum of the left hand at the carpometacarpal part of her left wrist. Claimant continued working but eventually sought treatment at St. Mary's Occupational Health on December 7, 2017.

2. Claimant was examined on December 7, 2017 by nurse practitioner ("NP") Harkreader. Cliamant reported a consistent accident history and NP Harkreader diagnosed Claimant with a wrist contusion and referred Claimant for an x-ray of her left wrist. The x-rays showed no fracture or dislocation of the left wrist. Claimant was provided with work restrictions and prescribed tramadol.

3. Claimant was examined by Dr. Rose on December 22, 2017. Dr. Rose diagnosed acute de Quervain's tenosynovitis and recommended occupational therapy and performed a steroid injection of the left first dorsal compartment of her wrist.

4. Claimant was examined by Dr. McLaughlin with St. Mary's Occupational Medicine on January 2, 2018. Claimant reported to Dr. McLaughlin that the injection performed by Dr. Rose was quite painful, but she was markedly improved after a few days. Dr. McLaughlin diagnosed Claimant with carpal tunnel syndrome in addition to the de Quervian's tenosynovitis. Dr. McLaughlin recommended ongoing conservative treatment including a prescription for Voltaren gel.

5. Claimant eventually underwent surgery on her left upper extremity under the auspices of Dr. Rose on March 13, 2018. Dr. Rose performed a left cubital tunnel release in situ, left de Quervain release of the wrist, and left carpal tunnel release. Claimant returned to Dr. Rose post-surgery evaluation and suture removal on March 22, 2018. Claimant reported she was doing well and Dr. Rose recommended Claimant undergo a short course of therapy and provided her with work restrictions of no lifting over 2 pounds.

6. Claimant was evaluated by NP Harkreader on March 29, 2018. NP Harkreader noted that towards the end of the examination, Claimant reported that xince the surgery, she had approximately 10 to 12 episodes where she will just go blank for a few seconds. Claimant also reported some blurred and double vision. NP Harkreader recommended that Claimant go to the emergency room to determine if she was having a transient ischmetic attack ("TIA"), but Claimant indicated that she would just make an appointment with her doctor to get that evaluated.

7. Claimant returned to Dr. Rose on April 12, 2018 and reported doing well overall, but it was noted that she was starting to set up a significant amount of scar tissue and having some edema. Dr. Rose recommended she start occupational therapy twice a week to work on her swelling and scar massage. Dr. Rose provided Claimant with work restrictions that included no use of the left upper extremity.

8. Claimant returned to NP Harkreader on April 25, 2018. NP Harkreader noted Claimant reported she would have pain in her left axilla at night if she hyperflexes her elbow with tingling in the ulnar distribution of her left hand. NP Harkreader noted Claimant was depressed and recommended she consult with Dr. Carris, a psychologist. NP Harkreader took Claimant off of work.

9. By May 10, 2018, Claimant reported to Dr. Rose that she had considerable improvement in her hand numbness and much less pain with thumb abduction. Claimant reported some burning paresthesias and hypersensitivity up the dorsum of her operative hand in approximately the radial sensory nerve distribution. Claimant also reported that with elbow hyperflexion, she has pain running down the course of her ulnar nerve down her forearm, into her small finger and the upper medial arm to her shoulder. Dr. Rose reported Claimant had palpable scar tissue related

peripheral neuropathies around the dorsal radial sensory nerve and the ulnar nerve at the elbow. Dr. Rose recommended a topical agent with some gabapentin to assist her hypersensitivity, along with another month of therapy. Dr. Rose also recommended Claimant begin working in the field as opposed to the office.

10. Claimant was examined by Dr. Burnbaum on June 4, 2018 in relation to her complaints of blacking out. Dr. Burnbaum opined the blanking out spells could be related to sleep loss. Dr. Burnbaum referred Claimant for an EEG to determine if there was any seizure activity associated with the spells. The EEG was performed on July 7, 2018 and showed no epileptiform abnormalities. The EEG was noted to be mildly abnormal due to predominant low voltage fast activity which could have been a medication effect.

11. Claimant returned to Dr. Rose on June 6, 2018. Dr. Rose noted that from a surgical perspective, there were no discrete signs of post surgical pathology that were able to be detected. Claimant complained of diffuse hypersensitivity around the radial sensory nerve with no discrete Tinel's sign indicative of a neuroma. Claimant reported her fingertip numbness and paresthesias were improved. Dr. Rose noted he was unsure of the origin of Claimant's neurologic symptoms. Dr. Rose noted he anticipated maximum medical improvement ("MMI") at the next visit.

12. Claimant returned to Dr. Stagg on July 31, 2018. Dr. Stagg noted Claimant still complained of the episodes which she described as occurring when the pain was really bothering her on the right side. Dr. Stagg recommended a repeat neurologic evaluation and ultimately referred Claimant to Dr. Collier for this examination. Dr. Stagg also recommended Claimant be seen by Dr. Price for evaluation.

13. Claimant was examined by Dr. Price on August 31, 2018. Dr. Price noted Claimant's complaints including her reports of not doing well post-operatively with issues involving ongoing pain. Claimant also reported developing some left calf pain and spasm post-surgery. Dr. Price noted that in response to the syncopal episodes, she had an EEG and CT scan, but Dr. Price did not have the results of those diagnostic tests.

14. Dr. Price noted that Claimant may have some form of sympathetically maintained pain now, and recommended a triple phase bone scan. Dr. Price also recommended massage therapy, acupuncture and recommended Ketamine cream instead of the current cream she was using.

15. Claimant returned to Dr. Rose on September 5, 2018 with Dr. Rose noting that Claimant's postsurgical course had been complicated by residual hypersensitivity in the radial nerve distribution, which was now mostly resolved, and some hypersensitivity and pain around the ulnar nerve in the cubital tunnel, which continued to give Claimant trouble, and a feeling of soreness in the pain. Dr. Rose noted Claimant's ulnar nerve symptoms were overall improved, but Claimant continued to have pain over the course of the ulnar nerve itself, which had been refractory to gabapentin, topical agents, and a

course of therapy. Dr. Rose noted Claimant had been referred to a pain specialist, and recommended against further surgical intervention.

16. The triple bone scan recommended by Dr. Price was performed on September 26, 2018. The triple bone scan showed bilateral polyarticular, periarticular increased radiopharmaceutical activity suggesting underlying arthopathy and asymmetric hyperemia within the distal left upper extremity without increased soft tissue or periarticular activity to definitely suggest CRPS.

17. Claimant returned to Dr. Price on September 27, 2018. Dr. Price reported that Claimant reported that the massage therapy had helped her, but that she did not like the stickiness of the Ketamine cream. On examination, Dr. Price noted both hyperpathia and allodynia.

18. Claimant returned to Dr. Rose on November 5, 2018. Dr. Rose noted Claimant complained of developing an allergy to the extended release gabapentin. Dr. Rose further noted that Claimant was having some significant hypersensitivity over the course of the ulnar nerve. Dr. Rose noted he could not find any instability at the elbow, and given her hypersensitivity over the median nerve decompression in the palm, he did not believe further decompression and anterior transposition at the elbow would be of any help.

19. Dr. Stagg issued a medical report on December 27, 2018 after reviewing surveillance video of Claimant provided by Respondents. Dr. Stagg opined that based on his review of the surveillance video that Claimant was exaggerating her restrictions which included no lifting, pushing or pulling over one pound.

20. Claimant was examined by Dr. Stagg on January 7, 2018 at which time they discussed the surveillance video. Dr. Stagg ultimately increased Claimant's work restrictions to include no lifting pushing or pulling greater than 25 pounds. Dr. Stagg also referred Claimant for a function capacity evaluation. ("FCE").

21. Claimant underwent an independent medical examination ("IME") with Dr. Hammerberg on January 3, 2019. Dr. Hammerberg reviewed Cliamant's medical records, obtained a medical history and performed a physical examination as a part of his IME. Dr. Hammerberg opined that Claimant was not at MMI and recommended Claimant undergo additional medical treatment including sympathetic blocks and treatment with Dr. Price. Dr. Hammerberg recommended that Claimant be prohibited from driving based on her reports of black out spells.

22. The FCE was performed on January 28, 2019. The FCE concluded Claimant was capable of lifting and carrying 3 pounds with her left hand and 10 pounds bilaterally, with no power gripping or repetitive gripping with the left hand, and grasping and handling with the left hand rarely.

23. Claimant returned to Dr. Stagg on February 7, 2019. Dr. Stagg noted in his report that Claimant demonstrated an ability on the surveillance video to perform activities in excess of what was depicted in the FCE. Claimant reported to Dr. Stagg that she had been self medicating with alcohol during this time which allowed her to perform activities depicted in the surveillance video. Dr. Stagg noted the recommendations of Dr. Hammerberg and agreed that she should undergo additional treatment. Dr. Stagg noted Claimant's work restrictions should include lifting limitations of between 1 to 5 pounds and no working at heights due to the possible seizures.

24. Dr. Stagg provided a prescription for an additional 12 acupuncture treatments recommended by Dr. Price on April 4, 2019. Claimant returned to Dr. Stagg on April 19, 2019 and it was noted that they were having difficulty getting the EEG recommended by Dr. Hammerberg approved.

25. Claimant returned to Dr. Stagg on May 17, 2019. Dr. Stagg noted Claimant was scheduled to undergo the EEG in early July. Dr. Stagg increased Claimant's work restrictions to no lifting greater than 5-10 pounds.

26. Claimant underwent a series of three stellate ganglion block injections performed by Dr. James on May 9, 2019, June 18, 2019 and June 19, 2019.

27. Claimant was re-examined by Dr. Stagg on July 19, 2019. Dr. Stagg noted Claimant reported headaches following the injections with Dr. James. Dr. Stagg recommended Claimant seek prompt medical attention for the reported headaches with Dr. James. Claimant returned to Dr. Stagg on August 15, 2019 and indicated that she had not been able to get ahold of Dr. James. Claimant further reported that she continued to experience the headaches she reported to Dr. Stagg on her previous visit.

28. Claimant underwent a repeat EMG and nerve conduction study on July 23, 2019. The EMG showed no electrodiagnostic evidence of left carpal tunnel syndrome, cervical radiculopathy, peripheral neuropathy, ulnar neuropathy, or brachial plexopathy.

29. Claimant underwent examination with Dr. Merrell on September 3, 2019 after complaints that she was having headaches along with trouble swallowing and having problems with her throat swelling after the ganglion block injections. The examination revealed no identifiable cause of Claimant's complaints.

30. Claimant was examined by Dr. Price on September 24, 2019. Claimant reported symptoms to Dr. Price which included headaches, throat swelling, bowel and bladder loss and arm pain. Dr. Price noted that it was unclear as to what could be causing Claimant's symptoms and noted Claimant could be depressed and there may be a somatization of symptoms.

31. Claimant returned to Dr. Merrell on October 2, 2019 for her ongoing complaints involving her throat, which Claimant maintained had been ongoing since her

stellate ganglion block injections. Dr. Merrell diagnosed Claimant with globus sensation and noted that the esophagram was normal. Dr. Merrell opined that any issues with Claimant's complaints involving her throat were not related to the stellate ganglion block injections.

32. Claimant underwent a stress infrared thermogram and QSART on October 24, 2019 under the auspices of Dr. Schakaraschwili. Dr. Schakaraschwili noted the QSART and stress infrared thermogram was positive for complex regional pain syndrome ("CRPS").

33. Claimant underwent a psychological IME with Dr. Moe on January 20, 2020. Dr. Moe reviewed Claimant's medical records and examined Claimant in association with his IME. Dr. Moe opined that Claimant's current depression and anxiety symptoms were due, in part, to Claimant's work injury. However, Dr. Moe opined that the evidence showed Claimant had a propensity for somatization which existed pre-injury and was not the product of the injury. Dr. Moe opined that Claimant had a psychological impairment of 3% mental impairment related to the work injury.

34. Respondents obtained an IME with Dr. Cebrian on January 15, 2020. Dr. Cebrian issued a report in connection with his IME in which he opined that Claimant's left carpal tunnel syndrome and left cubital syndrome were not causally related to the December 7, 2017 work injury as there was not a mechanism of injury that would cause these conditions. Dr. Cebrian opined that a hose striking the Claimant's hand would not cause an injury to the median nerve at Claimant's elbow.

35. Dr. Cebrian opined that Claimant's other reports of symptoms, including the headaches, throat swelling, black out spells, neck pain, upper back pain, dizziness and memory loss were explained by Dr. Moe's report which cited to Claimant's pre-existing somatic symptom disorder. Dr. Cebrian opined that Claimant was at MMI as of January 15, 2020 and that her impairment rating was limited to the left thumb.

36. Claimant was examined by Dr. Price on February 7, 2020. Dr. Price noted she felt there was some somatization of her pain and opined that she needed to review the IME reports before opining on Claimant's permanent impairment rating.

37. Claimant was examined by Dr. Stagg on March 11, 2020. Dr. Stagg noted Claimant should return to Dr. Price for a determination of MMI and permanent impairment. Dr. Stagg further opined the Claimant should follow up with Dr. McKee-Cole. Dr. Stagg provided Claimant with work restrictions that included no lifting, pushing, or pulling greater than 10 pounds.

38. Dr. Price examined Claimant on April 10, 2020 at which time Dr. Price opined Claimant was at MMI. Dr. Price provided Claimant with a permanent impairment rating of 32% scheduled impairment of the upper extremity based on loss of range of motion of the wrist, median neuropathy, motor impairment of the median nerve and

sensory loss in the ulnar nerve. Dr. Price also provide Claimant with an impairment rating of 3% mental impairment based on the IME of Dr. Moe.

39. Dr. Stagg issued a note on May 15, 2020 in which he clarified his opinion with regard to Claimant's work restrictions and noted Claimant was limited to 10 pounds lifting with her left upper extremity. Dr. Stagg opined that Claimant did not have restrictions with regard to her right upper extremity.

40. Respondents requested a DIME which was performed by Dr. Hughes on September 1, 2020. Dr. Hughes reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Hughes opined that Claimant had reached MMI as of January 15, 2020. Dr. Hughes provided Claimant with a permanent impairment rating of 4% of the upper extremity based on loss of range of motion in the left wrist and elbow. Dr. Hughes opined that Claimant was not entitled to an impairment rating for a diagnosis of a left upper extremity neurological condition since the electrodiagnostic and clinical findings were inconsistent with entrapment neuropathy. Dr. Hughes opined that Claimant had a negative clinical presentation for CRPS. Dr. Hughes provided Claimant with a 3% psychiatric impairment. Dr. Hughes opined that there was no medical basis for permanent work restrictions and no nerves or other tissues were at risk from performance of full activity on an as tolerated basis.

41. Respondents filed a final admission of liability ("FAL") on September 24, 2020 admitting to the 3% psychiatric impairment and 4% upper extremity scheduled impairment rating provided by Dr. Hughes. The FAL noted that Respondents had continued paying temporary total disability ("TTD") benefits from January 15, 2020 through September 16, 2020, totaling $17,422.20. Respondents applied this overpayment of benefits again the $8,28310 in PPD benefits owed to Claimant and claimed a remaining overpayment of $9,139.10.

42. Claimant's counsel issued an inquiry to Dr. Price on January 23, 2021 which discussed the issues of MMI and permanent impairment. Dr. Price opined in response to the inquiry that Claimant was at MMI as of February 7, 2020. Dr. Price further opined that Claimant's impairment rating was properly established as 32% of the upper extremity and noted that Claimant's impairment rating was due to her diagnosis of CRPS.

43. Respondents obtained a supplemental report from Dr. Cebrian on February 5, 2021. Dr. Cebrian reviewed Dr. Price's updated records and Dr. Hughes' DIME report and opined Dr. Hughes properly found Claimant to be at MMI as of January 15, 2020. Dr. Cebrian noted that there was no new treatment after January 15, 2020 after that date that would justify a different MMI date. Dr. Cebrian opined that Dr. Price erred in providing Claimant with an impairment rating that included permanent impairment related to her ulnar and median nerves as these were not related to the industrial injury. Dr. Cebrian noted that if Dr. Price were to provide Claimant with an impairment rating for CRPS, it should have been under Table 1 of page 109 of the *AMA*

Guides to Permanent Impairment, 3rd Edition, Revised, and not as an impairment rating for the median or ulnar nerves. Dr. Cebrian further reiterated his opinion that Claimant's left cubital and left carpal tunnel syndrome were not causally related to the December 7, 2017 work injury. Dr. Cebrian further opined that Claimant's appropriate work restrictions would include no lifting of more than 20 pounds with the left hand. Dr. Cebrian further opined that Claimant would not be under any restrictions with regard to driving as there was no evidence of seizure activity.

44. Claimant obtained a vocational assessment report from Bob Van Iderstine dated February 8, 2021. Mr. Van Iderstine reviewed Claimant's medical records, performed an interview with Claimant and performed labor market research in connection with his vocational assessment. Mr. Van Iderstine indicated in his report that this was a difficult case to assess due to the differences of opinions regarding Claimant's work restrictions. Mr. Van Iderstine indicated in his report that for purposes of his vocational assessment he was relying on the work restrictions set forth in the January 28, 2019 FCE. Mr. Van Iderstine identified Claimant's commutable labor market as being in the Grand Junction, Colorado area. Mr. Van Iderstine opined in his vocational assessment that Claimant was incapable or returning to her previous employment and it was unlikely that she could obtain employment in the competitive labor market.

45. Respondents obtained a vocational assessment report from Katie Montoya dated January 6, 2021. Ms. Montoya reviewed Claimant's medical records, performed an interview of Claimant and performed labor market research in connection with her report. Ms. Montoya opined that the work restrictions provided by Dr. Stagg allowed Claimant to return to work in a light duty capacity with lifting restrictions of up to 20 pounds bilaterally. Ms. Montoya identified multiple positions in the Grand Junction labor market which she opined represented positions Claimant was capable of performing.

46. Dr. Price testified at hearing in this matter. Dr. Price testified her diagnosis of Claimant was possible CRPS and possible depression, but noted on cross-examination that Claimant did not meet confirmed criteria for CRPS. Dr. Price testified it was appropriate to provide Claimant with a permanent impairment rating of 32% of the upper extremity based on her determination that Claimant had probable CRPS based on the positive thermogram study and positive QSART test. Dr. Price testified that not everyone with CRPS presents the same way. Dr. Price testified Claimant's black out spells could be related to her high blood pressure, and testified she did not know if the black out spells were related to her work injury. Dr. Price testified she agreed with Dr. Merrell's statement that the stellate ganglion block would not cause the symptoms Claimant complained had developed after the injections. Dr. Price testified surgeries can result in complications including neuropathic pain. Dr. Price testified Claimant was properly placed at MMI as of February 7, 2020.

47. Dr. Price testified she adopted the work restrictions set forth in the FCE of January 2019. Dr. Price testified Claimant continued to complain of pain and the pain

complaints may lead Claimant to need to take breaks at work. Dr. Price testified she disagreed with Dr. Cebrian's opinion regarding Claimant's work restrictions.

48. Dr. Cebrian testified by deposition in this case. Dr. Cebrian's testimony was consistent with his IME report. Dr. Cebrian testified that work restrictions for a patient are to prevent reinjury and not to avoid any discomfort. Dr. Cebrian testified that the surveillance of Claimant supported the opinion of Dr. Hughes that Claimant did not need any work restrictions related to her December 7, 2017 work injury.

49. Claimant testified at hearing with regard to her injury. Claimant testified consistently with regard to the injury occurring on December 7, 2017 when the fuel line twisted and flipped over and hit Claimant on the back side of her thumb on her left hand. Claimant testified that the pain behind her thumb has remained and she continues to have problems grasping with her thumb. Claimant testified her entire left arm itches and she feels shocks down into her fingers.

50. Claimant testified she had three stellate ganglion block injection on May 9, June 18 and June 19, 2019. Claimant testified after the injections, she developed swelling of her throat and she had to gag after the second injection. Claimant testified that she only sleeps 2-3 hours at a time per night because she wakes up from gagging.

51. Claimant testified she has occasional bad days and when she has a bad day, she would not be able to show up and complete work. Claimant testified that she would be unable to work at a grocery store due to having to do frequent lifting. Claimant testified she couldn't work in a restaurant because she would be unable to carry plates. Claimant testified she had trouble focusing due to her pain.

52. Claimant testified she discussed the surveillance video with Dr. Stagg on January 7, 2019 and advised Dr. Stagg that she was self medicating with alcohol when the video was taken. Claimant testified Dr. Rose advised her to drink alcohol with her medications and offered to prescribe Claimant with an elixir to take with the medications. Claimant's testimony in this regard is found by the ALJ to be not credible as it is inconsistent with the medical records of Dr. Rose.

53. Claimant testified she continued to receive TTD benefits up until the DIME appointment with Dr. Hughes on September 16, 2020.

54. Claimant's husband, WR[Redacted], testified at hearing. Mr. WR[Redacted] testified consistently with Claimant's testimony regarding her activities of daily living.

55. Mr. Van lderstine testified at hearing consistent with his vocational assessment report. Mr. Van lderstine testified after Claimant's injury she returned to work for Employer as a dispatcher and continued to work there until June 2018. Mr. Van lderstine testified he utilized the restrictions from the FCE in developing his opinion regarding whether Claimant could earn wages in the commutable labor market. Mr. Van lderstine testified the FCE reported Claimant gave a full effort during the FCE.

56. Mr. Van Iderstine testified Claimant's medical condition and restrictions resulted in a sedentary profile primarily using her right upper extremity. Mr. Van Iderstine testified he thought Claimant was capable of working a job with one arm on a part time basis. Mr. Van Iderstine testified that because Claimant had difficulty grasping things with her thumb, she would have limited use of the left hand, as the thumb is crucial for pinching things

57. Mr. Van Iderstine testified Dr. Price had opined that Claimant may have to miss days at work if her condition flared up and would need to take breaks during the day. Mr. Van Iderstine testified this would affect her ability to maintain employment if she were able to find a job. Mr. Van Iderstine testified if Claimant were to have bad days and miss multiple days per month due to pain, this would be unacceptable in a competitive labor market. Mr. Van Iderstine testified Claimant's depression and anxiety could impact her ability to perform customer service type of work.

58. Mr. Van Iderstine testified he disagreed that Claimant could perform the job duties in the positions identified by Ms. Montoya in her voacational assessment. Mr. Van Iderstine testified many of the jobs would require bilateral use of the upper extremities. Mr. Van Iderstine testified that the cashier job identified by Ms. Montoya could include cleaning. Mr. Van Iderstine opined that Claimant was incapable of earning wages in her commutable labor market.

59. Mr. Van Iderstine admitted on cross examination that the work restrictions set forth by Dr. Stagg when Claimant was placed at MMI were higher than the restrictions set forth in the FCE.

60. Ms. Montoya testified at hearing consistent with her vocational assessment. Ms. Montoya testified that at the time Claimant was placed at MMI, the restrictions set forth by Dr. Stagg included no lifting greater than 10 pounds with the left upper extremity, with no restrictions on the right upper extremity. Ms. Montoya testified that based on these work restrictions, Claimant would be capable of working a job in the light duty classification of work. Ms. Montoya noted that there were no restrictions on Claimant's standing, walking or sitting.

61. Ms. Montoya further noted that Dr. Hughes had opined that Claimant had no work restrictions. Ms. Montoya also noted Dr. Cebrian's opinion that Claimant was capable of lifting 20 pounds. With regard to Claimant's report of missing work on bad days, Ms. Montoya opined that missing work 1-2 days per month would be tolerated, but missing more than two days per month would not be tolerated.

62. Ms. Montoya opined based on the work restrictions set forth by Dr. Stagg, Claimant would be capable of working in the commutable labor market. Ms. Montoya noted that the FCE in this case was performed over a year before Claimant was placed at MMI and approximately two months after the surveillance was obtained.

63. The ALJ credits the opinions set forth by Dr. Hughes in his DIME report over the opinions expressed by Dr. Price with regard to Claimant's date of MMI and finds that Claimant has failed to overcome the opinion of the DIME physician with regard to MMI by clear and convincing evidence. The ALJ notes that the opinion by Dr. Hughes with regard to the date of MMI is consistent with the opinions expressed by Dr. Cebrian in his IME reports and testimony at hearing. The ALJ further notes that Claimant's medical treatment after January 15, 2020 did not change and Claimant did not report any significant improvement to establish that she continued to remain not at MMI after January 15, 2020.

64. The ALJ credits the opinions of Dr. Stagg with regard to Claimant's work restrictions and finds that Claimant's proper work restrictions would be those set forth by Dr. Stagg. The ALJ notes that the restrictions set forth by the FCE were established well before Claimant was placed at MMI. The ALJ further credits the medical records from Dr. Stagg that established that the work restrictions set forth by the FCE were inconsistent with what Claimant was depicted as being capable to perform on the surveillance video as supportive of his opinion regarding Claimant's work restrictions.

65. The ALJ credits the opinions of Dr. Price with regard to Claimant's permanent impairment rating and finds that Claimant has established that it is more probable than not that she sustained a permanent impairment rating of 32% of the upper extremity as a result of the work injury. The ALJ notes that Claimant's work injury and medical treatment are consistent with an impairment rating that includes the thumb, wrist and elbow of Claimant's left upper extremity. The ALJ therefore finds that Claimant has failed to establish that it is more probable than not that the situs of impairment in this case is contained on a part of the body not set forth on the schedule of impairments set forth at Section 8-42-107(2).

66. The ALJ finds that Claimant has provided insufficient evidence to establish that the impairment rating in this case should be converted to a whole person impairment rating with the impairment being contained on a part of the body that is not on the schedule. The ALJ finds that the situs of Claimant's impairment in this case is limited to the left upper extremity. The ALJ notes that Claimant has made numerous complaints of issues involving areas of the body that are not on the schedule of impairments set forth at Section 8-42-107(2), including, but not limited to, headaches, neck pain, trouble swallowing and shooting pains into the lower extremity. However, the ALJ finds that none of these complaints are related to injuries sustained in the December 7, 2017 work injury.

67. The ALJ credits the opinions expressed by Ms. Montoya over the opinions expressed by Mr. Van Iderstine and finds that Claimant has failed to establish that it is more probable than not that she is incapable of earning wages in the same or other employment. The ALJ notes that Mr. Van Iderstine's opinion relied on the work restrictions set forth by the FCE that occurred prior to Claimant being placed at MMI. Because the ALJ finds the work restrictions set forth by Dr. Stagg to be more credible and persuasive than the work restrictions from the FCE, the ALJ finds the opinions

expressed by Ms. Montoya which relied on these restrictions to be more persuasive in this case.

68. The ALJ notes that Dr. Price opined that she would adopt the work restrictions set forth in the FCE. Insofar as this opinion is in conflict with the opinion of Dr. Stagg with regard to Claimant's proper work restrictions, the ALJ credits the opinions of Dr. Stagg over the contrary opinions of Dr. Price.

69. The ALJ rejects the opinions expressed by Mr. Van Iderstine that Claimant would be incapable of maintaining employment in this case based on Claimant's potential of missing employment due to having bad days or needing to take breaks. The ALJ notes that this argument is speculative in this case as there is no indication of Claimant having been unable work for periods of time due to bad days or excessive breaks. Claimant was provided with light duty work by Employer up until June 2018, and there is insufficient evidence in the records that Claimant was incapable of performing that job due to the consequences of her work injury.

70. The ALJ further notes that while Mr. Van Iderstine testified he did not believe Claimant was capable of working the jobs that Ms. Montoya identified as being appropriate for Claimant, it is not the Respondents' responsibility to find a position Claimant is capable of working. The ALJ further notes that while Claimant does not need to prove that the industrial injury is the sole cause of her inability to earn wages, she must establish that the injury is a significant causative factor in her inability to earn wages. In this case, the ALJ credits the opinions expressed by Ms. Montoya in her report and testimony at hearing and finds that Claimant has failed to establish that it is more probable than not that the industrial injury is a significant causative factor to her inability to earn wages.

71. As a result of the injury, Claimant has noticeable disfigurement in an area normally exposed to public view. The disfigurement in this case includes scarring of the left upper extremity measuring 1 ½ inch in length and ¼ inch in width on the palmar side of the left wrist; scarring measuring 1 inch in length an ¼ inch in width on the ulnar side of the wrist on the wrist bone; scarring measuring three (3) inches in length and ½ inch in width on the left elbow. Additionally, Claimant has noticeable bruising on the left tricep, left bicep and left deltoid.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, Claimant has failed to overcome the opinion of the DIME physician with regard to the opinion that Claimant reached MMI as of January 15, 2020 by clear and convincing evidence. As found, the opinions expressed by Dr. Hughes and Dr. Cebrian in their reports are credible and persuasive with regard to the issue of MMI. As found, the medical treatment after January 15, 2020 provided by the authorized providers in this case did not change in a significant manner which would support a finding that Claimant had overcome the opinion of MMI by clear and convincing evidence.

6. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. §8-40-201(16.5)(a), C.R.S. (2007). A claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO,* 948 P.2d 115 (Colo. App.

1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the Claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances. *Weld County School Dist. R.E. 12 v. Bymer, Id.*

7. The claimant is not required to establish that an industrial injury is the sole cause of her inability to earn wages. Rather the Claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds*, *Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is incapable of earning wages in the same or other employment. As found, the opinions expressed by Dr. Stagg with regard to Claimant's work restrictions are found to be credible and persuasive as it applies to Claimant's condition in this case.

9. As found, the opinions expressed by Ms. Montoya with regard to Claimant's ability to earn wages in her commutable labor market are credited over the contrary opinions expressed by Mr. Van Iderstine. As found, Ms. Montoya utilized the work restrictions set forth by Dr. Stagg and credibly opined that Claimant was capable of earning wages in her commutable labor market.

10. As found, the testimony of Mr. Van Iderstine that Claimant would likely be incapable of maintaining gainful employment based on her potential to miss days from work due to pain related to her industrial injury or need to take excessive breaks while at work is found by the ALJ to be not persuasive. As found, Claimant has failed to establish by a preponderance of the evidence that the industrial injury of December 7, 2017 would a significant causative factor in her inability to earn wages.

11. When an injury involves an extremity impairment that is subject to scheduled awards in §8-42-107(2), the clear and convincing burden of proof that would be attached to a whole person permanent impairment rating from a DIME physician does not apply and the usual preponderance burden of proof applies for the claimant to prove entitlement to benefits. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App.1998) and *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

12. The courts have noted that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. *See Egan v. Industrial Claim Appeals Office, supra.* In *Egan* the court noted that requiring causation questions to be challenged through a DIME applies only to injuries resulting in whole person impairment, but when a dispute concerning causation is in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute.

13. Here there was no dispute at the hearing over whether the impairment was limited to a schedule award and the parties agreed that the preponderance of the evidence burden of proof applied.

14. As found, the ALJ credits the opinions of Dr. Price over the contrary opinions expressed by Dr. Hughes and Dr. Cebrian and finds that Claimant has established by a preponderance of the evidence that she sustained a permanent impairment rating of 32% of the upper extremity. As found, the ALJ credits the medical records entered into evidence and finds the opinion expressed by Dr. Price with regard to the scheduled impairment rating to be credible and persuasive.

15. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8–42–107(1)(a), C.R.S. The term "injury" contained in §8–42–107(1)(a), C.R.S. "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo.App. 1997); see also *Strauch v. PSL Swedish Healthcare System, 917 P.2d 366* (Colo.App.1996). Depending upon the facts of a particular claim, therefore, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. See *Strauch v. PSL Swedish Healthcare System, supra.*

16. As found, Claimant has failed to prove establish by a preponderance of the evidence that the situs of impairment in this case is not contained on the schedule of impairments set forth at Section 8-42-107(2). As found, Claimant's situs of impairment is contained on the left upper extremity and at the elbow, wrist and thumb. Although Claimant alleged numerous other complaints that she maintained were related to the industrial injury, the ALJ finds that the situs of the impairment in this case was confined to the left elbow, left wrist and thumb.

17. Pursuant to Section 8-42-108, C.R.S., claimant is entitled to a discretionary award up to $5,019.83 for her serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the ALJ concludes claimant is entitled to disfigurement benefits in the amount of $2,509.91, payable in one lump sum.

18. Based on the finding that Claimant did not overcome the finding of MMI by clear and convincing evidence, and Claimant's testimony that she received TTD

benefits up until the September 16, 2020 DIME, along with the FAL filed by Respondents in this case in which the overpayment was documents, the ALJ determines that Respondents have established that Claimant received TTD benefits through September 16, 2020 which resulted in an overpayment of $9,139.10 after the initial offsets were taken with the first FAL.

19. After consideration of the benefits due Claimant pursuant to this Order, Respondents may claim an overpayment of $9,139.10 in TTD benefits paid after MMI against any further benefits owed to Claimant. If there is any dispute with regard to the application of the overpayment against future benefits owed to Claimant, the parties may bring that issue before the Office of Administrative Courts.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the opinions expressed by the DIME physician regarding the issue of MMI is incorrect.

2. Claimant has failed to establish by a preponderance of the evidence that she is entitled to an award of Permanent Total Disability. Claimant's claim for an award of Permanent Total Disability is therefore denied and dismissed.

3. Claimant has proven by a preponderance of the evidence that she is entitled to an award of Permanent Partial Disability benefits based on a rating of 32% of the upper extremity.

4. Claimant has failed to prove by a preponderance of the evidence that she sustained a functional impairment that is not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S. Claimant's request to convert the impairment rating from a scheduled impairment to a non-scheduled award pursuant to Section 8-42-107(8), C.R.S. is denied and dismissed.

5. Respondents shall pay Claimant disfigurement benefits in the amount of $2,509.91.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may

access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 2, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the C5-C6 interior cervical discectomy and fusion surgery recommended by Dr. David Lee is reasonable, necessary, and related to the admitted work injuries she suffered on August 23, 2019.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was an equipment operator and laborer for Employer, who is in the business of oil pipeline installation, including construction, cleanup, repair, seating pipelines, and other dirt work. Claimant's various job duties included ground work and land repairs on properties where pipelines had been laid by Employer and operating a tractor and skid steer. Claimant worked in multiple locations around the United States, including Keenesburg, Colorado, Cheyenne, Wyoming, and eventually Kansas.

2. Claimant was injured on August 23, 2019 while working for Employer in Kansas. Claimant was hit on the left side of her body, by an industrial back hoe bucket with a mop pipe attachment, knocking her hard hat off, and throwing her in such a way that she landed on her right arm, injuring her back and neck knocking her to the ground, causing her to lose consciousness. The bucket weighed approximately 3,500 lbs. and the mop pipe that was attached to it with a chain was approximately 5 foot wide and 20 inches in circumference, weighing approximately 550 lbs.

3. Following being struck, Claimant had onset of severe headache, neck pain, back pain, right shoulder pain, wrist pain, ankle pain, elbow pain, and scapular pain. All on the right side. She stated she was directed to not attend the emergency room but would be contacted by the company physician from Texas. Claimant stated that she had a medical appointment from her room in Lyons, Kansas over FaceTime with Dr. Homsten and did not travel to Texas from Kansas. She stated that she moved around following the injury from Hutchinson, Kansas to Wichita, Kansas to see the neurosurgeon, then to Seward, Nebraska where she was treated for physical therapy. She reported at that time that she continued having pain in her neck, shoulder, headaches and radiating pain down her right arm, together with numbness and tingling as well as burning sensations but had sporadic care as one provider was waiting on results from the other.

4. Claimant was virtually seen by Walter Holmsten, M.D. of RediMD of Texas, on the day of her injury by a telemedicine. Dr. Holmsten documented Claimant injured her whole right side when she was struck by a bucket and knocked down. As a result of the accident, Claimant suffered severe headaches, neck pain, back pain, right shoulder

and scapular, wrist, knee ankle and elbow injuries. On inspection, Dr. Homsten noted bruising, swelling and discoloration of the neck and the right shoulder. He noted that x-rays were all negative for fractures. The lumbar spine x-ray was read by Gazaway Rona, M.D. on August 26, 2019 noting a mild lumbar spondylosis, greatest at the L3-4 level and the cervical spine x-ray showed moderate degenerative changes at the C5-6 level. Claimant was returned to full duty and advised not to aggravate her injuries. He also recommended over the counter Tylenol for pain and ordered an MRI of the lumbar spine.

5. On September 25, 2019 Dr. Rona interpreted the cervical MRI. The history noted was that Claimant was hit by a large piece of machinery and lost consciousness causing headaches, loss of short term memory, neck pain, and right arm pain. She found grade 1 retrolisthesis of C5 on C6. Dr. Rona noted degenerative changes of the endplates at C5-6 with a small focal central disc protrusion andosteophyte complex producing mild central spinal stenosis with narrowing of the AP diameter spinal canal to 6-7 millimeters at the C4-5 level. She also found a moderate disc bulge and posterior osteophyte complex and bilateral uncovertebral joint hypertrophy producing moderate central spinal stenosis with narrowing of the AP diameter spinal canal to 5 millimeters with effacement of the ventral cord at the C5-6 level. There was also severe bilateral neural foraminal stenosis at this level.

6. On October 1, 2019 Dr. Erik Severud of Alliance Orthopedics in Kansas diagnosed displacement of cervical intervertebral disc and ordered an epidural steroid injection (ESI) but did not specify the level. He noted that the MRI showed severe narrowing at C5-6 and C4-5 to a lesser extent. He documented numbness, tingling, and swelling and that Claimant needed to see a spine surgeon as this was not his area of expertise. He also limited Claimant to sedentary duty and no driving of heavy machinery.

7. Dr. Mark Whitaker examined Claimant on October 21, 2019. He noted that Claimant complained of neck and upper extremity pain accompanied by numbness and tingling in the arms and hands as well as headaches. During strength testing he did not document deltoid, biceps and wrist extensors on the right, only the left. Following examination and discussion of her options, Dr. Whitaker recommended cervical epidural steroid injection at the C6-7 level. X-Rays showed a complete displaced collapse of C5-C6.

8. Claimant had a C6-7 epidural steroid injection on November 4, 2019, in Wichita, KS by Jon Parks, M.D. of Advanced Pain Medicine Associates, for neck pain and cervical neuritis.

9. Claimant followed up with Dr. Whitaker on November 13, 2019. He noted that Claimant retuned with cervical stenosis as well as a right labral tear in the right shoulder. He noted that the ESI in the neck did not relieve symptoms and continued to have predominant right shoulder pain. He recommended right shoulder surgery and repair prior to any further treatment of Claimants cervical spine.

10. On November 22, 2019 therapist William Long of Enhanced Physical Therapy noted that Claimant was being discharged from their clinic after four visits as Claimant was moving back home to Mississippi. He further documented that she would continue to benefit from physical therapy at a clinic in Mississippi. She was demonstrating ROM, strength, and functional mobility limitations noting significant pain. Claimant

advised she would be following up with her physicians to plan a surgical date to address her right shoulder, as well as the neck, and low back complaints.

11. Claimant continued to work with the crew in a light duty position with Employer following the date of the injury as they travelled throughout several towns in the Midwest including Kansas and Nebraska until she returned home to Mississippi around Thanksgiving 2019, where Claimant established consistent medical care for her workers compensation injury. Claimant testified that, as a result of her injury, she continued with pain in her neck, right shoulder, and down her arm, as well as continued headaches, since the accident.

12. Claimant was evaluated by Dr. John Berry in Mississippi for her right shoulder on December 2, 2019. He noted that he reviewed the right shoulder MRI that demonstrate an anterior labrum tear, degenerative changes with increased Intensity over the AC joint, supraspinatus tendinosis, and edema at the posterior humeral head. He documented that Claimant had radicular pain down to the arm, but that her shoulder was bothering her more than anything. Dr. Berry diagnosed internal derangement in her right shoulder and recommended surgical repair of the right labrum, distal clavicle excision, decompression, and debridement of the right shoulder. He referred Claimant to Dr. Lee for an evaluation of her cervical spine.

13. Claimant was evaluated by nurse practitioner Jessica Bush, of Southern Bone and Joint Specialists, on December 7, 2019. Nurse Bush documented a history of injury consistent with Claimant's testimony. She noted that Claimant had neck pain that radiated down the right arm to the fingers, which sometimes included completely numbness of the right hand. On exam she documented that Claimant had recreation of pain with cervical extension and when looking to the left. Upper extremity strength was normal except for right sided biceps, grip strength, and hand intrinsics. Claimant also had a positive right shoulder impingement exam and mild decreased sensation of the right upper extremity compared to the left with palpation. She diagnosed cervical disc displacement and spinal stenosis. She recommended cervical epidural steroid injection at the C5-6 level but if this did not help her pain, they would likely refer her to a surgeon. She prescribed physical therapy for the cervical and lumbar spine to include heat, massage, TENS, local modalities, and cervical traction, and Claimant was taken off work until she followed up after the injection.

14. Claimant was attended by Dr. Joe Leigh on December 16, 2019 who documented that Claimant had pain in the neck and radiation of pain into the right shoulder and further radiation of pain into the right arm with numbness and tingling in the fingertips of the right hand. He noted decreased range of motion of the neck in all quadrants, posterior cervical paraspinous tenderness bilaterally, greater on the right, tenderness in the trapezius on the right, marked limitation in range of motion of the right shoulder, and muscle mass symmetric in both upper extremities. He recommended proceeding with a right C6-7 and C5-6 ESI, but the procedure performed was at the right C4-5 and C5-6 cervical levels.

15. On December 31, 2019 Claimant was again seen by Nurse Bush who documented that Claimant had the cervical steroid injection with Dr. Joe Nick Leigh at the Pain Treatment Center on December 16. She continued to complain of neck pain that

radiated down the right arm into the fingers with numbness and weakness. She stated that right C4-5 and C5-6 cervical ESI caused side effects from the injection, including swelling of her face. She noted Claimant continued to have recreation of pain with cervical extension when looking to the left. Her upper extremity strength was still 5/5 except for her right biceps grip and hand intrinsic weakness, a positive right shoulder impingement exam, and decrease sensation in the right upper extremity when compared to the left upon palpation. She continued to diagnose cervical disc displacement, cervical spinal stenosis with radiculitis and low back pain with facet arthrosis. She continued to keep Claimant off work.

16. On January 10, 2020 Dr. Berry documented that Claimant continued with a lot of pain. On exam he found positive Neer's, positive Hawkins, positive empty can testing, positive tenderness over the AC joint, positive O'Brien's testing[1] and pain related in most all planes of the right shoulder. He performed a corticosteroid injection into the right shoulder and stated they would send a new request for prior authorization for the right shoulder surgery due to the anterior labrum tear, ACJ arthrosis, supraspinatus tendinosis and posterior humeral edema.

17. Claimant continued to require the right shoulder surgery but before it could be performed Claimant suffered a mild heart attack on January 17, 2020. The shoulder surgery was delayed until July 2020, to allow Claimant to recover from her heart attack and be released by her physicians for surgery.

18. Dr. Berry performed a right shoulder intra-articular arthroscopic bicep tenodesis, subacromial decompression, distal clavicle excision and extensive debridement on July 9, 2020 at Forrest General Hospital. Dr. Berry stated that there was an obvious tear at the superior labrum at the insertion of the biceps tendon and the undersurface of the labrum had a tear that propagated medially towards the glenoid. He also found extensive bursitis covering the underlying rotator cuff and he removed the subacromial spurring and overhanging osteophyte spur of the calcific and frayed coracoacromial ligament.

19. Claimant testified that the shoulder surgery helped with some problems with the shoulder area itself but did not help with the ongoing pain and problems in her neck, shoulder and right arm that continued through the date of hearing. Claimant has ongoing pain in the neck (both sides), the area between the neck and shoulder, with pain, numbness and tingling that runs down her arms, right worse than left. Claimant had lost strength in her right arm, bicep, forearm and some fingers, though she noted that on occasion the pain, burning, numbness and tingling involve both arms and hands. The shoulder surgery did not help her symptoms into her right arm.

20. Nurse Bush documented on September 21, 2020 that Claimant continued with neck pain. Though her right shoulder had improved after Dr. Berry performed surgery. She stated that she had one episode of tightness in the cervical spine after a long day of activity. She diagnosed cervical disc displacement, cervical spinal canal stenosis with radiculitis, low back pain with bilateral radiculitis, lumbar disc displacement, lumbar spinal stenosis, foraminal stenosis, and lumbar facet arthrosis. She

[1] Neer's, Hawkins, empty can, and O'Brien's tests are tests commonly used to identify possible impingement syndrome or other pathology of the shoulder.

recommended physical therapy for the cervical and lumbar spine including work-hardening and conditioning. She provided sedentary work status of walking or standing only occasionally, lifting 10 lbs. max., including for frequent lifting or carrying of objects.

21. Following Claimant's shoulder surgery, she was referred to a work hardening program for her cervical and lumbar pain on November 2, 2020. Ms. Bush, NP noted that since beginning this program her pain had returned to the previous status when she was first seen in the clinic. She was unable to undergo cervical epidural steroid injections due to a reaction to a previous one. She ordered a CT myelogram and referred Claimant back to Dr. Lee.

22. The CT myelogram, read by Dr. Mark Molpus, revealed that the C5-6 level demonstrated disc osteophyte complex with a minimum AP diameter spinal canal of 8.1 mm at the midline and encroachment upon the neuroforamina bilaterally secondary to bony hypertrophic changes.

23. Claimant was evaluated by Dr. David Lee, a board-certified neurosurgeon in Mississippi, on December 21, 2020. He noted Claimant had complaints of neck pain, headaches daily along with pain across her right shoulder, back pain with facet loading type pain, pain down her right greater than left leg into her foot, with some grip weakness. On physical examination he noted Claimant kept her neck in a forward position, had loss of range of motion in extension and rotation to the right. She had a positive Spurling test[2] on the right but not the left. Dr. Lee reviewed the September 25, 2019 MRI scan and compared it to the CT Myelogram of December 11, 2020. He noted Claimant initially had a disc herniated at C5-6 level with cephalad extension. It caused moderate stenosis of the spinal canal without cord signal change with foraminal stenosis. The new diagnostic showed that the disc that herniated had migrated cephalad but improved, but the disc had almost collapsed with endplate changes with moderately severe stenosis. He further noted that there was no high grade stenosis at the thoracic or lumbar spine levels. On exam he noted that Claimant had loss of range of motion of the neck, primarily extension and rotation to the right and had a positive Spurling sign on the right. Dr. Lee diagnosed Claimant with cervical disc displacement, radiculopathy cervical region, and spondylosis cervical region. Dr. Lee ordered an updated cervical MRI for a better look at the canal and spinal cord itself and an upper extremity EMG.

24. The cervical MRI of February 4, 2021, showed a C5-6 mild to moderate multifactorial developmental and acquired central stenosis (6-7 mm) and severe foraminal stenosis due to minimal retrolisthesis at C5, moderate broad based disc osteophyte complex and additional spondylosis. It also showed slight flattening of the ventral cord and impingement on bilateral C6 roots.

25. Dr. Lee saw Claimant on February 18, 2021 noting that the December 16, 2020 ESI for the neck cased facial swelling and she also had another cervical spine ESI that caused facial swelling. She was advised not to have any further cervical spine ESIs due to the side effects. Claimant did report that she continued to benefit from the lumbar spine ESIs. Claimant continued to complain of neck issues and grip weakness, with pain going down her arm, right greater than left. On exam she continued to keep her neck in

[2] A Spurling's test is to assess nerve root pain.

a forward posture and had loss of range of motion. He commented that Claimant had an EMG which was oddly unremarkable and recommended a home cervical traction unit for her neck.

26. On April 26, 2021 Dr. Lee recommended a cervical myelogram/post myelogram CT to get a better idea of whether Claimant would need surgical intervention for her cervical spine. On May 3, 2021 he noted that based on the myelogram of December 11, 2020 Claimant would require a C5-6 anterior cervical discectomy fusion.

27. Claimant was reevaluated by Dr. Lee on June 7, 2021, on physical exam he found her neck in a forward postured, with limited neck range of motion in rotation and extension, and mild wrist strength weakness on the right. He noted a disc protrusion at C5-6, as well as bilateral foraminal stenosis at C5-6 that is fairly severe. He noted the negative EMG results. He recommended an anterior cervical discectomy and fusion (ACDF) at C5-6 due to severe foraminal stenosis and continued neck and upper extremity pain. He wanted some follow up regarding medication and cervical spine X-rays prior to any surgical procedure. She had some additional images at Southern Bone and Joint of the cervical spine on June 17, 2021. The films revealed evidence of modic changes at C5-6 with prominent foraminal stenosis as well as central stenosis without cord signal change.

28. On August 9, 2021, Dr. Lee recommended a C5-6 ACDF via a left approach and discussed the risks, complications and alternative treatments with Claimant. The anterior cervical discectomy and fusion at C5-C6 is as a result of the injury that occurred on the job on August 23, 2019. He based his opinion on Claimant's history, his physical examination and the objective findings on MRI, CT scan, X-ray and discography, that the Claimant currently requires surgery.

29. At the time of the injury Claimant had a preexisting degenerative cervical stenosis and spondylosis that was asymptomatic. Following her work injury, Claimant's neck became symptomatic and has stayed symptomatic. She has received medical care for her neck condition as part of the claim. As a result of the aggravation of this preexisting condition, Claimant requires the recommended cervical surgery.

30. Respondents retained Dr. N. Neil Brown who provided multiple IME reports dated January 22, 2021, November 4, 2021, November 17, 2021, and December 13, 2021. Dr. Brown examined Claimant one time on November 4, 2021. Dr. Brown reviewed the medical records particularly noting that there were "no medical records preceding the date of injury of August 23, 2019." Dr. Brown reported that Claimant had the following:

> Currently, she complains of neck and low back pain. Her neck pain varies from 6 to 7 /10 and is primarily described at the base of her neck, but the pain can radiate to the top of her shoulders bilaterally. She has occasional numbness and tingling sensation extending down her biceps to her dorsal aspect of her forearm, right side worse than left, and this can extend into her "pinky" and ring finger more than the other fingers. She also has associated daily headaches which involve the occipital region bilaterally with radiation frontally subsequently. Occasionally these are associated with nausea but more often they are a generalized ache. She states that she had an epidural steroid injection while in Kansas and this was complicated by facial swelling and headache, though otherwise the epidural steroid helped transiently. She uses a TENS unit with minor benefit. Her neck pain is worsened

> more with extension than flexion, though both of these do cause pain. Prolonged sitting also worsens her neck pain. Her neck is improved using Epsom salt baths, Icy-Hot patches or Biofreeze. She states she feels weak in her right shoulder and her grip is decreased in her right hand. She has received a surgical recommendation to treat the C4-5 and C5-6 levels with fusions.

On exam, Dr. Brown found Claimant had a positive Phalen sign on the right side associated with tingling in her index, middle, ring and fifth fingers, the worst in the fifth finger, normal power, bulk and tone in all major muscle groups of the upper and lower extremities though he questioned mild antalgic weakness graded at 4+/ 5 in her right deltoid, Spurling's testing bilaterally caused some discomfort at the base of the neck in the midline and this was worse in severity with right-sided maneuver compared to the left. She also had tenderness in the midline at the base of her neck extending bilaterally over her trapezius musculature toward the shoulders and significant cervical loss of range of motion.

31. Dr. Brown stated that Claimant undoubtedly sustained at least a cervical strain related to the impact injury and that "[W]ith the mechanism of injury, it is certainly possible that her neck pain and occasional radicular symptomatology could relate to facet-mediated pain." He did not agree that Claimant required ACDF surgery at this time as related to the August 23, 2019 work injury. Dr. Brown is of the opinion that even without surgery, Claimant still requires medical care for her work related neck condition which includes medical branch blocks, and radiofrequency ablations if the blocks are successful.

32. On November 22, 2021 Claimant was seen by Micah Childs, P.A. due to increased symptoms following the IME with Dr. Neil Brown. He noted that Claimant did not have preexisting symptoms prior to her August 23, 2019 work injury and that there were no records of diagnostic testing prior to this time either that would show severe cervical stenosis. Claimant explained that during examination, what seemed to be a Spurling's maneuver that Dr. Brown performed, Claimant's pain symptoms were exacerbated also causing significant increase in headaches. Claimant reported she was in significant and constant pain. She had her neck in a forward posture. He recommended a new MRI to assess whether there was a worsening and was to follow up with Dr. Lee.

33. At hearing Claimant credibly testified that she continued to have constant neck pain. The pain sometimes gets to the point that the pain is severe, with burning that goes down both her arms and into her hands, and she cannot use them. The pain and symptoms affected her activities of daily living. She depends on others to do things she always used to do, and has to pace herself with breaks. She sleeps on the couch that has a 4 inch memory foam, because of her back and neck pain, and has to take medications, which she does not like taking. She also uses a heating pad daily. She has learned to use her left hand because of the weakness in her bicep, forearm and some of her fingers on the right side.

34. Dr. Brown testified at hearing as well. He opined that he could not determine if Claimant would benefit from the surgery proposed by Dr. Lee because the records and his particular exam did not establish a specific source of Claimant's pain and complaints within the C6 dermatome. Dr. Brown suggested that the pain and symptoms Claimant feels going up to the neck and down into the bicep could be related to the

shoulder injury. He testified that EMG findings only help when the patient has injury or damage to the nerve, but that patients can have inflammatory conditions without permanent nerve injury. He stated that any neurosurgeon that sees the amount of narrowing on an MRI scan as Claimant has, would be likely to recommend surgery despite whether it is work related or not, including himself. Anything less than 9 mm is considered potentially significant stenosis for the spinal cord and Claimant's AP diameter is 5 mm, which is very narrow, puts her at risk and is a potential safety issue.

35. Dr. Brown suggested that Claimant have medial branch blocks to better zero in on the pain generator. He explained that the mechanism of injury on August 23, 2019 was consistent with a cervical sprain/strain syndrome, and that, if significant enough, it can cause torn muscles and tendons, which heal by scarring. He explained that the healing scar tissue could cause a capsule around the facet joint, which can cause persistent neck pain, all of which cannot be seen on MRI. He suggested that after two MBBs, if they are successful in relieving pain for the duration of the anesthetic, then the pain is localized and a radiofrequency ablation could be performed, all of which would be related to the work related injury. He continued to opine that the stenosis and the need for fusion was not related.

36. Dr. Brown stated that he found weakness of the deltoid muscle, which, if it is nerve related weakness, would correspond to the C5 dermatome. The distribution of a C6 radiculopathy goes down from the neck over the shoulder, into the bicep, to the dorsal forearm, and into the thumb, sometimes the index finger. He further stated that a Spurling's maneuver is a provocative test for the presence of radiculopathy, if the pain goes down the arm, the biceps, dorsal forearm and into the thumb and would be consistent with a C6 radiculopathy. Dr. Brown stated that if Claimant had a cervical spine ESI that did not relieve symptoms, it was a bad prognosticator for successful surgery. However, the ESI of November 4, 2019 was performed at the C6-7 level, not the C5-6 level, which is the level Dr. Lee was proposing for surgery. This testimony is not persuasive.

37. Dr. Lee testified by post-hearing deposition on February 28, 2022. He stated that he continued to diagnose cervical spondylosis, cervical stenosis without myelopathy and cervical disc degeneration. The diagnosis was supported by neurological examination which showed claimant kept her neck in a forward posture and her mild wrist weakness on the right. The right wrist extension weakness was from the C5-6 disc level issues. He explained that patients that keep their neck in a forward posture is because, when you extend the neck, it decreases the area of space where the root exits and the area in the central spine canal where the cord resides. Her neurological findings, the nerve root compression together with the long history of symptoms and ongoing stenosis make it appropriate and reasonable for her to proceed with the surgery. Dr. Lee stated he anticipated that Claimant's symptoms would improve with the surgery at the C5-6 level because Claimant has obvious pathology confirmed by the dermatome with her wrist weakness and objective examination confirmed by a positive Spurling's sign. Further, Dr. Lee opined that Claimant would be unlikely to improve without surgery given her level of stenosis and foramen, which would continue to worsen with time, potentially causing further stenosis, bruising of her spinal cord and significant permanent nerve root damage.

38. Dr. Lee opined that the August 23, 2019 work related injury aggravated Claimant's underlying asymptomatic degenerative condition to such an extent that from the date of the injury forward, the C5-6 disc collapsed and justify the recommended surgery. He stated that the changes seen in the year and one half between the MRIs, would normally take a considerable amount of time generally and the cause of the quick collapse was the fact that the injury accelerated the process causing the need for the surgery.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Medical Benefits that are Reasonably Necessary and Related

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The issue of whether medical treatment is necessary for a compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

As found, Dr. Lee testified that he offered Claimant a one-level cervical discectomy and fusion of her neck because of the severe foraminal stenosis and the disk collapse associated with the spinal stenosis. Dr. Lee testified that damage at the C5-6 level was documented by his physical examination, including the way Claimant held her neck during his physical examination and the strength and sensory loss in muscles that are innervated by the C5-6 nerve roots. According to Dr. Lee the two muscles that are affected by that nerve root level are biceps strength and wrist extension strength to see if there is a weakness. Dr. Lee noted that Claimant had some wrist strength weakness on the right side during exam. Dr. Lee was of the opinion that Claimant did have spinal cord compression at the C5-6 level and objective evidence of a C5-6 radiculopathy in addition to the significant cervical stenosis that supported that recommendation for surgery. He also was of the opinion that the recommended surgery would improve the C5-6 nerve root symptoms, but even if it would not, that the narrowing had to be addressed because it would not improve. As ultimately found, Dr. Lee's opinions that the work-related accident caused the need for the surgery is credible and more persuasive than the contrary opinions of Dr. Brown. This is reinforced by the other authorized treating providers that Claimant's degenerative condition was asymptomatic prior the work related event.

As found the work related incident was a trauma of significant force, causing Claimant to be thrown several feet away, bruised in multiple parts of Claimant's body and also sufficient to cause loss of consciousness. As found, Claimant complained of neck pain from the inception of the injury, including numbness, tingling and pain travelling from her neck down to her arm and hand. Dr. Homsten noted bruising, swelling and discoloration of the neck and the right shoulder. As found, while the underlying degenerative changes documented by Dr. Rona, including degenerative changes to the endplates C5-6 are not proximally caused by the work injury. As further found, the fact that Claimant was asymptomatic prior to the work injury, and worked a heavy laboring job at the time of the injury, in addition to the trauma suffered, is sufficient nexus to prove that the accident caused or aggravated the central disc protrusion at the C5-6 levels, which now produce the severe stenosis. As found, it is more likely than not the aggravation caused the need for treatment including correction of the 5 millimeter stenosis with effacement of the ventral cord and severe bilateral neural foraminal stenosis. Nurse practitioner Bush documented that Claimant had recreation of pain with cervical extension and when looking to the left, loss of strength for right sided biceps, grip strength, hand intrinsics and mild decreased sensation of the right upper extremity compared to the left with palpation. Based on medical testimony all of these findings are indications of a radicular nerve problem at the indicated level.

As found, Claimant continued to complain of headaches, neck, shoulder and arm pain during her care with her medical providers, including difficulty utilizing her right upper extremity, and, at times, her left upper extremity. The medical records show a consistent deterioration of function and decline from the date of the admitted August 23, 2019 injury. The reports of Dr. Lee, Dr. Barry, Nurse Practitioner Bush and other treating providers are more persuasive than the contrary opinions of Dr. Dr. Brown. This is further bolstered and supported by the credible testimony of Claimant that she that she did not have any problems with her neck or upper extremities prior to the traumatic incident of August 23, 2019, 2019. The lack of prior medical records showing a history of similar complaints is also a material fact considered by this ALJ and is additionally persuasive. Claimant has no prior history of neck problems. Ultimately, it is found that the Claimant's need for the surgery as recommended by Dr. Lee is proximately caused by the work injury of August 23, 2019 and is reasonably necessary to address the work-related injury and aggravation of Claimant's previously asymptomatic degenerative condition. From the totality of the evidence, the C5-6 interior cervical discectomy and fusion surgery recommended by Dr. Lee is found reasonable, necessary, and related to the injuries Claimant suffered in her workplace incident on August 23, 2019.

Respondents argue that Dr. Lee did not follow the recommendations of The Medical Treatment Guidelines (MTGs) as he had not obtained a psychological evaluation prior to recommending surgery. The MTGs are regarded as the accepted professional standards for care in *Colorado* under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from

under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, Section 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*Emphasis added*).

Pursuant to W.C.R.P. Rule 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. Rule 17-5(C) provides "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the MTGs are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive). Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the Guidelines upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As found in this case, while the MTGs may provide for specific recommendations for psychological evaluation pursuant to W.C.R.P. Rule 17, Exhibit 8(A)(III)(F) as cited by Respondents,[3] Claimant has shown by a preponderance of the evidence that she suffered an aggravation of her preexisting underlying stenosis, complained of neck pain

[3] Current Rule 17, Exhibit 8 Cervical Spine Injury Medical Treatment Guidelines effective January 30, 2022 reorganized and revised the sections, and now is under Section 8.b.iii for Spinal Fusion, p. 54, Recommendation 144.

immediately following the injury, and subsequent upper extremity problems, including tingling and numbness down her arm into her hand. Neither Dr. Lee nor Dr. Brown recommended psychological testing before the surgery, and providers outside of Colorado cannot be compelled to comply with the requirements of Colorado guidelines. Further, neither provider found any confounding psychological issues in this case as Dr. Brown indicated that Claimant had a normal mental status and Dr. Lee found no confounding psychological issues.

As found, Dr. Lee has indicated that Claimant continues to have radicular symptoms, and without the surgery at this point Claimant is at serious risk of further consequence if the stenosis is not corrected. This ALJ infers from the records that there is some urgency to proceed with the surgery as Claimant's stenosis is serious and places Claimant as risk. Dr. Brown also indicated that anything less than a 9 millimeters is considered very narrow spinal canal and requires corrective surgery, which he would also have recommended for Claimant. This ALJ has considered the experts' opinions and testimony with regard to the MTGs and has rejected the opinions of Dr. Brown in reference to the need for psychological evaluation before recommending surgery. In fact, this ALJ infers from Dr. Lee's testimony that, but for the August 23, 2019 work related traumatic accident, Claimant's functional decline and subsequent need for surgery would not have been accelerated. Dr. Lee discussed the natural progression of a disc collapse when there is an injury superimposed on spinal stenosis. Dr. Lee testified that his opinion that the work injury had aggravated her preexisting degenerative condition based on the changes he noted between the post injury September 25, 2019 MRI and the MRI scan in early 2021 which showed changes in the disc that would not be expect to be see in a year but in a much longer period of time without the presence of a traumatic injury. As further found, the medical records document a significant worsening while Claimant was participating in a work hardening therapy in November of 2020 that necessitated additional treatment and referral back to Dr. Lee, which are casually related to her work injury. Claimant has shown by a preponderance of the evidence that the August 23, 2019 accident precipitated Claimant's complaints of neck, arm and hand symptoms aggravating her underlying asymptomatic degenerative condition and proximately caused the need for the surgery proposed by Dr. Lee. Claimant has proven by a preponderance of the evidence that the cervical spine surgery proposed by Dr. Lee is reasonably necessary and related to the August 23, 2019 injury.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for the anterior cervical discectomy and fusion of the cervical spine as recommended by Dr. David Lee as reasonable, necessary and related to the admitted workers compensation injury of August 23, 2019.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 4th day of April, 2022.

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable back injury on July 21, 2021?

- Did Claimant prove entitlement to TTD benefits from July 26, 2021 to February 15, 2022?

- The parties agreed to reserve the issue of potential TPD benefits commencing February 15, 2022, if the claim is compensable.

- The parties stipulated to an average weekly wage of $437.72.

FINDINGS OF FACT

1. Claimant worked for Employer as a sandblaster. He typically worked from a bucket at the end of a telescoping boom lift, which enables him to reach various parts of railroad cars. On July 21, 2021, Claimant and a co-worker, [Redacted, hereinafter NM], were sandblasting an old railroad car using the boom lift. Mr. NM[Redacted] was operating the controls and Claimant was using the sandblasting gun. Claimant alleges he injured his back when the bucket abruptly "dropped" several feet and "bounced" up and down.

2. Claimant felt no back pain or other symptoms during or immediately after the incident. He finished his shift and went home. Within a couple of hours, he noticed mid and low back pain.

3. Claimant awoke the next morning and felt "excruciating" pain in his back. He went to work and reported the symptoms to Employer's HR director, [Redacted] AB. Claimant said he attributed the pain to an incident when the boom suddenly "dropped" and "jerked him." Ms. AB[Redacted] completed an Employers' First Report and offered to send Claimant to Concentra. Claimant declined treatment and started his shift. After working five hours, Claimant informed Ms. [Redacted] AB his back was bothering him and asked to go home. Ms. [Redacted] AB approved his request and Claimant left.

4. Claimant did not work the next day (Friday). He returned to work on Monday (July 26) and worked a complete shift. Ms. [Redacted] AB credibly testified Claimant exhibited no sign of pain or limitations.

5. Claimant went to the Parkview Medical Center emergency department after work on July 26, 2021. He complained of pain in his mid and low back. The ER physician wrote:

> Patient states that last week while he was at work on a forklift, it abruptly dropped several feet and then jolted back up into his legs as the machine

> was malfunctioning. He essentially notes an axial force transmitted through his legs to his back.

Physical examination showed moderate tenderness in the upper thoracic region and mild tenderness in the lumbar area. There were no lower extremity strength or sensory deficits. Lumbar and thoracic CT scans showed Schmorl's nodes at multiple levels but no fracture or other acute abnormality. The ER physician diagnosed a soft tissue "sprain versus strain" and gave Claimant a Toradol injection. Claimant stated Employer did not have light duty, so he was given a one-week work excuse.

6. Claimant did not return to work for Employer after July 26, 2021.

7. Claimant saw NP Jennifer Livingston at Concentra on August 4, 2021. Claimant provided the following history of injury:

> He was in a boom lift on the 21st. He was going down in the left when it dropped 4-5 feet suddenly, stopped, and then went back up. Patient reports of jarring feeling but no pain at the time. He continued to work for about 20 minutes. Within 1 ½ hours the pain started in his back. He states he has a stabbing pain that spreads from his spine out in the thoracic area. Some pain in the lower back but it is "all over" and he can't pinpoint an origination point.

Claimant told Ms. Livingston the imaging performed at Parkview showed Schmorl's nodes "which patient feels are associated with his injury." Claimant stated his pain ranged from "4-5/10 at its best, 10/10 at its worst." Examination showed limited thoracic range of motion, but no tenderness or muscle tone abnormalities. The lumbar exam was completely normal with full range of motion and no tenderness. Ms. Livingston diagnosed "thoracic injury" and ordered an MRI. She gave Claimant another Toradol injection, prescribed a muscle relaxer, a Medrol Dosepak, Tylenol, and Voltaren gel. She referred Claimant to physical therapy and imposed a 5-pound lifting restriction. Based on Claimant's description of the accident, Ms. Livingston concluded his condition was work-related.

8. Claimant underwent lumbar and thoracic MRIs on September 1, 2021. The thoracic MRI showed a benign hemangioma and mild spondylosis. The lumbar MRI showed loss of lumbar lordosis and multilevel "chronic" Schmorl's nodes. There was no canal or neural foraminal stenosis at any level. The facet joints appeared "unremarkable" throughout the lumbar spine.

9. Claimant ultimately received extensive conservative treatment, including medications, physical therapy, massage therapy, and chiropractic treatment. None of these interventions has provided any substantial benefit.

10. Claimant also saw Dr. Kenneth Finn on October 26, 2021. Dr. Finn noted "subjective complaints out of proportion to physical findings, making objective picture difficult." He thought Claimant had a soft-tissue injury but ordered a bone scan to rule out a stress fracture and lab work to assure no systemic inflammatory condition. Dr. Finn

doubted any intervention would improve Claimant's outcome and suggested Claimant consider a different line of work.

11. The bone scan and the lab work came back normal.

12. Claimant had an IME with Dr. Jack Rook on December 1, 2021. Claimant's main complaints were mid and low back pain. Dr. Rook described the mechanism of injury as being inside the lift bucket when it descended abruptly, approximately five feet, and then bumped up and down several times before coming to rest. Claimant stated he had no pain immediately after the injury but started having pain approximately two hours after his shift. Dr. Rook noted Claimant had no prior history of any mid or low back problems. On examination, Dr. Rook noted severe tenderness from the thoracic vertebrae just below his shoulder blades to the L4 level. There was also severe tenderness of the underlying facet joints at these levels. Range of motion was decreased. Dr. Rook diagnosed facet mediated pain and myofascial pain syndrome. He opined that Claimant suffered a work-related injury from the incident he described in the boom lift. He reasoned that Claimant developed back pain shortly after the incident, had no prior medical history of back problems, had no restrictions before this incident, filed his claim timely, and there was no alternate explanation for the development of symptoms the evening after the incident. Dr. Rook opined the drop of five feet—as reported by Claimant—applied acute compressive forces to Claimant's back. When the discs compress, the facet joints come into direct opposition, which irritates the joints and the supporting myofascial structures. This can also result in micro-tearing of the thoraco-lumbar musculature.

13. Dr. N. Neil Brown performed an IME for Respondents on December 2, 2021. Claimant told Dr. Brown the boom lift "malfunctions every time" it is used. Claimant stated the boom "suddenly goes down once the gear is engaged and then goes up accompanied by a jolting sensation." He estimated the bucket traveled approximately five feet, which led to his injury. Dr. Brown observed that the distribution of Claimant's reported symptoms was "unusual and in a non-physiological rectangular fashion." He also noted "significant psychological overlays with symptom magnification any preoccupation with pain as well." He was somewhat puzzled that Claimant had received no benefit from the multiple treatment modalities he received. Nevertheless, based on Claimant's description of a significant "axial loading mechanism and secondary vibration," Dr. Brown concluded Claimant probably suffered a thoracolumbar strain/sprain. He also opined the treatment provided was causally related to the alleged injury.

14. On January 17, 2022, Dr. Brown issued an addendum report stating, "I agree with Dr. Rook that the claimant sustained an acute injury to his mid and lower back as a result of an occupational injury on July 21, 2021. I agree with his listed rationale to support this opinion." However, he questioned whether the additional treatment recommended by Dr. Rook would be helpful, given Claimant's poor response to all prior treatment and several psychological "red flags."

15. Based on Claimant's statements that the boom lift routinely "malfunctions" with abrupt drops and vigorous bouncing, Employer investigated the operation of the lift to determine whether it was malfunctioning or if any repairs were necessary. Employer's maintenance supervisor [Redacted, hereinafter MC], inspected the machine on several

occasions and could find no defects. He also attempted unsuccessfully to recreate the incident Claimant described. He took the lift to the location where Claimant had been working on July 21 and "kinda performed it all over again just to see if maybe we were missing something. And there was nothing, as far as a drop or anything like that." Mr. [Redacted] MC explained there is a "small bounce" when the machine is lowered, but nothing he could consider "jarring" or "jolting."

16. Ms. [Redacted] AB recorded a video of the testing conducted by Mr. [Redacted] MC on her phone, which was entered into evidence as Exhibit U. Mr. [Redacted] MC testified the operation of the lift depicted in the video is consistent with his experience using that machine on multiple occasions. He testified the slow movement shown in the video is the only speed at which the lift can move, and it has safety valves to prevent it from moving or dropping if there is a hydraulic failure other malfunction.

17. [Redacted, hereinafter RS] is one of Claimant's former co-workers. He worked for Employer for approximately six years before taking another job that offered more hours. Mr. [Redacted] RS participated in the testing performed by Mr. [Redacted] MC and depicted in the video. He explained "we tried to make it do [what Claimant described], and we could not." They could not force any "abrupt stop" or "find anything that may have been wrong with it." In his experience, it was "impossible" for the machine to drop several feet or jolt the occupants of the bucket as Claimant has described. Mr. [Redacted] RS explained that when the bucket is finished lowering, it slows down over approximately one foot and stops with a "cushion motion" and "bounces just a little bit." This description is consistent with the motion shown on the video. Mr. [Redacted] RS also testified he saw the boom being lowered on July 21, 2021 while Claimant was in the bucket, and observed it bouncing slightly. However, the motion of the boom on July 21 was "nothing abnormal."

18. [Redacted] NM was working in the lift with Claimant at the time of the alleged accident. Mr. [Redacted] NM disputed Claimant's allegations regarding the operation of the boom lift. He was unaware of any malfunction and testified the boom lift was operating normally on July 21. He experienced no sudden drops or jerking on July 21 or any other occasion. He could recall no time where Claimant appeared surprised or affected by motion of the boom. Mr. NM testified the movement of the boom depicted in the video is consistent with the machine's usual operation. Based on his prior experience with the boom lift, he could not understand how Claimant could have been injured.

19. Respondents obtained a record review from Dr. Michael Rauzzino. In addition to the medical records, Dr. Rauzzino was furnished a copy of the video and a written statement from Mr. Miera. Dr. Rauzzino noted the imaging of Claimant's spine showed no objective evidence of any acute injury or trauma. He also cited the concerns raised by multiple providers regarding possible symptom magnification. Regarding causation, Dr. Rauzzino opined,

> One needs to understand the mechanism of injury. There is a discrepancy between [Claimant's] account, which is consistent with what he described initially in the emergency room and subsequently to other providers, and that of Mr. Miera who was in the boom lift with him at the time of the reported

> injury. I watched video footage of the boom lift going up and down; it is difficult to imagine that the boom lift would have suddenly fallen five feet based on the footage I observed. Ultimately, the mechanism of injury would likely be determined by the ALJ. If the ALJ or both parties believe that [Claimant] did not sustain a fall of four to five feet while in the boom, potential occupational injury would not be likely.

20. Ms. Livingston and Dr. Johansen at Concentra reviewed Dr. Rauzzino's report and agreed Claimant did not injure his back at work.

21. Employer's witnesses are credible and persuasive. Although Mr. [Redacted] NM was mistaken about how far the boom was extended, this discrepancy does not materially detract from his testimony.

22. Claimant's account of an abrupt drop and vigorous bouncing is not credible. Claimant conceded the movement of the boom shown in the video was "pretty close" to what he experienced on July 21, 2021.

23. Dr. Rauzzino's analysis is credible and persuasive. The gentle bouncing of the boom lift would not, and did not, injure Claimant's spine. This conclusion is buttressed by the complete absence of symptoms during or immediately after the incident. Dr. Rook and Dr. Brown's conclusion that Claimant suffered a work-related injury are based on the faulty assumption that Claimant's description of the alleged accident is accurate.

24. Claimant failed to prove he required any medical treatment or suffered any disability proximately caused by his work.

25. Claimant failed to prove he suffered a compensable injury on July 21, 2021.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The fact that a claimant experiences symptoms after performing work activity does not necessarily establish a causal connection to the work activity. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). And a referral for treatment by the employer after receiving a report of symptoms does not automatically establish a compensable injury. *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017). Similar logic applies to the fact that an employee was given restrictions or taken off work by a designated provider. Rather, the claimant must prove the symptoms and need for treatment and/or disability were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

As found, Claimant failed to prove he suffered a compensable injury. Employer's evidence regarding the operation of the boom lift is credible. The incident described by Claimant probably did not occur. Dr. Rauzzino's analysis is persuasive. Dr. Rook and Dr. Brown's causation determinations are predicated on the faulty assumption that the bucket abruptly fell 4-5 feet and "bounced." Had such an incident actually happened, the ALJ would have no difficulty concluding Claimant suffered a compensable injury. But based on the credible testimony of Mr. [Redacted] MC and Mr. RS, such uncontrolled motion does not even appear possible, much less probable. The boom lift probably functioned as depicted on the video and described by Employer's witnesses. Regardless of how Claimant may have perceived the motion, it is unlikely he was subjected to sufficient force to injure his spine. And having made a 4-5 foot "drop" and vigorous "bouncing" central to his story from the outset, it is too late for Claimant to change horses at the hearing and assert that the actual mechanics of the incident are unimportant. The persuasive evidence fails to show that the back symptoms Claimant experienced starting in July 2021 were proximately caused by his work.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 5, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that his 23% scheduled upper extremity impairment rating should be converted to a 14% whole person rating.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant began working for Employer in January 2019. On May 12, 2019 Claimant developed right shoulder pain while lifting a 55-pound drum of wet cheese.

2. On May 23, 2019 Claimant visited Authorized Treating Physician (ATP) Aline Coonrod, M.D. for an examination. He reported stinging pain in the anterior part of his right shoulder. Claimant also noted numbness into his right hand and fingers.

3. On September 19, 2019 Claimant visited orthopedic surgeon Joshua Snyder, M.D. for an evaluation. He reported significantly decreased range of motion as well as muscle spasms, popping and catching within his right shoulder. Claimant also noted hand swelling and difficulties with activities. Dr. Snyder reviewed a June 3, 2019 right shoulder MRI and described Claimant's condition as consistent with adhesive capsulitis, biceps subluxation and subscapularis tendinopathy. He recommended right shoulder arthroscopy.

4. On October 30, 2019 Dr. Snyder performed a right shoulder arthroscopy, labral debridement and subacromial decompression. The postoperative diagnoses included a partial thickness rotator cuff tear of the subscapularis, rotator cuff impingement and a labral tear.

5. During a January 23, 2020 visit Dr. Snyder noted full range of motion of Claimant's neck, but painful range of motion of the right shoulder in all planes. Dr. Snyder was uncertain about Claimant's continued significant pain. Claimant had "very minimal labral fraying" and "minor impingement" in the right shoulder. Addressing the conditions surgically did not improve his discomfort.

6. On February 20, 2020 Dr. Snyder reported that Claimant's right shoulder was still very uncomfortable, but he still continued to have good range of neck motion. Dr. Snyder noted that a February 5, 2020 MRI revealed no significant changes from the prior MRI. He did not have anything more to offer Claimant and recommended a neurology consultation.

7. ATP Dr. Coonrod referred Claimant to orthopedic surgeon John David Hart, M.D. for a consultation. On March 16, 2020 Dr. Hart commented that a February 5, 2020 right shoulder MRI revealed AC joint arthropathy, inflammation around the long head of the biceps and a partial thickness tear of Claimant's rotator cuff. Because therapy was not improving Claimant's symptoms, Dr. Hart recommended a distal clavicle resection and tenodesis of the long head of the biceps.

8. On May 26, 2020 Eric McCarty, M.D. performed an arthroscopic distal clavicle excision, a mini-open subpectoral biceps tenodesis, an arthroscopic capsular release and manipulation under anesthesia, and an arthroscopic subacromial decompression of Claimant's right shoulder. The postoperative diagnosis was right shoulder acromioclavicular joint inflammation, biceps tendinitis, adhesive capsulitis and subacromial impingement. Dr. McCarty recommended continued physical therapy.

9. At a physical therapy appointment on July 21, 2020 Claimant reported that his right shoulder was improving and there was a decrease in biceps cramping. Nevertheless, he still experienced occasional popping in the right AC joint. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

10. On July 27, 2020 Dr. Hart reported that Claimant was doing well with physical therapy and had improved range of motion. However, he still demonstrated some residual stiffness. Claimant had some pain in his right shoulder at the extremes of motion and soreness around the elbow.

11. On August 7, 2020 Ashley Chrisman, P-AC reported that a right shoulder glenohumeral joint injection performed on July 27, 2020 had not provided Claimant with any relief. She noted Claimant was continuing physical therapy but having difficulties with external rotation and abduction. Claimant's pain was localized to his anterior shoulder at the biceps groove.

12. On August 24, 2020 Claimant returned to Dr. McCarty for an examination. Following the May 26, 2020 surgery, the July 27, 2020 glenohumeral injection, and an August 7, 2020 biceps tendon sheath injection, Dr. McCarty remarked that Claimant was doing well. He recommended continuing physical therapy and home exercises to improve strength and range of motion. If Claimant failed to improve, Dr. McCarty would consider manipulation under anesthesia with capsular release.

13. On October 6, 2020 Dr. McCarty performed manipulation under anesthesia and an injection of Claimant's glenohumeral joint. The postoperative diagnosis was right shoulder adhesive capsulitis.

14. On November 19, 2020 Claimant visited Gregory Reichhardt, M.D. for a physiatry consultation and electrodiagnostic evaluation. Claimant reported pain over the right shoulder anteriorly and laterally. Aggravating factors included raising his arm to bend his elbow and bending it back. On physical examination Claimant demonstrated no tenderness on palpation of the cervical spine, normal cervical range of motion, and

negative Spurling's and Lhermitte's signs. He exhibited tenderness to palpation over the right shoulder anteriorly or laterally and exhibited moderate range of motion limitations. The electrodiagnostic evaluation was normal, with negative suprascapular, long thoracic, and bilateral spinal accessory neuropathy.

15. At a December 17, 2020 visit with Dr. Coonrod, Claimant reported increased spasms mostly in the front of his right shoulder. Dr. Coonrod assessed Claimant with impingement syndrome and noted little improvement since his tenodesis surgery. Claimant was actually experiencing more pain around the anterior capsule of the shoulder. He had ceased physical therapy several weeks earlier because it was not helping him, but he continued home exercises.

16. On December 21, 2020 Dr. McCarty reported that Claimant was still experiencing similar symptoms without much improvement. He recommended continuing with physical therapy and home exercises to improve strength and range of motion. Dr. McCarty suggested continued visits with Dr. Reichhardt to assess and treat the painful periscapular musculature. He remarked that a gym membership might be helpful, and commented that Claimant was approaching Maximum Medical Improvement (MMI).

17. On January 8, 2021 Claimant underwent an independent medical examination with Mark Failinger, M.D. Claimant reported stiffness and tightness in the right shoulder, but no swelling in the shoulder area. He also occasionally experienced numbness and swelling in his right hand. Claimant denied any neck pain or radiating symptoms from his neck down through the arm. He was not taking any medications for right shoulder pain.

18. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical, and upper back regions. Dr. Failinger determined that Claimant had likely reached MMI when he last visited Dr. McCarty on November 23, 2020 or at least by December 21, 2020. He reasoned that Claimant did not require lifting restrictions below waist level. However, he recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI. He assigned Claimant a 19% right upper extremity impairment, consisting of 14% for range of motion deficits and 6% for other disorders of the upper extremity.

19. On April 19, 2021 Claimant visited Dr. Coonrod for an examination. He noted improved range of motion, but not full abduction. External rotation was also limited. Claimant's pain was mostly located in the front of his right shoulder. Dr. Coonrod commented that Claimant was approaching MMI, but would leave the determination to Dr. Reichhardt.

20. On April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he experienced pain specifically over the

anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There was normal cervical range of motion with no cervical paraspinal muscle spasms. Dr. Reichhardt concluded that Claimant had reached MMI on April 21, 2021. He recommended six follow-up visits with a physician over the following two years. Claimant stated that he would like to follow-up with Dr. McCarty. Dr. Reichhardt assigned a 22% upper extremity impairment consisting of a 13% rating for range of motion deficits and a 10% rating for the distal clavicle excision. The extremity rating would convert to a 13% whole person impairment rating.

21. On August 16, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Alicia Feldman, M.D. In her physical examination, Dr. Feldman reported tenderness to palpation over the anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman determined that Claimant had reached MMI on April 19, 2021 when he last visited Dr. Coonrod. She assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. The extremity rating would convert to a 14% whole person impairment. Dr. Feldman did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine. She agreed that Claimant did not require work restrictions below waist level. However, Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Feldman did not recommend maintenance care because Claimant had already received extensive treatment and plateaued.

22. On February 25, 2022 Respondents filed a Final Admission of Liability (FAL) acknowledging Dr. Feldman's 23% scheduled impairment rating and denying maintenance medical care. Claimant challenged the FAL seeking to convert the extremity impairment to a whole person rating and requesting medical maintenance benefits.

23. Claimant testified at the hearing in this matter. He explained that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident at work Claimant remarked that he underwent physical therapy and massage therapy for his neck and right shoulder region. He complained of pain in the neck, back, and in the front and back of his right shoulder. Claimant commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

24. Claimant noted that, since reaching MMI on April 19, 2021, he has continued to experience pain on a permanent basis in not only his right shoulder, but also the upper back and neck regions. The symptoms occur especially when he attempts to raise his arm overhead or out in front of him. He also suffers symptoms when he engages in any type of lifting in excess of 10 pounds at waist level.

25. Claimant has failed to prove it is more probably true than not that his 23% scheduled right upper extremity impairment rating should be converted to a 14% whole person rating. Initially, on May 12, 2019 Claimant developed right shoulder pain when lifting a 55-pound drum of wet cheese while working for Employer. Claimant specified that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident. He remarked that he underwent physical therapy and massage therapy for the neck and right shoulder region. Claimant complained of pain in the neck, back, and in the front and back of his right shoulder. He commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

26. Although Claimant testified that physical therapy and massage therapy were directed to his shoulder and neck area, the record fails to support his testimony. The only therapy note in the record, from July 21, 2020, involved his subjective report of right shoulder popping and pain in the anterior and posterior areas. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

27. The medical records also generally reflect that Claimant did not report pain to his neck or back area. During a January 8, 2021 evaluation with Dr. Failinger, Claimant noted stiffness and tightness in the right shoulder but no swelling in the shoulder area. He occasionally experienced numbness and swelling in his right hand, but denied any neck pain or radiating symptoms from his neck down through the arm. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical and upper back regions. Similarly, ATP Dr. Coonrod documented pain only to the shoulder when he stated that Claimant was approaching MMI on April 19 2021.

28. On April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he had pain specifically over the anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There were also no cervical paraspinal muscle spasms and normal cervical range of motion. Finally, during Dr. Feldman's DIME she reported tenderness to palpation over Claimant's anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. She did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine.

29. The preceding medical records reflect that Claimant's functional disability is limited to right arm movements and reaching. Furthermore, Claimant's testimony reveals that the primary catalyst for his pain is the use of his right arm. Although Claimant's pain may extend to a portion of the body beyond the schedule of impairments, it does not constitute a functional impairment. The record thus reveals that the situs of Claimant's

functional impairment is in his right upper extremity. Specifically, Claimant's right upper extremity symptoms are limited to his arm and do not extend into a portion of his body beyond the schedule of impairments. Accordingly, Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

30. Claimant has failed to demonstrate that is more probably true than not that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Initially, at an April 21, 2021 permanent impairment evaluation Dr. Reichhardt recommended medical maintenance benefits in the form of six follow-up visits with a physician over the following two years. Claimant expressed that he would like to follow-up with Dr. McCarty.

31. However, the record reveals that the only recommendation for maintenance care came from Dr. Reichhardt. Notably, he did not recommend any particular course of treatment. Specifically, DIME physician Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. However, she did not recommend maintenance care because Claimant had already received extensive treatment and plateaued. Similarly, at an independent medical examination, Dr. Failinger recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger also did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI.

32. The preceding persuasive opinions of DIME physician Dr. Feldman and Dr. Failinger reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's May 12, 2019 right shoulder injury. The record reveals that Claimant has received extensive treatment and there are no further interventions that are reasonably be expected to change his condition or maintain MMI. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Shoulder Conversion

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68*.* Depending on the particular facts of a claim, damage to the structures of the "shoulders" may or may not reflect a "functional impairment" that is enumerated on the schedule of disabilities. *Walker v. Jim Fouco Motor Co.,* 942 P. 2d 1390 (Colo. App. 1997)*; see Henke v. United Airlines,* W.C. Nos. 4-456-163, 4-490-897 (ICAO, Sept. 10, 2003).

8. As found, Claimant has failed to prove by a preponderance of the evidence that his 23% scheduled right upper extremity impairment rating should be converted to a 14% whole person rating. Initially, on May 12, 2019 Claimant developed right shoulder pain when lifting a 55-pound drum of wet cheese while working for Employer. Claimant specified that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident. He remarked that he underwent physical therapy and massage therapy for the neck and right shoulder region. Claimant complained of pain in the neck, back, and in the front and back of his right shoulder. He commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

9. As found, although Claimant testified that physical therapy and massage therapy were directed to his shoulder and neck area, the record fails to support his testimony. The only therapy note in the record, from July 21, 2020, involved his subjective report of right shoulder popping and pain in the anterior and posterior areas. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

10. As found, the medical records also generally reflect that Claimant did not report pain to his neck or back area. During a January 8, 2021 evaluation with Dr. Failinger, Claimant noted stiffness and tightness in the right shoulder but no swelling in the shoulder area. He occasionally experienced numbness and swelling in his right hand, but denied any neck pain or radiating symptoms from his neck down through the arm. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical and upper back regions. Similarly, ATP Dr. Coonrod documented pain only to the shoulder when he stated that Claimant was approaching MMI on April 19 2021.

11. As found, on April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he had pain specifically over the anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There were also no cervical paraspinal muscle spasms and normal cervical range of motion. Finally, during Dr. Feldman's DIME she reported

tenderness to palpation over Claimant's anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. She did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine.

12. As found, the preceding medical records reflect that Claimant's functional disability is limited to right arm movements and reaching. Furthermore, Claimant's testimony reveals that the primary catalyst for his pain is the use of his right arm. Although Claimant's pain may extend to a portion of the body beyond the schedule of impairments, it does not constitute a functional impairment. The record thus reveals that the situs of Claimant's functional impairment is in his right upper extremity. Specifically, Claimant's right upper extremity symptoms are limited to his arm and do not extend into a portion of his body beyond the schedule of impairments. Accordingly, Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

Medical Maintenance Benefits

13. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Initially, at an April 21, 2021 permanent impairment evaluation Dr. Reichhardt recommended

medical maintenance benefits in the form of six follow-up visits with a physician over the following two years. Claimant expressed that he would like to follow-up with Dr. McCarty.

15. As found, however, the record reveals that the only recommendation for maintenance care came from Dr. Reichhardt. Notably, he did not recommend any particular course of treatment. Specifically, DIME physician Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. However, she did not recommend maintenance care because Claimant had already received extensive treatment and plateaued. Similarly, at an independent medical examination, Dr. Failinger recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger also did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI.

16. As found, the preceding persuasive opinions of DIME physician Dr. Feldman and Dr. Failinger reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's May 12, 2019 right shoulder injury. The record reveals that Claimant has received extensive treatment and there are no further interventions that are reasonably be expected to change his condition or maintain MMI. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

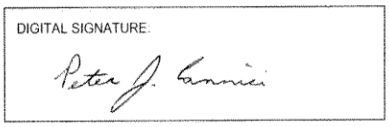
2. Claimant's request for maintenance medical benefits is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26,*

OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 5, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with Employer?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury and were provided by a physician authorized to provide treatment to Claimant?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of July 20, 2021 to July 27, 2021?

- If Claimant has proven a compensable injury, what is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified she was employed with Employer as a store manage at Employer's store in Palisade, Colorado. Claimant testified her job duties included performing all jobs needed at the store. Claimant testified she initially worked at the store from 2011-2012 and then returned to work at the store in 2013 and continued to the present time.

2. Claimant testified that on January 27, 2021, she was at work trying to kneel down to get into the safe that is located in the store behind the register. Claimant testified that when she kneeled, she felt a sharp pain going through her right knee. Claimant testified at hearing that she accessed the safe every day.

3. Claimant testified she reported the injury that day to her district manager and then called the Employer's injury hotline. Claimant testified she got off of work at approximately noon and sought medical treatment at Community Care of Grand Valley. Claimant was examined by physicians' assistant ("PA") Goodman on January 27, 2021. Claimant reported a history of developing pain in her right knee while at work about five (5) hours earlier as a result of kneeling down. Claimant reported that when she went to

kneel down in front of the safe, her knee felt unstable and suddenly hurt. PA Goodman diagnosed Claimant as having suprapatellar bursitis of the right knee and recommended ice and rest. PA Goodman provided Claimant with restrictions that included squatting, kneeling, and crawling and recommended that she avoid anything that required a knee bend past 90 degrees.

4. Claimant had a prior injury to her right knee while employed with Employer on August 7, 2014. Claimant sustained this injury as she was standing up from stocking a bottom shelf and her knee popped. As a result of that injury, Claimant underwent two surgeries to repair a tear of her medical meniscus. Dr. McLaughlin eventually put Claimant at maximum medical improvement for her injury on September 2, 2015 and provided with an impairment rating of 16% of the lower extremity. Dr. McLaughlin released Claimant to return to work without restrictions.

5. With regard to her present injury, Claimant was evaluated by nurse practitioner ("NP") Harkreader in Dr. McLaughlin's office on February 1, 2021. NP Harkreader noted Claimant's report of putting her left knee on concrete and bringing her right knee down to kneel when she felt a sharp pain in her right knee. NP Harkreader diagnosed Claimant with right knee infrapatellar bursitis and distal quadriceps strain and referred Claimant for an x-ray of her right knee. The x-rays were performed on February 2, 2021.

6. Claimant testified at hearing that after her left knee injury, she began experiencing pain in her left groin and left hip that she associated with trying to take weight off her right knee. Claimant testified that over the next few weeks, her knee would lick up and she developed swelling behind her right knee which she associated to a Bakers' cyst.

7. Claimant testified she had a prior injury to her right knee which resulted in two knee surgeries. Claimant testified that after being placed at MMI, she would have occasional discomfort, but was otherwise fine. Claimant testified that prior to the January 27, 2021 injury, the last treatment she had for her right knee was in 2015. Claimant testified that prior to the January 27, 2021 injury, she was not having pain, instability, and locking in her right knee. Claimant testified that the pain she is experiencing now in her right knee is different than what she experienced in the 2014 injury.

8. Claimant returned to Dr. McLaughlin on February 10, 2021. Dr. McLaughlin noted Claimant's prior workers' compensation injury to her right knee. Dr. McLaughlin noted Claimant reported doing well for some time following her previous injury. Dr. McLaughlin noted Claimant's complaints of pain and reviewed her x-rays. Dr. McLaughlin reported concerns with regard to joint and joint space narrowing in the medial joint and degenerative joint disease evidenced on the x-rays. Dr. McLaughlin noted Claimant reported problems getting in and out of chairs. On examination, Dr.

McLaughlin noted Claimant had markedly antalgic gait as Claimant did not appear to want to bear weight on her right leg.

9. Dr. McLaughlin diagnosed claimant with a right knee strain and bursitis with a pre-existing right knee injury. Dr. McLaughlin recommended Claimant be seen by an orthopedist and consider injections into the knee. Dr. McLaughlin referred Claimant to Dr. Dorenkamp for chiropractic treatment for her right and left sacroiliac tenderness. Dr. McLaughlin further recommended additional x-rays of the right knee to determine how severe the degenerative joint disease was, including notch views and standing x-rays.

10. Claimant underwent a magnetic resonance image ("MRI") of her right knee on March 16, 2021. The MRI revealed an extensive tear of the body, posterior horn, and posterior root of the medial meniscus which was severely diminutive in caliber. Grade 3 chondral changes in the medial compartment and to a lesser degree, the patellofemoral compartment were also noted.

11. Claimant was examined by Dr. Mitch Copeland on March 29, 2021. Dr. Copeland noted Claimant reported she was kneeling down to get into a safe when her knee twisted wrong. Claimant reported to Dr. Copeland symptoms that included pain, locking, swelling and giving away. Dr. Copeland reviewed Claimant's MRI and performed a physical examination of Claimant. Dr. Copeland diagnosed Claimant with osteoarthritis of the right knee with a tear of the medial meniscus. Dr. Copeland noted that Claimant had sustained a knee injury at work 2 months ago that caused the meniscus tear. Dr. Copeland noted that while the tear was symptomatic, he believed there was too much arthritis to consider a knee arthroscopy. Dr. Copeland opined that the osteoarthritis was the main driver of her pain and noted that a total knee arthroplasty would be her only surgical option.

12. Dr. Copeland provided Claimant with a steroid injection in the right knee and recommended Claimant stop smoking. Dr. Copeland further noted that Claimant was complaining of hip pain which Dr. Copeland noted he believed to be related to her altered gait.

13. Claimant continued to treat with Dr. McLaughlin and was referred to Dr. Kim, an orthopedist with the Steadman Group. Claimant was examined by PA Dvoirkin in Dr. Kim's office on April 28, 2021. PA Dvorkin noted Claimant reported right knee pain that was exacerbated in January at work while she was trying to kneel, when she had a significant sharp pain and noticed moderate to severe swelling afterwards. PA Dvorkin further noted Claimant reported havin progressively worsening right knee pain since an incident while trying to kneel back in January.

14. PA Dvorkin noted Claimant had reportedly quit smoking 1 week earlier. PA Dvorkin ordered x-rays of the right knee. PA Dvorkin diagnosed Claimant with right

knee osteoarthritis. PA Dvorkin recommended a right total knee replacement based on a review of the x-rays and clinical examination.

15. Claimant returned to Dr. McLaughlin on May 5, 2021. Dr. McLaughlin noted that Dr. Kim's office had indicated she would be an excellent candidate for knee replacement surgery. Claimant noted that she did not like hearing from Dr. Copeland that she would need knee replacement surgery when she was evaluated by him, but had come to grips with it. Dr. McLaughlin recommended she return to Dr. Copeland for evaluation and treatment and to get his opinion with regard to knee replacement surgery.

16. Claimant was examined by Dr. Copeland on May 17, 2021. Dr. Copeland again indicated that Claimant's only surgical option would be a total knee replacement.

17. Respondents obtained an independent medical examination ("IME") with Dr. Bernton on June 8, 2021. Dr. Bernton reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted Claimant reported that on January 27, 2021, she was in the process of kneeling when she felt a sharp pain in the front of her kneecap. Dr. Bernton diagnosed Claimant was a meniscal tear superimposed on degenerative arthritis of the medial patellofemoral compartments, along with evidence of probable patellar tendinitis. Dr. Bernton noted that Claimant had an upcoming IME with Dr. Ciccone to determine whether the knee condition was work related. Dr. Bernton noted Claimant reported some trapezius pain that developed concurrent with her use of a crutch. Dr. Bernton opined that trigger point injections may be helpful for treating the trapezius strain. Dr. Bernton noted that the transient SI symptoms were related to Claimant's gait abnormalities.

18. Dr. Bernton did not offer and opinion as to whether the knee condition was work related, and deferred to Dr. Ciccone regarding this issue.

19. Claimant underwent an IME with Dr. Ciccone on June 23, 2021. Dr. Ciccone reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Ciccone noted that while she was at work, she was squatting down to open a safe when she had increased pain in her knee. Dr. Ciccone opined that Claimant did not have a fall or twisting event in connection with her knee injury. Dr. Ciccone opined that opined that Claimant did not have a work related injury. Dr. Ciccone noted that while Claimant had more pain in the knee while kneeling, there was no injury. Dr. Ciccone noted that the kneeling could have occurred anywhere and was not specific to work.

20. Claimant returned to Dr. McLaughlin on July 20, 2021. Dr. McLaughlin noted Claimant's ongoing complaints of pain and noted Claimant was off of work. Dr.

McLaughlin issued a not taking Claimant off of work for the period of July 20 through July 27, 2021.

21. Claimant was examined by Dr. Matsumura on August 17, 2021. Dr. Matsumura noted that Claimant had a prior injury in December 2015 resulting in chronic back pain. Dr. Matsumura noted Claimant was referred to her by Dr. McLaughlin for evaluation of chronic pain issues involving her right knee. Dr. Matsumura further noted Claimant's MRI had revealed a torn meniscus. Dr. Matsumura noted that Dr. Copeland and Dr. Kim had recommended a total knee arthroplasty, which she agreed with. Dr. Matsumura recommended a Flector patch and instructed Claimant to follow up in three to four weeks.

22. Dr. McLaughlin testified by deposition in this matter. Dr. McLaughlin testified that PA Harkreader noted swelling over Claimant's distal quadriceps just over her right patella. Dr. McLaughlin testified that swelling could be considered objective evidence of an acute injury. Dr. McLaughlin testified as to his recollection of the Claimant's report of injury, notably that she was getting into a squatting position getting ready to put one knee down, when she felt pain in her knee. Dr. McLaughlin opined in his deposition that Claimant's reported knee pain was caused by Claimant getting into the squatting position which she described.

23. Dr. Ciccone testified by deposition in this matter consistent with his IME report. Dr. Ciccone testified that Claimant had a pre-existing condition in her knee which included the two prior knee surgeries and osteoarthritis. Dr. Ciccone opined that Claimant did not have an injury on January 27, 2021 because she was just performing normal activity. Dr. Ciccone testified that Claimant could have been doing that activity either inside or outside of work and there was nothing work specific about the activity. Dr. Ciccone noted that Claimant had degenerative changes in her knee and did not report a falling or twisting event. Dr. Ciccone opined that he did not believe Claimant's mechanism of injury (kneeling) was sufficient to cause any injury.

24. The ALJ credits Claimant's testimony at hearing along with the opinions expressed by Dr. McLaughlin in his reports and his testimony and finds that Claimant has established that it is more probable than not that Claimant sustained a compensable work related injury to her right knee on January 27, 2021 when she was kneeling down to get into the safe and experienced sharp pain in her right knee.

25. The ALJ notes that while Claimant had a history of prior knee injuries, there is a lack of credible evidence that Claimant was experiencing issues with her right knee after being placed at MMI in September 2015. The ALJ credits Claimant's testimony that the only symptoms she experienced after being placed at MMI in September 2015 was occasional discomfort as being credible and persuasive. The ALJ therefore finds that Claimant has demonstrated that it is more probable than not that the kneeling at work to get into the safe on January 27, 2021 aggravated, accelerated or

combined with Claimant's pre-existing condition to cause the need for medical treatment. Moreover, the ALJ credits the testimony of Dr. McLaughlin that the swelling that was noted by NP Harkreader on February 1, 2021 was objective evidence of an acute injury, and therefore, related to the kneeling incident at work on January 27, 2021.

26. Moreover, the MRI in this case revealed a torn medial meniscus which is consistent with Claimant's complaints of pain and swelling following the kneeling incident. The ALJ therefore finds that Claimant has established that it is more likely than not that the kneeling incident in this case aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment, and is therefore, a compensable work injury.

27. The ALJ credits the opinions expressed by Dr. Copeland along with the reports of Dr. Bernton and finds that the medical treatment for Claimant's back, hip and trapezius are related to her compensable January 27, 2021 work injury.

28. The ALJ credits the medical records entered into evidence along with the opinions expressed by Dr. McLaughlin and Dr. Copeland and finds that the medical treatment in this case rendered by Dr. McLaughlin, Dr. Copeland, Dr. Matsumara Dr. Dorenkamp, and the Steadman Group has been reasonable and necessary to cure and relieve Claimant from the effects of her industrial injury.

29. Claimant testified at hearing that she missed some time from work during the summer of 2021. Claimant argues in her position statement that she should be entitled to temporary disability ("TTD") benefits for the period of July 20 through July 27, 2021. The wage records entered into evidence show Claimant did not receive a paycheck for one week, as the paycheck for August 6, 2021 is missing. This corresponds with Dr. McLaughlin's July 20, 2021 report which took Claimant off of work for one week.

30. The ALJ credits the testimony of Claimant at hearing along with the wage records entered into evidence and the medical records from Dr. McLaughlin and finds that Claimant has proven that it is more likely than not that she is entitled to TTD benefits for the period of July 20 through July 27, 2021.

31. At the time of Claimant's injury, Claimant was receiving weekly paychecks in the amount of $1,019.63. Additionally, according to the wage records, in the year prior to Claimant's injury, she earned $5,000 in bonuses. The ALJ credits Claimant's testimony at hearing along with the wage records entered into evidence and finds that the financial bonuses Claimant received were regularly provided to Claimant on a consistent basis and should be included in the calculation of her AWW.

32. The ALJ therefore determines that Claimant's average weekly wage should include the bonuses, averaged out over the prior year, ($5,000 divided by 52 =

$96.15). Therefore, the ALJ calculates Claimant's AWW to be $1,115.78 ($1,019.63 + $96.15 = $1,115.78).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2020. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra*.

4. As found, Claimant has established that it is more probable than not that her injury arose out of and in the course and scope of her employment with employer. As found, Claimant has established by a preponderance of the evidence that she sustained an injury to her right knee on January 27, 2021 when she was kneeling down to get into the safe and experienced pain and swelling in her right knee, which resulted in the need for medical treatment.

5. The ALJ recognizes that Respondents argue that the knee injury could have happened at any time based on Claimant having degenerative joint disease in her knee. However, the fact that Claimant had a prior injury or pre-existing condition does not negate the fact that a compensable injury occurs if the injury aggravates, accelerates or combines with the preexisting disease or infirmity to produce disability or the need for treatment. In this case, the ALJ finds that the kneeling at work combined with Claimant's preexisting condition to cause the need for medical treatment, including the treatment for the torn meniscus, resulting in the recommended total knee replacement.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

7. As found, Claimant has proven by a preponderance of the evidence that treatment provided by Dr. McLaughlin, Dr. Copeland, Dr. Matsumura, Dr. Dorenkamp and the Steadman Clinic along with the recommended total knee replacement is reasonable medical treatment necessary cure and relieve the Claimant from the effects of the industrial injury.

8. As found, the medical records from Dr. McLaughlin, Dr. Copeland and the Steadman Clinic, along with the testimony of Claimant and Dr. McLaughlin at hearing are found to be credible and persuasive with regard to this issue. Additionally, the ALJ credits the opinions expressed by Dr. Bernton in his IME report with regard to the treatment provided to Claimant for her hip, back and trapezius pain and finds that Claimant has established by a preponderance of the evidence that this medical treatment is reasonable and necessary to cure and relieve Claimant from the effects of her industrial injury.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume

his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. McLaughlin that took Claimant off of work completely between July 20, 2021 and July 27, 2021, resulting in a wage loss to Claimant as evidenced by the wage records entered into evidence. As found, claimant has established that he is entitled to TTD benefits for the period of July 20, 2021 through July 27, 2021.

11. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. As found, Claimant was earning weekly wages in the amount of $1,019.63 at the time of the injury. As found, Claimant had earned bonuses in the previous year of $5,000, which the ALJ finds were regularly received by Claimant and should be included in calculating Claimant's AWW. As found, Claimant's AWW at the time of the injury is determined to be $1,115.78.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the treatment from Dr. McLaughlin, Dr. Copeland, Dr. Matsumura, and Dr. Dorenkamp, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay Claimant TTD benefits based on an AWW of $1,115.78 for the period of July 20, 2021 through July 27, 2021 pursuant to Section 8-42-105, C.R.S.

3. All matters not determined herein are reserved for future determination

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: April 6, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that this claim should be reopened pursuant to Section 8-43-303, C.R.S., due to fraud.

If the claim is reopened, whether the respondents have demonstrated, by a preponderance of the evidence, that they are entitled to recover benefits paid to the claimant in the amount of $16,364.90.

FINDINGS OF FACT

1. On June 4, 2019, the claimant suffered a work injury while employed with the employer. The body parts injured at that time included the claimant's neck and back.

2. On July 8, 2019, the respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits. The claimant's TT□ benefits were paid at a rate of $558.80 per week.

3. The claimant's authorized treating physician (ATP) for this claim has been Dr. Larry Kipe. Beginning on June 20, 2019, Dr. Kipe restricted the claimant from all work.

4. On August 20, 2019, the claimant was seen by Dr. Kipe. At that time, the claimant reported that he had not returned to work and "does not feel he can work." The claimant also reported constant neck pain, paresthesia down his arms, and pain in his lumbar spine. Based upon the statements made by the claimant on that date, Dr. Kipe continued to restrict the claimant from all work.

5. On August 21, 2019, the claimant attended a Department of Transportation (DOT) medical examination for purposes of obtaining a commercial driver's license (CDL) medical certificate. The medical examination was performed by Noel K. McKey, DC.

6. In preparation for the DOT examination, the claimant completed a Medical Examination Report Form. In that form, the claimant reported that he had no neck or back problems. The claimant also reported no bone, muscle, joint, or nerve problems. On exam, Dr. McKey noted that the claimant's back and spine were normal. The claimant was cleared to receive a two year medical certificate.

7. On December 4, 2019, the claimant returned to Dr. Kipe. At that time, the claimant reported problems with pain and an inability "to get around". Dr. Kipe continued to restrict the claimant from all work. On that same date, Dr. Kipe authored a letter in which he stated that the claimant should remain off of work "indefinitely".

8. On January 30, 2020, Dr. Kipe issued a report in which he determined that the claimant reached maximum medical improvement **(MMI)** on January 28, 2020. Dr. Kipe also noted that the claimant could return to full duty work, with no permanent impairment.

9. Based upon Dr. Kipe's January 30, 2020 report, on January 31, 2020, the respondents filed a Final Admission of Liability (FAL). The FAL was amended on February 12, 2020 to accurately reflect the amount of TTD paid to the claimant.

10. Dr. Kipe testified that each time he restricted the claimant from all work he did so based upon the claimant's subjective reports that he could not work. Dr. Kipe testified that he relied upon the statements made by the claimant in determining whether the claimant had any work restrictions. Upon learning of the August 21, 2019 DPT examination and the statements made by the claimant as part of that examination, Dr. Kipe determined that the claimant had reached MMI, was released to full duty, with no permanent impairment.

11. MV[Redacted], Senior Resolution Manager with the insurer was the individual that filed the FALs in January and February 2020. Ms. MV[Redacted] testified that the claimant's TTD benefits were terminated on January 28, 2020 because the claimant had reached MMI with no permanent impairment rating.

12. Ms. MV[Redacted] also testified that between August 20, 2019 and January 28, 2020, the respondents paid the claimant $16,364.90 in TTD benefits.

13. The ALJ credits the medical records, the DOT examination records, and the testimony of both Dr. Kipe and Ms. MV[Redacted] . The ALJ finds that it is more likely than not that the claimant intentionally misled Dr. Kipe regarding his inability to work. This is evidenced by the contradictory information he provided Or. McKay on August 21, 2019. The ALJ finds that the claimant was kept off of work by Dr. Kipe because of the claimant's subjective report that he could not work. However, it is clear that the claimant was capable of working as evidenced by his report to Dr. McKey.

14. Based upon the evidence and testimony presented, the ALJ finds that the claimant did engage in fraud in this matter. In reaching this determination, the ALJ finds the following. 1) The claimant's claim that he could not work was a false representation of a material fact. 2) The claimant knew that he was not providing Dr. Kipe with accurate information when he continued to report he was unable to work. 3) Dr. Kipe relied upon the claimant's false representations. 4) The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations. 5) The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant,

resulting in damage to the respondents. The ALJ infers that the claimant also knew that his false representations would result in continued TTD payments.

15. The ALJ also finds that the respondents have successfully demonstrated that they are entitled to recover amounts paid to the claimant between August 20, 2019 and January 28, 2020. The ALJ finds that the amount overpaid as a result of the claimant's misrepresentations to Dr. Kipe totals $16,364.90.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, *C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. **App.** 2000).

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos,* 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers,* W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim.

Berg v. Industrial Claim Appeals Office, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission,* 646 P.2d 399 (Colo. 1981).

5. In the present case, the respondents seek to reopen the claim on the basis of fraud. The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.,* W.C. No. 4-156-147 (ICAO, Dec. 15, 2005), *citing Morrison v. Goodspeed,* 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra*

6. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.,* W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

7. As found, the respondents have successfully demonstrated, by a preponderance of the evidence, that the claim should be reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud. The elements of fraud identified above are found to exist in the present matter. Specifically:

- The claimant's claim to Dr. Kipe on August 20, 2019 that he could not work was a false representation of a material fact.
- The claimant knew that he was not providing Dr. Kipe with accurate information when he reported he was unable to work.
- Dr. Kipe relied upon the claimant's false representations.
- The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations.
- The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant, resulting in damage to the respondents.

8. As found, the respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

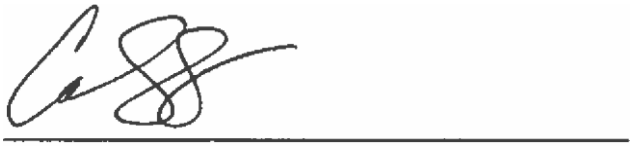
ORDER

It is therefore ordered:

1. The claim is reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud.

2. The respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

Dated this 7th day of April 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable electric shock injury to her left upper extremity on July 21, 2021.

II. If Claimant established that she suffered a compensable injury, whether she also established that a sonographic analysis of the left upper extremity recommended by Dr. Scott Primack is reasonable, necessary and related to her July 21, 2021 injury.

III. If Claimant established that she sustained a compensable injury, whether she also established that the right to select the authorized provider to attend to her injury passed to her.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Background and Claimant's Testimony

1. Claimant is employed as a cashier. (Transcript "Tr." p, 13:10-13). She testified that while working the drive through window on July 21, 2021, she placed her left hand on the corner of a metal table near the leg that ran to the ground and felt an electrical shock to her hand that travelled through her arm and up into her neck. (Tr. p, 13:21-25; p, 14:1-4; p. 17:1-6). She testified that an electronic register with an attached computer and a credit card machine were plugged in on top of the metal table. (Tr. p, 17:1-16). She testified that there was water on the floor nearby the table. (Tr. p, 17:23-25; 18:1-6). The July 21, 2021, incident was the second time Claimant claimed to have been shocked while working the drive through window. The first shock occurred July 7, 2021. (Rs' Ex. C, p. 20). Claimant did not seek treatment following her first electric shock.

2. Claimant lifted her left hand from the table and began screaming and waiving her left arm as if to shake the electricity out. (Tr. p, 14:1-9). Her supervisor was notified and an accident report was completed. *Id*. She rated the immediate pain to her left arm at 9/10. (Tr. p, 14:9-19; p, 15:14-24). She described the triceps of the left arm as feeling weak, sore, and heavy, with a display of blotchy redness and swelling appearing within an hour of being shocked. (Tr. p, 21:5-25).

3. Claimant testified that her current symptoms include a jabbing feeling in the palm of her left hand, a prickly feeling in her fingertips, and weakness, heaviness

and soreness in her left biceps and triceps. (Tr. p, 23:14-19). Claimant testified that there are times when she does not feel pain, but when she does experience pain, it is different every day. (Tr. p, 23:20-25). According to Claimant, her pain comes and goes as it "pleases". Sometimes its pain that she can deal with" and sometimes it is so unbearable that she just wants to cry. *Id.*

4. Claimant testified that her skin was dry at the time she was shocked. (Tr. p, 20:6-10).

5. In addition to her work at [Employer Redacted], Claimant owns and operates a cleaning business. Despite her alleged electric shock and persistent symptoms, Claimant testified that she has been able to continue her cleaning jobs without income loss. (Tr. p, 24:9-14). Moreover, she did not lose any time from [Employer Redacted]. (Tr. p, 26:21-23).

Claimant's Treatment at Concentra Medical Centers

6. On July 23, 2021, Claimant presented to her authorized treating physician, Dr. Bradley at Concentra Medical Centers.[1] (Rs' Ex. C, p. 8). She reported numbness, burning, and weakness to her left arm. *Id*. at 20. Claimant advised Dr. Bradley that her first shock on July 7, 2021 caused some "chest pain [and] heart racing [for] 4-5 days. *Id*. at p. 20. On physical exam, it was noted that the left arm was puffy and red, with mild tenderness in the dorsal aspect of the upper arm. *Id*. at 21. She displayed full range of motion, normal strength, normal sensation, no muscle weakness, and no muscle atrophy. *Id*. An EKG was normal. *Id*. at 12. Dr. Bradley assessed a work-related electrical shock to the left upper extremity. *Id*. at 12. Claimant was prescribed diclofenac sodium, methocarbamol, and naproxen, and kept at full duty with the limitation of wearing rubber gloves while working. *Id*. at 23.

7. On July 26, 2021, Claimant returned to Concentra and was evaluated by Nurse Practitioner (NP) Jennifer Livingston. (Rs' Ex. C, p. 24). She reported no improvement to her left arm and described a shaky feeling, soreness, and weakness. *Id*. at p. 27. Claimant reported not having "full control" over her left arm, complaining that she was "unable to fix her own hair" and had difficulty "shampooing her hair and bathing/dressing due to weakness and pain in [the] arm". *Id*. She reported persistent redness and swelling in the left arm. *Id*. Physical examination revealed mild erythema and swelling of the upper and lower (forearm) portions of the left arm but no weakness. *Id*. Sensation was intact for light touch in all dermatomes tested. *Id*. at p. 28. The remainder of the upper extremity examination was normal, as was examination of the neck and chest. *Id*. The medications prescribed by Dr. Bradley were reportedly helping and no further medications were prescribed. *Id*. at p. 29. Referrals were made to Dr. Scott Primack for an EMG, diagnostics, and physical therapy. *Id*. While the history and mechanism of injury (MOI) were obtained directly from Claimant, NP Livingston opined that the relationship between the MOI and the presenting symptoms could not be

[1] Claimant testified that she chose to go to Concentra on July 23, 2021. (Tr. p, 27:2-4).

determined. *Id*. at 30. NP Livingston concluded by indicating that Claimant's objective clinical findings were not consistent with Claimant's history and/or a work related mechanism of injury/illness. *Id*.

8. On July 28, 2021, Claimant underwent her first physical therapy session. (Rs' Ex. C, p. 31). During this encounter, Claimant reported, "shooting" pain in her left shoulder. *Id*. at p. 33. According to Claimant's report, her symptoms, including radiating pain and tingling would occur intermittently. *Id*. Claimant's symptoms were reportedly aggravated by movement and alleviated by rest. *Id*. Claimant exhibited no significant findings on palpation and observation, normal range of motion, normal muscle tone, and negative upper limb tension testing to the median, ulnar and radial nerves. *Id*. at 34. No objective musculoskeletal pathology was identified. (Rs' Ex. C, p. 31; Rs' Ex. E, p. 102). She was discharged that same day. *Id*.

9. On August 3, 2021, Claimant returned to Concentra and was evaluated by NP Livingston. (Rs' Ex. C, p. 38). Claimant reported that she was "kinda ok, kinda not". *Id.* She described persistent sensory symptoms in left arm, noting she woke up one morning with hard, heavy and weird tingling in the left arm. *Id*. According to Claimant, when she raised her arms away from her sides in the shape of a "T", an electrical sensation ran from arm to the other and back. She reported that she was still cleaning homes and one of her clients, who is a physical therapist, told her that her symptoms were emanating from her median nerve. NP Livingston explained that the majority of Claimant's symptoms were in the area of the ulnar nerve rather than the median nerve. *Id*. NP Livingston reiterated her opinion that the objective findings on exam in inconsistent with Claimant's history and/or a work related MOI. *Id*. at 41.

10. On August 20, 2021, Claimant returned to Concentra and was evaluated by Dr. Bradley. (Rs' Ex. C, p. 42). Dr. Bradley opined that the objective findings were not consistent with a work-related mechanism of injury. *Id*.

11. On August 23, 2021, Respondents filed a Notice of Contest, citing the need for further investigation into causation and the extent of the alleged injury. (Rs' Ex. B, p. 5).

12. On September 1, 2021, Claimant presented to Dr. Primack for an EMG. (Rs' Ex. D, p. 90). The evaluation of the left median motor nerve was within normal limits; however, the rest of the study was not completed secondary to Claimant's inability to tolerate even the lowest of electrical stimulation. *Id*. NP Livingston spoke with Dr. Primack following Claimant's EMG during which Dr. Primack informed her that with the first level of testing, Claimant was screaming, crying, and cursing. (Rs' Ex. C, p. 45). Consequently, Dr. Primack suggested that Claimant undergo a neuro-musculoskeletal ultrasound with emphasis on the median and ulnar nerves. *Id*., see also, Rs' Ex. D, p. 90.

13. On September 9, 2021, Claimant returned to Concentra and was evaluated by NP Livingston. (Rs' Ex. C, p. 56). She reported tingling in her left arm

down to her hand, which travelled to her right hand, and stabbing pain in the thoracic back area around the scapula. *Id*. She was assessed for situational mixed anxiety and depressive order. *Id*. at 58.

14. On September 23, 2021, Claimant returned to Concentra and was evaluated by Dr. Bradley. (Rs' Ex. C, p. 63). On physical exam, Claimant's left arm appeared normal with no tenderness, no muscle weakness, no atrophy, and no deformity. *Id*. at 69. Dr. Bradley noted that further treatment was not approved as the claim had been denied on August 23, 2021. *Id.* at p. 70. Dr. Bradley concluded that the objective findings were not consistent with a work-related mechanism of injury. *Id*. at 71. Although he did not indicate that Claimant was at maximum medical improvement (MMI), Dr. Bradley opined that Claimant did not require maintenance care, and had no permanent impairment. *Id*.

15. Dr. Bradley placed Claimant at MMI on September 30, 2021 without permanent impairment and without maintenance medical treatment needs. (Rs' Ex. C, p. 73).

Claimant's Independent Medical Examination (IME) with Dr. Burris

16. On December 14, 2021, Claimant presented to Dr. John Burris for a Respondent requested IME. (Rs' Ex. E, p. 93). She reported 5-6/10 pain, in a "circumferential glove-type distribution" throughout her left arm from the upper arm distally into all digits. *Id*. at 94. She reported an internal shaking sensation and a feeling as if her left hand was not part of her body. *Id*. She described jabbing/twisting pain and noted that while she is occasionally pain free, she experiences sharp, achy, shooting, burning, stabbing, tight, and pins and needles pain. *Id*. At times, the pain feels like hot water running over a cold hand. *Id*. She was unable to identify any alleviating factors and noted that her pain is worse with activity. *Id*.

17. According to Dr. Burris, Claimant demonstrated an extreme somatic focus during her IME. (Rs' Ex. E, p. 99). He described that she held her left arm in front of her body with the hand in a guarded claw-like position, but inconsistent with that posture repetitively the hand without difficulty to adjust her facemask. She was emotional and tearful throughout the examination. *Id.* When asked to make a fist with her left hand, Claimant balled the hand into a normal appearing loose fist and then began crying hysterically, stating that she could not make a fist. Physical examination of the cervical spine and left upper extremity were benign.

18. Follow his records review and physical examination, Dr. Burris opined that Claimant's pain complaints did not "follow a dermatomal pattern and [were] out of proportion to her examination which [was] benign with no objective findings". (Rs' Ex. E, p. 100). He explained that a "sudden exposure to an electrical current of significance usually results in direct tissue necrosis (i.e. skin burn or lesion) at the sites where the current enters and leaves the body". *Id.* Noting that Claimant's physical examinations had not exhibited objective signs consistent with significant electrical injury, i.e. burns or

abnormal EKG, Dr. Burris questioned whether an actual exposure to electrical current took place. *Id*. at p. 100-101. Assuming that Claimant had been shocked as she described, Dr. Burris concluded that the electrical exposure was "very minor" and did not result in "identifiable physical pathology. *Id*. at p. 101. Giving Claimant the benefit of the doubt that an exposure to an electrical current occurred, Dr. Burris testified that her original complaints could have been related to that exposure. *Id.* Nonetheless, Dr. Burris opined that her persistent symptoms more than five months after the reported incident and without evidence of physical pathology were likely unrelated to the July 21, 2021 incident and were probably psychosocial in nature. *Id*.

19. Dr. Burris opined that Claimant had reached MMI for the workplace event without impairment. (Rs' Ex. E, p. 102). Noting that a psychiatric referral had been made for "situational mixed anxiety and depressive disorder", Dr. Burris recommended 6-8 claim related maintenance psychological sessions to include cognitive behavioral therapy and (sic) assist with pain coping strategies. *Id*. at. P. 103.

Dr. Burris' Testimony

20. As noted, Dr. Burris testified at hearing. He was qualified as a Board Certified expert in Occupational Medicine. Dr. Burris testified that he has had experience in treating electrical energy injuries. (Tr. p, 30:15-19). In injuries associated with electrical energy, physical contact with an energized electrical circuit provides a pathway for electricity to traverse the body as it seeks ground. (Rs' Ex. E, p. 100). Factors influencing the severity of electrical injury include the voltage, amperage, current type, duration of contact, area of contact, pathway of the current through the body, and amount of tissue resistance. *Id*. Depending on the contact site and the pathway, the flow of electricity can cause damage to nerves, muscles, or major organs such as the heart, brain, eyes, kidneys, or gastrointestinal track. (Tr. p, 34:23-25; 35:1-7). Because exposure to an electric current of significance usually results in direct tissue necrosis (skin burn or lesion) at the sites where the current enters and leaves the body, (Rs' Ex. E, p. 100) a search must be made for both an entry and exit wound on the skin to determine the electrical pathway through the body. *Id*. Moreover, Dr. Burris testified that it is standard medical practice for patients sustaining any type of electrical exposure have an immediate EKG to assess damage to the heart. (Tr. p, 34:23-25; 35:1-7).

21. Dr. Burris testified that most tissue damage is related to the heat produced by the electric current and tissue resistance, which is largely influenced by the water content of the tissue. (Tr. p, 54:1-25). Dry skin is more resistant to electrical current, so the energy is dissipated at the skin resulting in skin burns. (Cl's Ex. 1, p. 4). The more resistant the skin, the less damage to internal structures of the body. *Id*.

22. Dr. Burris testified that the arm possesses three nerves that travel distally into the forearm and hand – the median, ulnar, and radial. (Tr. p, 32:13-25). The median nerve goes through the carpal tunnel and supplies sensation to the palm of the hand and the thumb, index and middle fingers. *Id*. The ulnar nerve has a similar tunnel at the elbow and supplies sensation to the little and ring fingers and the palmar side of the

hand. *Id*. The radial nerve supplies sensation to the backside of the hand. (Tr. p, 33:1-2). These nerves also innervate the muscles of the arm, and if there is a disconnect, such that the muscle is not getting the appropriate signal from the nerve, the muscle will waste away (atrophy). (Tr. p, 33:5-12). Dr. Burris testified that Claimant had no sign of atrophy and had normal muscle bulk and tone; normal reflexes, normal nerve function, and normal strength, signifying that her nerve and muscle function are intact. (Tr. p, 33:3-17).

23. Dr. Burris reiterated his opinion that because Claimant's treating providers did not document tissue pathology, the EKG was normal, and there were no entry or exit wounds, any exposure she had to an electric current would have been relatively mild. (Tr. p, 35:1-7; 40:4-22). Consistent with this opinion, Dr. Burris testified that if Claimant had experienced a significant exposure to electrical current resulting in tissue damage her pain would be relentless. (Tr. p, 48:22-25; 49:1-4). According to Dr. Burris, Claimant's description of waxing and waning symptoms and periods of being completely pain free supported a conclusion that a "psychological process" was contributing to her symptom complex. *Id.*

24. Dr. Burris testified that he disagrees with Dr. Primack's recommendation for a diagnostic ultrasound because Claimant's physical and neurologic examinations are normal. (Tr. p, 35:8-20). The purpose of the ultrasound would be to determine whether there is excessive inflammation around the nerves at the tunnels they traverse as they come out through the extremity. *Id*. In testing the median nerve as part of the EMG, Dr. Primack completed initial motor testing of the nerve. (Tr. p, 34:5-10). The testing revealed that the median nerve was normal. *Id*. As for the radial and ulnar nerves, Claimant's sensory and motor nerve testing revealed normal results suggesting that the radial and ulnar nerves are functioning normally. *Id*. Thus, there is no indication that an ultrasound is reasonable or necessary. *Id*.

25. Dr. Burris testified that, had Claimant been exposed to electrical energy, it is possible that it would have irritated the tissue and caused some redness and swelling as the body's natural response. (Tr. p, 38: 5-15). However, because the swelling and redness dissipated and was no longer documented after the first week post exposure, Dr. Burris testified that it could be inferred that it resolved. (Tr. p, 56:1-3).

26. Assuming that the statements contained in Claimant's Exhibit 1 come from a reputable source, Dr. Burris testified that he had no reason to question the material and actually agreed with much of the content read into the record from Claimant's Exhibit 1. (Tr. pp, 51-55).

27. As presented, the evidence, including the testimony of Dr. Burris, persuades the ALJ that Claimant sought treatment as a direct result of the pain, numbness, tingling, redness and puffiness (swelling) in her left arm after being exposed to electrical current on July 21, 2021. Accordingly, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury. While the evidence presented supports a finding that Claimant's left upper extremity

injury is compensable, the ALJ is convinced that Claimant's electrical exposure was relatively minor and probably did not cause the necessary tissue damage to explain her ongoing symptoms. Indeed, the evidence presented supports a finding that Claimant has normal muscle bulk, normal reflexes, normal sensation and normal strength in the left upper extremity. This suggests strongly that both the sensory and motor components of the nerves innervating the left arm are intact. When combined with the intermittent nature of Claimant's symptoms, the lack of abnormal examination findings supports a conclusion that psychosocial factors are playing a role in her persistent symptoms.

28. Based upon the evidence presented, the ALJ finds that Claimant has failed to establish that the recommended sonogram is reasonable or necessary. In finding that Claimant has failed to establish that the recommended sonogram is reasonable or necessary, the ALJ credits the testimony of Dr. Burris to find that Claimant's sustained symptoms are, more probably than not, related to her extreme somatic focus and psychosocial factors.

29. Based upon the evidence presented, the ALJ finds that the right to choose the physician to attend to the injuries in this case passed to Claimant. Moreover, the ALJ is persuaded that Claimant exercised her choice in medical providers by electing to attend medical appointments at Concentra Medical Centers with Dr. Bradley, NP Livingston and their referrals.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). In this case, the ALJ rejects the suggestion that Claimant was not exposed to an electric current prompting her to seek treatment on July 23, 2021. While Dr. Burris questioned whether Claimant was actually exposed, no persuasive evidence was produced tending to establish that Claimant fabricated the MOI in this case. Moreover, Dr. Bradly's physical examination performed on July 23, 2021 demonstrated objective signs of injury including puffiness and redness on the left arm. Nonetheless, the testimony of Dr. Burris and Claimant's subsequent examinations, which fail to document objective findings consistent with tissue damage/pathology, support a conclusion that Claimant's electric shock was relatively minor and not the cause of her persistent symptoms. As found, the ALJ credits the testimony and opinions of Dr. Burris to conclude that Claimant's ongoing symptoms are likely being driven by an extreme somatic focus and psychosocial factors.

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements before an alleged injury will be determined to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo.

1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, there is little doubt that Claimant's alleged injuries occurred during the time and place limits of her relationship with Employer and during an activity connected to her job-related functions, namely filling fast food orders at a drive through window. Accordingly, the ALJ concludes that Claimant has proven that she was in the course and scope of her employment at the time she was exposed to an electrical current causing pain, swelling and redness in the left upper extremity. While the evidence supports a conclusion that Claimant was in the course and scope of her employment, the remaining question is whether Claimant's injuries arose out of her work duties.

F. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra; Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

G. As found here, the content of the July 23, 2021 examination of Dr. Bradly supports a conclusion that Claimant had puffiness and redness in the proximal aspect of the left arm following her complaint of being exposed to electric current after touching an energized metal table while working to fill fast food orders at the drive through window at work. While it is unclear how the table became energized, Dr. Bradly's July 23, 2021, physical examination documents objective findings (redness and swelling) consistent with an electrical exposure. Based upon the evidence presented, the ALJ concludes that this MOI probably caused Claimant's initial subjective complaints of pain, weakness, tingling and cardiac symptoms (racing heart), which in turn prompted her to seek treatment on July 23, 2021. Dr. Burris could not think of a more likely explanation for Claimant's symptoms than the electrical shock. Moreover, when asked about the cause of the swelling and redness seen on July 26, 2021, Dr. Burris could not think of anything else besides the electrical shock that could have caused those objective findings. The evidence presented supports a conclusion that Claimant has established a sufficient "nexus" or causal relationship between her employment and the electric shock giving rise to her need for treatment.[2] Accordingly, the injury is compensable.

[2] Whether Claimant established the requisite causal connection between her work and her injuries is one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question*

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970);* § 8-41-301(1)(c), *C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

I. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, the evidence demonstrates that Claimant's physical examinations after July 26, 2021 were essentially normal and without objective findings consistent with pathology/injury. Despite the lack of any objective medical finding to explain her persistent symptoms, Claimant continued to report "weird" paresthesias and shooting pains in the left arm. During her IME with Dr. Burris, she complained of pain in a "circumferential glove-type distribution" throughout her left arm from the upper arm distally into all digits. She reported an internal shaking sensation and a feeling as if her left hand was not part of her body and described jabbing/twisting pain in the left arm. Her extreme somatic focus in the absence of any objective evidence of muscle or nerve damage led Dr. Burris to raise concern that psychosocial factors were driving her ongoing symptoms. Regarding the recommendation for sonographic analysis, the ALJ credits the testimony of Dr. Burris to conclude that Claimant's nerve function is, more probably than not, normal and there is an absence of objective pathology to support further diagnostic testing. Accordingly, the Claimant has failed to establish that the ultrasound recommended by Dr. Primack is reasonable or necessary.

Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

Right of Selection

J. Under § 8-43-404(5)(a)(I)(A), the employer or insurer has the right in the first instance to designate the authorized provider to treat a claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .” In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor."

K. An employer /insurer’s duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011). In this case, the evidence presented persuades the ALJ that Claimant reported her injury to Respondent-Employer the same day it occurred. The ALJ is also convinced that, Respondent took no action to designate a provider to attend to Claimant’s injuries following that report. Accordingly, the ALJ concludes that the initial right to select a provider to treat Claimant’s injuries passed to her. Based upon the evidence presented, including Claimant’s testimony that she “chose” to attend medical appointments at Concentra Medical Centers, the ALJ concludes that Claimant exercised her right of selection by choosing to treat with Dr. Bradly and NP Livingston. Indeed, the evidence presented supports a conclusion that Claimant attend multiple appointments at Concentra through September 23, 2021 when Dr. Bradley placed Claimant at MMI. Based upon Claimant’s designation, the authorized provider(s) in this case include Dr. Bradley, NP Livingston and their referrals, including Dr. Primack.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she suffered a compensable left upper extremity injury on July 21, 2021.

2. Claimant's request for additional medical treatment in the form of diagnostic sonographic analysis is denied and dismissed as she failed to prove, by a preponderance of the evidwence, that such testing is reasonable or necessary.

3. Dr. Bradley, NP Livingston and their referrals, including Dr. Primack comprise the authorized providers in this case. Respondents are liable for Claimant's treatment with Concentra Medical Centers and Dr. Primack's offices though September 23, 2021 when Claimant was placed at MMI by Dr. Bradley.

4. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 7, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-181-279-001

ISSUES

1. Whether Claimant the right knee injury Claimant sustained on August 8, 2021 arose out of his employment with Employer, and is therefore compensable.

PROCEDURAL MATTERS

Claimant objected to Dr. Lesnak's deposition testimony on the ground that Dr. Lesnak provided opinions not disclosed in his report as required by C.R.C.P. 26(a)(2). However, the disclosure provisions of C.R.C.P. 26 are not applicable in workers' compensation cases. *See Wilkinson v. Colowyo Coal Co.*, W.C. No. 4-723-603 (ICAO Aug. 28, 2009); *Kelly v. Kaiser-Hill Co. LLC*, W.C. 4-332-063 (ICAO Aug. 11, 2000); *Bullock v. Continental Serv.*, W.C. No. 4-810-664 (ICAO Feb. 8, 2011). Accordingly, Claimant's objection is overruled.

STIPULATIONS

At hearing, the parties stipulated to the following, which were accepted by the ALJ:

1. If Claimant's injury is deemed compensable, Respondent is liable for reasonable and necessary medical treatment provided by Claimant's authorized treating physicians.

2. If Claimant's injury is found compensable, Respondent is liable for temporary partial disability benefits from August 8, 2021 to September 16, 2021.

3. If Claimant's injury is found compensable, Respondent is liable for temporary total disability benefits September 17, 2021 until November 19, 2021.

4. Claimant's average weekly wage is $812.82. (Claimant reserves the right to seek an increase in average weekly wage in the future if applicable).

FINDINGS OF FACT

1. Claimant has been employed by Employer for approximately two years. On August 8, 2021, while performing his job duties, Claimant was walking in the back area of Employer's store carrying a piece of cardboard from a display that had been dismantled to the cardboard baler. While walking, Claimant felt a "pop" in his right knee and fell, sustaining an injury to his right knee.

2. Exhibit C is a video of Claimant's injury. The video shows Claimant taking approximately 8-10 steps, most of which are obscured by the cardboard Claimant was

carrying or other objects in the screen. The video shows Claimant taking three visible steps with his right leg. The first step, Claimant moves from right to left across the screen and only the medial side of his right leg is visible. The next unobstructed view of Claimant's right leg is when he took one step away from the camera, during which his right leg appeared to flex laterally. Immediately upon taking the third visible step, Claimant grasped his right knee, and falls to the ground. The area where Claimant was injured was free of debris, dry and unobstructed. The cardboard Claimant was carrying did not appear to contribute to his injury.

3. Claimant credibly testified that when the injury occurred, he did not recall twisting his knee, stepping on anything, or slipping. Prior to August 8, 2021, Claimant had no injuries to his right knee, no symptoms and had not previously received treatment for his right knee.

4. Claimant saw Lori Long Miller, M.D., at Concentra on August 9, 2021. Claimant reported he was walking at work while carrying cardboard to a baler and felt a sudden pop in his right knee and fell to the floor, without slipping or tripping. Claimant was unable to bear weight and was using crutches. Claimant reported no prior knee injuries. On examination, Dr. Miller noted that Claimant's knee was swollen with diffuse tenderness over the anterior knee and in the popliteal fossa, limited range of motion, and crepitus on palpation. (Dr. Miller's note indicates that the examination was of the Claimant's left knee, but the ALJ infers that this was a dictation or typographical error based on the diagnosis of a right knee injury). Dr. Miller recommended an MRI and physical therapy for pain relief. (Ex. 4).

5. On August 10, 2021, Claimant had a right knee MRI performed. The MRI showed a "near complete radial tear involving the medial meniscus posterior horn root junction with associated meniscal extrusion." The MRI also showed a possible posterior cruciate ligament (PCL) sprain or reactive edema, and moderate joint effusion with a moderate amount of fluid in the joint. Finally, the MRI demonstrated tricompartmental osteoarthritis worse in the patellofemoral compartment and a full-thickness cartilage defect along the lateral trochlea. (Ex. 7).

6. On September 17, 2021, Claimant underwent a right knee surgery performed by Gregg Koldenhoven, M.D. Dr. Koldenhoven performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty tricompartmental. (Ex. 5).

7. On January 11, 2022, Claimant attended a medical examination by Lawrence Lesnak, M.D., at Respondents' request. Dr. Lesnak reviewed Claimant's medical records examined Claimant, and reviewed the video of Claimant's injury. In his report, Dr. Lesnak opined that Claimant did not sustain an industrial injury, based on his observation of the video of Claimant's injury. Specifically, Dr. Lesnak stated: "the acute pop that [Claimant] reportedly developed involving his right knee while he was walking during work hours on 08/08/2021, does not appear to have any industrial causation whatsoever." Dr. Lesnak's opinion was essentially that Claimant's injury did not "arise out of" Claimant's employment. To the extent Dr. Lesnak's opinion constitutes to a legal opinion that

Claimant did not sustain a compensable injury under the Act, it is outside the scope of his expertise and unpersuasive.

8. In deposition, Dr. Lesnak testified that Claimant's right knee MRI did not show any acute pathology, that his meniscal tear was pre-existing, and that the meniscal "extrusion" or "flap" got caught between the femur and tibia when his knee flexed while walking. He testified that based on the video, Claimant had "a very exaggerated kind of bowlegged gait with his right knee, which clearly indicates chronic pathology involving the right knee. I mean it is just not in alignment and not walking correctly." Dr. Lesnak also testified that Claimant "certainly had pathology that was causing an abnormal gait."

9. Dr. Lesnak's deposition testimony regarding Claimant's "abnormal gait" indicating chronic pathology was inconsistent with his previously-issued report. Specifically, in his report Dr. Lesnak stated that "Prior to the incident, [Claimant] was ambulating normally without any signs of gait antalgia or <u>any observable signs or symptoms involving his right knee whatsoever</u>." (Ex. B, p. 7)(Emphasis added). Moreover, the video evidence of the Claimant's injury shows no more that three visible steps, and only one step in which the Claimant's gait could reasonably be seen. The ALJ finds Dr. Lesnak's opinion that the Claimant's right leg gait "clearly indicates chronic pathology involving the right knee" to lack credibility, given that the video demonstrates only one step in which Claimant's right knee appeared to bow outward.

10. The ALJ finds Dr. Lesnak's opinion that Claimant's MRI and gait were indicative of a pre-existing meniscal tear, flap or extrusion that caught in his knee joint to be speculative and unpersuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the

fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The evidence establishes that Claimant's injury occurred "in the course" of his employment. That is, it occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The issue before the ALJ is whether Claimant's injury "arose out of" his employment.

The "arising out of" element requires a claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

As the Colorado Supreme Court explained in *City of Brighton*, "All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks,

which are neither employment related nor personal." *City of Brighton*, 318 P.3d at 502. For the reasons set forth below, the ALJ concludes that Claimant's injury was the result of a neutral risk, because it was "attributable neither to the employment itself nor with the employee [himself]." *Id*.

Claimant's injury does not constitute an "employment risk" because the neither the physical condition of the area where Claimant was injured nor the specific activity of walking while carrying cardboard caused his injury. Although the Claimant's injury was captured on video, neither the video nor the testimonial evidence established that Claimant's injury was caused by a risk directly tied to the work itself. Claimant was merely walking carrying several light pieces of cardboard. Claimant testified that he did not slip, twist, or otherwise have an explanation for the injury.

Claimant's injury also does not fall into the category of "personal risks," which include purely idiopathic or personal injuries unrelated to employment. No credible evidence was presented that Claimant's meniscal tear was pre-existing, or that a pre-existing knee condition contributed to, or caused his injury. Claimant credibly testified that he had no prior right knee injuries, symptoms, or treatment. Dr. Lesnak's testimony that Claimant's gait "clearly indicates chronic pathology involving the right knee" is not credible, and his opinion that Claimant's meniscal tear was pre-existing and got caught in his knee is speculative and unpersuasive. The ALJ concludes that the cause of Claimant's injury is unexplained. Consequently, it falls within the "neutral risk" category of injury, and should be analyzed as such under *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

"Importantly, however, injuries stemming from neutral risks, whether such risks be an employer's dry and unobstructed stairs or stray bullets, 'arise out of' employment because they would not have occurred but for employment. That is, the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) Neutral risks are analyzed under the "but-for" test. The "but for" test provides that an injury from a neutral risk 'arises out of' employment 'if it would not have occurred but for the fact that the conditions and obligations of employment placed the claimant n the position where he was injured." Id.

Here, Claimant was engaging in an employment function, carrying cardboard to a baler while walking in the rear of Employer's store where the injury occurred. But for his employment, Claimant would not have been walking when and where he was walking when the injury occurred. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee on August 8, 2021.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right knee arising out of the course of his employment with Employer on August 8, 2021.

2. Respondent is liable for reasonable and necessary medical treatment provided by Claimant's authorized treating physicians.

3. Respondent is liable for temporary partial disability benefits from August 8, 2021 to September 16, 2021.

4. Respondent is liable for temporary total disability benefits September 17, 2021 until November 19, 2021.

5. Claimant's average weekly wage is $812.82.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 7, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant works as social learning program director and mental health clinician at the Colorado Mental Health Institute in Pueblo. She suffered admitted injuries on December 29, 2020 when a patient punched her in the face. Her physical injuries included a zygomatic arch fracture and a neck injury. She also developed post-traumatic stress disorder (PTSD).

2. This was the second time Claimant had been assaulted at work. On October 13, 2018, an inmate punched her in the mouth and knocked out most of her teeth, which required extensive dental reconstruction. She also received chiropractic treatment and acupuncture. After completing treatment, she had some residual mouth soreness but no ongoing pain. She was put at MMI on November 20, 2019 with no permanent impairment and no restrictions. The ATP opined she might require future dental care depending on her ongoing symptomology. Respondent filed a Final Admission of Liability (FAL) on August 25, 2020 admitting for medical benefits after MMI.

3. Claimant worked without limitation until the December 2020 assault. There is no persuasive evidence she received any additional treatment related to the 2018 injury in the interim.

4. Claimant was seen at the Parkview Medical Center emergency department on December 29, 2020. She described sharp, throbbing pain over the right side of her face. She was having difficulty opening her mouth fully because of pain. A CT scan showed a right zygomatic arch fracture. She was given pain medication and advised to eat soft food pending follow-up with an ENT specialist.

5. Employer referred Claimant to Dr. Terrance Lakin for authorized treatment. At her initial appointment, on December 30, 2020, Claimant reported severe facial pain and headaches. Physical examination showed signs and symptoms consistent with TMJ. Dr. Lakin referred her back to Dr. Thomas, who performed the dental implants for to the 2018 injury.

6. On January 11, 2021, Dr. Esperanza Salazar performed an open reduction surgery for the zygomatic arch fracture.

7. On January 28, 2021, Nurse Emily Rogers in Dr. Lakin's office noted Claimant was still having "pretty bad headaches." She also documented cervical tension and trigger points in the occipital region and trapezius, worse on the right. Ms. Rogers referred Claimant for massage therapy.

8. Claimant started having panic attacks in February 2021. She was referred to Dr. Herman Staudenmayer, a psychologist.

9. Dr. Thomas found no damage to Claimant's implants but thought she was probably having TMJ issues. He recommended Botox injections and evaluation by a dentist who specializes in treating TMJ.

10. Claimant saw Dr. Elmer Villalon for the TMJ on March 6, 2021. Claimant explained she had some residual jaw "popping" from the 2018 assault, but her jaw issues were much more significant after the 2020 incident. Dr. Villalon recommended a splint and therapy.

11. Claimant was evaluated by Dr. Michael Sparr on April 12, 2021. Dr. Sparr diagnosed a cervical strain, persistent cervical facet dysfunction, severe occipital neuralgia, and associated headaches. He opined the diagnoses were "directly related" to the December 2020 work injury. He recommended occipital nerve blocks and trigger point injections.

12. Claimant's last documented appointment with Dr. Villalon was on May 3, 2021. Claimant did not think the splint was helping much. She was using the splint a couple of hours during the day but was struggling to use it at night. Although her symptoms were similar, there was some improvement with her jaw motion. She was also complaining of some neck soreness. Dr. Villalon recommended a physical therapy evaluation.

13. Claimant received approximately two months of chiropractic treatment from Dr. Donald Dressen. The treatment provided limited benefit.

14. On May 6, 2021, Kelsey Walls PA-C in Dr. Sparr's office documented persistent cervical facet dysfunction, myofascitis with trigger points, and occipital neuralgia. She referred Claimant to a different chiropractor at Pueblo Chiropractic to provide treatment in conjunction with additional injections.

15. Claimant followed up with Ms. Walls on May 19, 2021. Ms. Walls noted,

> Unfortunately, she has not been able to transition her care to Pueblo Chiropractic so that we may resume her trigger point injections knowing that deep tissue work will be performed following. Her first round of trigger point injections were followed by chiropractic manipulation only with no massage provided afterwards. This led to only short-term benefit from the injections. In light of this, we will defer trigger point injections today. Once she has established at Pueblo Chiropractic we will have her return to the clinic to finish her last remaining 3 rounds of trigger point injections.

16. No additional records from Dr. Sparr's office and no records from Pueblo Chiropractic were submitted at hearing.

17. On June 3, 2021, Dr. Salazar released Claimant from treatment for the zygomatic arch fracture. He recommended she continue TMJ treatment with Dr. Villalon.

18. Claimant received a course of psychological treatment with Dr. Gutterman, Dr. Staudenmayer, and William Beaver. Her last appointment with Dr. Staudenmayer was on June 9, 2021. He noted her mood and affect had been more stable recently but she was still showing residual effects of the trauma. She had recently resumed work involving patient contact, which triggered anxiety. Claimant also expressed "frustration and disappointment over continued physical problems." Dr. Staudenmayer indicated he would follow up with Claimant in July "to assess her coping mechanisms" after she had worked full-time for a longer period.

19. Claimant saw Dr. Lakin on June 4, 2021. Claimant stated Dr. Villalon had "canceled last minute," but she would try to reschedule. She thought she had received some benefit from treatment with Dr. Villalon even though "she does not have great interactions" with him. Dr. Lakin opined Claimant was approaching MMI and would probably have permanent impairment. He further opined,

> I anticipate appropriate medical maintenance would be with Dr. Villalon for TMJ follow-up for 6-12 months. If she is not pleased with Dr. Villalon perhaps consider Dr. Scott or Dr. Philson. Also Dr. Dressen chiropractor 8 visits in 6 months and Dr. Gutterman in follow-up for 6-12 months if Dr. Gutterman desires. Also trigger [sic] Salazar ENT follow-up only as needed for 2 years.

20. Claimant participated in a functional capacity evaluation (FCE) on August 12, 2021. She reported continued neck pain, jaw pain, difficulty chewing, headaches, and balance issues. Claimant demonstrated the ability to perform sedentary to sedentary-light lifting activities and no bending because of neck pain and dizziness. She was able to perform upper extremity activities on a frequent basis, except for overhead reaching.

21. Dr. Centi placed Claimant at MMI on September 8, 2021 with a 14% whole person rating for her cervical spine. Dr. Centi opined Claimant required no ongoing treatment.

22. Respondent filed an FAL on October 29, 2021 admitting for the 14% rating. The FAL denied medical benefits after MMI based on Dr. Centi's report.

23. On December 21, 2021, Dr. Dressen responded to an inquiry from Claimant's counsel regarding maintenance medical needs. Dr. Dressen opined,

> Sporadic chiropractic/P.T. care for this patient would prevent recurrences. This would be supportive care in [sic] the patient's injuries per [sic] related to her W/C injury. Dental care also needs some consideration.

24. Claimant testified credibly at hearing regarding her ongoing injury-related symptoms and limitations. She credibly testified she would like the opportunity to follow-

up with authorized medical providers to see what, if any, treatment may be available to relieve the effects of her injury.

25. Claimant proved a probable need for future treatment to relieve the effects of her injury or prevent deterioration of her condition.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of her injury. Claimant had serious injuries and remains symptomatic more than a year after the accident. Dr. Lakin and Dr. Dressen's opinions regarding treatment after MMI are credible and more persuasive than the contrary opinion of Dr. Centi. Claimant is entitled to a general award of reasonably necessary medical treatment after MMI.

ORDER

It is therefore ordered that:

1. Respondent shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury and prevent deterioration of her condition.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition

to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 8, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-162-929-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that his occupational disease arose out of, and in the course of, his employment.

STIPULATIONS

If found compensable, the parties agreed that Claimant is entitled to temporary total disability (TTD) benefits beginning January 3, 2021 until terminated by law. Respondents reserved the right to later raise the defense that Claimant was responsible for his termination of employment effective the date of his resignation, October 13, 2021. The parties stipulated to a base average weekly wage (AWW) of $1,057.04, with an increase to $1,629.68 as of August 1, 2021 due to COBRA.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant was employed by Employer as a jail deputy from July 30, 2020 to October 13, 2021. Claimant's duties included performing head counts to ensure all the inmates were present, doing status walks, delivering food, and keeping peace within the jail. Claimant had nearly constant contact with others while working. His usual work day began at approximately 5:45 a.m. and ended at 6:00 p.m. (Tr. 14:12-22, 16:15-24).

2. In December 2020, Claimant was in training and worked with a Field Training Officer (FTO) each day. Claimant and the FTO would work side-by-side throughout the shift. (Tr. 36:20-37:12).

3. Claimant credibly testified that on December 30, 2020, after completing his shift, he developed a dull headache over his eyes. Claimant testified that at the time, he did not attribute it to anything other than a headache. Claimant's next shift was scheduled for January 4, 2021. (Tr. 32:20-33:3).

4. On or about Thursday, December 31, 2020, Claimant's wife started to exhibit COVID-19 (COVID) symptoms. There was no evidence presented at hearing regarding the specific symptoms Claimant's wife began to exhibit on December 31, 2020. According to Claimant, his wife progressively got worse over the next few days. She lost the ability to taste and smell, had a headache, body aches, a cough and a runny nose. She scheduled a COVID test for the morning of January 3, 2021. (Ex. I).

5. At 10:49 a.m. on January 3, 2021, Claimant emailed Employer to notify human resources and his supervisors of his wife's condition, and that she was awaiting her COVID test results. He also said "[t]he only symptom that I have had thus far is a headache." He asked if he should report to work the following day, or stay home. Claimant did not mention that he first developed a headache on December 30, 2020. (Ex. I).

6. Claimant credibly testified that he sent another e-mail, later in the day on January 3, 2021, to tell his Employer that he was now "experiencing symptoms" and was going to get a COVID test the next day, January 4, 2021. (Tr. 22:11-23:7). Neither party produced a copy of this e-mail, but Sergeant JH[redacted] credibly testified that Claimant contacted him later in the day on January 3, 2021, to inform him that he was experiencing flu-like symptoms similar to his wife. (Tr. 60:7-14).

7. Claimant took a COVID test on January 5, 2021. Claimant's COVID test came back positive. (Tr. 23:23-24:3). His wife's test, however, came back negative. Claimant's wife did not take a second COVID test. (Tr. 23:19-22).

8. Claimant contacted Sergeant JH[redacted] to inform him of his positive COVID test. Claimant told Sergeant JH[redacted] he believed he contracted the virus while at work. Sergeant JH[redacted] acknowledged that this was possible. (Tr. 62:1-12).

9. Sergeant JH[redacted] told Claimant to contact human resources and complete the necessary workers' compensation paperwork. Claimant followed the 14-day protocol that was in place and stayed home. Claimant and Sergeant JH[redacted] communicated approximately once a week. Claimant credibly testified that he informed Sergeant JH[redacted] that he had not received a response from human resources regarding the workers' compensation paperwork, so Sergeant JH[redacted] sent it to him. (Tr. 24:4-25:3).

10. The Notification of Injury was completed on or about February 8, 2021. (Ex. B).

Potential Workplace Exposure

11. Claimant testified that the COVID protocol at the jail in December 2020 was for employees to wear the standard-issued uniform, gloves and a mask while searching cells. Claimant testified that he and his fellow employees wore masks they brought from home. These masks varied from cloth masks to gaiters. Claimant further testified that he wore his N95 mask when dealing with uncooperative inmates during booking. (Tr. 14:23-15:21).

12. Deputy MG[Redacted] is a jail deputy, and a FTO. Deputy MG[redacted] testified that he wore his N95 mask, along with gloves and glasses when going into the isolation/quarantine unit at the jail. (Tr. 49:15-16).

13. The inmates were required to wear cloth masks that they had made. (Tr. 16:25). Both Claimant and Deputy MG[redacted] credibly testified that the jail personnel routinely had to admonish the inmates to correctly wear their masks because they would pull them down. (Tr. 16:6-11 and 50:18-25).

14. According to Respondents' employment records, he worked December 15, 16, 17, 20, 21, 22, 27, 28, 29 and 30, 2020. (Ex. D). Claimant believes he most likely contracted COVID on or around December 28, 2020, when he worked in the isolation/quarantine unit. (Tr. 27:15-18)

15. On December 28, 2020, Deputy MG[redacted] worked with Claimant in the 1-North housing area for the entire shift. The 1-North housing area was split into two pods, NA and NB. The NA pod had 16 rooms that held 32 inmates. The NB pod had 32 rooms, and held 64 inmates. (Tr. 40:10-17). When not in contact with the inmates, the two deputies worked together in a mini control room that was separated from the jail population by a 3-4-foot wall with glass up to the ceiling. The deputies were completely enclosed except when the door was opened. (Tr. 40:10-41:23). The deputies did not wear masks while in the mini control room or while on breaks. (Tr. 73:3-9).

16. The NB pod of 1-North housed a transitional population. The transitional population held new inmates for 14 days to see if they became symptomatic. If the inmates were not symptomatic, they would be moved into the general population pod. (Tr. 41:24-42:17).

17. The NA pod of 1-North housed an isolation/quarantine population. (Tr. 47-48). This was one of several isolation/quarantine pods within the jail. (Tr. 34:20-35:1). Isolated inmates were those that the medical staff identified as either exhibiting symptoms of, or who had tested positive for, COVID. The quarantine population were those inmates that were in close contact with someone who either exhibited symptoms of, or tested positive for, COVID. Isolated and quarantined inmates were housed in individual cells. (Tr. 62:13-63:22). Deputy MG[redacted] did not recall if any of the inmates were symptomatic or had tested positive for COVID on December 28, 2020. (Tr. 43:18-23).

18. Deputy MG[redacted] credibly testified that he and Claimant would be in the inmate areas throughout the facility including the cells and day rooms. They had regular contact with the inmates during status checks and food delivery. They also had contact with the inmates when they took them into and out of the day rooms. (Tr. 43:24-46:12).

19. Deputy MG[redacted] and Sergeant JH[redacted] both testified that when conducting cell searches in the isolation/quarantine unit, the deputies wore safety glasses, gloves, a "medical gown" and N95 masks. (Tr. 49:15-20 and 63:25-64:14). When serving meals the deputies would go door-to-door, opening each door, handing the inmate their food, and then closing the door and moving on. The inmates in the isolation/quarantine unit would be let out individually in 30-minute increments for 90 minutes per day. (Tr. 48:4049:14).

20. Deputy MG[redacted] testified that he did not remember whether he wore an N95 mask on December 28, 2020. (Tr. 57:7-10).

21. Sergeant JH[redacted] tested positive for COVID on January 11, 2022. (Tr. 64:21-25). He believes he contracted the virus during a meeting in a small office with an FTO, who knowingly did not feel well and had COVID symptoms. They were in close proximity for about 45 minutes and did not wear masks. (Tr. 70:3-21).

22. Sergeant JH[redacted] testified he was in contact with the pods where Claimant worked. He would check in on the FTO office by the quarantine unit and give occasional breaks to the jail deputies. (Tr. 65:1-8).

23. The CDC reported multiple COVID outbreaks in the [Employer facility Redacted] between December 8, 2020 and January 6, 2021. Of the individuals that contracted COVID, 17 were inmates and 18 were staff members. (Ex. 1).

Potential Household and Community Exposure

24. Claimant lives with his wife and three children. He credibly testified that his wife and children had been home since December 18, 2020, because his children were out of school for winter break. (Tr. 20:2-22).

25. Prior to December 18, 2020, Claimant's wife periodically worked outside of the house. On the days Claimant's wife was at work, the only person she was in contact with was the owner of the insurance agency where she was employed. Claimant's wife worked remotely from home as of December 18, 2020. (Tr. 20:23-21:5).

26. Claimant credibly testified that neither he nor his family participated in any activities outside the home, other than work and school. (Tr. 20:6-14).

27. Claimant's children were required to wear masks while in school and none of the children exhibited COVID symptoms, nor did they ever test positive for COVID. (Tr. 21:6-8).

28. Claimant credibly testified that the only person outside of his wife and children that came into his home was his mother-in-law. She was in his home December 24 and December 25, 2020. Claimant's mother-in-law had been in isolation prior to spending Christmas with Claimant's family. (Tr. 21:7-22 and 33:24-34:4).

29. Claimant credibly testified that the only thing he did outside of work was to pick up groceries. Claimant ordered groceries on-line. The grocery store worker would put the groceries in the trunk of his car. Claimant's contact with the grocery worker was momentary while the worker handed Claimant his receipt. (Tr. 21:9-15 and 33:15-23).

Expert Opinions

30. Marcus Oginsky, M.D., is board-certified in internal medicine and utilization management. He also practices outpatient medicine with three detention centers in the Denver Metro Area. (Ex. 2)

31. At the request of Claimant, Dr. Oginsky issued a report dated October 17, 2021. In his report, Dr. Oginsky discussed the characteristics of COVID, and the differences between community transmission, household transmission and workplace transmission. (Ex. 1).

32. Dr. Oginsky testified, via deposition, on February 9, 2022. He testified that "[i]t is usually impossible to designate that Person A gave [COVID] to Person B." (Dep. Tr. 9:15-17) Because of this it is necessary to establish the probability that the infection occurred in a certain environment. (Dep. Tr. 9:8-17). He indicated the amount of time you spend with a person in a closed environment increases the probability of contracting COVID from that exposure (Dep. Tr. 12:6-9).

33. With respect to community transmissions, Dr. Oginsky opined that while it is possible to contract COVID by chance encounters while in the community, such as the grocery store, the probability of doing so is exceedingly low. (Ex. 1 and Dep. Tr.12:22-13:21).

34. In December 2020, Claimant's time in the community was limited to picking up groceries. Dr. Oginsky opined that the probability of Claimant contracting COVID from a community transmission was low. (Dep. Tr. 13:22-14:6).

35. In contrast to a community transmission, the probability of a household transmission is high. If members of a household have COVID, the probability of others in the household contracting the infection is high. This is due to the close proximity of people, generally without masks, for longer periods of time. (Ex. 1 and Dep. Tr. 14:14-25).

36. Dr. Oginsky testified, however, that it is highly improbable that Claimant's home was a source of his infection because his wife tested negative for COVID[1], and none of Claimant's children contracted COVID. (Dep. Tr. 15:11-23).

37. Dr. Oginsky cited statistical data from the CDC reporting the attack rate in correctional environments to be about 72% for inmates, and 20-30% for jail personnel. (Dep. Tr. 19:10-24). Dr. Oginsky credibly testified that the CDC has reported extensively that the correctional environment is a high-risk environment for COVID transmission. (Dep. Tr. 62: 1-5).

[1] The date Claimant's wife began exhibiting COVID-like symptoms is irrelevant because her COVID test was negative.

38. Dr. Oginsky analyzed the probability of Claimant contracting COVID in the community, home and workplace. He noted the low probability of community and home transmission. In comparison to these environments, he opined that the highest probability of transmission of COVID to Claimant was in the workplace. (Ex. 1 and Dep. Tr. 29:5-8 and 56:6-17).

39. Robert Watson, M.D., is board certified in occupational medicine, and he holds a master's degree in public health. At the request of Respondents, Dr. Watson performed an IME to address issues related to Claimant's COVID diagnosis and causation. Dr. Watson issued his IME report on June 9, 2021. (Ex. A).

40. Dr. Watson testified, via deposition, on February 9, 2022. He credibly testified that it is effectively impossible to determine who might have transmitted the virus to Claimant. (Transcript pg. 9:9-21). Dr. Watson credibly testified that he agrees with Dr. Oginsky that it is impossible to identify where a transmission occurred. (Dep. Tr. 19:7-8).

41. Dr. Watson agreed with Dr. Oginsky that the concentration of the COVID virus was higher in the jail than in the community. (Dep. Tr. 17:20-24). He also agreed that household transmission could be as high as 60 to 80 percent. (Dep. Tr. 19:9-12).

42. Dr. Watson credibly testified that despite Claimant's wife's negative test results, it should not be assumed that she did not have COVID because she exhibited symptoms that were very much consistent with COVID. (Dep. Tr. 20:1-18). He further opined that in people at a high risk for having COVID, false negatives may be as high as 50%. (Dep. Tr. 21:20-22:4). Dr. Watson testified that it is more likely that Claimant's wife transmitted COVID to Claimant, rather than any other source (Dep. Tr. 25:17-20).

43. Both Dr. Oginsky and Dr. Watson credibly testified that it is impossible to identify who transmitted COVID to Claimant. They disagree, however, as to the environment where Claimant likely contracted COVID. While both Dr. Oginsky and Dr. Watson provided credible testimony, Dr. Oginsky was more persuasive.

44. Claimant's only community interaction in December 2020 involved a brief encounter with a grocery store worker. Based on the low attack rate in the community, and Claimant's limited activity in the community, the ALJ finds that it is not probable that Claimant contracted COVID through a community transmission.

45. In contrast, the attack rate in the home environment is high, 60-80%. There is no evidence, however, that anyone in Claimant's household, other than Claimant, contracted COVID in late December 2020. While Dr. Watson credibly testified that Claimant's wife exhibited symptoms of COVID, this testimony is not persuasive because Claimant's wife's tested negative for COVID. There is no objective evidence that Claimant's wife had COVID in late December 2020. Based on these facts, the ALJ finds that it is not probable that Claimant contracted COVID through a household transmission.

46. A correctional environment is a high-risk environment for COVID transmission, and this in fact occurred at the jail in December 2020 when there was an active COVID outbreak. Additionally, often the inmates did not properly wear the cloth masks they made, and the deputies did not wear masks while on break or while working in small quarters in the mini control room. Claimant worked consistently in the jail the last few weeks of December, and on December 28, 2020, he worked in the isolation/quarantine unit of the jail. Based on these facts, the ALJ finds that it is more probable than not that Claimant contracted COVID in late December 2020, while in the course of his employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish compensability, an employee must prove by a preponderance of the evidence that his injury or occupational disease arose out of the course and scope of employment with his employer. §8-41-301(1), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). The Act defines "occupational disease" as

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14), C.R.S. The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *Boulder*, 706 at 786*; Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. The Supreme Court stated "[a]n activity arises out of and in the course of employment when it is sufficiently interrelated to the conditions and circumstances under which the employee generally performs his job functions that the activity may reasonably be characterized as an incident of employment, although the activity itself is not a strict employment requirement and does not confer an express benefit on the employer." *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210 (Colo. 1996).

Claimant developed a headache, a known COVID symptom, on December 30, 2020 after his shift ended. (Findings of Fact ¶ 3). Claimant's symptoms worsened on January 3, 2020, and he tested positive for COVID on January 5, 2020. Although Claimant's wife exhibited symptoms of COVID beginning December 31, 2020, she tested negative for COVID, and no one in Claimant's household contracted COVID during this time. (Id. at ¶¶ 6-7). It is not probable that Claimant contracted COVID through a household transmission. (Id. at ¶ 45).

The only place Claimant went outside of the home and the workplace was to the grocery store. He would order groceries on-line and pick them up. His only interaction with the grocery store worker was when the worker handed him the receipt. (Id. at ¶ 29). It is not probable that Claimant contracted COVID through a community transmission. (Id. at ¶ 44).

Between December 8, 2020 and January 6, 2021, there were multiple reported outbreaks of COVID at the jail. Of the individuals infected, 17 were inmates and 18 were staff members. (Id. at ¶ 23). A correctional facility, such as the jail, is a high-risk environment for COVID transmission. (Id. at ¶ 37). The deputies at the jail did not wear their masks when working closely together in the mini-control room and when on breaks. (Id. at ¶ 15). The inmates routinely pulled down their masks and did not properly wear them. (Id. at ¶ 13). Claimant worked 12-hour shifts for ten days between December 15 and 30, 2020. On December 28, 2020, Claimant worked in the isolation/quarantine unit. (Id. at ¶ 14). It is more probable than not that Claimant contracted COVID in late December 2020 while in the course of his employment. (Id. at ¶ 46). Claimant has proved by a preponderance of the evidence that he suffered a compensable injury in the course of his employment.

ORDER

It is therefore ordered that:

1. The claim is found compensable. It is more probable than not that Claimant contracted COVID in the course of his employment, while performing his duties as a jail deputy.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 8, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable right shoulder injury in the course and scope of his employment on April 16, 2021.

IF CLAIMANT ESTABLISHED A COMPENSABLE SHOULDER INJURY

II. Whether Claimant proved by a preponderance of the evidence that the right reverse total shoulder arthroplasty performed by authorized treating physician ("ATP") Rudy Kovachevich, M.D., on December 14, 2021 was automatically authorized; in the alternative, is the proposed arthroplasty reasonable, necessary, and related to the April 16, 2021 work injury.

III. Whether Claimant established by a preponderance of the evidence an average weekly wage ("AWW') of $581.90, based upon his gross earnings in 2020 divided by 52 weeks, which wage comports to a temporary total disability ("TTD") rate of $387.93.

IV. Whether Claimant established by a preponderance of the evidence an entitlement to TTD benefits from December 14, 2021 ongoing until terminated pursuant to statute.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 5, 2021 on the issues of compensability, medical benefits that are reasonable, necessary and related to the injury, causation of the injury, average weekly wage, and entitlement to TTD benefits. Claimant also listed a penalty of automatic authorization for the surgery under W.C.R.P. Rule 16-7 alleging Respondents' denial of the requested surgery occurred more than 10 business days after the request was submitted to Insurer.

Respondents filed a Response to the November 5, 2021 Application for Hearing on November 17, 2021 citing issues of relatedness, preexisting condition, reasonable and necessary medical benefits, and average weekly wage.

Both Claimant and Mark Steinmetz, M.D., who was accepted as an expert in occupational medicine and as a Level II accredited provider, testified in this matter.

STIPULATION

The parties stipulated that the medical providers at Colorado Occupational Medical Partners including Dr. Matthew Lugliani, PA-C Tom Chau and Dr. David Rojas and those at the Orthopedic Centers of Colorado including Sean Griggs, M.D., and Rudy Kovachevich M.D., were authorized treating providers.

The stipulation is approved and ordered by this ALJ.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 67-year-old parts deliver worker for Employer since 2012. He would pick up parts from Employer and deliver them to retail customers. The parts would include tires or other parts. Claimant stated that he had some minor symptoms with regard to his right shoulder prior to his date of injury.

2. Claimant was seen by his primary treating provider, Dr. John Draper of Ponderosa Family Physicians for near yearly checkups or routine general medical examinations. On April 7, 2014 Dr. Draper noted that Claimant was seen for follow up of hypothyroidism diagnosed a year before. At that time, Claimant complained of right shoulder pain for the prior two months but did not report any specific injury. Dr. Draper found no crepitance, no atrophy, no muscle asymmetry, no capsular winging, no swelling, full active range of motion, no tenderness of the acromioclavicular joint, full strength of all rotator cuff groups, found all stability tests negative and had no impingement signs. Dr. Draper found some arm weakness and referred Claimant for six visits of physical therapy.

3. Claimant's next visit to Dr. Draper was on May 18, 2015 who documented that the PT did not help his shoulder but that his right shoulder problems "now is all resolved." Over three years later, on September 27, 2018 Claimant stated that he had no issues with the shoulder upon Dr. Draper's query and declined further evaluation with regard to the shoulder. Dr. Draper stated that he found no issues on incidental shoulder exam. On October 2, 2019 Claimant again returned to his physician for a regular physical and follow up. Dr. Draper noted Claimant had persistent pain in his right shoulder but no change in symptoms and there was no examination or diagnosis. Further, Claimant denied any muscle aches, painful joints or weakness. The last physical prior to the injury was October 19, 2020. While Dr. Draper did not document any complaints of upper extremity symptoms, he ordered an x-ray. In fact, his general exam of the extremities indicates that there was no clubbing, cyanosis or edema and that Claimant denied any muscle aches, painful joints or weakness. The x-ray ordered by Dr. Draper was read by Dr. Eduardo Seda on October 23, 2020 and stated Claimant had normal soft tissue, glenohumeral joint space, and acromioclavicular joint. His impression was mild glenohumeral osteoarthritis.

4. On Friday, April 16, 2021 Claimant was loading a tire from the dock onto his truck, trying to control the lift from the right to the left at approximately chest level into the bed of the truck, when he heard a pop in his shoulder and subsequently had a sharp pain in his shoulder joint going down his deltoid and bicep. Claimant obtained a picture of his right bicep following the incident and the image showed a very large bruised area along the deltoid and biceps muscle of the right arm. Further, following the incident, the pain in the shoulder became constant, with right shoulder swelling through the weekend.

5. Claimant reported the incident to his immediate supervisor, the dispatcher, Jamie. Claimant did not request medical attention at that time. During the weekend, the

pain increased and was preventing him from lifting his arm further than chest or shoulder height.

6. Claimant had a regularly scheduled physical on the following Monday, April 19, 2021 at Ponderosa Family Physicians and advised his physician, Dr. John B. Draper, that he started having right shoulder pain three days earlier. He noted that there was swelling above the area of bruising, but there was also a defect in the biceps. Upon examination of the right upper arm he found a palpable defect in the biceps and tender to palpation at the site, though strength remained good. He specifically stated that Claimant had had consistent problems for some time, and that they had obtained an x-ray that showed no issues, but because there was swelling and bruising present, he ordered an MRI of the upper arm to rule out an abnormal mass. He noted that Claimant had had recurrent bruising. [On August 6, 2021, Dr. Draper added an addendum stating he received a call from Claimant's spouse to correct the medical record from "three episodes last year" to "incident occurred three days prior."]

7. Claimant reported his injury to another supervisor, the store manager, at Employer immediately following his appointment with Dr. Draper and advised that he was scheduled for an MRI through his private insurance on April 29, 2021.

8. Respondents filed issued an Employer's First Report of Injury (FROI) stating that Claimant had reported the work-related injury on April 16, 2021. The report indicates that Claimant "was delivering tires, lifted tire off the truck, he got bruised on his R arm." The report seems to have been completed by Insurer on May 11, 2021.

9. On April 29, 2021 Claimant underwent an MRI for the "Upper Extremity and Non Joint W/WO" at Health Images. Dr. Steven Ross found full thickness supraspinatus and infraspinatus tendon tears and moderate grade partial thickness tear subscapularis tendon with medial tendon retraction estimated at 4.5 cm, some glenohumeral joint effusion and moderate grade partial thickness tear of the subscapularis tendon. He noted that the biceps tendon and biceps muscles were intact. Dr. Ross recommend a dedicated MRI of the right shoulder for further evaluation.

10. The store manager did not do anything until after Claimant received the MRI information about the torn rotator cuff. Claimant credibly testified that after receiving an explanation of the resulting MRI he returned to Employer and indicated that treatment would need to be pursued through the workers' compensation system. Claimant was sent to Colorado Occupational Medical Partners, the authorized treating providers.

11. Claimant's first visit with the designated provider in the workers' compensation system occurred on May 13, 2021 where authorized treating provider, physician's assistant (P) Thanh Chau, took a history that Claimant was a right-hand dominant 66 year old male Driver for Employer for many years, presenting for a new patient visit for right shoulder and upper arm pain that occurred about 4 weeks prior. Claimant stated that he was lifting a heavy tire and described pushing with his right arm across his body when he felt a pop and sudden pain in his upper arm. Claimant advised that this occurred at the end of his shift on Friday. He was able to rest over the weekend and presented to his PCP on Monday, April 19. An MRI was ordered, and this was completed on April 29. Claimant clarified that he had not seen any other medical providers

since. He was hoping that his symptoms would improve. Claimant reported decreased strength in his right shoulder as well as decreased motion. He did not have any pain down into his elbow or wrist. No distal numbness or tingling. Claimant denied any previous injuries to his right shoulder. On exam of the left shoulder, Mr. Chau found Claimant was tender to touch at the anterior shoulder, deltoid and bicep head. He found decreased range of motion, and strength, and Claimant was unable to resist abduction and had pain throughout motion. PA Chau indicated that he was able to pull the MRI scan that was done on April 29, 2021 and that it reflected a full thickness tear of the supraspinatus and infraspinatus. Mr. Chau stated that the objective findings were consistent with history and work-related mechanism of injury, recommended referral to the orthopedic specialist, Dr. Griggs, and Claimant was placed on temporary work restrictions.

12. Mr. Chau consulted with Dr. Griggs on May 25, 2021 and Claimant was referred for an MRI of the right shoulder without arthrogram.

13. On May 25, 2021 Claimant was evaluated at Orthopedic Centers of Colorado by ATP Sean Griggs, M.D., from a referral by PA Chau. He took a history of present illness. He noted that Claimant was a right hand dominant 67-year-old male who presented for an evaluation of the upper extremity. Claimant complained of sudden onset of the right upper extremity injury, which occurred on April 16, 2021 at work. Claimant reported that he had was lifting a tire at work, felt a pop in his arm and had now developed weakness and difficulty with overhead reaching. Claimant described symptoms as moderate to severe and worsening. The pain was described as shooting and a burning sensation. The symptoms occurred constantly and Claimant denied any prior treatments for the shoulder or significant pain or dysfunction prior to the injury.

14. Dr. Griggs performed a musculoskeletal examination that showed limited forward elevation of the right shoulder, positive external rotation lag sign of the right shoulder compared to left, a positive abdominal compression testing on the right shoulder compared to left, and a positive Popeye sign on the right. Dr. Griggs diagnosed right shoulder injury with massive rotator cuff tear which may be acute on chronic versus completely acute. He noted that Claimant had a long head biceps rupture but also had a massive tear. He stated that he would like to obtain a shoulder MRI so that the muscle bellies could be evaluated to determine if there was any evidence of chronicity to the tear such as significant atrophy. This would help to determine his ability to repair the rotator cuff.

15. On May 27, 2021 Claimant returned to PA Chau who noted that Claimant had no significant improvement. He did see the orthopedist, Dr. Griggs on Tuesday, May 25. He agreed with Dr. Griggs regarding a referral for a dedicated right shoulder MRI scan. This was placed that same day on May 25 and were still awaiting approval.

16. Mr. Chau placed Claimant on restrictions of no lifting, reaching overhead or reaching away from the body and no use of the right arm. These restrictions were continued in subsequent status reports by Mr. Chau, Dr. Matthew Lugliani, and Dr. David Rojas through the last report available dated November 23, 2021, which included no commercial driving.

17. On June 1, 2021, Claimant had the second MRI which reflected a massive rotator cuff tear with complete disruption of the supraspinatus and infraspinatus as

well as a biceps pulley injury with dislocation of the bicep tendon out of the bicipital groove and associated partial subscapularis tearing. Dr. Brian Cox also noted degenerative disease of the acromioclavicular and glenohumeral joints.

18. On June 3, 2021 Claimant returned to Dr. Griggs, who found significant weakness with resisted external rotation on the right compared to the left, positive abdominal compression and moderate acromioclavicular joint arthritis. Dr. Griggs provided a diagnosis of acute on chronic massive rotator cuff tear of the right shoulder. He advised Claimant that there was some evidence that he had a chronic tear prior to this new injury. The new injury was to the subscapularis and the biceps now is dislocating. Claimant was given several options including total reverse arthroplasty but Claimant elected to proceed with the arthroscopic rotator cuff repair.

19. It was Dr. Griggs' opinion that the Claimant had suffered "a traumatic complete tear of the right rotator cuff" which required surgery and on June 3, 2021 Dr. Griggs submitted a request for right arthroscopic rotator cuff superior capsule reconstruction, possible bicep tenodesis ("repair right rotator cuff'), and subacromial space decompression and acromioplasty.

20. On June 10, 2021 Claimant returned to Mr. Chau who noted that reevaluation for his right shoulder showed a massive rotator cuff tear. On exam he found complaints of right arm and shoulder pain with aching, burning, stabbing and sharp pain. He found weakness and loss of range of motion. He advised Claimant to continue his current restrictions of no use of the right arm and no reaching away from the body or overhead with the right upper extremity. He documented that Dr. Griggs had recommended surgery, felt that this was an acute on chronic rotator cuff tear and that Claimant was awaiting authorization for surgery.

21. After Dr. Griggs' request for surgery was received by Respondents on June 9, 2021, Respondents had Claimant's claim peer reviewed by Mandy Flores, D.O., who noted that a formal objective physical examination report was not provided and neither was the official radiology report regarding the right shoulder, so she gave the opinion that the request for right shoulder arthroscopic rotator cuff repair was not medically necessary.

22. On June 11. 2021 Insurer advised Dr. Griggs that the requested surgery was denied.

23. On July 6, 2021 Claimant reported to ATP Chau who noted that Claimant was there for reevaluation and stated that his shoulder pain was worsening. He reported that Claimant had continued working and that Employer was providing him assistance in the shop but not when he was making the deliveries so the pain was increasing. He was having problems lifting, pulling, reaching out and reaching up. Claimant had not heard back regarding surgery authorization recommended by Dr. Griggs. The clinic had been trying to contact Dr. Griggs's office to get an update but were advised that Dr. Griggs had been out of town. Mr. Chau also reported that Claimant had been in contact with Insurer who advised Claimant that an independent medical examination (IME) was being scheduled.

24. On June 22, 2021 Hand Surgery Associates, on behalf of Dr. Griggs, submitted a second surgical request for the right shoulder surgery.

25. On July 13, 2021 Dr. Flores, M.D., issued a report that the right shoulder arthroscopic rotator cuff superior capsular reconstruction, possible biceps tenodesis was medically necessary. Dr. Flores stated that the Guidelines indicated that in cases of rotator cuff tear "options would include arthroscopic or open debridement and/or repair. In cases with extensive rotator cuff tear, preservation of the coracoacromial ligament is recommended to prevent instability." Dr. Flores specifically documented as follows:

> In this case, the injured worker was seen regarding injury to the shoulder after lifting up a tire and feeling a pop. Examination showed near symmetric elevation of the shoulders, negative external rotation lag, there was significant weakness with resisted external rotation of the right shoulder compared to the left, and neurologically the injured worker was intact. Reviewed MRI of the right shoulder on 6/01/2021: demonstrated massive rotator cuff tear with disruption of the supraspinatus and infraspinatus, disruption of the superior edge of the subscapularis, biceps the injury with dislocation of the bicep tendon out of the bicipital groove, and moderate acromioclavicular joint arthritis with glenohumeral joint disease. There was also mild supraspinatus atrophy, moderate-to severe atrophy of the infraspinatus, and mild atrophy of the subscapularis. As examination demonstrated significant weakness with resisted external rotation, as formal MRI report documented mild supraspinatus atrophy, moderate-to severe atrophy of the infraspinatus, and mild atrophy of the subscapularis.

Dr. Flores recommended that request for right shoulder arthroscopic rotator cuff superior capsular reconstruction, with possible biceps tenodesis be certified.

26. On July 13, 2021 Insurer's Utilization Management Team sent Dr. Griggs and Claimant a Notice of Approval and Modification advising that the requested surgery was certified as medically necessary and appropriate.

27. On July 14, 2021 Respondents requested a Rule 16 letter from Marc Steinmetz, M.D. Respondents' provided Dr. Steinmetz with Dr. Flores' report denying surgery but did not provide him with the second report by Dr. Flores dated July 13, 2021, certifying the surgery as reasonably necessary. Dr. Steinmetz's record review noted that he did not have the PCP records available, that he had "incomplete medical records," and that because the issue of causation was not clear at that time, the recommended surgery and ice machine were not reasonable or necessary. The notation at the bottom of the report indicate that the report was dictated on July 12. The notation at the top of the report indicated that the "Date of Exam" was July 14, 2021. This ALJ infers that date of exam really meant the date when the report was issued.

28. Dr. Steinmetz's report of July 14, 2021 was clearly more than 10 days after the June 22, 2022 request by Dr. Griggs for surgery, as well as, the July 13, 2021 notification to Dr. Griggs, certifying the surgery. It was unclear from Dr. Steinmetz testimony why he was contacted and why he was not provided with complete records.

29. On September 30, 2021 Claimant presented for a Respondent requested IME with Dr. Steinmetz who, after reviewing the records, was still of the opinion that Claimant's history was inconsistent, "changed over time," "was unreliable," and that Claimant's condition was chronic and preexisting, therefore, surgery should be denied.

30. On October 26, 2021 Division Director Paul Tauriello issued a Director's Order for Respondents to file an admission or denial in the matter within fifteen (15) days

of the order or be subject to penalties.

31. Dr. Griggs evaluated Claimant on November 17, 2021 and stated that Claimant had the surgery scheduled but it was cancelled. He noted that Claimant continued to have problems with is shoulder, though the physical therapy had helped. His musculoskeletal examination showed limited active forward elevation of the right shoulder compared to left, pain to impingement maneuvers of the right shoulder, weakness of the right shoulder compared to left and active forward elevation on the right is to about 100 degrees compared to 160 on the left. Dr. Griggs noted that based on Claimant's previous MRI findings and the time from his last evaluation it was likely that Claimant had further atrophy of the muscles and he was not sure that Claimant would be a candidate for surgical repair of the cuff any longer. Dr. Griggs stated that typically at Claimant's age and with the size of tear and the existence of atrophy of the muscle bellies another option would be a reverse prosthesis. Claimant reported having significant difficulty with the shoulder and wanted to now discuss reverse arthroplasty, so Dr. Griggs referred him to Dr. Rudy Kovachevich, an orthopedic specialist for joint replacements in his office.

32. Respondents filed a Notice of Contest on November 19, 2021.

33. Claimant was evaluated by Dr. Kovachevich on November 22, 2021. Dr. Kovachevich documented a history of injury that was consistent with Claimant's reports to other providers, that Claimant had some deformity in his anterior arm concerning for a bicep rupture, difficulty raising his arm, and Dr. Griggs evaluated him for a massive rotator cuff tear with some atrophy. Due to the nature of his injury, he was referred to Dr. Kovachevich for discussion of reverse total shoulder arthroplasty. He noted ongoing pain in the shoulder and dysfunction with movement and use as well as weakness. The symptoms continued to persist and had not really improved with conservative care. Claimant noted pain at nighttime sleeping as well. On exam Dr. Kovachevich noted Claimant had weakness of his active forward elevation, external rotation weakness and that internal rotation was limited. Dr. Kovachevich advised Claimant he had only two choices, to continue with conservative care, living with his current level of functioning or proceed with a reverse total shoulder arthroplasty. Claimant requested the surgery. Imaging studies were performed and revealed evidence of mild ligament arthritis with superior migration of the humeral head.

34. In addition, on November 23, 2021 Matthew Lugliani, M.D., at the Colorado Occupational Medical Partners, gave the opinion "I do not agree with the IME's evaluation and treatment suggestions. Patient can very well have had a preexisting condition which was accelerated through his work activity."

35. Claimant followed up with Dr. Kovachevich's office on December 6, 2021 for a preoperative evaluation. PA Madelyn Stein documented that Claimant continued to have traumatic complete tear of the rotator cuff and following assessment of right chronic shoulder pain and weakness determined Claimant was an appropriate surgical candidate for the reverse arthroplasty of the right shoulder, which she indicated was scheduled for December 14, 2021 at Swedish Orthopedic Center.

36. Claimant underwent surgery with Dr. Kovachevich on December 14, 2021 for the right reverse total shoulder arthroplasty. Claimant was instructed to keep the

shoulder immobilizer sling in place and that the dressings would be removed within 5 days.

37. Up until this point, Claimant had remained under temporary work restrictions, which the Employer accommodated. Following surgery, Claimant was unable to return to work.

38. Dr. Kovachevich examined Claimant on December 23, 2021 and noted that Claimant had some pain, as expected, but was to proceed with therapy, was already off the stronger pain medication and would be reassessed within four weeks. X-rays showed stable reverse arthroplasty in good alignment and position.

39. Dr. Kovachevich again attended Claimant on January 24, 2022 noting that, overall, Claimant was doing well, making progress regarding range of motion function with therapy, tolerated gentle passive and mild active motion of the shoulder, had been tolerating his sling and had no acute issues of note.

40. Respondents' expert Steinmetz issued an addendum report on January 27, 2022 affirming his previous opinions following further record review. Dr. Steinmetz testified consistent with his records.

41. Respondents' expert Steinmetz agreed that the surgery performed by Rudy Kovachevich, M.D., who was a referral from Dr. Griggs, was a reasonable and necessary surgery but took issue with it being related to the events of April 16, 2021, as he believed the surgery was not causally related. Dr. Steinmetz, however, gave the opinion on cross-examination that Claimant had not returned to his baseline condition, as his condition was "progressively worsening" but still maintained that the underlying need for the surgery was not related to the events of April 16, 2021.

42. Claimant continues to be off work following surgery, has not been released from care and has not been returned to modified-duty. Claimant indicated that the surgery he underwent has provided relief for pain and has given him more range of motion. He has had a reasonably good result and continued to progress as expected.

43. In 2020 Claimant earned $30,258.98, which divided by 52 weeks provides an average wage of $581.88. Respondents provided a thirteen week calculation resulting in an average wage of $528.06. However, if the wages earned by Claimant from pay period ending April 14, 2020 through pay period ending April 13, 2021, which is a period of 52 weeks, the average weekly wage is calculated at $552.04. As found, $552.04 is a fair approximation of Claimant’s earnings and is his average weekly wage in this matter.

44. As found, Claimant has shown that he was injured in the course and scope of his employment with Employer. Clearly, Claimant had occasional pain in his right shoulder, however, the fact that Claimant continued to perform work that was challenging, lifting materials, such as tires at awkward levels into vehicles, is persuasive to this ALJ. As found, Claimant had an aggravation of his preexisting degenerative condition of his right shoulder and bicep, causing massive rotator cuff tear and bicep tear following the pop while lifting the tire on the job.

45. Dr. Lugliani's and Dr. Grigg's opinions are more persuasive than the contrary opinion of Dr. Steinmetz whose opinion relies, in part, upon his view that Claimant's history was inconsistent. As found, after full reviewed of the records in

evidence, the Claimant's history is consistent. Although Claimant may have had aches and pains prior to April 16, 2021, those aches and pains in his right shoulder were intermittent, went away and there were no work restrictions prior to the events of April 16, 2021. As found, Claimant was performing his regular job where he was lifting tires and delivering them without any limitation. As further found, Claimant would lift the tires at shoulder level and depositing them into his truck and while Claimant was lifting a tire into his truck, he felt a pop and pain in his arm which was the proximate cause of his aggravation of the underlying degenerative disease and a specific incident causing the complete tear of his rotator cuff tear and bicep injury.

46. Also persuasive were the records of different providers at Colorado Occupational Medical Partner who completed Physician's Report of Workers' Compensation Injury forms (WC164), all of which indicate that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. Further, while some of the tears may have been chronic, the Orthopedic Centers of Colorado reports by Dr. Griggs opining that the need for surgery was due to an "acute on chronic massive rotator cuff tear" are also persuasive over the contrary opinion of Dr. Steinmetz.

47. As found, Claimant was initially projected to have an arthroscopic rotator cuff repair pursuant to Dr. Griggs' initial recommendations on June 22, 2021. However, by November 17, 2021 Dr. Griggs noted that based on Claimant's previous MRI findings and the time from his last evaluation it was likely that Claimant had further atrophy of the muscles and he was not sure that Claimant would be a candidate for surgical repair of the cuff any longer. As found, due to the delay in authorization and the denial of the claim, Claimant's tears continued to progress, the degenerative process was seriously accelerated by the work related injury of April 16, 2021 and the tissue retracted as opined by Dr. Griggs, necessitating a more invasive procedure as recommended by Dr. Kovachevich for a total reverse right shoulder arthroplasty. Finally as found, the procedure performed by Dr. Kovachevich was reasonably necessary and related to the April 16, 2021 work related claim.

48. As found, Claimant continued to work for employer until the date of his surgery on December 14, 2021 under Dr. Kovachevich. Claimant is temporary totally disabled as of December 14, 2021 and is entitled to temporary disability benefits. This is supported by the fact that Claimant continues to be under his provider's care and, as of the date of the hearing, continues to engage in physical therapy and continues to use the arm immobilizer pursuant to medical recommendations.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which she seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances

of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo.

App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, the medical records, Claimant's testimony, and the opinions of Dr. Lugliani, Mr. Chau, Dr. Rojas, Dr. Griggs and Dr. Kovachevich are more persuasive than the contrary opinion of Dr. Steinmetz. Claimant has shown that he was injured in the course and scope of his employment with Employer. While Claimant had occasional complaints of intermittent pain in his right shoulder before the work related injury, the fact that Claimant continued to perform his work without limitations, lifting supplies like tires at awkward levels into vehicles is persuasive to this ALJ. As found, Claimant had an aggravation of his preexisting degenerative condition of his right shoulder and bicep.

Dr. Lugliani's and Dr. Grigg's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition. In contrast, Dr. Steinmetz's opinion relied upon his view that Claimant's history was inconsistent, which was not persuasive. As found, although Claimant had intermittent aches and pains, Claimant had no limitation, and had a significant aggravation causing the complete tear of the rotator cuff and bicep tear on April 16, 2021. As found, the pop in his arm and shoulder on April 16, 2021 was the proximate cause of Claimant's disability and need for medical care, causing the aggravation of the underlying degenerative disease and a specific incident causing the complete tear of his rotator cuff tear and bicep injury. This is supported by the ATP status reports which all indicate that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. As found, while some of the tears may have been chronic, Dr. Griggs' opinion that the need for surgery was due to an "acute on chronic massive rotator cuff tear" was persuasive over the contrary opinion of Dr. Steinmetz. Claimant has shown by a preponderance of the evidence that Claimant sustained a work related on April 16, 2021 in the course and scope of his employment with Employer, aggravating his underlying degenerative right shoulder condition.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this April 16, 2021 work related injury. As found, Claimant was initially projected to have an arthroscopic rotator cuff repair pursuant to Dr. Griggs' initial recommendations on June 22, 2021. However, by November 17, 2021 Dr. Griggs noted that, based on Claimant's previous MRI findings and the time from his last evaluation, Claimant had further atrophy of the muscles and was no longer a candidate for surgical repair of the cuff. As found, due to the delay in authorization and the denial of the claim, Claimant's tears continued to progress, the degenerative process was seriously accelerated by the work related injury of April 16, 2021 and the tissue retracted, necessitating a more invasive procedure as recommended by Dr. Kovachevich for a total reverse right shoulder arthroplasty. Finally as found, the procedure performed by Dr. Kovachevich was reasonably necessary and related to the April 16, 2021 work related claim, as Claimant continued to complain of limitations and inability to continue to tolerate the symptoms caused by the work related injury. Claimant has proven by a preponderance of the evidence, that the need for the reverse total right shoulder arthroplasty was causally related to the April 16, 2021 work related injury within a reasonable degree of probability.

C. Failure to Comply with W.C.R.P. Rule 16-10

Claimant requested a determination with regard to authorization of the surgery recommended by Dr. Griggs, an authorized treating provider. Claimant reasons, first, that the surgery is automatically authorized under the Division rules as Respondents failed to deny or authorize the surgery within 10 days. Secondly, Claimant argues that the surgery is reasonably necessary and related to the work injury of April 16, 2021.

The parties agreed that Dr. Griggs and Dr. Kovachevich are authorized treating physicians. On June 22, 2020, Dr. Griggs requested prior authorization to proceed with a right arthroscopic rotator cuff superior capsular reconstruction, possible biceps tenodesis, as reasonably necessary and related to the April 16, 2021 work-related accident. Dr. Griggs provided Respondents with the proposed date of surgery programed for August 4, 2021. There is a notation on the faxed form that the document was sent to one department and potentially then faxed to the Utilization Review Department. The records or testimony do not show when Respondents received the request but that they must have received the request by July 13, 2021, as Dr. Flores approved the certification for the surgery. The question here is whether the surgery was automatically approved by Respondents' failure to respond or whether Claimant must prove by a preponderance of the evidence that the surgery was reasonably necessary and related to the injury.

W.C.R.P. Rule 16-7(B), in effect as of the request for prior authorization on June 22, 2021, states that Respondent have ten (10) business days to comply with certain provisions.[1] The pertinent W.C.R.P. are W.C.R.P. Rule 16-7 (2021), Rule 16-7-1(B) (2021) and Rule 16-7-2 (2021).

As found, Claimant was injured in the course and scope of his employment, Respondents conceded the authorized treating physician requested prior authorization

[1] As of January 1, 2021 this rule changed from 7 to 10 days of receipt of the complete request.

for the surgery. From the start of Claimant's treatment with Dr. Griggs on May 25, 2025, Dr. Griggs anticipated that the complete rotator cuff tear, which was aggravated by the work related trauma, would probably require a surgery, if conservative care measures were unsuccessful. However, as of November 19, 2021 Respondents filed a Notice of Contest in this claim and had no obligation to comply with the requirements of prior authorization rules. Further, this issue is moot, as Claimant did not proceed with the arthroscopic procedure requested by Dr. Griggs but had a total reverse arthroplasty of the right shoulder, which was found to be reasonably necessary and related to the injury as stated above.

B. Average Weekly Wage

49. An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from pay period ending April 14, 2020 through pay period ending April 13, 2021, which is a period of 52 weeks. As found Claimant's fair approximation of his average weekly wage is $552.04. Claimant has failed to show that the average weekly wage should be calculated using wages from 2020 alone, as Claimant was injured on April 16, 2021.

C. Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning

capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits from the date of his surgery on December 14, 2021 until terminated by law. Claimant sustained a work related injury on April 16, 2021 that caused a disability lasting more than three work shifts and caused him to leave work and lose wages following the surgery. Claimant was severely incapacity at the time of the hearing and continued to use an arm immobilizer, causing continued wage loss. Claimant has not been placed at maximum medical improvement by an authorized treating provider nor has he returned to modified or regular employment. Claimant has shown that it is more likely than not that Claimant is disabled and entitled to receive indemnity benefits as a cause of the work injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a compensable work related aggravation of his preexisting degenerative condition, causing injury to his right shoulder and upper extremity on April 16, 2021 within the course and scope of his employment.

2. Respondents shall pay for Claimant's reasonably necessary and related medical benefits as provided by the stipulated authorized treating providers, including the right shoulder reverse total arthroplasty performed by Dr. Rudy Kovachevich on December 14, 2021.

3. Claimant's fair approximation of his average weekly wage is $552.04.

4. Respondents shall pay for temporary total disability benefits as of December 14, 2021 at the rate of $368.03 per week until terminated by law.

5. Respondents shall pay interest at the statutory rate of eight percent on all amount not paid when due.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise,

the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 11th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on April 12, 2021?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of his work injury?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits?

- If Claimant has proven he sustained a compensable injury, what is Claimant's average weekly wage ("AWW")?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that Respondent was uninsured for workers' compensation benefits at the time of the injury?

- Whether Respondent has proven by a preponderance of the evidence that Claimant's actions at the time of his injury constituted horseplay and/or a substantial deviation from employment duties thereby removing the incident from being a compensable workers' compensation injury?

- Whether Respondent has proven by a preponderance of the evidence that Claimant willfully violated a safety rule and is subject to a reduction of workers' compensation benefits pursuant to Section 8-42-112(1)(b)?

FINDINGS OF FACT

1. Claimant was hired as a farmer for Employer on April 5, 2021. Claimant's job duties included performing weed mitigation at a specific location in the open area in front of an abandoned cabin within Bureau of Land Management ("BLM") land. Employer is an organic and biodynamic farm with property that borders BLM land. Employer has rights to graze cattle on the adjoining BLM land. In order to obtain and maintain the organic farm certifications, Employer cannot use herbicides on its own land, and the animals cannot be exposed to herbicides on the BLM land. In order to prevent herbicides from being used by the BLM on the BLM lands where the animals

will be, Employer had to take the on responsibility of manual weed mitigation. In order to do this, Employer retained specialists to catalog the types and locations of weeds that needed to be mitigated in the BLM areas used by Employer. Employer then created a plan to mitigate in each specific location. The first location for this project was the location in front of the abandoned cabin that Claimant was assigned to work on April 12, 2021.

2. Claimant testified at hearing that he was assigned the task of weed mitigation since he started working for the employer. Claimant was informed by his supervisor, who Claimant identified as "O[redacted]", that his job was to pull weeds for the near future. Claimant testified that he was to work with a pick axe and shovel to pull weeds on the BLM land, most often on his hands and knees. Claimant testified that prior to the date of injury, all of his work was weed mitigation.

3. Respondent admitted at hearing that as of April 12, 2021, they did not maintain workers' compensation insurance.

4. In order to get to the area where he was assigned to perform weed mitigation, Claimant was provided a side-by-side ATV (hereinafter referred to as a "Razor" as testified to at hearing}. Claimant testified that on April 12, 2021, after waiting for about an hour at the farm, he drove the Razor toward the designated area in front of the cabin to pull the weeds. Claimant testified that when he was driving on the trail to the location, he came across two hunters that were walking back towards the cabin where he was heading to work. Claimant testified he stopped the vehicle and spoke to the hunters because he was concerned that he was going to be working in the area they were hunting. Claimant testified that he informed the hunters where he was working.

5. Claimant testified he tried to call O[redacted], but he did not have cell service. Claimant testified he later encountered O[redacted] and a coworker on the trail, and informed O[redacted] about the hunters. Claimant testified that O[redacted] told him that the hunters did not have permission to be on the property. Claimant testified that O[redacted] told Claimant that if he saw the hunters, he should tell them that they did not have permission to be on the property

6. Claimant testified that he, O[redacted], and the employee who was riding with O[redacted], returned to the farm, and worked there for about an hour. Claimant testified that he was not given any instruction on whether or how to interact with the hunters. Claimant testified that he then drove back up to the cabin site with the other employee, whose name he could not recall. Claimant testified that he then received a cell phone call from O[redacted] telling him he needed to get a tarp and some rocks to cover the weeds they were picking at the cabin site. Claimant testified that he left the other employee at the cabin, and then used the Razor to go back down to the farm to retrieve a tarp and some rocks.

7. Claimant testified that on the way back to the cabin, he again saw the

hunters and he decided that he wanted to go tell the hunters that they did not have permission to be on the property. Claimant testified he was going uphill when he made a left turn on the trail that was leading up to their location, heard the rocks shift in the back and the Razor rolled over.

8. Claimant testified that after the accident, he went to get help from his co-worker, but his coworker told him that he didn't want anything to do with it and walked away. Claimant testified that the hunters came down to the accident scene to help Claimant and called O[redacted]. Claimant testified that O[redacted] eventually came to the scene and Claimant apologized to O[redacted]. Claimant was then taken to the hospital. Claimant testified he was going only 5-10 miles per hour when he was driving on the trail before he entered the corner and was navigating the left hand turn at 5 miles per hour when the Razor rolled. Claimant testified he was wearing his seat belt at the time of the accident.

9. Claimant testified at hearing that as a result of the accident, he broke his collarbone.

10. The accident in this case occurred approximately 500 feet beyond the designated weed mitigation site, off the trail while Claimant was driving in the direction away from the designated weed mitigation site.

11. LH[Redacted] testified at hearing. Mr. LH[Redacted] is Claimant's coworker who was working with Claimant at the weed mitigation site near the cabin when the accident occurred. Mr. LH[Redacted] testified that he no longer works for Employer. Mr. LH[Redacted] testified that April 12, 2021 was his first day of work for Employer. Mr. LH[Redacted] testified that he was assigned to work with Claimant on that day, picking weeds in a designated area in front of an old, run down miner's cabin about 10 minutes into the BLM land.

12. Mr. LH[Redacted] 's testimony was consistent with Claimant's regarding the earlier events of the day, including that Claimant met Mr. LH[Redacted] and O[redacted] in the morning on the trail and Claimant informed them about his discussion with the hunters. Mr. LH[Redacted] testified, however, that he did not hear O[redacted] tell Claimant to confront the hunters and tell them they were not supposed to be on the property.

13. Mr. LH[Redacted] testified that after meeting Claimant and O[redacted] on the trail, Claimant drove the Razor to the weed mitigation site and Mr. LH[Redacted] was the passenger. Mr. LH[Redacted] testified Claimant was driving pretty recklessly and smoking a hash pen while driving.

14. Mr. LH[Redacted] testified that he was to work at the weed mitigation site from 9:00 a.m. until 11:00 a.m. Mr. LH[Redacted] testified that after working for some time in front of the cabin, Claimant left the weed mitigation site, got in the Razor, and returned to the farm to get more materials, leaving Mr. LH[Redacted] at weed mitigation on his own. Mr. LH[Redacted] testified that at approximately 11:20 a.m., Claimant came back, but drove past

the cabin and deeper into the BLM land without stopping at the weed mitigation site. Mr. LH[Redacted] testified Claimant was having a good time and driving too fast as he passed the weed mitigation site and proceeded further into the BLM land. Mr. LH[Redacted] testified that his understanding was that there was no work-related reason for Claimant to be driving past the cabin and into the BLM land at that time.

15. Mr. LH[Redacted] testified that he was on his hand and knees picking weeds and talking to his mom on his phone, when a few minutes later, he heard yelling in the distance and saw Claimant coming toward him down the path. Mr. LH[Redacted] testified Claimant said at that point that an animal had jumped in front of him. Mr. LH[Redacted] testified he went with Claimant and saw the Razor flipped in an open field. Mr. LH[Redacted] testified Claimant did not state that he was trying to get to the hunters.

16. Mr. LH[Redacted] testified he and Claimant tried to flip over the Razor, but could not get it flipped onto its wheels. Mr. LH[Redacted] testified Claimant told him Claimant was going to lose his job and wanted to get the Razor back down to the cabin. Mr. LH[Redacted] testified that he then walked back to the cabin and waited for O[redacted]. Mr. LH[Redacted] testified he walked back to the crash site a couple of times to check on Claimant and saw the hunters had come to check on Claimant as well. Mr. LH[Redacted] testified O[redacted] eventually arrived at the cabin and they proceeded to where the Razor had rolled over. Mr. LH[Redacted] testified that he, Claimant and the hunters flipped the Razor back over and O[redacted] took Claimant to where the paramedics were.

17. Mr. LH[Redacted] testified that he did not abandon Claimant at the accident site and attempted to help Claimant tum the razor over, but was unable to do so. Mr. LH[Redacted] testified he took a picture of the Razor after the accident. A copy of the picture was entered into evidence at hearing. Mr. LH[Redacted] 's testimony is found to be credible and persuasive. It is noted by the ALJ that Mr. LH[Redacted] no longer works for Employer and is an independent witness in this case.

18. O[redacted] O[Redacted] testified for respondents. Mr. O[Redacted] confirmed that he received a call from Mr. LH[Redacted] informing him of the accident, and that he then proceeded to gather the people and material he needed to respond. Mr. O[Redacted] confirmed there was a conversation early in the day about the hunters, but denied ever giving Claimant directions to seek out the hunters and tell them they had to leave. Mr. O[Redacted] stated that Claimant was not doing anything that was of benefit to Employer at the time he rolled the Razor. Mr. O[Redacted] testified that he had informed Claimant about Employer's rules regarding speed limits for the off-road vehicles and about seat belts. Mr. O[Redacted] testified that he also discussed that the use of safety belts was mandatory in the off road vehicles.

19. Mr. O[Redacted] testified that he drove Claimant down from the roll-over location in his vehicle. Mr. O[Redacted] testified that Claimant told him at the time of the incident that he had not been wearing his restraints. Claimant explained to Mr. O[Redacted] on the drive that he could not wear the seat belt because he could not figure out how to

put it on. Mr. O[Redacted] took photographs and video after the incident, showing that the seat belt was not defective. Mr. O[Redacted] 's testimony is found credible.

20. Claimant was transported to Valley View Hospital after the incident where he underwent x-rays and CT scans which showed no acute fractures. The x-ray of Claimant's shoulder showed a mild widening of the AC joint with slight elevation of the distal end of the clavicle relative to the acromion. Claimant was discharged by the ER doctor who noted that they did not see any injuries to his chest, lungs, ribs, head, neck or right arm, but advised Claimant to follow up with his doctor for a possible MRI which could reveal a rotator cuff tear.

21. Claimant was examined by Dr. Copeland on April 14, 2021. Dr. Copeland noted the cervical spine and head CT did not show any acute changes. Dr. Copeland noted that the shoulder x-ray was consistent with a grade 1 AC shoulder separation, with no sign of fracture. Claimant was referred for an MRI of the shoulder which demonstrated a partial rotator cuff tear.

22. None of the physicians in this case and none of the diagnostic records indicate that Claimant broke his collarbone as a result of the injury. The testimony of Claimant that he broke his collarbone as a result of the accident is found to be not credible.

23. Claimant was examined by Dr. Lorah on April 21, 2021. Dr. Lorah reviewed the x-rays and MRI and diagnosed Claimant with a partial thickness rotator cuff tear. Notably, Dr. Lorah's records document a significant discussion with Claimant regarding the accident and Claimant's use of a seat belt. According to Dr. Lorah's medical records, Claimant reported to Dr. Lorah that he was not wearing his seat belt due to the fact that the seat belt was non-operational. Claimant reported to Dr. Lorah that he had told his boss prior to the accident about the seatbelt.

24. The ALJ finds the testimony of Claimant to be not credible. Claimant's testimony was contradicted at hearing by Mr. LH[Redacted] , Mr. O[redacted] and the medical records entered into evidence. Claimant's testimony with regard to the speed that he was traveling prior to the accident in this case was specifically contradicted by the credible testimony of Mr. LH[Redacted] who witnessed Claimant pass him immediately prior to the accident. Mr. LH[Redacted] 's testimony with regard to Claimant's actions operating the Razor are found to be consistent and credible.

25. The ALJ finds that Respondents have established that it is more likely than not that Claimant was engaged in horseplay that represents a deviation from his employment with Employer at the time of the industrial accident. The ALJ credits the testimony of Mr. LH[Redacted] with regard to Claimant's actions on the Razor prior to the accident and finds that Claimant was, more likely than not, joy riding in a reckless fashion when the injury occurred.

26. The ALJ specifically rejects Claimant's testimony that he was headed to instruct the hunters to leave the property at the time of his accident and finds that Claimant was engaged in a deviation at the time of the accident that was so significant that Claimant's injury did not arise out of and in the course and scope of his employment with Employer.

27. The ALJ notes that the horseplay in this case was significant in the fact that Mr. LH[Redacted] testified as to the nature in which Claimant was driving recklessly and his use of a hash pen while driving. The ALJ further notes that Claimant's horseplay in this case was not reasonably combined with his work activities. Claimant testified he was instructed to take the Razor and pick up rocks and a tarp, and bring them back to the weed mitigation area at the cabin. Claimant had completed this task, and then proceeded to take the Razor past the area where he was to leave the tarp and rocks, and proceeded further into the BLM land and away from his work area.

28. Claimant's testimony that he was headed into the area to confront the hunters is found to be not credible. Claimant's testimony was contradicted by the credible testimony of Mr. O[Redacted] and Mr. LH[Redacted] , both of whom contradicted Claimant's testimony that he was instructed by Mr. O[Redacted] to confront the hunters and tell them they were not allowed to be in the area. The ALJ further credits Mr. LH[Redacted] 's testimony that Claimant was driving too fast and having a good time and finds that Claimant was operating the Razor in a reckless manor. Claimant's testimony that he was driving 5-10 miles per hour on the trail prior to the turn and 5 miles per hour as he entered the turn is found to be not credible. The ALJ finds that there was no basis for Claimant to continue into the BLM land on the Razor other than to continue his joy ride on the Razor and did not confer a benefit on Employer.

29. The ALJ further finds that after passing the weed mitigation site, Claimant was proceeding on a deviation unrelated to his employment with Employer. The ALJ rejects Claimant's contention that he was headed to speak to the hunters and finds that Claimant's actions after passing the weed mitigation site was for his own enjoyment unrelated to any work activities for Employer.

30. Based on the ALJ's finding that Claimant failed to prove a compensable injury arising out of and in the course and scope of his employment with Employer, the ALJ need not consider the remaining arguments by Claimant.

31. The ALJ therefore finds that Respondents have proven by a preponderance of the evidence that Claimant's injury resulted from horseplay that was so significant that it Claimant's injury did not arise out of and in the course and scope of his employment with Employer. Based on the ALJ's finding that Claimant did not sustain a compensable injury, the ALJ does not need to address the remaining issues raised by Claimant at the commencement of the hearing.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2020. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Id.* For an injury to "arise out of" employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Id.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988).

4. Horseplay regularly occurs in the workplace and frequently results in compensation cases involving industrial injury claims. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995). In *Lori's Family Dining* the Court of Appeals set forth a four-part test to determine whether the participation in horseplay represents a deviation that takes the injury out of the arising out of employment requirement for workers' compensation cases.

5. Tile four-part test to determine if an injury arising out of horseplay is compensable under the Colorado Workers' Compensation Act includes, (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *Lori's Family Dining, supra.,* at 718.

6. As found, Claimant's act of horseplay in this case involved Claimant operating the Razor in a reckless manner, which ultimately resulted in the accident that led to Claimant's injury. As found, the ALJ credits the testimony of Mr. LH[Redacted] with regard to Claimant's operation of the Razor prior to the accident in reaching this conclusion. The ALJ finds that the extent and seriousness of the deviation is significant in that Claimant proceeded on the Razor past the area in which he was designated to work and further onto the BLM land. The ALJ finds that the deviation was not combined with the performance of a work duty as Claimant had abandoned his responsibility of dropping off the rocks and tarp in order to continue on the trail deeper into the BLM land and away from the work site. The ALJ finds that there was no credible evidence presented that the nature of the employment accepted any degree of horseplay to occur. tn fact, Claimant's testimony specifically denied that he was engaging in horseplay that would have been accepted by Employer.

7. The ALJ finds the testimony of Claimant regarding his operation of the Razor, including the purpose of his driving past the weed mitigation site, to be not credible. The ALJ credits the testimony of Mr. O[Redacted] and Mr. LH[Redacted] and finds that Claimant was not instructed to confront the hunters if he encountered them, and finds that the only basis for Claimant to continue past the weed mitigation site was to continue his joy ride on the Razor.

8. Because Claimant's injury resulted from a horseplay incident on Claimant's part that was so significant that Claimant's injury did not arise out of and in the course of his employment with Employer, Claimant's claim for compensation is dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 11, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

PROCEDURAL MATTER

At the outset of the hearing in this matter the ALJ sustained Respondents' objection to Claimant's Exhibits 6 and 7, pages 38-43, and excluded them from evidence. Exhibits 6 and 7 are cervical spine MRI results and analysis conducted on February 4, 2022 and February 21, 2022. The Exhibits thus constitute medical records. However, Claimant did not provide the Exhibits to Respondents prior to the March 8, 2022 hearing. Subsequent to the hearing, Claimant filed a Motion in Limine seeking to reverse the ALJ's evidentiary ruling and permit consideration of Exhibits 6 and 7. Respondents' objected to the post-hearing admission of the tended Exhibits.

Section 8-43-207(1)(c), C.R.S. empowers an ALJ to "make evidentiary rulings." The preceding statute vests the ALJ with "wide discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Off.*, 207 P.3d 895, 897 (Colo. App. 2009). An ALJ's evidentiary ruling will not be disturbed absent an abuse of discretion. *See Youngs v. Indus. Claim Appeals Off.*, 297 P.3d 964 (refusing to set aside ALJ's ruling that documents were inadmissible where no abuse of discretion was shown). An ALJ commits an abuse of discretion only if the evidentiary ruling "exceeds the bounds of reason." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993).

Section 8-43-210, C.R.S. requires that "[a]ll relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date." The court of appeals has recognized that exceptions to the twenty-day rule are contemplated by allowing continuances to file additional reports in appropriate circumstances. *See Ortega v. Indus. Claim Appeals Off.,* 207 P.3d 895 (Colo. App. 2009).

The record reflects that Claimant failed to exchange Exhibits 6 and 7 with Respondents more than twenty days prior to the hearing. Respondents would be prejudiced if Claimant's Motion in Limine was granted. Respondents did not have an opportunity to review and investigate Exhibits 6 and 7 prior the hearing and were thus unable to develop any rebuttal evidence. Claimant failed to provide any explanation for the failure to timely exchange the medical records prior to hearing. Moreover, Claimant did not request a continuance or otherwise demonstrate good cause to admit Exhibits 6 and 7. By failing to provide Respondents with Exhibits 6 and 7 until the date oi the hearing in this matter, exclusion of the documents is warranted pursuant to §8-43-210, C.R.S.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. If Claimant has demonstrated that her claim should be reopened, whether she has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits.

3. If Claimant has established that her claim should be reopened, whether Respondents have demonstrated by a preponderance of the evidence that Claimant abandoned her position and was responsible for her termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Claimant worked as a school bus driver for Employer. On November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant attempted to finish her work day, but went home due to increasing pain in her back.

2. Claimant received medical treatment from Authorized Treating Physician (ATP) Ethan Moses, M.D. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. Claimant requested acupuncture therapy and began experiencing relief from the treatments. On November 5, 2019 Dr. Moses permitted Claimant to perform modified duty employment. By December 13, 2019 he released Claimant to work full duty.

3. On October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant reached Maximum Medical Improvement (MMI). He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Moses assigned Claimant a 4% rating pursuant to Table 53 for a specific disorder of the cervical spine and a 9% rating for range of motion deficits. Combining the ratings yielded a 13% whole person impairment. Dr. Moses released Claimant to full duty work without restrictions.

4. Prior to Claimant's industrial accident, she experienced dizziness, difficulty sleeping, nausea and fatigue. Claimant attributed her symptoms to anxiety and did not connect them to any known physical condition. She also had a history of back and shoulder pain for over a year before the November 1, 2019 work accident.

5. On October 19, 2020 Respondents filed a Final Admission of Liability (FAL) regarding Claimant's November 1, 2019 industrial injury. The FAL acknowledged that Claimant reached MMI on October 13, 2020 with a 13% whole person impairment rating consistent with Dr. Moses's assessment. The FAL also denied medical maintenance

benefits after MMI. Claimant did not object to the FAL and the claim closed by operation of law.

6. Insurer paid Claimant a total of $22,073.28 in Permanent Partial Disability (PPD) benefits for the period October 19, 2020 through August 10, 2021. Claimant agreed at hearing that she received the preceding payments.

7. On April 14, 2021 Claimant terminated her employment with Employer. Employer prepared a Notice of Separation. The document specified that Claimant resigned through a text message to her supervisor Edie D[Redacted] on April 13, 2021. Claimant's last day worked was April 9, 2021. Claimant detailed that she resigned from her position through a text message following a series of personal conflicts with a co-worker. She explained that her co-worker repeatedly harassed her and expressed her concerns to Employer, but did not receive support.

8. Claimant's supervisor Ms. D[Redacted], who oversees Employer's operations and bus fleet, testified at the hearing in this matter. Ms. D[Redacted] remarked that Claimant would still be employed if she had not resigned her position during the Spring of 2021. She specified that Claimant made a personal decision to resign her employment. Notably, Employer reviewed video footage of Claimant's interactions with her co-worker. Ms. D[Redacted] commented that the video footage did not reveal any harassment. Instead, conversations were invited by both parties. In response to text messages from Claimant, Ms. D[Redacted] offered a transfer, but Claimant declined.

9. Claimant testified that, after her termination from employment, she began attending college full-time and presented her transcript into evidence. She further commented that she is able to perform various activities of daily living including grocery shopping, driving and cooking.

10. On December 28, 2021 Claimant underwent an independent medical examination with John R. Burris, M.D. Claimant reported that, on the date of her work injury, she was preparing her bus at the beginning of the day but slipped on a patch of ice and fell to the ground. She experienced immediate pain in her head, neck and back. During the following year, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in reported symptoms. Notably, Claimant also rejected repeated offers for treatment, MRIs, medications and physiatry referrals.

11. In conducting a physical examination, Dr. Burris noted that Claimant exhibited extreme pain behaviors and guarding. He also remarked that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020. Claimant had completed a reasonable course of conservative treatment and did not require additional care to cure or relieve the effects of her industrial injury.

12. Dr. Burris also testified at the hearing in this matter. He explained that Claimant's condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant has not suffered a worsening of condition since reaching MMI.

13. Claimant testified at the hearing in this matter. She explained that, based on medical treatment outside the Workers' Compensation system, her condition has worsened. Imaging has revealed foraminal stenosis and spurs along her neck. She desires cortisone injections to address her condition.

14. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant received treatment from ATP Dr. Moses. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. By December 13, 2019 Dr. Moses released Claimant to full duty work.

15. On October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant had reached MMI. He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. He assigned Claimant a 13% whole person impairment rating for the cervical spine and released her to full duty work without restrictions.

16. On December 28, 2021 Dr. Burris noted that during the year following her accident, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in symptoms. Notably, Claimant rejected repeated offers for treatment, MRIs, medications and physiatry referrals. In conducting a physical examination, Dr. Burris noted that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020.

17. Claimant testified that, based on medical treatment outside the Workers'; Compensation system, her condition has worsened. Imaging has revealed foraminal

stenosis and spurs along her neck. She desires cortisone injections to address her condition. However, in contrast to Claimant's testimony, Dr. Burris persuasively testified at the hearing that her condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant did not suffer a worsening of condition after she reached MMI.

18. Claimant completed a conservative course of treatment after her November 1, 2019 industrial injuries. There was no additional treatment that Claimant was willing to undergo at the time she reached MMI on October 13, 2020. At the time of MMI, Claimant continued to report subjectively pain complaints at 8/10 levels. Although Claimant testified at hearing that she continued to experience pain in her neck, her symptoms mirrored her complaints at the time she was placed at MMI. Furthermore, continued pain and some difficulty completing daily tasks after MMI would be expected as part of her condition and is reflected through the assignment of a 13% whole person permanent impairment rating. The persuasive medical records and testimony of Drs. Moses and Burris reveal that there is an attenuated causal connection between Claimant's work injury and a worsening of her symptoms after she reached MMI on October 13, 2020. Claimant has thus failed to establish that she suffered a worsening of condition that is causally related to her November 1, 2019 industrial injury. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

5. A request for continuing medical treatment must be presented at the time of MMI. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Indus. Claim Appeals Off.*, 905 P. 2d 1 (Colo. App. 1994). When a claim is closed, the claimant is precluded from receiving further benefits unless there is an order reopening the claim on the grounds of error, mistake or change of condition. *See Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), (a claim may be reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780 (Colo. App. 1991).

6. MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Off.,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

7. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant received treatment from ATP Dr. Moses. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. By December 13, 2019 Dr. Moses released Claimant to full duty work.

8. As found, on October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant had reached MMI. He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. He assigned Claimant a 13% whole person impairment rating for the cervical spine and released her to full duty work without restrictions.

9. As found, on December 28, 2021 Dr. Burris noted that during the year following her accident, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in symptoms. Notably, Claimant rejected repeated offers for treatment, MRIs, medications and physiatry referrals. In conducting a physical examination, Dr. Burris noted that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020.

10. As found, Claimant testified that, based on medical treatment outside the Workers'; Compensation system, her condition has worsened. Imaging has revealed foraminal stenosis and spurs along her neck. She desires cortisone injections to address her condition. However, in contrast to Claimant's testimony, Dr. Burris persuasively testified at the hearing that her condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant did not suffer a worsening of condition after she reached MMI.

11. As found, Claimant completed a conservative course of treatment after her November 1, 2019 industrial injuries. There was no additional treatment that Claimant was willing to undergo at the time she reached MMI on October 13, 2020. At the time of MMI, Claimant continued to report subjectively pain complaints at 8/10 levels. Although Claimant testified at hearing that she continued to experience pain in her neck, her symptoms mirrored her complaints at the time she was placed at MMI. Furthermore, continued pain and some difficulty completing daily tasks after MMI would be expected as part of her condition and is reflected through the assignment of a 13% whole person permanent impairment rating. The persuasive medical records and testimony of Drs. Moses and Burris reveal that there is an attenuated causal connection between Claimant's work injury and a worsening of her symptoms after she reached MMI on October 13, 2020. Claimant has thus failed to establish that she suffered a worsening of

condition that is causally related to her November 1, 2019 industrial injury. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 11, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

➢ Whether Respondents have proven by a preponderance of the evidence that Claimant did not sustain compensable injury arising out of and in the course and scope of her employment with Employer on June 27, 2019?

FINDINGS OF FACT

1. Claimant testified at hearing that she was employed with Employer on June 27, 2019 and was instructed to go to the back room and take boxes off the shelf. Claimant testified that there were two large boxes that were filled with oil. Claimant testified that when she was lifting the second box, she hurt her back. Claimant testified she informed her supervisor of the injury on the date it occurred.

2. Claimant testified that a few days later, she went to work and told her boss that she could hardly breath, but was informed by her supervisor that she should limit herself to just cashier work. Claimant testified at hearing that she called her son and had him pick her up and take her to the emergency room.

3. Claimant was examined at the St. Mary's Hospital emergency room ("ER") on June 29, 2019. Claimant reported to the ER that she had 2 days of worsening low back pain after doing a lot of heavy lifting and twisting while at work. The ER physician noted Claimant had a history of what sounded like neuropathy to the bottom of her feet. The ER records document that Claimant reported a long history of low back pain, which had become quite severe the past two (2) days.

4. Claimant reported to the ER physician that she had not seen anyone for her low back, but usually gets a massage and that helps. Claimant reported she had gotten a massage the day before, but it seemed to make her symptoms worse. The ER physician noted that Claimant's symptoms were consistent with acute on chronic low back pain and instructed to follow up with her primary care physician.

5. In a separate part of the ER records, PA Steerman notes that Claimant presented with low back pain and has had low back pain for quite a while, which she believes is secondary to her job as she does quite a bit of lifting at work. PA Steerman noted further that yesterday Claimant was see at physical therapy for foot pain when she developed increased low back pain. Claimant reported the pain was worse with movement.

6. Claimant was examined by physicians' assistant ("PA") Richards in

Norwood, Colorado on July 5, 2019. PA Richards completed a WC164 form that provided Claimant with work restrictions of no lifting greater than 15 pounds and no repetitive lifting greater than 10 pounds. PA Richards also obtained x-rays of Claimant's thoracic and lumbar spine and referred Claimant for physical therapy. The records from PA Richards do not contain an accident history, but the WC 164 indicates that Claimant's maximum medical improvement ("MMI") date is unknown at this time as it is a new case.

7. Notably, PA Richards had evaluated Claimant prior to her work injury and had seen Claimant on May 19, 2019 for her annual physical. PA Richards noted Claimant worked full time and takes care of her grandkids. PA Richards noted Claimant complained of living in pain that stems from the area of her uterus and tried to have the pain diagnosed, but was eventually told Medicaid would not pay for a hysterectomy. Claimant reported having insomnia that she related to her pelvic pain and aching pain in her legs.

8. Claimant returned to PA Richards on June 24, 2019 (3 days prior to her work injury) for evaluation of foot pain and plantar fasciitis. Claimant reported to PA Richards that she had a lot of back pain and damaged nerves in her neck, but denied any history of ankle sprains. Claimant reported some tingling in her toes, but not as bad as her hands. PA Richards referred Claimant for physical therapy.

9. Respondents filed a general admission of liability ("GAL") on July 31, 2019 admitting for medical benefits only.

10. Claimant was evaluated by Ms. Fusting, the physical therapist, on August 9, 2019. The physical therapist noted that Claimant had gone to the ER around the end of June after developing back pain that Claimant described as taking her breath away. Ms. Fusting noted that the Claimant reported that the ER doctor thought lifting at work that day caused her back to spasm. Ms. Fusting noted Claimant's signs and symptoms were consistent with low back pain with muscle strain. Ms. Fusting noted pain with palpation, and impaired strength.

11. Claimant returned to PA Richards on September 3, 2019. PA Richards noted Claimant's accident history of taking down heavy boxes and then twisting to place the boxes on a "U-boat" and being unable to continue to do this work after 2 boxes. Claimant also reported that on the next day she was lifting and placing bottles of water from the ground on to the "U-boat" and on the last one she felt a strain in her lower back. PA Richards noted Claimant denied back pain in the past, but noted that the ER records reported a history of back pain that improved with massage. PA Richards continued Claimant on a 15 pound lifting restriction and recommended Claimant continue physical therapy.

12. Claimant returned to PA Richards on October 15, 2019 and noted she continued to experience low back pain, with pain waking her from her sleep. PA

Richards noted Claimant had been back to work light duty and was improving but had been having to do a lot more bending which increased her pain again. PA Richards recommended undergo a magnetic resonance image ("MRI") of her lumbar spine.

13. Claimant was next evaluated by PA Richards on November 15, 2019. PA Richards noted Claimant's MRI was scheduled for November 25, 2019. PA Richards noted that Claimant had reported increased symptoms at her last visit secondary to excessive work requirements. Claimant reported she had been able to follow her work restrictions and continued her physical therapy and her symptoms again improved.

14. Claimant returned to PA Richards on February 7, 2020 and noted that she had not yet been able to get the MRI. PA Richards noted Claimant was complaining of lower extremity symptoms, which PA Richards thought were muscular rather than neurological. PA Richards reported that Claimant advised that her back pain continued to come and go, but would still have some bad days when her back pain is severe. Claimant noted that her back pain was mostly localized to the central lower back with some symptoms now in her legs bilaterally. PA Richards noted that Claimant appeared to have improved with physical therapy as she was no longer complaining of thoracic spine pain. PA Richards continued Claimant's work restrictions and referred Claimant to Dr. Gebhard for an orthopedic consultation.

15. Claimant eventually underwent the MRI of the lumbar spine on February 24, 2020. The MRI showed lower lumbar spine degenerative disc and facet disease at the L4-5 and L5-S1 levels.

16. Claimant returned to PA Richards on March 31, 2020. PA Richards noted the findings on the MRI and again recommended Claimant be evaluated for a spine consultation and referred Claimant to Dr. Clifford.

17. Claimant returned to PA Richards on May 1, 2020. PA Richards noted Claimant's pain continued to worsen. PA Richards noted Claimant was to be seen by Dr. Clifford in two weeks. PA Richards increased Claimant's work restrictions to no lifting pushing, pulling or carrying over 10 pounds.

18. Dr. Clifford eventually evaluated Claimant on June 22, 2020. Dr. Clifford noted Claimant's accident history of lifting boxes from overhead down to her waist when she started having increasing pain. Dr. Clifford noted Claimant had some history of back pain. Dr. Clifford noted Claimant reported currently having severe pain which was 7 to 8 out of 10 on a daily basis. Claimant also reported leg pain on the left side with cramping in the calf that is worse when she straightens her leg.

19. Dr. Clifford performed a physical examination of Claimant and reviewed Claimant's MRI scan. Dr. Clifford diagnosed Claimant with L5-S1 disc degeneration with left sided L5-S1 disc protrusion with radiculopathy in the L5-S1 nerve root distribution. Dr. Clifford recommended Claimant undergo a left L5-S1, S1-S2

transforaminal epidural steroid injection.

20. Claimant was evaluated by Dr. Linder on June 29, 2020. Dr. Linder is a physician in the same office as PA Richards. Dr. Linder noted the recommendations by Dr. Clifford and noted Claimant complained of some incontinence that was getting worse while walking. Dr. Linder continued Claimant's work restrictions to no lifting more than 10 pounds and advised Claimant to follow up after the epidural steroid injection.

21. The left L5-S1, S1-S2 transforaminal epidural steroid injections were performed on July 22, 2020 under the auspices of Dr. Clifford.

22. Claimant was examined by PA Richards on July 28, 2020. Claimant reported to PA Richards some relief in her left leg symptoms after the epidural steroid injection. Claimant reported she was now having right leg radicular symptoms. PA Richards noted Claimant may need a new MRI based on the new right leg symptoms. PA Richards continued Claimant on the 10 pound work restriction.

23. Claimant was re-examined by PA Richards on September 28, 2020. PA Richards noted that while the epidural steroid injection seemed to initially help Claimant's symptoms, her symptoms returned with return to work. PA Richards further noted Claimant was now complaining of symptoms on the right. Claimant reported to PA Richards that she believed the concrete floors at work may be contributing to the worsening symptoms. Claimant reported she was not able to tolerate more than four (4) hours of work.

24. PA Richards noted that Claimant was contacted by Dr. Clifford's office and advised that her left sided epidural steroid injection was rejected. PA Richards noted decreased range of motion on examination due to pain in all directions. PA Richards continued Claimant's work restrictions.

25. Claimant returned to PA Richards on October 26, 2020. PA Richards noted that the epidural steroid injection was declined and recommended that Claimant continue with ongoing physical therapy two times per week for another 4-6 weeks. Claimant's 10 pound work restrictions were continued.

26. Claimant was next evaluated by PA Richards on November 24, 2020. PA Richards noted that Claimant's ongoing physical therapy had not been authorized, however Claimant had reported some recent improvements with her home exercise program, and PA Richards again recommended ongoing physical therapy of once every two weeks for 3-4 months. PA Richards opined that Claimant had not reached maximum medical improvement.

27. Respondents arranged for an independent medical evaluation ("IME") with Dr. Lesnak on December 22, 2020. Dr. Lesnak reviewed Claimant's medical records, obtained a medical history and performed a physical examination of Claimant

in connection with his IME. Dr. Lesnak also reviewed video surveillance of Claimant in connection with his IME. Dr. Lesnak noted that Claimant had an accident history that included an injury at work on June 29, 2019 (sic). Dr. Lesnak further noted the accident history recorded by PA Steerman which indicated Claimant's back pain started at a physical therapy appointment for her foot.

28. Dr. Lesnak reviewed the medical records from PA Richards on July 5, 2019 and noted that the records do not provide a history of an injury at work or of any complaints of back pain. Dr. Lesnak notes that Claimant was complaining of phtotophobia and an acute headache for the past three hours. Dr. Lesnak noted that PA Richards recommended lab tests and a brain MRI on July 5, 2019. The IME report does not mention the WC164 form that recommended x-rays of the lumbar and thoracic spine.

29. Dr. Lesnak noted Claimant returned to PA Richards on September 3, 2019 and those records referenced Claimant injuring her back on June 27 while taking down heavy boxes and the twisting to place the boxes on the "U-boat". Dr. Lesnak specifically notes in his report that this accident history does not reference Claimant developing significantly worsened pain during a physical therapy session for her foot prior to the ER evaluation. Dr. Lesnak further noted that by October 15, 2019, PA Richards was recommending an MRI scan. Dr. Lesnak was critical of this request as he found no documentation of any reproducible objective findings to suggest that an MRI study was medically indicated.

30. Dr. Lesnak reviewed the medical records from Dr. Clifford and based on Claimant's report that her symptoms may have partially improved for several days following the injection, followed by her symptoms recurring, Dr. Lenak opined that Claimant had a completely nondiagnostic and nontherapeutic response to the lumbar epidural injections trials.

31. Dr. Lesnak opined that Claimant's reported history of "developing increased symptoms in 06/2019 has 'changed' over time". Dr. Lesnak reviewed the surveillance video and noted that the video depicted Claimant on September 5, 2020 performing bending and lifting activities including picking up a portable propane tank off of the ground and placing it into a metal cage outside of the Dollar Store. Dr. Lesnak noted that the video from September 6, 2020 showed Claimant performing several activities including walking activities as well as using a long-handled broom to perform repetitive sweeping activities. Dr. Lesnak noted Claimant showed no signs of discomfort or functional inability when performing these activities.

32. Dr. Lesnak noted in his report that Claimant denied a history of low back pain or treatment for her low back during his IME evaluation. Dr. Lesnak opined that it was his opinion the Claimant did not sustain any type of injury during work hours in June 2019.

33. Dr. Lesnak issued a supplemental report dated July 28, 2021 which reviewed some medical records from Claimant that predated her work injury along with additional medical records from Claimant from after her work injury. Dr. Lesnak noted Claimant's June 24, 2019 examination with PA Richards in which she reported that he had chronic low back pain and damaged nerves in her neck.

34. Dr. Lesnak testified at hearing consistent with his report. Dr. Lesnak noted Claimant had four out of five positive Waddell's signs on his physical examination. Dr. Lesnak opined that the surveillance video of July 19, 2020 that he reviewed did not show Claimant performing work outside of her restrictions, but opined it was inconsistent with Dr. Clifford's report of June 2020 where Claimant reported pain of 7-8 out of 10. Dr. Lesnak opined that Claimant was performing work outside of her work restrictions on September 5, 2020 when she was lifting the propane tank and putting it in the cage, as she was under a lifting restriction of 10 pounds at the time. Dr. Lesnak opined that even if the propane tank were empty, it would still exceed Claimant's 10 pound work restriction set forth by Dr. Linder.

35. Claimant testified at hearing that the propone tank depicted in the video was empty and was recorded lifting the propane tank while at work for Employer. Claimant testified that if she overexerts herself at work it will cause pain. Claimant testified that she did not believe lifting the empty propane tank exceeded her work restrictions.

36. The ALJ finds the opinions expressed by Dr. Lesnak to be not credible with regard to the issue of compensability. The ALJ notes that the surveillance video which Dr. Lesnak opined showed Claimant performing work outside of her restrictions took place at a time when Claimant was at work for Employer, and thus, assigned, by Employer, to perform the work outside of her restrictions. The ALJ finds that if Employer were significantly concerned about Claimant performing work outside of her restrictions, they should not have assigned her work that exceeded the restrictions from Dr. Linder and PA Richards. The ALJ further finds that the opinions expressed by Dr. Lesnak that relied on video surveillance of Claimant performing duties assigned by Employer is not credible with regard to the issue of compensability in this case.

37. The ALJ does not find that the reference in the ER records regarding Claimant's pain developing after a physical therapy appointment overcomes the other evidence in this case that Claimant sustained a compensable injury at work to allow Respondents' to withdraw the GAL in this case. The ALJ would note that Respondents were privy to the June 29, 2019 ER report prior to filing the July 31, 2019 GAL in this case. Moreover, the ER records contain multiple references to an accident history consistent with Claimant's report of injury to later physicians and consistent with her testimony at hearing.

38. The ALJ notes that Dr. Lesnak's reliance on the July 5, 2019 report from PA Richards which he indicated failed to set forth an accident history as a basis for his

opinion that Claimant did not sustain a compensable accident history at work is misguided in this case. Dr. Lesnak's report is silent with regard to the July 5, 2019 WC164 form completed by PA Richards which referred Claimant for lumbar spine and thoracic spine x-rays. However, the WC164 form identifies the third party administrator for handling the workers' compensation claim along with the workers' compensation number assigned to the claim. It is therefore reasonable to assume that Respondents were privy to the WC164 form prior to filing the GAL in this case.

39. Moreover, the medical records in this case document Claimant reporting to PA Richards just a few days prior to her work injury that she had chronic low back pain. But these records are consistent with Claimant's testimony in that Claimant at no time was seeking treatment for this condition. While Claimant mentions this portion of her medical history to PA Richards, she does not seek treatment for this condition, and the evidence establishes that Claimant was not under current medical care for her chronic low back pain. The mere fact that Claimant has a pre-existing condition does not negate the fact that she may still have a compensable injury at work. Moreover, these records document that PA Richards was informed of Claimant's prior condition before providing treatment related to her workers' compensation injury. Notably, at no point in providing care for Claimant did PA Richards opine that her current need for medical care was not related to her injury at work on June 27, 2019.

40. Likewise, the surveillance videos entered into evidence in this case showing Claimant performing her work duties while employed with Employer in September 2020 are not persuasive evidence that Claimant did not sustain a compensable injury at work on June 27, 2019. The video surveillance simply depicts Claimant performing the work duties assigned to her by Employer.

41. The ALJ finds Claimant's testimony at hearing with regard to the onset of her low back pain on June 27, 2019 that led Claimant to seek medical treatment to be credible and persuasive, and finds that Respondents have failed to prove that it is more probable than not that Claimant did not sustain a compensable injury arising out of her employment with Employer on June 27, 2019.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). However, Section 8-43-201 was modified effective August 5, 2009 to provide that a party seeking to modify an issue determined by a general or final

admission of liability shall bear the burden of proof for any such modification. Section 8-43-201(1). Because Respondents are seeking to modify claimant's benefits as admitted under the general admission of liability, Respondents bear the burden of proof in this case by a preponderance of the evidence.

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2018. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra*.

5. As found, the ALJ finds the testimony of Claimant with regard to her work injury of June 27, 2019 to be credible and persuasive and supported by the medical records in this case. The ALJ further finds the opinions expressed by Dr. Lesnak in his IME reports and testimony to be not persuasive evidence that Claimant did not suffer an injury on June 27, 2019.

6. Therefore, Respondents' have failed to prove by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of and in the course and scope of her employment with employer.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw the general admission of liability is hereby DENIED.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 13 , 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-637-002

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the C2-4 facet injection recommended by John Sacha, M.D., is reasonably necessary to cure or relieve the effects of Claimant's admitted industrial injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment with Employer on May 12, 2021, when a large pallet tipped over falling onto Claimant striking him in the head.

2. On May 13, 2021, Claimant was seen at an emergency where CT scans of his head and cervical spine were taken. The cervical spine CT showed no acute fracture or subluxation, and moderate canal stenosis at C5-C6 that was attributed to degenerative changes. No records of a physical examination at the emergency room were offered into evidence. (Ex. F).

3. On May 18, 2021, Claimant saw Carol Dombro, M.D., at Concentra. Dr. Dombro was Claimant's authorized treating physician (ATP) for a follow up check for his head and neck. Claimant reported vague issues related to his head injury and that his neck discomfort was mostly resolved. Claimant also reported shoulder symptoms, but could not recall how he injured his shoulder. Dr. Dombro's examination of the cervical spine was normal. Claimant was diagnosed with a closed head injury without post-concussive symptoms, cervical strain "mostly improved;" and new left shoulder pain in the distribution of a previous workers' compensation injury. Dr. Dombro recommended that Claimant begin physical therapy that day. (Ex. F).

4. Claimant began attending physical therapy on or about May 18, 2021, and attended twenty physical therapy sessions through July 22, 2021. Claimant received physical a cervical strain, including therapeutic exercises, manual therapy, dry needling, and vestibular therapy. Claimant's cervical range of motion in both left and right rotation was documented as limited and did not significantly improve with therapy. Claimant did report that dry needling helped his neck pain, but his headaches and dizziness became worse. (Ex. F).

5. Claimant's next documented treatment was with Richard Mobus, D.C., at Concentra on June 16, 2021. At that visit, Claimant reported lower cervical pain and headaches. Claimant attended six chiropractic visits between June 16, 2021 and July 21, 2021. At his discharge from chiropractic care on July 21, 2021, Claimant reported a moderate improvement in symptoms, but continued to report cervical pain at a rating of 4/10. (Ex. F)

6. On June 23, 2021, Claimant saw John Sacha, M.D., (physical medicine and rehabilitation physician) at US Medical Group, on referral from Dr. Dombro. By virtue of this referral, Dr. Sacha is an ATP. Dr. Sacha noted that Claimant had completed three weeks of physical therapy and had begun chiropractic treatment, with "slight improvement." Claimant reported bilateral neck pain, occipital headaches, dizziness, blurred vision, nausea, and forgetfulness. On examination of Claimant's cervical spine, Dr. Sacha noted spasms, segmental dysfunction, poor posture, and pain with extension. He also noted that extension-rotation and palpation of the upper cervical segments preproduced Claimant's headaches. Based on his examination, Dr. Sacha diagnosed Claimant with post-traumatic cervical facet syndrome; whiplash associated disorder; and post-traumatic occipital neuralgia secondary to cervical facet syndrome. He recommended a cervical MRI and that that Claimant complete chiropractic and physical therapy with IMS needling. (Ex. 4).

7. Claimant returned to Dr. Dombro on June 23, 2021. Claimant reported head, neck, left shoulder and upper back pain rating 3/10. Dr. Dombro indicated that Claimant's left shoulder and neck were "much improved" with physical therapy and dry needling. Claimant continued to report daily headaches. (Ex. F).

8. On July 6, 2021, Claimant underwent a cervical MRI, which demonstrated abnormalities at C3-4. The radiologist compared Claimant's MRI to a previous cervical MRI from 2015, and noted that Claimant had degenerative disc disease and joint changes superimposed on borderline narrow spinal canal with progression at C3-4 producing moderate to marked dural sac narrowing with mild cord deformity and left paracentral chronic myelomalacia. Claimant also had degenerative changes at C4-7, without cord deformity. (Ex. E)).

9. On July 12, 2021, Dr. Sacha noted that although Claimant adamantly denied any prior cervical injuries, the presence of the 2015 MRI indicated Claimant likely had prior cervical complaints. Dr. Sacha indicated the MRI showed the same amount of degenerative disc disease and canal stenosis with some chronic myelomalacia of the cervical spinal cord. He further noted that the MRI showed "significant straightening of his cervical lordosis in the upper cervical spine, which is consistent with [Claimant's mechanism of injury." On examination, Dr. Sacha noted cervical spasms, diminished range of motion, and segmental dysfunction of the mid- and upper cervical spine. Notwithstanding that Claimant had a prior cervical MRI, Dr. Sacha opined that Claimant had sustained a whiplash injury from his employment. He diagnosed claimant with cervical facet syndrome, occipital neuralgia, head contusion, resolved, left lateral epicondylitis, nonphysiologic presentation, and left shoulder complaints. (Based on the context of the medical record, the ALJ infers that Dr. Sacha's diagnosis of "nonphysiologic presentation" was in relation to Claimant's left shoulder complaints, which were new at that time.) Dr. Sacha recommended a bilateral C2-4 facet injection and bilateral 3rd occipital nerve block. He noted that the injections would be "for diagnosis, treatment, and causality." (Ex. F).

10. Respondents submitted Dr. Sacha's request for authorization of a C2-4 facet injection to William Barreto, M.D., for an opinion on the medical necessity of the proposed

treatment. The specific question posed was "Is Bilateral C2-4 Facet Injection with anesthesia medically necessary?" Dr. Barreto reviewed and summarized Claimant's July 6, 2021 MRI report and Dr. Sacha's July 12, 2021 record. Dr. Barreto's report indicates he reviewed additional records from Mile High Sports and Rehabilitation Medicine from July 21-26, 2021, and records from July 12- 28, 2021, identified only as "Misc.", but the records are not summarized in the report. (No records from "Mile High Sports and Rehabilitation" were offered or admitted into evidence). Dr. Barreto's report does not indicate that he reviewed Claimant's physical therapy records.

11. In addressing the question posted, Dr. Barreto discussed three situations where facet injections may be medically necessary based on the Colorado Medical Treatment Guidelines. Those situations include "patients with pain 1) suspected to be facet in origin based on examination findings and 2) affecting activity; OR patients who have refused a rhizotomy and appear clinically to have facet pain; or patients who have facet findings with a thoracic component." Dr. Barreto also cited additional criteria in the "Official Disability Guidelines, Neck and Upper Back Chapter, Online Version (Update 3/31/2021)." Neither the Colorado Workers' Compensation Act nor the W.C.R.P. reference, incorporate or adopt the "Official Disability Guidelines," (ODG) and no evidence was offered explaining the authority or relevance of the ODG.

12. After citing the above-referenced authorities, Dr. Barreto's analysis consisted of the following: "In this case, the patient still has cervical paraspinal spasm, diminished range of motion and segmental dysfunction of the mid upper cervical spine. There is pain with extension rotation. However, there is no documentation of failed conservative care or any indication an active therapy program is to [be] started. As such, the requested bilateral C2-4 facet injection with anesthesia is not medically necessary and is not certified." (Ex. D, p. 6). Given that Dr. Barreto's did not review Claimant's physical therapy records which demonstrate that Claimant had undergone an active therapy program, his opinion is not persuasive.

13. On August 18, 2021, Dr. Sacha wrote a letter addressing Insurer's denial of the C2-4 facet injection, and addressed Dr. Barreto's contention that there was no documentation of failed conservative care or indication of an active therapy program. Dr. Sacha wrote: "In reviewing this patient's case, the patient has already completed multiple attempts at aggressive therapy that included prolonged physical therapy including both active and passive therapeutic modalities, chiropractic, home exercise and medications. So, the patient has clearly already done the conservative care for this case, and what is interesting, is that the patient not only meets the criteria including absence of radicular pain and spinal stenosis, straightening of his cervical lordosis, has had the conservative care that has been failed, but also has declined doing the radiofrequency and wanting to do the facet injections first. As such, he meets all the medical criteria." (Ex. 4). The ALJ notes that no records were submitted indicating Claimant was offered or declined a radiofrequency procedure.

14. Claimant returned to Dr. Sacha on September 16, 2021, October 7, 2021, October 25, 2021, and November 24, 2021. At Claimant's examination on November 24, 2021, Dr. Sacha noted that Claimant's neck pain and headaches were "essentially unchanged."

On examination, he found cervical paraspinal spasms, segmental dysfunction, and pain with extension and extension rotation. Dr. Sacha's diagnosis was cervical facet syndrome, occipital neuralgia, and lateral epicondylitis. (Ex. F).

15. On September 22, 2021, Claimant saw Stephen Dahaney, M.D., at Concentra, who assumed the role of ATP. Dr. Danahey indicated that Claimant's neck was "fine now but through out the day it will start to hurt him." He diagnosed Claimant with a cervical sprain, closed head injury, elbow sprain, and left shoulder strain. He indicated that Claimant was not at maximum medical improvement at that time. (Ex. F).

16. Claimant returned to Dr. Danahey on January 27, 2022. At that time, Claimant noted posterior cervical discomfort and increased headaches with neck motion. Dr. Danahey indicated that Claimant was not at MMI because of ongoing evaluation. Dr. Danahey offered no opinion regarding Dr. Sacha's recommended injection. (Ex. F).

17. At hearing, Claimant testified that he continues to have dull pain in his neck that becomes "stabbing" with motion, and that his neck pain increases his headaches. He testified that he had no headaches prior to May 12, 2021. Claimant testified that he understands the risks of undergoing a facet injection and that he wishes to proceed with the injection. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*,

183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the C2-4 facet injection recommended by Dr. Sacha is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. Dr. Sacha indicated that the purpose of the proposed injection is "diagnosis, treatment, and causality." From this, the ALJ infers that the intention of the C2-4 facet injection is, at least in part, to treat Claimant's diagnosis of facet joint syndrome, which Dr. Sacha diagnosed as traumatic. Dr. Barreto's opinion on medical necessity is not persuasive. The only expressed basis for his determination that the recommended procedure was not medically necessary was the mistaken notion that Claimant had not failed conservative care or undergone an active therapy program. The evidence established that Claimant underwent physical therapy, including manual therapy, exercises, and dry needling with only minimal improvement in his symptoms.

Respondents' contention that Claimant does not meet the criteria for facet injections under the Medical Treatment Guidelines is not compelling. In January 2022, the Division of Workers' Compensation adopted the latest version of Rule 17, Exhibit 8, related to

cervical spine injuries. (Although the original recommendation was made prior to the adoption of the current version, the ALJ finds the January 2022 rule to be the operative guideline, given that any injections would be performed after their adoption). Notwithstanding, W.C.R.P. Rule 17, Ex. 8, paragraph 8.a.ii, provides that one of the following sets of criteria must be met before proceeding with a facet joint injection

1) at least 3 months of pain, unresponsive to 6 weeks of conservative therapies, including manual therapy; and confounding psychosocial risk factors have been screened for and clinically addressed; and physical examination findings are consistent with facet origin pain (e.g., pain on extension with lateral bending and referral patterns are consistent with the expected pathologic level) that is affecting activity; OR
2) the patient has refused a rhizotomy despite facet origin pain on clinical exam; OR
3) the patient has facet findings with a thoracic component.

Here, the Claimant's medical records establish that he has experienced at least three months of pain which was unresponsive to physical therapy, including manual therapy for more than six weeks. (Claimant underwent physical therapy from at least May 18, 2021 through July 21, 2021, without significant improvement in pain levels) and Claimant continues to complain of neck pain and headaches. Dr. Sacha's diagnosis of post-traumatic cervical facet syndrome demonstrates that Claimant's symptoms are consistent with facet origin pain. Although no evidence was admitted regarding screening for confounding psychosocial risk factors, logically, such a screening should be performed at or near the time of the recommended procedure. Thus, the failure to perform a screening for confounding psychosocial risk factors when the procedure was initially recommended in 2021, does not preclude that screening being performed prior to a future procedure. Thus, the ALJ finds that Claimant substantially meets the MTG requirements for a facet joint injection. The ALJ finds and concludes that performance of the recommended C2-4 facet joint injection is reasonably necessary to cure or relieve the effects of Claimant's May 12, 2021 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of a C2-4 facet joint injection, recommended by Dr. Sacha is GRANTED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-335-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable, work-related injury.

2. If Claimant sustained a compensable, work-related injury, was he terminated for cause and responsible for his own wage loss, if any.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant worked for Employer from August 16, 2018 to February 19, 2020. His responsibilities including moving materials through the galvanizing system in an orderly and efficient manner. (Ex. G and Ex. H).

2. Claimant testified that he sustained a work-related injury to his bilateral hands due to chemical exposure while working for Employer.

3. Claimant testified he went to the emergency room for his hand pain prior to January 23, 2020, and that the providers should have known this was a work injury. Claimant did not present any evidence of the visit or treatment.

4. On January 23, 2020, Claimant went to the AFC Urgent care where he was treated by Kevin Ralls, FNP. Claimant's chief complaint was "hand pain." Claimant's medical record reads "b/l hands visibly dirty. Dry cracked skin noted over b/l hands and fingers. Fissures noted b/l distal fingers 1-5 and over b/l palmar PIPs and DIPs 1-5, no pus drainage or streaking." Claimant reported having pain in his bilateral hands and under his nails for three weeks. (Ex. A).

5. According to the medical records, Claimant told Mr. Ralls he worked with metal beams and used his hands while working. Claimant denied any injuries or metal fragments in his hands. Mr. Ralls diagnosed Claimant with dermatitis, and prescribed Keflex and Lotrisone cream. He advised Claimant to seek further treatment at the emergency room or from a primary care provider if his condition worsened. (Ex. A).

6. Claimant testified that he told Mr. Ralls about the chemical exposure. The ALJ does not find this testimony persuasive because there is nothing in the medical record referencing a work-related injury or chemical exposure.

7. Mr. Ralls wrote Claimant a note stating that Claimant was unable to return to work until January 28, 2020, unless Claimant chose to return sooner. (Ex. A). Claimant's

employment records note that Claimant called out sick on January 22, 2020, and had a doctor's note excusing him from work until January 28, 2020. (Ex. F).

8. Claimant returned to work on January 27, 2020, but left early before completing his shift. (Ex. F). Claimant testified he left work early because of the pain in his hands. Claimant further testified that he took a video of his hands and sent the video to his direct supervisor. At no time in the video does Claimant say that his hands were subject to chemical exposure, nor does he reference a work-related injury. (Ex. 6).

9. Claimant called in sick on January 28, 2020, and returned to work on January 29, 2020. (Ex. F).

10. Claimant testified that he did not seek further medical treatment for his hands after his initial evaluation with Mr. Ralls.

11. BM[Redacted[is the plant manager for Employer. Mr. BM[Redacted] credibly testified that Claimant never reported he was out due to a work-related condition.

12. Mr. BM[Redacted] credibly testified that Claimant's job did not require the use of chemicals. He testified that some employees handle chemicals, but those employees are provided protective equipment, including gloves, to prevent chemical exposure.

13. On February 10, 2020, Employer terminated Claimant for his repeated violation of Employer's attendance policy. Claimant's termination followed multiple warnings, write-ups, and a suspension. Claimant's violations of Employer's attendance policy are well documented in his personnel file. (Ex. G).

14. On July 26, 2019, Claimant received a verbal warning because of tardiness. (Ex. G).

15. Claimant's first written warning for attendance issues, specifically tardiness, occurred on August 19, 2019. Employer provided Claimant a copy of the attendance policy concurrently with the write-up. Claimant checked a box indicating that he agreed with the recitation of facts and signed the document. (Ex. G).

16. Claimant's second written warning for attendance issues, specifically tardiness, occurred on October 9, 2019. (Ex. G).

17. Claimant third written warning for attendance issues, specifically frequent tardiness, occurred on November 15, 2019. Employer moved Claimant to second shift to help improve his tardiness. The written warning noted that further violations of the attendance policy would result in suspension or termination. Claimant checked a box indicating that he agreed with the recitation of facts and signed the document. (Ex. G).

18. Claimant's fourth written warning for attendance issues occurred on December 12, 2019. The written warning noted Claimant left work on two occasions to run personal errands without clocking out. Employer suspended Claimant, and the warning indicated

that the consequences for any further violations of the attendance policy would result in termination. (Ex. G).

19. Between December 12, 2019 and February 10, 2020, when he was terminated, Claimant continued to violate Employer's attendance policy with his repeated tardiness.

20. Claimant did not file a Workers' Claim for Compensation until August 22, 2021. He listed the date of his injury as February 1, 2020, and stated that he had a cumulative fungal and bacterial infection occurring at each of his fingertips. There is no reference to the alleged chemical exposure. (Ex. B).

21. LB[Redacted] completed Employer's First Report of Injury on September 29, 2021. Under "tell us how the injury occurred," Ms. LB[Redacted] stated, "[u]nknown, did not report to management, disgruntled employee." (Ex. C).

22. The ALJ finds that Employer terminated Claimant for cause on February 10, 2020.

23. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that he sustained an injury to his hands in the course of his employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ.

Cordova v. Indus. Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant is required to prove by a preponderance of the evidence that he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Merely feeling pain at work in and of itself is not "compensable." *See Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (I.C.A.O. April 11, 2007).

On January 23, 2020, Claimant went to urgent care because of pain in his fingers and nail beds. (Findings of Fact ¶ 4). Claimant's medical records make no mention of chemical exposure at work, or any type of work injury. To the contrary the records say that Claimant "denies any injuries." (*Id.* at ¶ 5). Mr. BM[Redacted] , the plant manager, credibly testified that Claimant's job did not require the use of chemicals. (*Id.* at ¶ 12). Claimant failed to present sufficient evidence to prove that he suffered an injury to his bilateral hands during the course of his employment. (*Id.* at ¶ 23).

ORDER

It is therefore ordered that:

1. Claimant's claim for compensability is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-183-992-001

ISSUES

I. Whether Respondent has proven by a preponderance of the evidence that Claimant is responsible for his termination from employment, and thus precluded from receiving Temporary Total Disability ("TTD") benefits.

STIPULATIONS

A. Claimant's average weekly wage ("AWW") is $980.67.

B. TTD Benefits are payable but for the termination of cause.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was employed by Employer as a trailer mechanic. His employment began on or about March 29, 2019. Although Employer carries mail across state lines for the United States Postal Service ("USPS"), Claimant performed his job duties exclusively in Colorado.

2. On March 29 ,2019, Claimant was provided a copy of the Employer's Drug, Alcohol and Controlled Substance Policy (Drug Policy). On that same day, Claimant affirmed that he fully understood the terms of the Drug Policy and agreed to abide by it. **R. Ex. E., 99-102.**

3. On September 29, 2021, Claimant was sent to perform work on a tractor-trailer that was stalled in the middle of the road. He sustained multiple injuries, including left hip and spinal fractures, when the driver of the semi-truck began to drive while Claimant was underneath the attached trailer. He was crushed by a wheel axel.

4. Emergency services were called. Northglenn Ambulance arrived on the scene at 4:20 p.m. Claimant was transported to the Emergency Department at UC Health ("UCHER"). **Cl. Ex. 4**.

5. Claimant arrived at the UCHER at 4:40 p.m. **R. Ex. D: 14**. Claimant was administered fentanyl intravenously at 4:45 p.m. (i.e., 1645 on a 24-hour clock), and 6 mg of morphine intravenously at 6:25 p.m. (i.e., 1825 on a 24-hour clock). **Cl. Ex. 5: 55**.

6. Claimant's urine was collected for a toxicology screen at 7:30 p.m. (i.e., 1930 on a 24-hour clock). It was positive for opiates and cannabinoids - marijuana. **Cl. Ex. 6: 65**.

7. Claimant underwent left hip surgery on September 30, 2021. **Cl. Ex. 8**.

8. Claimant was discharged from UCHER on October 2, 2021. **R. Ex. D: 15**.

9. Right after the accident, Claimant was disabled and unable to perform his regular job duties.

10. Respondent filed a General Admission of Liability on October 21, 2021. Respondent admitted for medical benefits only and indicated "Claimant is responsible for termination of employment." **Cl. Ex. 1**.

11. BG[Redacted] is the General Manager of Employer. Mr. BG[Redacted] testified that Employer has a contract with the United States Federal Government ("USFG") to haul mail for the USPS. Mr. BG[Redacted] testified, as part of that contract, Employer must maintain an anti-drug policy for its drivers that complies with the Drug-Free Workplace Act of 1988. Mr. BG[Redacted] testified that only drivers have to take a pre-employment drug test per federal mandate.

12. Mr. BG[Redacted] testified that a copy of the Drug-Free Workplace Act of 1988 is not given to employees. Mr. BG[Redacted] testified that a list of prohibited substances is not detailed in Employer's Drug Policy. Mr. BG[Redacted] testified a list of prohibited substances is not given to employees. Mr. BG[Redacted] testified that a list of what constitutes a "controlled substance" is not given to employees. Mr. BG[Redacted] testified that what constitutes a controlled substance varies from state to state depending on what substances are legal in each state.

13. Mr. BG[Redacted] testified Employer's Drug Policy does allow for the use of legally obtainable drugs by employees, and what a legal drug is varies from state to state. Mr. BG[Redacted] testified there is nothing given to Colorado employees indicating cannabis or marijuana use is prohibited by Employer despite it being legal in Colorado. Mr. BG[Redacted] testified that alcohol is a legally obtainable drug, and an employee can test positive for alcohol while at work and retain his or her employment.

14. Mr. BG[Redacted] testified that he terminated Claimant's employment because Claimant's urinalysis from the UCHER was positive for opioids and cannabis - marijuana.

15. EC[Redacted] works for Employer as the Safety and Compliance Manager, but previously she was the Human Resources Manager for nine years. Ms. EC[Redacted] testified she handles the onboarding process for new employees, including providing the Employee Handbook and Drug Policy. Ms. EC[Redacted] testified she does not inform employees that marijuana use is prohibited by Employer unless the employee asks. She testified Employer does not provide employees a list of controlled substances or a list of prohibited substances.

16. Ms. EC[Redacted] testified Employer's Drug Policy does not make it clear to employees which legally obtainable drugs are permissible to use and which are not. Ms. EC[Redacted] testified that Employer's Drug Policy is ambiguous in regard to off-the-clock cannabis - marijuana - use to Colorado employees.

17. Claimant used marijuana before and after obtaining employment with Employer, and he was not subject to a drug test before beginning his employment. Claimant was provided a copy of the Employee Handbook, inclusive of the "Drug, Alcohol, and Controlled Substances Policy" ("Drug Policy") by Employer during the onboarding process. Employer did not orally or specifically inform Claimant that marijuana use was included in Employer's "Zero Tolerance" policy. Moreover, Claimant was not provided a list of prohibited substances.

18. Claimant was not provided a copy of the federal "Drug-Free Workplace Act of 1988" that is referenced in Employer's Drug Policy. Claimant understood the policy to mean he could be randomly drug tested at any time.

19. Claimant credibly testified that when the injury occurred, he was not under the influence of marijuana or opioids, nor feeling any effect of marijuana use that occurred before the injury. Claimant also credibly testified that he is not a recreational user of opioids.

20. The opioids detected in Claimant's urine was due to Claimant being administered opioids in the hospital.

21. Employer's Drug policy prohibits "the use, purchase, transfer, or possession of a controlled substance by any employee in a company vehicle or while performing company business[.]" It states, "The presence of an amount of any controlled substance that results in a positive test of any employee, while in a company vehicle or while performing company business is prohibited." Further, that "Being under the influence of a controlled substance while in a company vehicle or while performing company business is prohibited." **Cl. Ex. 3: 23**.

22. Marijuana possession, sale, and distribution is regulated by both state and federal law. In Colorado, marijuana is regulated as a controlled substance. *See* Colo. Rev. Stat. § 18-18-102. But as of 2012, Amendment 64 made it legal under state law for adults (people 21 years old or older) to possess and cultivate certain amounts of marijuana for personal use.

23. In regard to "Legal Drugs," the Drug Policy states that "The use or being under the influence of any legally obtainable drug by any employee while in a company vehicle or while performing company business, is prohibited, as such use or influence may affect the safety of others." **Cl. Ex. 3: 23**.

24. Claimant did not use, and was not under the influence of, marijuana while performing his job duties at the time of the accident.

25. Employer's Drug Policy is modeled after federal laws and regulations and not Colorado state laws and regulations. The Drug Policy specifically states that:

> This program is designed to comply with the regulations of the DrugFree Workplace Act of 1988 (Public Law 100-690) and applicable Federal Regulations including the Federal Motor Carriers Drug and Alcohol Clearinghouse. **R. Ex. E. 99**.

26. Employer's Drug Policy is ambiguous about whether it is permissible for employees to use marijuana in Colorado, which is legal to use and possess in Colorado, after hours. As testified to by Mr. BG[Redacted] , Employer's Drug Policy is only designed to comply with federal statute for drivers.

27. Moreover, the Drug Policy is ambiguous as to whether non-drivers, such as Claimant, are subject to the same substance use policies as drivers.

28. Employer's Drug Policy creates an ambiguity for Colorado employees as to whether off-the-clock marijuana use is permitted because it does not specify as to whether

marijuana is considered a prohibited controlled substance or a permissible legally obtainable drug for Colorado employees.

29. Employer did not clearly and unambiguously inform Claimant that off-the-clock marijuana use was prohibited.

30. Employer did not clearly and unambiguously inform Claimant that off-the-clock marijuana use was a terminatable offense.

31. Employer's "zero tolerance" policy does not clearly and unambiguously prohibit off-the-clock usage of legally obtainable drugs in Colorado such as marijuana.

32. Claimant was not under the influence of opioids or marijuana while working for Employer, or at the time of injury.

33. Claimant is not responsible for his termination because non-driver employees such as Claimant would not reasonably expect off-the-clock marijuana use, which is legal in Colorado, to result in the loss of employment.

34. Claimant is entitled to TTD benefits from the date of injury until terminated by law.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v.*

ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondent has proven by a preponderance of the evidence that Claimant is responsible for his termination from employment, and thus precluded from receiving Temporary Total Disability ("TTD") benefits.

As found, Claimant's work accident caused his disability and prevented Claimant from performing his regular job duties. Thus, he would be entitled to temporary total disability benefits. However, Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, Respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish a claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

Unless it is ambiguous a contract must be enforced as written. *Cary v. Chevron*, U.S.A., 867 P.2d 117 (Colo. App. 1993). A term in ambiguous if "fairly susceptible" to more than one interpretation. *Dorman v. Petrol Aspen Inc*., 914 P.2d 909 (Colo. 1996). Further, in determining whether the policy is ambiguous, the language must be examined "and construed in harmony with plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fiberglas Fabricators*, *Inc. v. Klyberg*, 799 P.2d 371, 374 (Colo. 1990).

As found, Claimant is not responsible for his termination because he did not act volitionally or exercise some control of his termination because, in light of the totality of the circumstances, he would not reasonably expect off-the-clock marijuana or cannabis use to result in the loss of employment. In other words, Employer allowed Claimant to believe off-the-clock marijuana or cannabis use was permissible and subjectively decided to apply the terms of its Drug Policy in a way that allowed Employer to terminate Claimant despite the apparent ambiguities in the Drug Policy, and Claimant has no control over that.

To begin, Mr. BG[Redacted] testified Claimant was terminated, partially, for having opioids in his system. As evidenced by the medical records, the opioids in Claimant's system were placed there by his providers at the UCHER. Claimant testified he does not recreationally use opioids and was not under the influence of opioids prior to his work injury. There is a lack of credible and persuasive evidence to contradict Claimant's testimony.

Next, Employer's Drug Policy is ambiguous is multiple ways. First, it is ambiguous as to off-the-clock cannabis use by non-driver employees of Employer in Colorado. Mr. BG[Redacted] testified Employer's Drug Policy is intended to comply with federal law "for drivers." Claimant is not a driver; he is a mechanic. Claimant does not work across state lines. Thus, it is ambiguous as to whether the intent of compliance with federal law is intended for mechanics like Claimant.

Second, Employer's Drug Policy allows employees to use legal drugs that are legally obtainable. Cannabis – marijuana - is a legal drug that is legally obtainable in Colorado where Claimant works. Employer's Drug Policy implies employees can use marijuana so long as the employee does not use or is under the influence of marijuana while in a company vehicle or while performing company business. Claimant credibly testified he did not use, nor was he under the influence of, marijuana at work.

Third, Employer's Drug Policy does not define what a "controlled substance" is, nor does it define what a legal or legally obtainable drug is. The Drug Policy does not specify whether Employer categorizes marijuana as an impermissible controlled substance or a permissible legally obtainable drug. Simply stated, the Drug Policy does not indicate that off-the-clock marijuana use is prohibited despite it being legal in Colorado, leaving employees to figure it out for themselves.

Fourth, Ms. EC[Redacted] testified that Employer does not inform its Colorado employees that off-the-clock marijuana use is prohibited unless the Claimant asks. Thus, Employer does not inform employees off-the-clock marijuana use will result in termination unless the Claimant asks. Expecting a new employee to ask his or her new employer what legal and legally obtainable drugs he can use is an unreasonable expectation, and

strongly suggests a “don’t-ask-don’t-tell” policy on behalf of Employer in regard to its Colorado employees and the use of marijuana.

Fifth, Employer’s “zero tolerance” policy does not specify that testing positive for a legally obtainable drug, the use of which occurred off-the-clock, will result in termination. Furthermore, Mr. BG[Redacted] testified that an employee can test positive for alcohol, a legally obtainable drug under Employer’s Drug Policy but not be terminated. Thus, per Mr. BG[Redacted] ’s testimony the “zero tolerance” policy is a not a “zero tolerance” policy creating more ambiguities within the Drug Policy.

Sixth, although the Drug Policy states that employees will be tested before they start their employment with Employer, Claimant did not undergo preemployment testing. Again, this is additional evidence which creates ambiguity as to whether the Drug Policy was applied against mechanics such as Claimant.

Thus, the ALJ finds and concludes that Claimant is not responsible for his termination because non-driver employees such as Claimant would not reasonably expect that off-the-clock marijuana use will result in the loss of employment. The Drug Policy is subject to multiple reasonable interpretations, including whether marijuana is a prohibited controlled substance or a permissible legally obtainable drug. As a result, Respondents failed to establish by a preponderance of the evidence that Claimant is at-fault for his termination and wage loss. Claimant is therefore entitled to TTD benefits from the date of injury until terminated by law.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is entitled to temporary total disability benefits as of the date of his injury.
2. Claimant shall be paid temporary total disability benefits based on an average weekly wage of $980.67.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 14, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-096-070-003

ISSUE

1. Whether Claimant has overcome the Division Independent Medical Examination (DIME) physician's opinion regarding Claimant's impairment rating by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant was working for Employer as the Supervisor of Housekeeping when she sustained an injury in the course of her employment on January 4, 2019. On that day, Claimant fell down a stairwell. Claimant sustained numerous facial fractures, including a left-sided tripod fracture, left maxillary sinus fractures, a left lateral orbital wall fracture, a left zygomatic arch fracture, and non-displaced fractures of the anterior and posterior wall of the left maxillary sinus. In addition to her facial injuries, Claimant sustained a right middle finger strain and a fractured tooth. (Ex. B).

2. Following the work injury, Claimant had nasal congestion and difficulty breathing through her nose, with the left side worse than the right. On August 29, 2019, Peter McGuire, M.D., an ENT specialist, performed a septoplasty, concha bullosa excision, left, and septoplasty with submucous turbinate resection on Respondent. (Ex. R).

3. In January 2020, Claimant transferred care to ENT, Christopher Mawn, M.D. because of her continued difficulty breathing. On July 21, 2020, Dr. Mawn operated on Claimant to repair a nasal valve collapse. On December 3, 2020, Dr. Mawn noted in his records that Claimant was "[o]verall doing well with improved nasal breathing. She had some congestion on the right side, but was overall happy with the results." (Ex. AA).

4. On January 7, 2021, Jason Crawford, M.D, Claimant's authorized treating physician (ATP) evaluated her. Dr. Crawford documented that Claimant self-rated her breathing at 80% of her baseline. Claimant described continued "left eye pressure", but Dr. Crawford noted that two separate eye specialists treated her and did not identify any anatomic defect. Claimant's physical examination revealed "no significant nasal congestion." (Ex. BB).

5. On April 1, 2021, Dr. Crawford placed Claimant at maximum medical improvement (MMI). Her physical examination revealed "no sinus tenderness. No significant nares obstruction." Dr. Crawford concluded Claimant did not sustain a permanent impairment. (Ex. DD).

6. Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Crawford's opinions. Claimant objected and proceeded to a DIME, performed by Brian Beatty, D.O.

7. Dr. Beatty described the scope of his examination as follows: "[t]o consider maximal [sp.] medical improvement, permanent impairment and apportionment. To evaluate the right hand, face, nose, and throat." (Ex A).

8. Dr. Beatty noted Claimant's subjective complaints as:

> She also developed left upper teeth sensitivity and went to a dentist and was told she had a fractured tooth and this had occurred in May/April 2019. She still has some pain in the left jaw/temporal region when she chews and she still has difficulty with right middle when she tries to grafts. She has seen an ophthalmologist due to some difficulty with her left eye but she is unable to wear contact lenses and notes that her eye is dry. He left shin feels fine. She still has some stuffiness in her left sinus and stiffness in her right middle finger. She is still working full duties.

Dr. Beatty's physical examination revealed temporomandibular joint tenderness on the left, but full range of motion of the jaw with no deviation, clicking, or popping, and normal nasal passages. Dr. Beatty acknowledged Claimant's "persistent stuffiness" on the left nostril, and recommended a repeat CT scan. Dr. Beatty assigned Claimant a 7% impairment for the right middle finger due to the loss of range of motion, which equaled 1% whole person impairment. He did not assign any additional permanent impairment. (Ex. A).

9. Respondent filed an FAL consistent with the DIME opinion. (Ex. EE). Claimant objected and requested a hearing to overcome the DIME physician's opinion that she did not sustain a permanent impairment related to her facial injuries.

10. Respondent retained Carlos Cebrian, M.D., to perform an Independent Medical Examination (IME). Dr. Cebrian reviewed the medical records, examined Claimant, and prepared an IME report. (Ex. B).

11. In his IME report, Dr. Cebrian explained that the AMA Guides, 3rd Ed, *Revised* (AMA guides) presented three areas of potential impairment for Claimant's facial injuries, two in Chapter 9 (Ear, Nose, Throat and Related Structures) and one in Chapter 4 (Nervous System).

12. Dr. Cebrian credibly testified that according to the AMA Guides, Claimant did not qualify for an Air Passage Defect impairment rating (Chapter 9, Table 5, p. 181) because Claimant did not have complete obstruction of the nose. This was supported by Claimant's testimony.

13. Dr. Cebrian credibly testified that according to the AMA guides, Claimant did not qualify for a rating under nerve disorders (Chapter 4, Table 2, p.111) as Claimant's injury did not rise to the level of permanent impairment. Claimant did not provide any evidence to challenge this opinion.

14. Dr. Cebrian credibly testified that Claimant ***could*** receive a rating for Face Structural Integrity under Section 9.2 of the AMA Guides (p.179). Dr. Cebrian would place Claimant in Class I, which is "when the facial abnormality is limited to a disorder of the cutaneous structures, such as visible scars and abnormal pigmentation." Individuals in this class can be assigned an impairment rating of 0-5%. Dr. Cebrian testified that he would assign a 5% impairment rating. He explained in his IME report that the rating was due to the "loss of structural integrity of the face. This is evidenced by her left eye being open, more than the right, and a fullness of the left cheek. This category would also include any visible scarring on the face." (Ex. 1, pp 24-25).

15. Claimant underwent surgery in February 2022, at her own expense, to correct the facial deformities Dr. Cebrian referenced in his IME report.

16. Dr. Cebrian testified at hearing in support of his IME report. He explained that while he offered an impairment for Facial Structural Integrity, it was not incorrect for Dr. Beatty not to do so as the Class I impairment provided a range of impairment from 0% to 5%. The Level II Accreditation Curriculum provides guidance for such ratings, "[t]he impairment percentages are meant to reflect interference with social and vocational activities." https://codwc.app.box.com/v/L2ACurriculum p.353. He acknowledged the Curriculum statement and conceded in his testimony that he was likely "generous" with the 5% rating. Further, Dr. Cebrian explained it was not inconsistent for the DIME not to assign a rating for a permanent impairment as the AMA Guides provide ranges beginning with 0%.

17. Claimant credibly testified regarding her treatment, including the surgeries referenced above and her current symptoms. Claimant described sensitivity in her teeth on the left side and in the four areas on the left side of her face, as delineated in Exhibit 2. Claimant testified that she avoids cold drinks, chews carefully, and experiences symptoms when blowing her nose. Claimant testified she described these symptoms to Drs. Crawford, Beatty, and Cebrian. Accordingly, each doctor had the same information with which to determine permanent impairment.

18. Dr. Cebrian credibly testified that Dr. Beatty's assignment of no impairment rating for Claimant's facial injuries was not in error.

19. The ALJ finds that Claimant did not overcome Dr. Beatty's opinion on impairment by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

DIME Physician's Impairment Findings

The party seeking to overcome the DIME physician's finding regarding permanent impairment bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

The DIME physician, Dr. Beatty, specifically noted in his report that he was considering injuries to Claimant's face, but he did not assign Claimant an impairment rating for her facial injuries. (Findings of Fact ¶¶ 7-8). Dr. Crawford, the ATP, agreed that no impairment rating was appropriate for Claimant's facial injuries. (*Id.* at ¶ 5). Respondents' IME physician, Dr. Cebrian, credibly testified that Dr. Beatty did not err by not assigning Claimant an impairment rating for her facial injuries. With respect to facial

structure impairment, Dr. Cebrian credibly testified that because the AMA Guides provide for a 0% impairment for a Class I impairment, Dr. Beatty did not err by not assigning an impairment rating. (*Id.* at ¶¶ 16 and 18). Claimant presented no evidence to the Contrary. Dr. Beatty's opinion regarding Claimant's impairment rating must be overcome by clear and convincing evidence, and Claimant failed to do this.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant's admitted injury is not on the schedule of disability pursuant to Sec. 8-42-107(2), C.R.S.

II. If Claimant has a whole person impairment, whether Respondents have overcome the DIME physician's impairment by clear and convincing evidence.

III. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to maintenance medical benefits after maximum medical improvement.

PROCEDURAL HISTORY

Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME) on September 16, 2021 on the issue of Claimant's right shoulder impairment.

Respondents filed an Application for Hearing on December 16, 2021 on issues that included overcoming the DIME physician's opinion, compensable components of the Claimant's impairment and permanent partial disability benefits.

Claimant filed a Response to Respondents' December 16, 2021 Application for Hearing on December 17, 2021 on issues that included permanent partial disability benefits, and medical benefits that are authorized and reasonably necessary.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 66 year old at the time of the hearing in this matter. He worked for Employer as a driver delivering construction materials, as of July 24, 2016. Employer was in the business of supplying materials such as pipes, water heaters and other equipment. Claimant would frequently have to load and unload large pieces of equipment, including lifting them off the delivery truck. Some of the water heaters would weigh up to 120 lbs. and he would frequently handle eleven to twelve per day. His truck had a tail gate door that weighed approximately 30 to 40 lbs. which he had to open and close multiple times throughout the day. He would lift the truck door in an upward motion. He frequently worked from approximately 4:30 a.m. to 5 p.m. and sometimes Saturdays.

2. For the five years from the date of his hire to the date of his admitted work related injury, he was able to perform all the essential functions of his job, and was working full time without limitations. He had no problems lifting the back gate of the truck,

lifting the water heaters in and out of the truck, getting up in the back of the truck and securing the equipment by tying them down.

3. On January 11, 2021 Claimant was sent to Colorado Springs with several deliveries. On the fourth or fifth delivery, Claimant was lifting the back door of the truck, it got stuck and when forcing the door up, Claimant felt a pop in his shoulder. Claimant is 5' 6" tall and he had to lift the tail door above his shoulder level. He felt a stabbing, knifing sensation in his right shoulder. Claimant indicated that the pain was between the tip of his shoulder anteriorly and up towards the base of his neck. Claimant immediately started sweating from the level of pain and felt agitation due to the pain.

4. Claimant finished his route as he was able and returned to report the injury to the Employer's warehouse manager, who sent him to see a physician at Concentra Medical Centers.

5. Claimant stated that he continued to have pain and problems with the right shoulder from the date of injury and ongoing. He required medications to help him handle his pain and his loss of function, which he did not have prior to the date of injury. He stated he continued to need some physical therapy and medications to handle his ongoing right shoulder problems.

6. He continued to have difficulty raising his arm in front of him. He continued to have difficulty with activities of daily living, especially if they involved lifting his right arm, such as washing his hair or putting on a hat. He even reported he had problems using the bathroom. Prior to the January 11, 2021 work related injury he was able to perform these activities without problems.

7. Claimant stated that he did not have an interpreter for all his medical appointments, and while he communicated the best he could with his providers, he could not be sure that he was making himself understood. He stated that his providers would frequently use words he did not understand. Claimant disputed that he ever used the word "pinch," but instead reported he felt a stabbing or knifing pain in his right shoulder.

8. Claimant was first seen on January 11, 2021 by Dr. Christian Updike of Concentra Medical Centers at Denver Aurora North. He presented for a right shoulder and arm injury which occurred on January 11, 2021 while he was pulling a door and felt a "pinch" in his arm. On exam, Dr. Updike found joint pain and muscle pain, tingling and numbness. Dr. Updike diagnosed a biceps rupture and sent him to his primary care provider as his hypertension was uncontrolled. He was provided with a sling and an MRI was ordered, but Dr. Updike indicated that anti-inflammatories and physical therapy were contraindicated until his blood pressure was under control. He provided restrictions of no use of the right arm and no driving company vehicles.

9. Claimant returned to see Dr. Updike[1] the following day stating that his right shoulder pain was getting worse and was constant. Dr. Updike found joint pain, muscle pain, neck pain, joint swelling, joint stiffness and night pain. He was mildly tender at top of shoulder, wearing a sling, very tender with ROM at the biceps. He assessed a right biceps tendon rupture, and referred Claimant to an orthopedic specialist as well as prescribed pain medications. He also noted that Claimant had a history of left biceps

[1] Visit transcriptions are authored by Dr. Updike but the Physician's Reports are authored by Dr. Amanda B. Cava.

rupture. On January 14, 2021 Dr. Updike ordered interpreter services for Claimant's appointments. As found, with regard to the sensation Claimant felt at the time of his admitted injury, Claimant's testimony is more persuasive as Dr. Updike did not indicate having an interpreter at the first evaluation and specifically noted ordering an interpreter on January 14, 2021.

10. On January 19, 2021 Claimant was evaluated by Dr. Cary Motz at the Concentra clinic. Dr. Motz took a history from Claimant that he was "a 65-year-old gentleman who injured his right shoulder on 01/11/2021 when he pulled up on the lift gate on his delivery truck and it stuck. He felt a pop in his right shoulder." Dr. Motz documented that Claimant had significant discomfort since the injury. He developed some deformity in the biceps. He had been treated with Percocet, muscle rub cream and lidocaine patches. He continued to have moderate discomfort and was using a sling. Claimant denied any prior problem with his right shoulder but Claimant stated he did have a Popeye deformity on the left due to a prior injury. On exam, Dr. Motz noted Popeye deformities in both biceps, but the left one was asymptomatic. Claimant had significant tenderness about the right shoulder and biceps tendon. He had limited range of motion, his rotator cuff strength was difficult to examine due to pain and there may have been some swelling about the right shoulder. He diagnosed probable long-head biceps tendon tear, probable rotator cuff tears and asymptomatic left chronic biceps tendon tear. Dr. Motz stated that Claimant may have a rotator cuff tear that lead to a biceps tendon tear on the right. He stated he needed the MRI to be performed to assess the shoulder further.

11. On January 21, 2021 Dr. Updike referred Claimant to Dr. Zimmerman for a physiatrist evaluation for purposes of pain management, including narcotic use.

12. The MRI was completed on January 28, 2021 and read by Adam Williams, M.D. There was a full-thickness, full-width tear of the supraspinatus and infraspinatus tendons with medial retraction of the torn tendon stump to the level of the glenoid. Subscapularis and teres minor tendons were intact. There was stage IV atrophy of the supraspinatus and infraspinatus. Subscapularis and teres minor muscles themselves were normal bulk and signal. The posterior labrum findings were suggestive of an old, healed labral tear. There was large effusion at the subacromial-subdeltoid bursa. The long head biceps tendon was completely torn and distally retracted. There was moderate acromioclavicular osteoarthrosis, and noted that fluid within the subacromial-subdeltoid bursa may represent bursitis, fluid extravasation from the glenohumeral joint, or a combination of both.

13. On February 1, 2021 Dr. Amanda Cava evaluated Claimant with regard to his right anterior shoulder and right lateral shoulder pain. She stated Claimant was having constant pain that was sharp and severe, was affecting his sleep and movement and causing joint and muscle pain as well as joint stiffness. On exam she noted Claimant was tender to touch in the anterior lateral right shoulder, had limited range of motion in all planes with pain. She provided medications, prescribed therapy and noted that objective findings were consistent with work related mechanism of injury.

14. On February 2, 2021 Respondents filed a General Admission of Liability for medical benefits and temporary disability benefits at the average weekly wage of $861.01 with a TTD rate of $574.01 beginning on January 15, 2021 though it states that the waiting period was paid.

15. Claimant was evaluated by Dr. Fredric Zimmerman at Concentra Advanced Specialists in Denver on February 2, 2021. Dr. Zimmerman documented a history consistent with Claimant's testimony of sudden "stabbing pain" in the right shoulder as well as weakness. He documented that Claimant had an interpreter for this appointment. On exam, he noted Claimant had limited range of motion and significant shoulder pain. Lift-off, Neer test and cross-arm test were all positive for impingement and irritability. Claimant had loss of biceps strength on the right compared to the left. After discussion of Claimant's options, including surgery and injection, Dr. Zimmerman noted that surgery was reasonable. He referred Claimant to Dr. Michael Hewitt for surgical consultation.

16. Claimant was evaluated by Dr. Motz on February 2, 2021. Following review of the MRI, he determined that the rotator cuff was not repairable and Claimant would require a reverse total shoulder arthroplasty to surgically address the shoulder but that "would need to be performed outside of the work comp claim as this is clearly a chronic massive tear that was headed for joint replacement more than likely down the road." He offered Claimant a steroid injection which might decrease the inflammation and reduce the pain in order to gain better function. He noted that Claimant's massive rotator cuff tear was chronic and not work related. He released Claimant from care.

17. Dr. Updike responded to Insurer's inquiry regarding the claim on February 19, 2021. Dr. Updike stated that Claimant's preexisting chronic rotator cuff tears were not work related or aggravated by the injury and the total shoulder arthroplasty would not be required through the workers' compensation system. He opined the biceps tendon rupture was related to the January 11, 2021 workplace accident. He recommended a steroid shot and physical and massage therapy for the work related aggravation and stated he would be at maximum medical improvement (MMI) within twelve weeks.

18. Pursuant to Dr. Zimmerman's referral, Claimant was evaluated by Dr. Michael Hewitt for an orthopedic surgeon consult on March 8, 2021. He reviewed the injury and history with Claimant. On shoulder exam, there was mild muscular atrophy, no acromioclavicular deformity, and biceps deformity consistent with probable biceps tendon rupture. Active range of motion was significantly decreased and caused pain even with mild shoulder shrug. Dr. Hewitt reviewed the MRI findings and discussed the treatment options with Claimant and, specifically advising him that he would, in all likelihood, need surgery.

19. Claimant was seen on March 22, 2021 by Dr. Nathan Faulkner for a third surgical opinion regarding his right shoulder. Dr. Faulkner took a history that Claimant stated he had had a prior fall on his right elbow while at work but did not report the injury and his shoulder improved. He recounted the incident of January 11, 2021 consistent with Claimant's testimony, including the immediate onset of sharp pain. Dr. Faulkner stated that the atrophy shown on MRI supported that the massive rotator cuff tear was not acute. He agreed with Dr. Updike's treatment plan for conservative care following the work injury as there were no prior records of injury.

20. Dr. Updike opined on April 30, 2021 that Claimant had a profound chronic rotator cuff tear that was destined to needing a total shoulder replacement before the January 11, 2021 event took place, with that event possibly being the final tear of any remaining shoulder muscle. He noted that, because of the events of January 11, 2021

Claimant would not likely ever be placed back to work at full duty and an impairment rating was appropriate but surgery was not appropriate under workers' compensation system.

21. On July 27, 2021 Dr. Zimmerman completed an impairment rating evaluation, noting the use of an interpreter. He stated Claimant was ineligible for narcotic medication prescriptions as he was non-compliant with his narcotic pain management contract. Dr. Zimmerman placed Claimant at MMI and provided an impairment rating in accordance with the *AMA Guides to the Evaluation of Permanent impairment*, Third Edition (*Revised*) with a 22% upper extremity impairment that converted to a 13% whole person impairment. Dr. Zimmerman indicated that there was no indication for apportionment with no previous right shoulder workman's compensation claims and did not recommend any further maintenance care.

22. Claimant was attended by Janelle Tittelfitz, PA-C on July 28, 2021. She noted that if Claimant required narcotic medication refills, that he would have to reach out to Dr. Zimmerman but that since he was using Lidoderm patches and Diclofenac gel, they would refill those with his pharmacy. She contacted his physical therapy who noted that he should continue for one more week of PT as he continued to await notice of authorization for surgery. Ms. Tittelfitz stated that she suspected that Claimant had an acute right shoulder biceps rupture but a chronic rotator cuff tear. Claimant stated that PT had helped a lot and requested further therapy. Ms. Tittelfitz advised Claimant that the stage IV atrophy indicated an old rotator cuff tear and that Insurer was unlikely to authorize the total shoulder replacement. She also reviewed discharge evaluation procedures with Claimant advising that he was at MMI per Dr. Zimmerman's report and impairment with no further maintenance care. The Physician Report of Injury (M-164) was issued by Dr. Cava on July 28, 2021 also stated no to maintenance care after MMI.

23. Dr. Robert Watson issued a DIME report on November 17, 2021. He took a history, reviewed the medical records submitted, and performed both a physical examination and range of motion testing. He indicated that he evaluated Claimant with an interpreter present. Dr. Watson noted that Claimant was complaining of pain in the anterior right shoulder and towards the body of the biceps on the right. Claimant complained of aching and inability to lift his arm above his head or shoulder level. On exam of the upper extremity, Dr. Watson found on palpation of the shoulder girdle some mild tenderness extending from the mid right shoulder girdle posterior, down to the area of the acromion; palpation of the shoulder showed tenderness over the bicipital groove; an obvious "Popeye" deformity consistent with the long head of the biceps tendon rupture on the right; full motion of the elbow, wrist and hand; and loss of range of motion of the upper extremity. A negative drop arm test, with restricted motion, positive Speed's Impingement test and negative Finkelstein's test in the wrist and hand. Dr. Watson found Claimant to be at maximum medical improvement on July 21, 2021, agreeing with Dr. Zimmerman that Claimant required no maintenance care. He noted that only the biceps tendon rupture was work related but that the massive rotator cuff pathology was degenerative, based on the MRI findings, and not work related.

24. Dr. Watson provided an impairment rating using the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*). Range of motion for the shoulder was added, for a total of 19% for a regional impairment of the upper extremity of the right shoulder and converted it to a whole person impairment,

using Table 3 (p. 16), which equaled 11%. Claimant was given permanent work restrictions at light physical demand, no overhead reaching of the right upper extremity, and no ladders. Lastly, he noted that no maintenance medical care was needed for the work related injury.

25. Dr. Watson testified by deposition on March 9, 2022. Dr. Watson was accepted as an expert, who was Board certified by the American Board of Preventative Medicine and Occupational Medicine and Level II accredited.

Dr. Watson stated that the biceps tendon rises on the head of the humerus, comes down through the bicipital groove of the humerus, and then attaches on the proximal radius and forearm, with the biceps tendon running underneath the supraspinatus and infraspinatus and subscapularis tendons. He explained the anatomy of the shoulder girdle, specifically noting that there were three primary muscle groups and four main tendons that comprise the rotator cuff in addition to the biceps tendon and the deltoid muscles, all of which are necessary to have full range of motion. Dr. Watson stated that while physiologically, the biceps tendon rupture primarily accounted for the loss of flexion that he was required to perform the impairment rating under the *AMA Guides* and the Division guidelines for determining an impairment rating. He specifically stated with regard to loss of range of motion that "[T]hey do not necessarily allow me to separate these out for the purpose of impairment rating unless I have preexisting range of motion measurements. So from an administrative standpoint, this is the whole, and I don't get to separate them out unless I have some way to apportion it."

26. It is inferred from reports issued by Dr. Motz, Dr. Faulkner, Dr. Updike and Dr. Watson that, because Claimant already had a preexisting rotator cuff tear, the biceps tendon on the right was assisting Claimant in utilizing his arm to continue performing work activities and once ruptured, Claimant had little remaining substantial tendon structures that would assist him with significant arm movement.

27. As found, Claimant's rotator cuff pathology is primarily preexisting the January 11, 2021 workplace injury.

28. As found, Claimant's biceps rupture is work related, including the loss of range of motion.

29. As found the appropriate impairment to be assigned is for loss of range of motion in accordance with the *AMA Guides* and the impairment rating protocols established by Division.

30. As found, Claimant's functional impairment involves not just the arm, as the arm has little function without the tendons, tissue and muscle surrounding the glenohumeral joint (ball of the humerus). The biceps tendon is attached proximally from the humerus head and is part of what induces the function.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

(2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Impairment Benefits

Claimant asserts in this matter that he has an injury to the whole person, and that his admitted injury is not on the schedule of impairments. Respondents not only assert that the schedule applies in this case, but that Claimant must prove by clear and convincing evidence that the causation analysis of Dr. Watson must be overcome by clear and convincing evidence because his true opinion is that the biceps tendon is part of the arm alone, not involving functional limitations of the shoulder girdle, and that only flexion of the arm is involved, which is exclusively on the schedule.

a. Schedule vs. Whole Person

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* Section 8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under Section 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). The ALJ must determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868- 996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (Dec. 28, 2006).

Base on case law, this ALJ concludes that medical impairment benefits must be determined in statutory order. The first question must be whether Claimant has an impairment on the schedule of impairments first. This burden is by preponderance of the evidence, not a clear and convincing standard, because the DIME process does not apply to scheduled injuries, if this is a scheduled injury.

In the case of a shoulder injury, where the long head of the bicep tendon of the right shoulder was ruptured, the question is whether the injury has affected structures and function beyond the arm at the shoulder. *Brown v. City of Aurora*, W .C. 4-452-408 (Oct. 9, 2002). The portion of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*) (*Guides*) related to the upper extremity is not a model of clarity but it is clear that an upper extremity and an arm at the shoulder are not equivalent. The upper extremity is composed of multiple sections that include the hand, forearm, arm, and shoulder complex or girdle. In turn, the joints that are between each section are the writs or radiocarpal joint, the elbow, and the glenohumeral joint. See AMA *Guides*, Ch. 3, Sec. 3.0. Proximal to the glenohumeral joint are the acromioclavicular joint, the clavicle and the scapula and all the muscle tissue that is proximal to the joint including the supraspinatus, infraspinatus, trapezius muscles that are involved in producing movement of the upper extremity. The *Guides* are further confusing because Figure 2 of Sec. 3.1b

at p. 15 (impairments of upper extremity from amputation at various levels) shows an anatomical sketch where a 100% loss of the *upper extremity* rating is assigned when there is an amputation of the arm at the mid-point of the humerus bone. The same figure also converts the 100% upper extremity impairment to 60% of the whole person, even if the entire *shoulder girdle* remains intact. The *Guides* do not rate impairments of the "*shoulder*." The *Guides* rate impairments of the *upper extremity*. However, the schedule of impairments is for "*loss of an arm at the shoulder*." Section 8-42-107(2), C.R.S. Inherent in this rating provision are the body part impairment, in this case the arm, that is being measured "*at the shoulder,*" which is the location.

As is noted by the Industrial Claim Appeals Office panel in *Newton v. Broadcom, Inc.,* the General Assembly chose not to list the scheduled body part as the "loss of the arm and the shoulder," or "loss of the arm and all bodily tissue directly attached thereto," or "loss of the shoulder joint," or "loss of the shoulder girdle," or "loss of the upper extremity." *Newton v. Broadcom, Inc.*, I.C.A.O., W.C. No. 5-095-589-002 (July 8, 2021). As this ALJ is precluded from reading nonexistent provisions into the Act, *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App. 2016), it cannot be assumed that "arm at the shoulder" is anything that extend into the shoulder joint or functionally affects body parts or structures or function that are at the shoulder itself or proximal from the shoulder joint. In this case, Claimant worked for employer loading and unloading heavy construction supplies on his own for five years, for example heavy water heaters that would weight up to 120 lbs. It is also clear that Claimant had chronic rotator cuff tears as shown by the MRI of January 28, 2021. The Claimant credibly testified that he was able to perform all his job functions prior to the January 11, 2021 admitted work related injury but now is severely limited in his abilities, as noted by the DIME physician by limiting him to light physical demands and no overhead reaching of the right upper extremity. Since Claimant already had significant pathology prior to the work injury, this ALJ infers and concludes that Claimant's remaining upper extremity structures, including the long head biceps tendon, were compensating for the preexisting conditions and that the rupture of the long head biceps tendon was what caused him to lose significant remaining function of the upper extremity, the proverbial straw the broke the camel's back.

The arm, without other bodily tissue, is immotile. Said another way, the arm, without other bodily tissue, has no spontaneous power to move. Thus, without other bodily tissue, the arm itself has no range of motion and no functional ability. For range of motion to exist in the arm, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate. See *Newton, supra.* The long head biceps tendon attaches above the head of the humerus bone, right below the coracoid process. Here, the humerus bone is not the injured body part. The bone itself did not lose function or substance. Any corresponding loss of range of motion is not attributable to the humerus bone. Here, like in *Newton*, there is no indication that the loss of range of motion is due to an impingement or loss of bony material. Rather, any loss of range of motion is attributable to the loss of function of the muscles, tendons, or cartilage, or all three, which operate together to permit spontaneous movement of the arm. *Newton, supra*

Findings regarding pain, physical limitations, problems with range of motion, protective carriage of the limb, and difficulty with activities of daily living are not factors that determine the "situs of functional impairments." Rather, they are manifestations of

functional impairments. Loss of range of motion is an effect of an impairment but not the underlying impairment itself. This ALJ is not persuaded by Respondents' suggestion that unless there is pain in the neck, no conversion is proper. There is no dispute that pursuant to the *Guides*, the loss of range of motion in this case as assigned by Dr. Watson is 22% of the upper extremity, which converts to 11% whole person impairment. The "arm" sustained no anatomical disruption to account for this loss of motion. Hence, the loss of motion arises from an anatomical disruption of the tissues of the biceps tendon that attaches right above and proximal to the glenohumeral joint, at the supraglenoid tubercle, which is considered a region of the scapula, attaching to the coracoid process. See *Gray's Anatomy*. The tendon that was ruptured was substantially in reliance of tissue attachments in the torso. Therefore the anatomical disruption or functional impairment is not only of the arm or of the glenohumeral joint, but rather of the shoulder complex proximal to the torso from the glenohumeral joint.

As found, there is loss of function that is proximal[2] to the shoulder joint structures that activate the use of the arm when measuring loss of range of motion. Specifically, the DIME physician, Dr. Watson, concluded that Claimant had loss of range of motion caused by the work related injury and the impairment caused by the loss of range of motion cannot be separated in a workers' compensation rating without preexisting records showing impairment, which were not tendered to the DIME physician nor the court. As found, this ALJ cannot but conclude that Claimant has lost function that is beyond the glenohumeral joint because the impairment of the bicep is measured through the loss of motion of the upper extremity.

As specifically found here, Claimant's work related injury of January 11, 2021 caused a disruption in the functioning of his upper extremity, not just his arm, and the biceps tendon may have been the last critical tissue structure that was keeping Claimant's upper extremity functioning before it ruptured. As found, Dr. Watson was clear in his testimony that Division prohibited any parceling out or apportionment of range of motion without medical records of a preexisting injury documenting prior loss of range of motion. Based on the totality of the persuasive evidence, Claimant is entitled to a determination that his loss of function encompasses all of his lost range of motion as required by the AMA *Guides*, the Division and the Level II accreditation requirements that a biceps tendon be rated based on loss of range of motion of the upper extremity, which affect portions of the body beyond the glenohumeral joint and proximal tissue function. Claimant has shown by a preponderance of the evidence that Claimant has an 11% whole person impairment rating, a rating not on the schedule.

b. Overcoming the DIME physician's opinion

Respondents also asserted that they need not overcome the DIME physician's opinion by clear and convincing evidence because Dr. Watson testified that the biceps tendon rupture primarily affected flexion, so the burden of proof is really just preponderance of the evidence. This ALJ disagrees. Respondents must prove that the

[2] Proximal to a joint is closer to the center of the body, trunk or torso. If it is proximal to the shoulder joint, it is towards the neck or the spine. If a symptom or condition is distal to the joint it moves away from the center of the body from the joint. If it distal to the shoulder joint, it is toward the hand.

DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021). The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, *supra*.

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*.

A party seeking to overcome the DIME physician's opinion need only prove that any one particular aspect of the impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

In this case, even if Claimant's objective physiologic functional impairment is only to flexion, the flexion is a function of the upper extremity, not of the arm alone. Flexion is not performed by the humerus. It is performed by multiple tissue, tendons and muscles as stated above. As found, Claimant's impairment is not on the schedule and is a whole person impairment. Dr. Watson's true opinion with regard to the assigning of impairment is that he, as a Level II physician, must comply with the AMA *Guides* and the Division impairment protocols, which require a physician to rate the upper extremity loss of range of motion when there is a biceps tendon rupture. As found, Dr. Watson fulfilled his mandate by providing such an impairment rating and the DIME physician correctly applied the *AMA Guides* and other rating protocols. Therefore, as further found in this case, Respondents' burden must be a clear and convincing standard. The totality of the persuasive evidence shows that Dr. Watson complied with the requirements of the AMA *Guides* and the impairment rating protocols in assigning the 11%whole person impairment rating for Claimant's loss of function related to the biceps rupture. There was no other persuasive evidence that Claimant has anything other than the 11% whole

person impairment. Respondents have failed to overcome the DIME physician, Dr. Watson's, impairment rating by clear and convincing evidence.

Lastly, if Claimant's arguments are that Claimant's massive rotator cuff injuries were related to this claim of January 11, 2021, whether fully related or aggravated by the incident, this ALJ concludes that they were not, as supported by Dr. Watson's opinion as well as multiple other provider's opinions, that the rotator cuff pathology was chronic and preexisting. Claimant has failed to show by any standard of proof that Claimant's rotator cuff injury is related to the January 11, 2021 workplace injury.

C. Maintenance Medical Benefits after Maximum Medical Improvement

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Drs. Watson, Zimmerman and Updike all agree that Claimant does not require maintenance medical benefits. There is a lack of persuasive evidence that any medical provider made recommendations for maintenance care in this matter. Claimant has failed to show by a preponderance of the evidence that he requires maintenance benefits after having achieved maximum medical improvement.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay permanent partial disability benefits based on the Dr. Watson's impairment rating of 11% whole person impairment. Respondents may take credit for any benefits paid from the date of MMI to the present.

2. Claimant's claim for maintenance medical benefits under *Grover* is *denied* and *dismissed.*

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 19th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-845-972-002

ISSUES

The issues for determination were:

- Did Claimant prove that hydrotherapy/aqua therapy (as prescribed by ATPs-Dr. Leahy and Dr. Polovitz) was reasonable, necessary and related as maintenance treatment, including the mileage going to and from hydrotherapy treatments?

- Is Claimant is entitled to reimbursement for payment of $677.75 for ophthalmological services rendered by ATP Dr. Politzer?

PROCEDURAL HISTORY

The undersigned ALJ issued a Summary Order on December 16, 2020. Respondents requested a full Order on December 31, 2020. This Order follows.

FINDINGS OF FACT

1. On January 17, 2011, Claimant suffered an admitted industrial injury while working for Employer. He was a restrained driver in his vehicle and was stopped at an intersection when he was rear-ended by another vehicle.[1]

2. Claimant received medical treatment for his injuries. Richard Leahy, D.O. from Elizabeth Family Health had previously treated Claimant before the MVA. Dr. Leahy was an ATP who provided treatment to Claimant starting in April 2011.[2]

3. Claimant was also injured on May 30, 2012 when his head was struck by an umbrella while undergoing rehabilitation for his work injuries. This was a compensable injury.

4. On May 17, 2011, Dr. Leahy wrote a prescription for hydrotherapy for Claimant that was to take place in Parker. The diagnosis was C6-C7 radiculopathy and cervical, lumbar spondylosis, DDD.

5. On August 8, 2012, Dr. Leahy wrote a prescription for hydrotherapy for Claimant. This was for a diagnosis of "DDD C-L spine".

6. A medical benefits issue arose in 2012 and ALJ Felter issued Findings of Fact, Conclusions of Law and Order on April 4, 2013 in which he ordered Respondents to pay for bilateral carpal tunnel surgery as recommend by A.T. Alijani, M.D.

[1] The MVA was described in Dr. Paz' IME report. [Exhibit 8, p. 76.; Exhibit B, p.6].

[2] Exhibit 12, p. 142.

7. Dr. Leahy authored a letter, dated April 18, 2016 in which he stated Claimant would need ongoing physical therapy or chiropractic treatment, along with pool therapy and medications for the injury sustained on January 17, 2011.

8. On September 28, 2016, parties entered into a settlement agreement for a full and final settlement of the case. The settlement agreement had a Medicare Set-Aside ("MSA") provision, which specified Respondents had the option of funding the MSA or leaving medical benefits open.[3]

9. The proposed MSA did not have a reference to or an amount allocated for future costs related to eye or vision issues.[4]

10. On April 18, 2018, Claimant was evaluated by Katherine Polovitz, M.D. He reported fatigue, slurred speech episodes and loss of time episodes. In the review of systems, Dr. Polovitz noted it was negative for blurred vision and eye pain. On examination, Claimant's neck had decreased range of motion ("ROM") with left rotation and right rotation. His neurologic exam was negative. Dr. Polovitz diagnoses were: post-concussion syndrome; post-concussional syndrome; seizures; unspecified convulsions; other fatigue.

11. Dr. Polovitz noted Claimant had done a version of cognitive therapy, as well as EMDR. Claimant's MRI and EEG were essentially normal around the time of that therapy and he had not had any recent episodes of loss of awareness. Dr. Polovitz recommended he continue with a very good sleep hygiene and routine exercise. Dr. Polovitz did not make specific treatment recommendations at that time (including for eye problems) and did not offer an opinion on causation.

12. There was no evidence in the record that Claimant reported eye symptoms or required treatment for vision issues from 2011-2019.

13. On August 5, 2019, Dr. Leahy wrote a letter recommending hydrotherapy for chronic pain s/p MVA.

14. Claimant submitted attendance records from Lifetime Fitness Gym for the period January 6, 2016 through September 18, 2019 (193 weeks). These records showed Claimant visited this facility 244 times during this period, which equated to 1.26 visits per week during this time.

15. In a letter, dated October 3, 2019, Dr. Leahy stated Claimant had been utilizing Lifetime Fitness Center since 2012 in order to obtain hydrotherapy. Dr. Leahy said Claimant required a pool-type setting in order to complete his treatment in a therapeutic venue. Dr. Leahy said a hot tub, although beneficial, was not adequate as a means of receiving essential treatment. He concluded Claimant required a pool in order

[3] Exhibit 10, p. 122.

[4] Exhibit 11, p. 140.

to maintain his quality-of-life following the trauma and subsequent health-related issues that were directly related to the 2011 MVA and 2012 injuries.

16. Dr. Leahy drafted a letter, dated November 4, 2019, in which he addressed aquatic or hydrotherapy. He noted Claimant suffered multiple traumatic injuries involving his lumbar, cervical, bilateral upper extremities, and head following the MVA of 2011. Claimant sustained further cervical and head injuries as a result of the 2012 pool accident. Dr. Leahy said the aquatic therapy was initiated in 2011 after invasive treatment and found to be extremely beneficial as his primary non-invasive therapeutic invention, utilized for pain control, core strength, cognitive maintenance and improvement. Dr. Leahy stated aquatic therapy utilizing a pool offered the necessary treatment for Claimant by utilizing the principles of hydrostatic pressure, buoyancy and viscosity of water. These principles used in a therapeutic venue were the standard of care utilized in similar multi-trauma cases to those suffered by Claimant. Dr. Leahy stated the support of the water was complete and surrounded the body from all sides. Reduced weight and hydrostatic pressure allowed Claimant to upload his spine, increase blood flow to injured areas promoting healing, reduction of joint stress, stretching out of muscle groups which were guarding given the neural and increase range of motion, as well as cardio therapy. Dr. Leahy said aquatic therapy had and would continue to be a necessity for Claimant's continued success. Dr. Leahy stated a hot tub would only be considered adjunct therapy.

17. Dr. Leahy's recommendations for hydrotherapy did not specify the duration or frequency of treatments. There was no evidence in the record Dr. Leahy oversaw Claimant's hydrotherapy at Lifetime Fitness. The ALJ found this opinion did not provide for oversight by an ATP or how the treatment would maintain MMI or prevent deterioration.

18. There was no confirmation in the record that Respondents paid for any part of Claimant's membership at Lifetime and reimbursement (from 2016-19) that was requested as part of Claimant's Application for Hearing.[5]

19. On or about November 8, 2019, Respondents denied the request for payment of Dr. Politzer's services and for glasses prescribed by Dr. Politzer (date of service February 26, 2019). No report was submitted from Dr. Politzer which provided an opinion as to why the need for glasses was related to Claimant's injuries. The denial was made pursuant to W.C.R.P. 16-11(A)(B) and (C).[6]

20. On November 20, 2019, Respondents denied the request for payment of mileage for hydrotherapy at Lifetime Fitness and Lifetime dues for the period of November 2016 through October 2019. A second denial for the mileage and Lifetime dues was sent on or about December 23, 2019.

[5] Exhibit 1, p.3.

[6] Exhibit C, pp. 38-39.

21. On March 3, 2020, Claimant was evaluated by F. Mark Paz, M.D., at the request of Respondents. At that time, he complained of numbness/tingling in the upper and lower extremities bilaterally; intermittent versus constant. Claimant also reported headaches. Dr. Paz reviewed the history of Claimant's treatment, including surgeries for CTS and for the lumbar spine. On examination, Claimant had good ROM in the thoracic spine (on flexion, right and left rotation), with no trigger points or fasiculations. Claimant's lumbar spine had no paraspinal muscle spasm or tenderness. Lumbar spine active range of motion on extension was less than 10°, right and left lateral flexion less than 10°, with no percussion tenderness in the midline of the lumbar spine, L1- S1. The straight leg raise tests for the right and left lower extremity were approximately 60°. No neurologic abnormalities were identified.

22. Dr. Paz' assessment was: neck pain; chronic low back pain; cervical degenerative disc disease, history of; cervical spondylosis, history of; traumatic brain injury, history of; sleep dysfunction; post-traumatic stress disorder, history of; deconditioning, history of; lumbar degenerative joint disease, history of; lumbar degenerative disc disease, history of lower extremity parasthesias; diabetic peripheral neuropathy; bilateral carpal tunnel syndrome; status post-decompressive surgery, right upper extremity; obesity; hypoxia by pulse oximetry, without tachycardia; elevated blood pressure; cognitive dysfunction, by history; diabetes mellitus type two; gout; hearing loss; Meniere's disease; left hand extensor tendon repair, history of; opioid dependence.

23. Dr. Paz opined the hydrotherapy treatment was not reasonable, necessary, nor causally related to the January 17, 2011 and/or May 30, 2012 incident. Hydrotherapy was defined as warm water pool treatments. Dr. Paz noted that the records of Dr. Leahy, who recommended the hydrotherapy, did not show he reviewed Claimant's treatment. As found, this treatment was essentially self-directed, along with Claimant's exercise program and not supervised by a medical professional. In addition, the ALJ found Dr. Leahy, though he recommended the treatment, did not specify that Claimant required it to maintain MMI or to prevent deterioration of his condition. Dr. Paz reviewed the DOWC MTG, specifically chronic pain disorder (Rule 17, Exhibit 9), cervical spine injury (Rule 17, Exhibit 8) and low back pain (Rule 17, Exhibit 1) as these applied to the case. Dr. Paz noted the term "hydrotherapy" was not identified by the DOWC MTG. Dr. Paz opined the definition of hydrotherapy, outside of DOWC MTG was not consistent with defined treatments of pool therapy or aquatic therapy. In addition, no treatment records were signed by a therapist as opposed to active therapy associated with hydrotherapy. Dr. Paz stated there was no evidence that this treatment was supervised. Dr. Paz distinguished hydrotherapy from pool therapy that was referenced in the DOWC MTG. Dr. Paz' analysis was persuasive to the ALJ.

24. Dr. Paz also stated that the eye care plan was not reasonable, necessary, nor causally related to the January 17, 2011 and/or May 30, 2012 incident. Dr. Paz noted that Claimant did not report subjective symptoms of vision abnormality during the IME, nor during the other IMES (performed by Drs. Goldman and McCranie). The ALJ credited Dr. Paz' opinions on relatedness, specifically whether the need for eye evaluations and treatment were related to the January 17, 2011 and May 30, 2012 injuries.

25. Claimant returned to Dr. Polovitz on April 15, 2020 (telehealth visit). He had not returned to his pre-injury baseline, but was keeping himself busy at home. He reported back pain, myalgias and neck pain. The evaluation was negative for blurred vision, eye drainage and pain. He had not had any recent episodes of loss of awareness and his sleep had improved. Dr. Polovitz‘ diagnoses were the same as the previous evaluation. She continued the prescription for modafinil and recommended that he continue to do aqua therapy. Dr. Polovitz said this was “absolutely” recommended for Claimant’s ongoing care and quality of life, including improving his sleep.

26. Claimant testified that the hydrotherapy helped the condition of his back, as it provided pain relief. He estimated that he went to Lifetime Fitness three times per week. In addition to the hydrotherapy, Claimant participated in a self-directed exercise and stretching program. Claimant was a credible witness when testifying that the hydrotherapy helped his physical condition.

27. There was no evidence in the record that Claimant’s hydrotherapy treatment was overseen by a health care professional.

28. Claimant failed to meet his burden of proof to show that care and treatment for an eye condition was reasonable necessary and related to his work injuries. Claimant failed to meet his burden of proof to show that the hydrotherapy treatment were reasonable and necessary.

29. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers’ Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical Benefits

Claimant had the burden of proving his entitlement to medical benefits by a preponderance of the evidence. The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

Claimant alleged that the evidence established he required hydrotherapy to maintain MMI and prevent deterioration of his condition. Claimant argued that his testimony, the medical records from the ATP's, along with the plausible inferences drawn therefrom, supported the conclusion that both hydrotherapy and evaluation by Dr. Politzer was reasonable, necessary and related. Respondents argued there was no evidence to support the conclusion that the hydrotherapy treatments were supervised by a physician. Respondents also asserted that there was no evidence to show that Claimant's eye issues were related to the work injuries. The ALJ concluded Claimant failed to meet this burden with regard to treatment of his eye condition and hydrotherapy.

As a starting point, Claimant suffered two injuries which arose out of and were in the course of his employment. (Findings of Fact 1, 3). He required both conservative treatment, as well surgical treatment for those injuries. (Findings of Fact 6, 21). As determined in Findings of Fact 9-12, there was no reference to eye symptoms or vision problems from 2016-19 in the treatment records, including when the case was settled with MSA provisions. The records from Claimant's treating physicians admitted at hearing failed to prove that his need for this treatment was caused by or related to the injuries suffered. The ALJ concluded Claimant did not meet his burden of proof to show that his need for eye care (including eyeglasses) was causally related to the industrial injuries and their sequalae. (Finding of Fact 28).

Next, the ALJ reviewed the request for reimbursement of Claimant's hydrotherapy at Lifetime Fitness (including member fees and mileage). Claimant failed to meet his burden of proof with regard to this request for medical benefits. As a starting point, the ALJ credited Claimant's testimony regarding the salubrious effect of this treatment. (Finding of Fact 26). However, the ALJ was not persuaded this constituted a medical treatment that would fit within *Grover* medical benefits. As determined in Findings of Fact 4-5, 7,15-16, Dr. Leahy made multiple recommendations for hydrotherapy. While Dr. Leahy described the mechanism and benefits of hydrotherapy, there was not a specific statement by Claimant's ATP-s (including Dr. Leahy) as to why this treatment was required to maintain MMI or prevent deterioration. (Finding of Fact 17). In addition, while this treatment was recommended by the Drs. Leahy and Polovitz, the parameters of this treatment [frequency, duration etc.] were not elucidated. *Id*. Both Dr. Leahy and Polovitz stated the hydrotherapy was required to maintain Claimant's quality of life, as opposed to a specific statement about MMI. The ALJ also found this treatment was not supervised by a medical professional. (Finding of Fact 27). Based upon this evidence, the ALJ

concluded the medical evidence did not support an Order requiring Respondent to pay for Lifetime Fitness and the hydrotherapy as a medical benefit.

In this regard, the ALJ also credited the expert testimony of Dr. Paz, who noted this treatment was not defined in the DOWC Medical Treatment Guidelines. As found, Dr. Paz distinguished between treatment that was supervised by a therapist and the treatment Claimant was doing, which was essentially self-supervised. (Finding of Fact 23). Claimant's request for medical benefits will therefore be denied, as there was not sufficient evidence to establish that this treatment was required to maintain MMI or prevent deterioration of his condition.

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, the Judge enters the following Order:

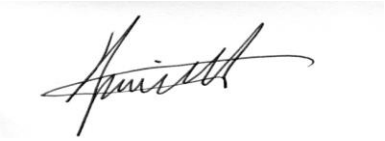
1. Claimant's claim for medical benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 20, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-087-009-005

ISSUES

I. Whether Claimant is at MMI.

II. The extent of Claimant's permanent impairment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On July 10, 2018, Claimant suffered an injury to his neck, low back, and groin when he was rear ended while driving his work vehicle. **RHE D, p. 15**. On February 1, 2022, Claimant testified that he was "in stop-and-go traffic, and a car that wasn't paying attention, whose lane had slowed down, switched lanes and rear-ended" him. **HearTr, p. 17**. Claimant sought care at the "closest Concentra he could find on google." **HearTr, p. 17**.
2. Claimant presented to Concentra right after the accident and was seen by Dr. Jay Reinsma. At this visit, Claimant complained of neck, back, and bilateral shoulder pain. Dr. Reinsma's assessment of Claimant included whiplash, low back strain, as well as pain in his left testicle. Due to Claimant's neck pain – whiplash injury – he also ordered cervical spine x-rays. The x-ray findings were "unremarkable." He also prescribed physical therapy and assigned work restrictions. **CHE 8, pp. 43-47.**
3. On July 13, 2018, Claimant returned to Dr. Reinsma. At this visit, he completed a pain diagram. Claimant noted that he had pain in his neck, shoulders, and back. **CHE 8, p. 56**.
4. On July 18, 2018, Claimant returned to Dr. Reinsma. At this visit, Claimant still complained of pain in his neck, shoulders and back. At this visit, however, Claimant also stated that he was having testicular pain. Claimant stated that he had a metal cup between his legs at the time of the accident and when he was thrown forward during the accident, the cup hit the steering wheel and caused the cup to strike his left testicle. **CHE 8, p. 57**.
5. Claimant kept treating with Dr. Reinsma for his back, neck, and shoulder pain. Dr. Reinsma kept prescribing physical therapy and chiropractic treatment.
6. On August 22, 2018, Claimant returned to Dr. Reinsma. Claimant still had ongoing neck pain and low pain and was not getting better. Therefore, Dr. Reinsma ordered an MRI and referred Claimant to a specialist – Dr. Aschberger. **CHE 8, pp. 75-78**, **87**.

7. Claimant underwent a cervical MRI on August 29, 2018. The MRI showed the following:

> A very mild disc bulge at C4-5 and very small disc protrusions at C5-6 and C6-7 without central canal stenosis or spinal cord compression.
>
> A small to moderate uncovertebral osteophytes from C3 through C7 contributing to mild to moderate foraminal narrowing.
>
> **CHE 8, p. 80**.

8. On September 18, 2018, Claimant was seen by Dr. John Aschberger – a physiatrist – for neck and back pain. In the report, it notes that Claimant has been undergoing chiropractic, acupuncture, and massage therapy. It also reports that Claimant did have a prior back strain. During the visit, Claimant asked about imaging of his thoracic and lumbar spine. But, based on Dr. Aschberger's assessment, he did not think it was warranted. Dr. Aschberger, did, however, recommended dry needling, and ongoing physical therapy in the form of stretching and massage therapy. Lastly, he noted his findings were mild overall. **CHE 8, pp. 87-90**.

9. On October 9, 2018, Claimant returned to Dr. Aschberger. At this visit, Claimant stated that his back pain was getting better and that he had some persistent tightness in his neck and upper trapezius. Claimant also complained of ongoing testicular pain. Dr. Aschberger noted that review of Claimant's physical therapy records revealed Claimant was improving his range of motion. Due to his testicular pain, Claimant was referred to his urologist, Dr. Horne. At this appointment, Dr. Aschberger assessed Claimant with a cervical strain and possible lumbar strain. **CHE 8, pp. 91-92**.

10. On December 13, 2018, Claimant was seen by Dr. Lacie Esser with continued neck and back pain. At this visit Claimant complained about his treatment. Claimant felt that he should be prescribed additional passive treatment, such as massage, hot/cold therapy, and partner stretches. He was also upset that it was taking too long to see additional specialists. Lastly, he complained about pain in his right ring finger. As a result, Dr. Esser referred Claimant to Dr. Sachar for evaluation of his right ring finger complaints. **CHE 8, pp. 111-115**.

11. On January 28, 2019, Claimant was seen by Dr. Sachar for his right ring finger. After obtaining an MRI, he diagnosed Claimant with a right finger PIP joint ganglion. He did not recommend any treatment at that time since it was not very symptomatic. **CHE 9, p. 123**.

12. On April 26, 2019, Claimant underwent an MRI of his lower back. The impression was:

1. Patchy appearance of the bone marrow suggesting osteopenia. Finding should be correlated with radiographs.
2. Multilevel degenerative disc disease as described. No disc herniation or spinal canal stenosis.
3. Bilateral pars defect at L5.

13. On June 6, 2019, Claimant was seen by Dr. Aschberger. At this appointment, Dr. Aschberger treated Claimant's lumbar strain by providing lidocaine injections at the L2, L4, and L5 area. **CHE 9, pp. 138-139**.

14. On June 7, 2019, Claimant was seen by Dr. Robert Kawasaki for lumbar epidural steroid injections. Claimant underwent an injection for lumbar radiculopathy. **CHE 9, pp. 142-143**.

15. On July 11, 2019, Claimant returned to Dr. Aschberger. At this visit, Dr. Aschberger evaluated Claimant. He noted Claimant's trapezial and cervical musculature was tight. He also evaluated his back. At this visit, he abruptly concluded that Claimant had reached MMI and provided an impairment rating. In determining Claimant's impairment, he concluded that Claimant did not suffer any permanent impairment to his cervical spine. He did not rate Claimant's cervical spine because he concluded that Claimant's symptoms and findings were myofascial and did not warrant a rating under the AMA Guides. He did, however, provide Claimant a 14% impairment for his lumbar spine and a 5% impairment for his testicle/scrotal injury. This combined to a 18% impairment. **RHE F, p. 59**.

16. On July 31, 2019, Claimant underwent a comprehensive evaluation by Dr. Usama Ghazi. After a comprehensive review of Claimant's medical records and a physical examination, Dr. Ghazi's assessment was:

    1. Whiplash injury with cervical facet syndrome with cervicogenic headaches.
    2. Occipital neuralgia. (This is the most severe pain complaint and is likely from occipital contusion against the headrest.)
    3. Thoracolumbar through lumbosacral facet pain.
    4. Moderate sacroiliac pain bilaterally without coccydynia.
    5. Neuritis/groin/testicular pain secondary to left testicular contusion.

    Based on his assessment and diagnoses, Dr. Ghazi recommended, and performed, bilateral greater occipital nerve blocks for Claimant's cervical pain and headaches. The injections were diagnostic – and therapeutic - and provided immediate pain relief of Claimant's occipital nerve pain. He also recommended cervical and lumbar facet injections. **CHE 9, pp. 156-163**.

17. On August 14, 2019, Dr. Kathy McCranie performed a Rule 16 evaluation to assist in determining whether medial branch blocks recommended by Dr. Ghazi were reasonably necessary and causally related to the work accident. Dr. McCranie concluded that the medial branch blocks were reasonably necessary and causally related to the work injury. She also thought that such treatment could be provided as maintenance treatment. **CHE 9, pp. 164-171**.

18. On September 6, 2019, Claimant underwent lumbar medial branch blocks. According to Dr. Aschberger, they were diagnostic since Claimant's pain significantly decreased after the injections. **CHE 9, pp. 171-172**.

19. On October 25, 2019, Claimant returned to Dr. Aschberger. Based on his response to the medial branch blocks, Dr. Aschberger stated that they would discuss proceeding with a facet rhizotomy at his next visit. **CHE 9, pp. 175-176**.

20. On November 22, 2019, Claimant started treating with Dr. Shimon Blau. At this appointment, Dr. Shimon performed trigger point injections – for Claimant's back pain.

21. On January 9, 2020, Claimant attend his first DIME appointment with Dr. Mitchell. **RHE D.** Claimant reported neck pain with occasional headaches, without radiation into the upper extremities. Claimant did not report any lower extremity numbness or tingling. Claimant, other than Ibuprofen, was taking Cyclobenzaprine for sleep. Upon physical examination, tenderness was found in the suboccipital regions and occipital nerve. Negative cervical facet loading was found, along with a negative Spurling's test. **RHE D, p. 19.** Normal upper and lower extremities findings were also noted.

22. Dr. Mitchell determined that Claimant was not at MMI. She recommended that Claimant undergo repeat injection to the greater occipital neuralgia, consideration of a C1-C2 nerve block. RHE D, p. 20. Dr. Mitchell did not find evidence of cervical facetogenic pain, however she stated that facet joint injections could be considered. She also recommended that Claimant could consider medial branch blocks and radiofrequency neurotomy for the low back given Claimant's subjective complaints. Dr. Mitchell also recommended biofeedback. She also provided Claimant a provisional impairment rating of 39% for his low back, cervical spine, and occipital neuralgia that was causing Claimant's headaches.

23. On January 10, 2020, Claimant returned to Dr. Shimon Blau and stated that the injections helped significantly for the pain in his right lower back, but not so much on the left. Dr. Blau repeated the injections – and assessed Claimant with low back pain and neck pain. **CHE 9, pp. 124-125**.

24. On February 27, 2020, Dr. Aschberger reevaluated Claimant. Dr. Aschberger reviewed Dr. Mitchell's DIME report and discussed care with Claimant. Dr. Aschberger referred Claimant to Dr. Zimmerman for medial branch blocks from T11 through L2. Per Dr. Mitchell's recommendations, biofeedback was also

recommended by Dr. Aschberger. The following quotes from this evaluation are relevant:

a. "I had gone over that with [Claimant]. We have performed an L1-L2 medial branch block, and on follow-up with myself, he reported some partial symptomatic benefit only, not really meeting the criteria for a diagnostic response to medial branch block." **RHE F, p. 65**.

b. "[Dr. Mitchell] talked about additional trigger point injections. [Claimant], of course, has been through a number of different processes for that." **RHE F, p. 65**.

c. "[Claimant] is discussing multilevel trials of injections, additional massage, and additional physical therapy. As Dr. Mitchell noted, [Claimant] has had 63 sessions of manual therapy of doubtful benefit, although she mentioned 10 sessions of manual therapy for maintenance over a 12-month period." **RHE F, pp. 65-66**.

25. On March 11, 2020, Claimant initiated biofeedback treatment with Jessica Graves, MA, LPC, BCB. **CHE 10, pp. 190-194**.

26. On April 22, 2020, Dr. Aschberger responded to a medical questionnaire from Respondents' counsel. **RHE F, p. 70**. Pertaining to impairment and following review of Claimant's job description, Dr. Aschberger's response to the third question about the provisional impairment rating, provided by Dr. Mitchell, stated, "[Claimant's] functional ability is not compatible with a 39% WP impairment."

27. On May 6, 2020, Claimant underwent medial branch blocks with Dr. Zimmerman. **RHE F, pp. 74-75** (note: referenced by Dr. Aschberger).

28. On July 28, 2020, Claimant underwent a bilateral L5-S1 radiofrequency neurotomy with Dr. Zimmerman. **RHE G, pp. 97-98**.

29. On September 10, 2020, Claimant returned to Dr. Aschberger for reevaluation. **RHE F, pp. 83-84**. Claimant reported good relief for about a week following the bilateral L5-S1 radiofrequency neurotomy but recurrent increasing symptoms. It was also noted that Claimant underwent a T11 through L2 radiofrequency neurotomy on August 12, 2020, also without significant relief of his symptoms. Dr. Aschberger recommended myofascial release. As for the cervical spine, Dr. Aschberger suggested consideration for facet blocks, "although given his lack of response thus far, I am not optimistic that this will provide much benefit." ***Id.*** **at 84**. The physical examination noted just limited thoracic and lumbar extension, with tightness and tenderness. There were not any notations of cervical motion restrictions, but yet it is not clear that he measured Claimant's cervical spine for any decrease in motion.

30. On November 19, 2020, Claimant had a follow-up visit with Dr. Aschberger, reporting no significant tenderness on palpation at the upper cervical levels, but

reporting headache. **RHE F, pp. 85-87**. Claimant also reported tightness at the neck but no issues with the low back. No range of motion restrictions are documented other than pain with cervical extension. Dr. Aschberger noted the DIME's recommendation for medial branch blocks for the cervical spine, but again concluded that such treatment would not help diagnostically.

31. On January 28, 2021, Dr. Aschberger again placed Claimant at MMI. Dr. Aschberger wrote in a progress report, Claimant "has his cervical facet injections. Report from Dr. Kawasaki does not show any dramatic reduction of symptoms." **RHE F, p. 88**. Dr. Aschberger noted that Claimant, "did have an episode of some tightness and pain at the base of the left neck and trapezius. He sought chiropractic intervention with 1 session and that settled down pretty well." **RHE F**, **p. 88**. Physical examination revealed only restrictions with cervical extension, without aggravation with palpation at the upper facets. No lumbar spine restrictions were documented by Dr. Aschberger. Dr. Aschberger again concluded that lateral branch blocks would not offer any additional information.

32. On May 12, 2021, Claimant returned to Dr. Mitchell for a follow-up DIME. **RHE E**, **pp. 26-34**. Dr. Mitchell concluded that Claimant was not at MMI due to chronic cervical pain. Claimant reported neck and low back pain without radicular symptoms.

33. Dr. Mitchell recommended cervical medial branch blocks followed by rhizotomies if appropriate. Dr. Mitchell disagreed with Dr. Barker's recommendations for epidural steroid injections at T12- L1 because prior diagnostic studies did not show evidence of spondylolisthesis. Dr. Mitchell further concluded that Claimant had developed spondylolisthesis; this condition was unrelated to the industrial injury.

34. Dr. Mitchell assigned an impairment rating of 30% whole person. This number relies on the assignment of a 17% whole person rating for the cervical spine, a 14% whole person impairment rating for the lumbar strain, and a 1% whole person impairment rating for the varicocele.

35. On November 19, 2021, Dr. Mitchell attended an evidentiary deposition. Dr. Mitchell testified as "[f]or the neck . . . he had very extended conservative therapy; physical therapy, massage, chiropractic. He had 23 cervical facet joint injections." **DepTr, p. 7**.

36. Dr. Mitchell testified as "for the lumbar spine, again a very extended course of conservative therapy; an epidural steroid injection at L1-2, medial branch blocks, and then eventually, radiofrequency rhizotomies at four levels in the lower thoracic and through the lumbar spine." **DepTr, p. 8**.

37. Dr. Mitchell does not believe that the cervical medial branch blocks, followed by rhizotomies, will provide any actual gain in functional improvement. **DepTr, p. 24**.

38. Dr. Mitchell, on record in deposition, officially amended her MMI finding after being walked through the statute and Level II Curriculum by Respondents' counsel, excerpted below:

> Counsel: . . . there is the indication of how the statute defines MMI, as well as the component of future medical care and how it interjects with MMI. So particularly, I just have the highlighted section there to get to the point here for you to read. Can you read that for me?
>
> Dr. Mitchell: Out loud?
>
> Counsel: Not out loud. I'm going to ask a follow-up question.
>
> Dr. Mitchell: Yes, I see the section.
>
> Counsel: Okay. Now, your testimony earlier is that it's not medically probable that Mr. [Claimant Redacted] is going to get any functional or therapeutical relief from the medial branch blocks; that's correct?
>
> Dr. Mitchell: Yes.
>
> Counsel: Okay. And so you would agree with me that, at least under this Desk Aid, the Division is instructing us and physicians that if future care, maintenance care, will not significantly improve the condition or the possibility of improvement or deterioration, the passage of time shall not affect the finding of MMI. In reading this instruction and guidance from the Division, do you believe that, given the fact that you don't expect the medial branch block to physically or therapeutically provide any improvement in Mr. [Claimant Redacted] , that you could confidently change your opinion and say that he is at maximum medical improvement?
>
> Dr. Mitchell: Well, it talks about the possibility of improvement or deterioration, not the probability. Possibility. And that's where I'm saying it's possible that there might be improvement in this case.
>
> Counsel: But your medical opinions, whether it's a patient coming in, whether you're conducting a Division IME, is always based on a reasonable degree of medical probability, though, correct?
>
> Dr. Mitchell: That is true.
>
> Counsel: And under the Level II curriculum and instruction guidelines that I'm sure not only that you originally learned

years and years ago, but the repetitive -- not repetitive, I'm sorry – repeat validations they continue to treat, that it is under a degree of reasonable medical probability, not possibility, as to asserting your and giving your opinions?

Dr. Mitchell: All right. You have a point.

Counsel: So that's a yes?

Dr. Mitchell: I guess.

Counsel: So is it medically probable, Doctor, that Mr. [Claimant Redacted] is at maximum medical improvement?

Dr. Mitchell: Oh, boy.

Counsel: I feel like I just took you through a formal logic class, undergrad.

Dr. Mitchell: Okay. I would say it's probable, then.

Counsel: Medically probable to a degree of reasonable probability that he's at maximum medical improvement?

Dr. Mitchell: Yes.

Counsel: And that would be at date of your follow-up examination in May of 2021?

Dr. Mitchell: Yes.

Dep Tr, pp. 46-48.

39. Claimant is working as a RAV technician, dealing with roadside emergencies and shop services, working 40 hours per week without any permanent work restrictions issued from his physicians. **Hear Tr, p. 29**. Claimant has, however, had to make self-modifications to perform his job. **Hear Tr, p. 32**.

40. The ALJ finds that Dr. Mitchell's ultimate opinion is that Claimant reached MMI on May 12, 2021 – the date of the follow up DIME – and has a 30% whole person impairment rating due to his industrial accident.

41. The ALJ finds that the treatment recommended by Dr. Mitchell, the DIME physician, does not have a reasonable prospect for defining Claimant's condition, suggesting further treatment, or curing him from the effects of his injury. As a result, Claimant's work-related conditions are stable and no further treatment is reasonably expected to improve his conditions.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *affd, Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005) (ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video)

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, during her deposition, Dr. Mitchell changed her opinion on MMI and concluded that Claimant reached MMI as of the date of her evaluation – May 12, 2021. As a result, Claimant has the burden of proving by clear and convincing evidence that he is not at MMI.

Dr. Mitchell did indicate that it was her opinion that Claimant needed cervical medial branch blocks - followed by radiofrequency rhizotomies if appropriate – before being placed at MMI. However, based on her deposition, it was found that such treatment did not have a reasonable prospect for defining Claimant's condition or suggesting further treatment. As result, the suggestion for such treatment is not inconsistent with a finding of MMI since it is not reasonably expected for such treatment to further define his condition, suggest future treatment, or cure his work-related condition. As a result, Claimant's work-related condition is stable, and no further treatment is reasonably expected to improve his condition.

Claimant, however, contends that Dr. Mitchell's opinion is that Claimant is not at MMI. The ALJ has, however, rejected such contention. As found, the ALJ concluded that Dr. Mitchell ultimately concluded in her deposition that Claimant is at MMI.

Based on the resolution of such conflict in the evidence, the ALJ finds and concludes that Claimant has failed to overcome Dr. Mitchell's opinion regarding MMI by clear and convincing evidence. Thus, Claimant is at MMI as of May 12, 2021.

II. The extent of Claimant's permanent impairment rating.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim*

Appeals Office, supra. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Since Claimant has been found to be at MMI as of May 12, 2021, and Dr. Mitchell provided Claimant an impairment rating, it is Respondents' burden to overcome her opinion regarding Claimant's impairment by clear and convincing evidence.

As found, Dr. Mitchell assessed Claimant's impairment and concluded that Claimant suffered a 30% whole person impairment rating. In determining Claimant's impairment, she concluded that Claimant suffered permanent impairment to his cervical spine, lumbar spine, and testicle in the form of a varicocele.

Respondents contend that the impairment rating provided by Dr. Mitchell is incorrect. In support of their opinion, they provided the opinions of Dr. Aschberger – who did not rate Claimant's cervical spine. Dr. Aschberger did not rate Claimant's cervical spine because he concluded that Claimant's symptoms and findings were myofascial. However, while Dr. Aschberger did not rate Claimant's cervical spine, he failed to provide a detailed opinion – which rises to the level of clear and convincing evidence – that the cervical spine rating should not be included. Merely stating that Claimant's cervical spine findings are myofascial and that Claimant's functional ability is not compatible with a 39% whole person impairment – the initial provisional rating provided by Dr. Mitchell - is insufficient. In the end, there is merely a difference of opinion regarding Claimant's impairment rating.

Moreover, in reviewing the record as a whole, the ALJ finds that the rating provided by Dr. Mitchell is supported by her testimony, the underlying medical records, and Claimant's testimony. Thus, the ALJ finds and concludes that Respondents failed to establish that Dr. Mitchel erred in determining Claimant's impairment rating.

As a result, the ALJ finds and concludes that Respondents failed to overcome Dr. Mitchell's opinion that Claimant has a 30% whole person impairment rating by even a preponderance of the evidence, let alone clear and convincing evidence.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on May 12, 2021.

2. Claimant suffered a 30% whole person impairment rating.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 22, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Respondents prove they properly terminated Claimant's TTD benefits on August 20, 2021?

- Did Claimant prove entitlement to reinstatement of TTD benefits on or after August 21, 2021?

FINDINGS OF FACT

1. Claimant works at Employer's distribution center as a warehouse worker. The job is physically demanding, with heavy lifting and prolonged standing and walking.

2. Claimant suffered an admitted injury to his right knee on September 28, 2020 while pushing a pallet of merchandise. A heavy box fell from the pallet and landed on his knee.

3. Claimant was initially diagnosed with a knee contusion. His symptoms failed to improve as expected and he was referred to Dr. Derek Purcell, an orthopedic surgeon. Dr. Purcell diagnosed subchondral edema and a tibial plateau stress fracture.

4. On February 26, 2021, Dr. Purcell performed a tibial plateau fracture fixation and chondroplasty.

5. Claimant continued to follow up with both Dr. Lakin (his ATP) and Dr. Purcell after surgery but did improve significantly. Dr. Purcell ordered a repeat MRI, which was completed on June 14, 2021. Claimant had developed increased edema in the posterior aspect of the lateral tibial plateau posterior to the previous lesion. There was also an area of articular cartilage loss on the weightbearing surface of the lateral tibial plateau. Dr. Purcell recommended a second surgery.

6. Dr. Centi took over Dr. Lakin's practice in June 2021. On June 24, 2021, Dr. Centi updated Claimant's work restrictions to no lifting, pushing, or pulling greater than 10 pounds, sitting 75% of the time and no standing or walking more than 15 minutes per hour.

7. On July 1, 2021, Employer offered modified duty within Claimant's restrictions. The primary duties were packing facemasks for other employees to use, and other general administrative tasks as needed. All assigned tasks could be performed in a seated position. Claimant was scheduled to work 12-hour shifts (as before the injury) from 6:00 a.m. to 6:00 p.m. Saturday-Monday.

8. Claimant returned to work on Monday July 5, 2021 but reported late. Claimant was scheduled to work his regular Saturday-Monday shifts starting Saturday

July 11, 2021. Between July 11, 2021 and the surgery on July 26, 2021, Claimant missed six scheduled shifts.

9. Dr. Purcell performed a proximal tibia lateral plateau open reduction and internal fixation procedure on July 26, 2021. Insurer commenced TTD on the surgery date.

10. On August 9, 2021, Dr. Centi amended Claimant's restrictions to include sitting 95% of the time and no standing or walking more than five minutes per hour.

11. Claimant returned to modified duty on August 21, 2021, performing the same tasks as before the surgery. Dr. Centi approved the modified work, all of which was to be performed in a "seated" position. Employer completed a Supplemental Return to Work form on August 25, 2021 documenting that Claimant had returned to work at full wages. Insurer filed a revised General Admission on August 27, 2021 terminating TTD on August 20, 2021.

12. Respondents proved Claimant's TTD benefits were properly terminated on August 20, 2021 because Claimant returned to work.

13. Claimant was scheduled to work modified duty from August 21 through September 17, 2021. However, he called off most of the shifts. Many of the absences are coded "Absent ill self," the code used when the employee calls off for self-reported medical issues. During this period, Claimant missed all or part of 14 scheduled shifts.

14. On September 17, 2021, Dr. Centi liberalized Claimant's work restrictions because he was doing a bit better. Claimant was late to work on September 18, 2021. On September 19, 2021, Employer mailed Claimant a letter again notifying him that work was available within his new restrictions. Claimant did not work on September 19 or 20, 2021. He reported to work on Saturday, September 25, 2021 and worked most of his scheduled shift. September 25, 2021 was the last day Claimant worked.

15. [Redated, hereinafter Ms. R], an HR representative for Employer, testified that Claimant was initially offered a modified position on June 18, 2021 and returned to work. However, he started missing time almost immediately. Multiple letters were sent to Claimant between June and September of 2021 advising him of work available within the restrictions assigned by Dr. Centi. Claimant continued to miss time from work, which caused staffing problems for the facility. Ms. R completed three corrective action forms in July 2021 addressing Claimant's pattern of tardiness and missed work. The next progressive disciplinary action for ongoing violations normally would have been termination. However, Claimant was not terminated, per Employer's policies, because "he is a team member on workmen's comp." Claimant was still an employee of Employer as of the hearing.

16. Ms. R's testimony was credible and persuasive.

17. At hearing, Claimant did not deny missing work between June and October 9, 2021. However, he stated he missed work because pain from the injury hindered his ability to tolerate working, even in a sedentary capacity.

18. Employer has a policy of offering only 12 weeks of modified duty. If the employee cannot return to regular work at the end of the 12-week period, they are put on unpaid administrative leave. Claimant exhausted his 12 weeks of modified duty as of October 9, 2021,[1] at which point he was put on unpaid leave and advised to stop reporting for work.

19. Claimant failed to prove he suffered a wage loss between August 21, 2021 and October 9, 2021 proximately caused by his injury. Employer had suitable work available during that period that he was capable of performing. Claimant's testimony he could not tolerate his assigned modified duty is not credible. The work offered by Employer was minimally demanding and well within his work restrictions. Dr. Purcell repeatedly advised Claimant to increase his weight bearing activities to further his rehabilitation, and Dr. Centi continually indicated Claimant was able to work modified duty from a medical standpoint. Claimant's allegations about his work capacity are unsubstantiated by any medical reports or other persuasive documentation.

20. Claimant has not worked or been released to regular duty since October 10, 2021.

21. Claimant proved he suffered an injury-related wage loss commencing October 10, 2021, when Employer stopped offering modified duty and placed him on unpaid leave.

CONCLUSIONS OF LAW

A. Termination of ongoing TTD effective August 21, 2021

Insurer admitted liability for TTD benefits commencing July 26, 2021, the date of Claimant's second surgery. Once commenced, TTD benefits must continue until one of the terminating events listed in § 8-42-105(3)(a)-(d). Termination of TTD is an affirmative defense that the respondents must prove by a preponderance of the evidence. Section 8-43-201(1); *Strombitski v. Man Made Pizza*, W.C. No. 4-403-661 (December 1, 2003).

One enumerated terminating event is a return to regular or modified employment. Section 8-42-105(3)(b). As found, Respondents proved Claimant's TTD benefits were properly terminated on August 20, 2021 based on his return to work.

B. Reinstatement of TTD between August 21, 2021 and October 9, 2021

[1] Mr. R testified Claimant's eligibility for modified duty "expired as of October 9, 2021." It is unclear whether he was put on administrative leave on October 9 or October 10. However, we can be confident he was on leave by October 10, 2021.

Because Claimant's TTD benefits were properly terminated on August 20, 2021, Claimant has the burden to re-establish eligibility for TTD at any time thereafter. A claimant is entitled to TTD benefits if the injury causes a disability and the disability causes the claimant to leave work. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

As found, Claimant failed to prove he suffered an injury-related wage loss from August 21, 2021 through October 9, 2021. Employer repeatedly offered Claimant suitable work within his restrictions during that period. Claimant consistently "began" the modified duty but then quickly stopped reporting to work. Claimant's testimony he could not tolerate his assigned modified duty is not credible. There is no persuasive reason Claimant could not have performed the sedentary, self-paced, non-production-level duties available to him. Claimant simply made a unilateral decision to stay home. Claimant provided no credible evidence of any specific aspects of his modified duty that caused him difficulty, and his nonspecific allegation that he was in too much pain to work at all is not persuasive. Claimant failed to prove any wage loss from August 21, 2021 through October 9, 2021 was proximately caused by the work injury.

C. TTD commencing October 10, 2021

As found, Claimant proved TTD benefits should be reinstated effective October 10, 2021. TTD benefits are intended to compensate for a wage loss proximately caused by an industrial injury. *Montoya v. Industrial Claim Appeals Office*, 488 P.3d 314 (Colo. App. 2018). The causal nexus between Claimant's injury and his wage loss was reestablished on October 10, 2021 when Employer terminated his eligibility for modified duty. On that date, Claimant was affirmatively advised to stop reporting to work and was put on unpaid administrative leave. At that point, Claimant lost the ability to mitigate his wage loss, because of factors that were entirely outside of his control. Claimant would have been off work as of October 10, 2021 regardless of his ability or willingness to perform modified duty.

Moreno v. Aspen Living, W.C. 4-676-020 (November 15, 2006), cited by Respondents, does not preclude the reinstatement of TTD benefits here. The claimant in *Moreno* had been found "responsible for termination of employment," which provides an independent statutory bar to an award of TTD benefits. In this case, Employer did not terminate Claimant despite the attendance issues. Accordingly, the "termination statutes" are inapplicable and Claimant eligibility for TTD is determined by reference to traditional principles of proximate causation.

ORDER

It is therefore ordered that:

1. Claimant's request for TTD benefits from August 21, 2021 through October 9, 2021 is denied and dismissed.

2. Insurer shall pay Claimant TTD benefits commencing October 10, 2021 and continuing until terminated according to law.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 22, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips lacked statutory authority to compel him to attend the January 6, 2022 Division Independent Medical Examination (DIME) with Brian Mathwich, M.D. and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME.

2. Whether Respondents have proven by a preponderance of the evidence that they may suspend the payment of Temporary Total Disability (TTD) benefits to Claimant for the period from November 23, 2021 until he attends the DIME with Dr. Mathwich.

3. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022.

4. Whether Claimant has demonstrated by a preponderance of the evidence that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury while working for Employer on December 9, 2018. On January 18, 2019 Insurer filed a General Admission of Liability (GAL).

2. Claimant underwent numerous surgeries and was eventually diagnosed with Chronic Regional Pain Syndrome (CRPS). On April 9, 2021 Authorized Treating Physician (ATP) Roberta Anderson-Oeser, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). Dr. Anderson-Oeser assigned a 42% whole person permanent impairment rating.

3. On May 12, 2021 Respondents challenged Dr. Anderson-Oeser's impairment determination and sought a Division Independent Medical Examination (DIME). The Division of Workers' Compensation (DOWC) issued a DIME physician panel on June 16, 2021.

4. Both Claimant and Respondents struck a member of the DIME panel. Brian Mathwich, M.D. was the remaining physician and on June 25, 2021 was selected to perform the DIME.

5. On July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit in the DOWC noting concerns about a potential conflict of interest. He specifically stated:

> I was informed [Claimant] has been seen in my practice by Dr. Anderson-Oeser and Dr. Cotgageorge. I was not aware as I have never seen [Claimant] nor discussed him with Dr. Oeser or Dr. Cotgageorge. Please let me know if you feel this is a conflict.

6. The parties discussed the possible conflict issue on July 26, 2021. They agreed that they had no concerns about Dr. Mathwich serving as the DIME physician. On July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich. The letter specified the following:

> Additionally, you indicated that you are not opposed to Dr. Mathwich conducting the DIME even given the potential conflict raised by Dr. Mathwich. As you know, Dr. Mathwich was part of Dr. Anderson-Oeser's practice prior to her departure. Both parties have agreed that the DIME can proceed with Dr. Mathwich.

7. The DIME was held in abeyance twice for the parties to pursue a possible settlement. Notably, the second order issued on September 27, 2021 by PALJ Royce Mueller granted the parties' request to hold the DIME process in abeyance "for 60 days from the date of this Order. If settlement does not occur with[in] 60 days, Respondents will reschedule the Division IME or seek further relief."

8. Ultimately, when the case did not settle at a settlement conference on November 5, 2021, Respondents scheduled the DIME for November 23, 2021. The date was three days prior to the end of the final 60-day abeyance period. Claimant did not object to the setting of the DIME and inquired whether Respondents would be providing transportation.

9. On November 12, 2021 Claimant attended a regularly scheduled maintenance appointment with Dr. Anderson-Oeser. Claimant mentioned an upcoming DIME with Dr. Mathwich. Based on the information, Dr. Anderson-Oeser revealed that she had left a prior medical practice with Dr. Mathwich. Because most of her patients followed her to her new office, Dr. Mathwich suffered a substantial loss of money and his practice closed.

10. On the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest. Moreover, the DIME appointment was set during the 60-day abeyance period noted by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021, Respondents were required to pay a $1400.00 rescheduling fee.

11. Respondents subsequently rescheduled the DIME for January 6, 2022. They also scheduled a prehearing conference seeking an Order to Compel Claimant's attendance at the rescheduled DIME and pay the costs for failing to attend the November 23, 2021 appointment.

12. On December 9, 2021 PALJ Susan D. Phillips conducted a prehearing conference. The issues considered at the conference included the following: (1) Claimant's motion for a new three-physician DIME panel pursuant to W.C.R.P. 11-3(E); (2) Respondents' motion to compel Claimant's attendance at a rescheduled DIME; and (3) Respondents' motion to compel Claimant to reimburse the DIME rescheduling fee.

13. On December 10, 2021 PALJ Phillips issued a prehearing order. Noting Claimant's failure to comply with W.C.R.P. Rule 11-4(4), she concluded there was no good cause for striking Dr. Mathwich as the DIME. Accordingly, Claimant's motion for a new three-physician DIME panel was rendered moot. PALJ Phillips also compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." Finally, she determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

14. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 prehearing order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

15. Claimant did not attend the rescheduled DIME on January 6, 2022. Silvia Malagon testified at the hearing that she is an administrative assistant employed by Mathwich & Associates. She was involved with scheduling Claimant's DIME appointments. Ms. Malagon remarked that Claimant did not appear for the January 6, 2022 DIME appointment. She specified that Claimant notified her that he would not be attending the DIME on the advice of counsel.

16. On January 14, 2022 Respondents filed a Response to the Application for Hearing. Respondents endorsed penalties against Claimant for violation of PALJ Phillips' December 10, 2021 order, reimbursement of the $1,400 DIME rescheduling fee, waiver, estoppel, laches and attorney fees.

17. Senior resolution manager at third-party administrator [Redacted] RA[Redacted] testified at the hearing. He remarked that Respondents have paid Claimant

Temporary Total Disability (TTD) benefits in the amount of $987.84 per week. Mr. RA[Redacted] detailed that from November 23, 2021 to March 30, 2022 Respondents paid total TTD benefits in the amount of $13,829.76.

18. Dr. Anderson-Oeser testified at the hearing in this matter. She explained that, at a regularly scheduled maintenance appointment with Claimant on November 12, 2021, he mentioned an upcoming DIME with Dr. Mathwich. She informed Claimant that she knew Dr. Mathwich personally because he was her employer at her prior practice of Ascent Medical. She left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by, Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the new practice and began Mathwich & Associates.

19. On the day Dr. Anderson-Oeser resigned, Ascent Medical was offered for sale. Dr. Anderson-Oeser was thus concerned about potential bias in the upcoming DIME with Dr. Mathwich. She acknowledged that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Dr. Anderson-Oeser specified that, after leaving Ascent Medical, she encountered many problems in obtaining patient medical records from the practice even though patients had signed releases. She noted that she does not currently have any mutual economic interest with Dr. Mathwich.

20. Claimant has failed to demonstrate that it is more probably true than not that PALJ Phillips lacked statutory authority to compel him to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. Initially, in her December 10, 2021 pre-hearing order PALJ Phillips compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." PALJ Phillips also determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

21. In *Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004) the respondents applied for a DIME. The claimant notified the respondents that he would not attend the DIME. The respondents rescheduled the DIME and obtained an order from a PALJ compelling attendance at the DIME. The claimant refused to attend the DIME and filed an Application for Hearing. Ultimately, the court of appeals upheld the assessment of a penalty against the claimant for violation of the PALJ's Order. *See Kennedy*, 100 P.3d at 950. The Court noted, "we agree with the Panel that a party may not elect, without fear of consequences, to ignore a ruling of the PALJ in the hope of obtaining a more favorable ruling before the ALJ." *Id.* Based on the reasoning of the court of appeals in *Kennedy* a PALJ has the authority to compel a claimant to attend a DIME. Thus, PALJ

Phillips had the ability to require Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

22. Despite the court of appeals' opinion in *Kennedy*, Claimant contends that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021 limit a PALJ's authority to nine distinct areas. Construed strictly, the amendments specifically delineate the authority of a PALJ. Claimant thus asserts the statutory amendments preclude a PALJ from compelling a claimant to attend a DIME.

23. Notably, the amendments to §8-43-207.5, C.R.S. do not define the limits of a PALJs authority, but identify distinct areas that constitute "procedural matters." Specifically, §8-43-207.5(2)(b), C.R.S. provides that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The plain language of the statute then details nine types of issues that constitute "procedural matters." However, the statute does not provide that "procedural matters" are limited to the nine enumerated areas, but instead states that "procedural matters include the enumerated powers. Furthermore, the nine listed areas contemplate a variety of situations that include broad categories such as resolving evidentiary and discovery disputes as well as imposing sanctions. Although the amendments clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from requiring a claimant to attend a DIME. Accordingly, based on the analysis in *Kennedy* and a review of amended §8-43-207.5(2), C.R.S PALJ's are not prohibited from compelling a claimant require to attend a DIME. Therefore, PALJ Phillips had the authority to order Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

24. PALJ Phillips also had the authority to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. PALJ Phillips remarked that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. As discussed in the preceding section, although the statutory amendments to §8-43-207.5(2), C.R.S. clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from imposing a rescheduling fee for a missed DIME appointment.

25. Moreover, W.C.R.P Rule 11-5(C) provides that a DIME "may only be rescheduled or terminated by the requesting party or by order. The party responsible for the rescheduling shall submit the rescheduling fee . . . to the DIME physician within ten (10) days after the defaulting event." Respondents were the requesting party for the DIME. However, Claimant canceled the DIME in contravention of Rule 11-5(C). Notably, on the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest and that the DIME was set during the 60-day abeyance period specified by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021,

Respondents were required to pay a $1400.00 rescheduling fee. Therefore, pursuant to Rule 11-5(C) PALJ Phillips properly required Claimant to pay the $1,400 fee.

26. Respondents have failed to prove that it is more probably true than that they may suspend the payment of TTD benefits to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich. Initially, Mr. RA[Redacted] testified at the hearing that Respondents paid Claimant TTD benefits at the rate of $987.84 per week for the period from November 23, 2021 to March 30, 2022 in the total amount of $13,829.76. Respondents assert that under §8-43-404(3), C.R.S. Claimant's right to receive weekly indemnity benefits that accrue and become payable during a period of refusal to attend a scheduled DIME shall be barred. Respondents are thus entitled to be reimbursed for indemnity benefits paid to Claimant during the period November 23, 2021 until he attends the DIME with Dr. Mathwich.

27. Despite Respondents' contention, the case law and express language of §8-43-404(3), C.R.S. reflect that the statute does not apply to the suspension of indemnity benefits for refusing to attend a DIME. Instead, §8-43-404(3), C.R.S. applies to a claimant's refusal to attend or obstruct vocational evaluations, independent medical examinations and evaluations by ATPs. In contrast, the DIME process involves the selection of an independent physician from a three-judge panel after an ATP has placed a claimant at MMI. The DIME physician then makes an independent determination regarding whether a claimant has reached MMI and assigns a permanent impairment rating. The specific language of §8-43-404(3), C.R.S. and the case law simply do not contemplate the suspension of TTD benefits when a case proceeds to the DIME process. Accordingly, Respondents' request to suspend the payment of TTD benefits for the period from November 23, 2021 until Claimant attends the DIME with Dr. Mathwich is denied and dismissed.

28. Respondents have failed to establish that it is more probably true than not that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. Initially, in PALJ Phillips' December 10, 2021 prehearing order she noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." However, Claimant did not attend the rescheduled DIME on January 6, 2022. Ms. Malagon testified that Claimant did not appear for the January 6, 2022 DIME appointment. She specified that Claimant contacted her to state that he would not be attending the DIME on the advice of counsel. Because PALJ Phillips compelled Claimant to attend the January 6, 2022 DIME but he did not attend, his conduct violated a lawful order.

29. Although Claimant violated PALJ Phillips' December 10, 2021 pre-hearing order by failing to attend the January 6, 2022 DIME, his action was not objectively unreasonable because it was based on a rational argument in law or fact. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 Prehearing Order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and

dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

30. The record reveals that Claimant did not simply ignore PALJ Phillips' prehearing order, but sought a hearing before an ALJ to challenge her ability to issue the order. Specifically, Claimant asserted that PALJs lack statutory authority to compel DIME attendance and to pay the cost of rescheduling a missed DIME. Although acknowledging the court of appeals' opinion in *Kennedy*, Claimant contended that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021, limit the authority of PALJ's to nine distinct areas. Claimant thus provided a rational explanation for his conduct. Although the preceding section of the present order rejected Claimant's contention, it was nevertheless predicated on a rational argument in law based on a strict construction of the amendments to §8-43-207.5, C.R.S. that does not permit PALJs to compel claimants to attend DIMEs or pay DIME rescheduling fees. Accordingly, Respondents are not entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022.

31. Claimant has failed to prove that it is more probably true than not that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest. Initially, both Claimant and Respondents struck a member of the DIME panel. Neither party requested summary disclosures under W.C.R.P. Rule 11-3. Because Dr. Mathwich was the only remaining physician, he was selected to perform the DIME on June 25, 2021. However, on July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit at the DOWC noting concerns about a potential conflict of interest. The parties discussed the potential conflict issue on July 26, 2021. Neither party expressed any concerns about Dr. Mathwich serving as the DIME physician. In fact, on July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich.

32. At the time Dr. Mathwich mentioned a potential conflict, Claimant had a responsibility to research and review any concerns. Although Claimant had ample opportunities even after Dr. Mathwich mentioned his issues, he did not raise any concerns. In fact, Claimant affirmatively agreed to Dr. Mathwich as the DIME. Based on Claimant's failure to comply with Rule 11-4, and his agreement to Dr. Mathwich as the DIME physician, Claimant waived the right to object to Dr. Mathwich as the DIME doctor.

33. Nevertheless, Claimant contends that, based on Dr. Anderson-Oeser's testimony there is a conflict of interest with Dr. Mathwich performing the DIME. Dr. Anderson-Oeser detailed that she was concerned about potential bias in the upcoming DIME with Dr. Mathwich. She reasoned that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Despite Claimant's contention, the record reveals that PALJ Phillips did not err in her December 10, 2021 order denying Claimant's motion for a new three-physician DIME panel and not removing Dr. Mathwich as the DIME physician.

34. Initially, the record reflects that PALJ Phillips had the authority and did not err in denying Claimant's motion for a new three-physician DIME panel. Specifically, Claimant did not request summary disclosures concerning any business, financial, employment, or advisory relation with the insurer within five business days of issuance of the three-physician list by the DOWC pursuant to Rule 11-4. Furthermore, although Drs. Mathwich and Anderson-Oeser were colleagues in the past, a conflict is only presumed "when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME." Because Drs. Mathwich and Anderson-Oeser do not currently practice together, no conflict is presumed. In fact, Dr. Anderson-Oeser specified that she does not currently have any mutual economic interest with Dr. Mathwich.

35. Under Rule 11-3(E)(2) "having practiced together in the past [is] not the types of relationships that will be considered a conflict." Dr. Anderson-Oeser remarked that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. However, in the absence of an actual conflict based on a current financial relationship, concerns about a potential conflict are speculative. Notably, Dr. Anderson-Oeser left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the practice and began Mathwich & Associates. The significant temporal delay since an actual business relationship between Drs. Mathwich and Anderson-Oeser's and the numerous manifestations of Dr. Mathwich's practice suggest that any concerns about a current conflict of interest are speculative. Accordingly, the record does not warrant disqualification of Dr. Mathwich as the DIME physician.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

PALJ's Authority

4. Section 8-43-207.5(2), C.R.S. grants a PALJ authority to issue "interlocutory orders." A PALJ may also order a party to participate in a prehearing conference and make evidentiary rulings. An order of a PALJ is "an order of the director and binding on the parties," and "such an order shall be interlocutory." §8-43-207.5(3); *see Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004); *Martinez v. Vertical Electric Inc.*, WC 5-049-469 (ICAO, Oct. 20, 2017) (orders relating to prehearing conferences are generally interlocutory because a prehearing conference is followed by a full hearing before the director or an ALJ). ALJ's have the authority to review the pre-hearing orders of PALJ's. *See Dee Enterprises v. Indus. Claim Appeals Off.*, 89 P.3d 430, 441 (Colo. App. 2003); *Villegas v. Denver Water*, WC 4-889-298-005 (ICAO Apr. 14, 2021). Orders related to DIME requests are interlocutory. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020); *see Bath v. Adams County,* W. C. No. 4-584-461 (September 20, 2005).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that PALJ Phillips lacked statutory authority to compel him to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. Initially, in her December 10, 2021 pre-hearing order PALJ Phillips compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." PALJ Phillips also determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

Authority to Compel Attendance at the January 6, 2022 DIME

6. As found, in *Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004) the respondents applied for a DIME. The claimant notified the respondents that he would not attend the DIME. The respondents rescheduled the DIME and obtained an order from a PALJ compelling attendance at the DIME. The claimant refused to attend the DIME and filed an Application for Hearing. Ultimately, the court of appeals upheld the assessment of a penalty against the claimant for violation of the PALJ's Order. *See*

Kennedy, 100 P.3d at 950. The Court noted, "we agree with the Panel that a party may not elect, without fear of consequences, to ignore a ruling of the PALJ in the hope of obtaining a more favorable ruling before the ALJ." *Id.* Based on the reasoning of the court of appeals in *Kennedy* a PALJ has the authority to compel a claimant to attend a DIME. Thus, PALJ Phillips had the ability to require Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

7. As found, despite the court of appeals' opinion in *Kennedy*, Claimant contends that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021 limit a PALJ's authority to nine distinct areas. Construed strictly, the amendments specifically delineate the authority of a PALJ. Claimant thus asserts the statutory amendments preclude a PALJ from compelling a claimant to attend a DIME.

8. The amendment to §8-43-207.5(1), C.R.S. provides, in relevant part, that

> any party to a claim may request a prehearing conference before a prehearing administrative law judge in the division for the speedy resolution of or simplification of any issues and to determine the general readiness of remaining issues for formal adjudication on the record. The issues addressed in the prehearing conference may include any issues properly within the authority of a prehearing administrative law judge pursuant to subsection (2) of this section.

Section 8-43-207.5(2)(b), C.R.S. effective September 7, 2021, specifies that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The statute then specifies that procedural matters include:

(I) Issuing subpoenas…
(II) Resolving prehearing evidentiary disputes
(III) Determining if depositions must be taken
(IV) Ruling on the imposition of sanctions for discovery disputes…
(V) Granting or denying requests for extensions of time…
(VI) Resolving disputes regarding discovery…
(VII) Appointing guardians ad litem and conservators…
(VIII) Determining the ripeness of legal issues for formal adjudication
(IX) Determining the competency of any party to a claim to enter into settlement agreements.

9. As found, notably, the amendments to §8-43-207.5, C.R.S. do not define the limits of a PALJs authority, but identify distinct areas that constitute "procedural matters." Specifically, §8-43-207.5(2)(b), C.R.S. provides that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The plain language of the statute then details nine types of issues that constitute "procedural matters." However, the statute does not provide that "procedural matters" are limited to the nine enumerated areas, but instead states that "procedural matters include the enumerated powers. Furthermore, the nine listed

areas contemplate a variety of situations that include broad categories such as resolving evidentiary and discovery disputes as well as imposing sanctions. Although the amendments clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from requiring a claimant to attend a DIME. Accordingly, based on the analysis in *Kennedy* and a review of amended §8-43-207.5(2), C.R.S PALJ's are not prohibited from compelling a claimant require to attend a DIME. Therefore, PALJ Phillips had the authority to order Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

Authority to Require Claimant to Pay November 23, 2021 Rescheduling Fee

10. As found, PALJ Phillips also had the authority to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. PALJ Phillips remarked that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. As discussed in the preceding section, although the statutory amendments to §8-43-207.5(2), C.R.S. clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from imposing a rescheduling fee for a missed DIME appointment.

11. As found, moreover, W.C.R.P Rule 11-5(C) provides that a DIME "may only be rescheduled or terminated by the requesting party or by order. The party responsible for the rescheduling shall submit the rescheduling fee . . . to the DIME physician within ten (10) days after the defaulting event." Respondents were the requesting party for the DIME. However, Claimant canceled the DIME in contravention of Rule 11-5(C). Notably, on the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest and that the DIME was set during the 60-day abeyance period specified by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021, Respondents were required to pay a $1400.00 rescheduling fee. Therefore, pursuant to Rule 11-5(C) PALJ Phillips properly required Claimant to pay the $1,400 fee.

Suspension of TTD Benefits

12. Section 8-43-404(3), C.R.S. provides, in pertinent part, that an insurer may suspend compensation when a claimant refuses to submit to a medical examination:

> So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division

> appointed pursuant to section 8-43-208 (1) or in any way obstructs the same, all rights to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred.

13. Demand appointments include examinations by an ATP or a request for an independent medical examination as contemplated by §8-43-404(1)(b) and (2), C.R.S. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020); *see Johnston v. Hunter Douglas*, W.C. No. 4-879-066-01 (ICAO, Apr. 29, 2014) ("provisions for a demand appointment and the consequences for refusing to attend or obstructing a demand appointment in §8-43-404(3), C.R.S., appear to apply to requests for an examination by an authorized treating physician or to a request for an Independent Medical Examination"); *Twiggs v. Hoffman Structures*, W.C. No. 4-430-471 (ICAO, Dec.11, 2001) (no language in §8-43-404, C.R.S. indicates the statute is inapplicable to requests for the claimant to undergo an examination by an authorized treating physician). The provisions of §8-43-404(3), C.R.S. thus apply equally to second opinions by non-treating physicians and a claimant's refusal to attend a rescheduled appointment with an ATP after being ordered by a PALJ. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020).

14. Section 8-43-404, C.R.S. is an all-encompassing statute that addresses many aspects of medical providers in the Workers' Compensation system. *Johnston v. Hunter Douglas*, W.C. No. 4-879-066-01 (ICAO, Apr. 29, 2014). Some sections apply only to independent medical examinations, while others apply only to the selection of the ATP. *Id.*; *see* §8-43-404(l)(a)-(b), C.R.S. & §8-43-404(5), C.R.S. In contrast, §8-42-107.2 governs the DIME process. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998).

15. As found, Respondents have failed to prove by a preponderance of the evidence that they may suspend the payment of TTD benefits to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich. Initially, Mr. RA[Redacted] testified at the hearing that Respondents paid Claimant TTD benefits at the rate of $987.84 per week for the period from November 23, 2021 to March 30, 2022 in the total amount of $13,829.76. Respondents assert that under §8-43-404(3), C.R.S. Claimant's right to receive weekly indemnity benefits that accrue and become payable during a period of refusal to attend a scheduled DIME shall be barred. Respondents are thus entitled to be reimbursed for indemnity benefits paid to Claimant during the period November 23, 2021 until he attends the DIME with Dr. Mathwich.

16. As found, despite Respondents' contention, the case law and express language of §8-43-404(3), C.R.S. reflect that the statute does not apply to the suspension of indemnity benefits for refusing to attend a DIME. Instead, §8-43-404(3), C.R.S. applies to a claimant's refusal to attend or obstruct vocational evaluations, independent medical examinations and evaluations by ATPs. In contrast, the DIME process involves the

selection of an independent physician from a three-judge panel after an ATP has placed a claimant at MMI. The DIME physician then makes an independent determination regarding whether a claimant has reached MMI and assigns a permanent impairment rating. The specific language of §8-43-404(3), C.R.S. and the case law simply do not contemplate the suspension of TTD benefits when a case proceeds to the DIME process. Accordingly, Respondents' request to suspend the payment of TTD benefits for the period from November 23, 2021 until Claimant attends the DIME with Dr. Mathwich is denied and dismissed.

Penalties

17. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

18. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

19. As found, Respondents have failed to establish by a preponderance of the evidence that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. Initially, in PALJ Phillips' December 10, 2021 prehearing order she noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." However, Claimant did not attend the rescheduled DIME on January 6, 2022. Ms. Malagon testified that Claimant did not

appear for the January 6, 2022 DIME appointment. She specified that Claimant contacted her to state that he would not be attending the DIME on the advice of counsel. Because PALJ Phillips compelled Claimant to attend the January 6, 2022 DIME but he did not attend, his conduct violated a lawful order.

20. As found, although Claimant violated PALJ Phillips' December 10, 2021 pre-hearing order by failing to attend the January 6, 2022 DIME, his action was not objectively unreasonable because it was based on a rational argument in law or fact. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 Prehearing Order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

21. As found, the record reveals that Claimant did not simply ignore PALJ Phillips' prehearing order, but sought a hearing before an ALJ to challenge her ability to issue the order. Specifically, Claimant asserted that PALJs lack statutory authority to compel DIME attendance and to pay the cost of rescheduling a missed DIME. Although acknowledging the court of appeals' opinion in *Kennedy*, Claimant contended that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021, limit the authority of PALJ's to nine distinct areas. Claimant thus provided a rational explanation for his conduct. Although the preceding section of the present order rejected Claimant's contention, it was nevertheless predicated on a rational argument in law based on a strict construction of the amendments to §8-43-207.5, C.R.S. that does not permit PALJs to compel claimants to attend DIMEs or pay DIME rescheduling fees. Accordingly, Respondents are not entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. *Compare Human Resource Co v. Indus. Claim Appeals Off.*, 948 P.2d 1194 (Colo. App. 1999) (failure to offer a reasonable factual or legal explanation for conduct permits the inference that the opposing party carried its burden to prove that the violation was objectively unreasonable).

Conflict of Interest

22. W.C.R.P. Rule 11-3 defines the phrase "conflict of interest" pertaining to a DIME physician. Rule 11-3(E) specifically provides that the DIME doctor shall:

> (E) Not evaluate the claimant if an actual conflict of interest exists. A conflict of interest includes, but is not limited to, instances where the physician or someone in the physician's office has treated the claimant or performed an Independent Medical Examination (IME) on the claimant. A conflict is presumed to exist when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME.

> (1) Direct or substantial financial interest is defined as a business ownership interest, a creditor interest in an insolvent business, employment relationship, prospective employment for which negotiations have begun, ownership interest in real or personal property, debtor interest, or being an officer or director in a business.
>
> (2) Being members of the same professional association, society, or medical group, sharing office space, or having practiced together in the past are not the types of relationships that will be considered a conflict;

23. W.C.R.P. Rule 11-4 permits parties to request disclosures within five business days of the issuance of a three-doctor panel from the Division in determining whether to strike a DIME physician. Rule 11-4(4) provides, in relevant part:

> (4) Within five (5) business days of issuance of the three-physician list by the Division, a party may request summary disclosure concerning any business, financial, employment, or advisory relation with the insurer or self-insured employer. Such request shall be submitted by electronic mail to the DIME Unit and copied to the other parties. The parties may use the information provided on the summary disclosure forms to assist in the decision to strike a physician.

24. As found, Claimant has failed to prove by a preponderance of the evidence that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest. Initially, both Claimant and Respondents struck a member of the DIME panel. Neither party requested summary disclosures under W.C.R.P. Rule 11-3. Because Dr. Mathwich was the only remaining physician, he was selected to perform the DIME on June 25, 2021. However, on July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit at the DOWC noting concerns about a potential conflict of interest. The parties discussed the potential conflict issue on July 26, 2021. Neither party expressed any concerns about Dr. Mathwich serving as the DIME physician. In fact, on July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich.

25. As found, at the time Dr. Mathwich mentioned a potential conflict, Claimant had a responsibility to research and review any concerns. Although Claimant had ample opportunities even after Dr. Mathwich mentioned his issues, he did not raise any concerns. In fact, Claimant affirmatively agreed to Dr. Mathwich as the DIME. Based on Claimant's failure to comply with Rule 11-4, and his agreement to Dr. Mathwich as the DIME physician, Claimant waived the right to object to Dr. Mathwich as the DIME doctor. *See Woolsey v. Pikes Peak Rock Shop, Inc., and Republic Indemnity Company*, WC 4-401-197 (ICAO, Mar. 13, 2004) (where the claimant objected to the DIME physician because he had previously been a treating physician, the ICAO reasoned that the

claimant had waived the right to remove the DIME physician because he previously agreed to him as the DIME physician).

26. As found, nevertheless, Claimant contends that, based on Dr. Anderson-Oeser's testimony there is a conflict of interest with Dr. Mathwich performing the DIME. Dr. Anderson-Oeser detailed that she was concerned about potential bias in the upcoming DIME with Dr. Mathwich. She reasoned that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Despite Claimant's contention, the record reveals that PALJ Phillips did not err in her December 10, 2021 order denying Claimant's motion for a new three-physician DIME panel and not removing Dr. Mathwich as the DIME physician.

27. As found, initially, the record reflects that PALJ Phillips had the authority and did not err in denying Claimant's motion for a new three-physician DIME panel. Specifically, Claimant did not request summary disclosures concerning any business, financial, employment, or advisory relation with the insurer within five business days of issuance of the three-physician list by the DOWC pursuant to Rule 11-4. Furthermore, although Drs. Mathwich and Anderson-Oeser were colleagues in the past, a conflict is only presumed "when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME." Because Drs. Mathwich and Anderson-Oeser do not currently practice together, no conflict is presumed. In fact, Dr. Anderson-Oeser specified that she does not currently have any mutual economic interest with Dr. Mathwich.

28. As found, under Rule 11-3(E)(2) "having practiced together in the past [is] not the types of relationships that will be considered a conflict." Dr. Anderson-Oeser remarked that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. However, in the absence of an actual conflict based on a current financial relationship, concerns about a potential conflict are speculative. Notably, Dr. Anderson-Oeser left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the practice and began Mathwich & Associates. The significant temporal delay since an actual business relationship between Drs. Mathwich and Anderson-Oeser's and the numerous manifestations of Dr. Mathwich's practice suggest that any concerns about a current conflict of interest are speculative. Accordingly, the record does not warrant disqualification of Dr. Mathwich as the DIME physician. *See generally City of Manassa v. Ruff*, 235 P.3d 1051, 1055 (Colo. 2010) (noting that the phrase 'conflict of interest' "has been described as a term of art, reflecting a host of different policy determinations, depending on the context in which it operates,...").

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. PALJ Phillips had the authority to compel Claimant to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME.

2. Respondents' request to suspend TTD payments to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich is denied and dismissed.

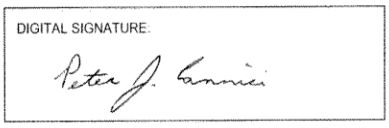
3. Respondents' claim for penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022 is denied and dismissed.

4. Claimant's request to remove Dr. Mathwich as the DIME physician based on a conflict of interest is denied and dismissed.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: April 22, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-145-039-001

ISSUES

1. Whether Respondents established by clear and convincing evidence that the DIME physician, John Hughes, M.D., incorrectly determined that Claimant is not at maximum medical improvement.

FINDINGS OF FACT

1. Claimant is a 55-year-old man who sustained an admitted work injury to his right ankle on July 28, 2020, while working for Employer. Claimant's injury occurred when his right foot slipped or twisted, and he "inverted" his right ankle.

2. Claimant is a Spanish speaker and understands limited English. Except where noted otherwise below, a Spanish interpreter was used for Claimant's medical visits.

3. Approximately five hours after his injury on July 28, 2020, Claimant was seen at Midtown Occupational Health Services by Ashley Pospisil, NP (nurse practitioner for supervising physician Lawrence Cedillo, D.O.). Claimant's complaints were limited to his right ankle, where he reported twisting his right ankle in the mud and inverting it, causing pain and swelling. Claimant was diagnosed with a mildly displaced oblique fracture in the distal fibula, and referred to Thomas Mann, M.D., for an orthopedic evaluation. No complaints of right knee issues were addressed in the report. (Ex. L).

4. Also on July 28, 2020, Claimant saw Dr. Mann at Cornerstone Orthopaedics & Sports Medicine. Dr. Mann examined Claimant and diagnosed him with a closed fracture of the right ankle (right oblique Weber B fracture with mild displacement) and mild joint incongruity of the right ankle. No complaints of right knee issues were addressed in Dr. Mann's report. (Ex. 3). Dr. Mann performed surgery on Claimant's right ankle on July 31, 2020. (Ex. 3).

5. On July 29, 2020, Employer filed an First Report of Injury, indicating the claimant sustained an ankle fracture on July 28, 2020. (Ex. A).

6. On August 3, 2020, Claimant saw Ms. Pospisil in follow up. At that time, Claimant was in a knee-to-toe splint, non-weightbearing on his right ankle, and using crutches. Ms. Pospisil provided Claimant with a prescription for a temporary wheelchair, for approximately six weeks during which Claimant was anticipated to be non-weightbearing. Claimant was also advised to elevate his right leg whenever resting. No complaints of right knee issues were addressed in the report. The August 3, 2020 record does not indicate whether an interpreter was present. (Ex. L).

7. Claimant returned to Ms. Pospisil on August 14, 2020. Claimant reported he was using the prescribed wheelchair, although it presented difficulties navigating his work site.

Due to the difficulties, Ms. Pospisil prescribed a scooter in lieu of a wheelchair. No complaints of right knee issues were addressed at this visit. (Ex. L).

8. On August 17, 2020, Claimant presented to Dr. Mann for a post-surgical evaluation. Claimant reported occasionally using prescribed pain medication, keeping his leg elevated, and being non-weightbearing. No knee issues were addressed at this visit. Dr. Mann placed Claimant in a walking boot with instructions to begin partial (50%) weightbearing while in the boot. The medical record does not indicate an interpreter was used. (Ex. M).

9. On August 31, 2020, Claimant returned to Ms. Pospisil. Claimant reported using a scooter while ambulating which was helpful. Claimant was advised to continue to use the boot and scooter for ambulation, and to elevate his right leg whenever seated. No knee issues were addressed. (Ex. L).

10. Claimant began physical therapy for his ankle on September 10, 2020 at Midtown Occupational Health Services. At the time, Claimant remained at 50% weightbearing, and used a scooter for ambulation otherwise. The therapy performed included only seated exercises. Claimant's right knee was not addressed at physical therapy. The medical record does not indicate an interpreter was used. (Ex. O).

11. On September 14, 2020, Claimant attended his second session of physical therapy and saw Ms. Pospisil after that appointment on the same day. Records from both providers indicate Claimant saw Dr. Mann that day, however, no record from Dr. Mann was included in the records provided. Nonetheless, the physical therapy records indicate Claimant provided a new physical therapy script which included physical therapy for "R knee MCL sprain as well." Ms. Pospisil's record from that day does not mention Claimant's right knee. (Ex. O & L).

12. Claimant returned to Ms. Pospisil on September 28, 2020, the records from this date do not mention Claimant's right knee. (Ex. L).

13. On October 15, 2020, Dr. Mann examined Claimant's right knee. Claimant reported worsening pain and "crunching" of the right knee. He noted that the knee was normal to inspection with normal alignment and no effusion. The knee was normal on testing, with the exception of "significant medial joint line tenderness" and "a "palpable click around the patella." Dr. Mann diagnosed Claimant with osteoarthritis of right knee, discussed a potential cortisone injection, and ordered physical therapy for Claimant's right knee. (Ex. 3).

14. Claimant returned to Dr. Mann on November 16, 2020. Claimant's knee was not addressed, but Dr. Mann noted that "If indicated by occ med, [Claimant] may follow up for a separate visit concerning evaluation of the right knee." (Ex. M).

15. Claimant saw Ms. Pospisil on November 23, 2020, for indicated complaints of right ankle and right knee sprain. Examination of Claimant's right knee showed mild edema, 4/5 strength, and mild tenderness to palpation in the lateral joint line. Ms. Pospisil's diagnosis under the heading "Work Related" was "Mildly displaced right oblique fracture

distal fibula, right knee sprain." She recommended 4 weeks of physical therapy for both the right ankle and knee. (Ex. L).

16. On December 16, 2020, Claimant saw Ms. Pospisil and reported concerns about right knee instability, swelling and 6-7/10 pain. Examination of the right knee was the same as November 23, 2020. Ms. Pospisil ordered an MRI of the right knee to rule out a meniscal tear, and directed Claimant to continue in a right knee sleeve for instability. (Ex. L).

17. On December 23, 2020, Claimant underwent a right knee MRI, which was interpreted as showing "a very small knee joint effusion," "a complex tear of the body and posterior horn of the medial meniscus," "severe osteoarthritis and near complete loss of articular cartilage from the patellar femoral compartment" and "mild to moderate osteoarthritis and moderate chondromalacia of the medial femoral tibial compartment." (Ex. O). Based on the MRI findings, Claimant was referred to Michael Hewitt, M.D.

18. Claimant saw Dr. Hewitt on January 13, 2021. Based on his examination and review of the MRI, Dr. Hewitt diagnosed Claimant with a right knee medial meniscus tear with mild medial compartment arthritis. Dr. Hewitt proposed treatment options including observation, activity modification, NSAIDs, brace, therapy, cortisone injection, and arthroscopy. He noted that arthroscopy was unlikely to address Claimant's arthritis. Dr. Hewitt recommended a partial medial meniscectomy, indicating he believe surgical treatment was medically reasonable. Claimant indicated he would like to proceed with the procedure. (Ex. N).

19. On January 25, 2021, Claimant saw Sadie Sanchez, M.D., at Midtown Occupational Health Services. Claimant reported to Dr. Sanchez that he had mentioned his knee pain when he was initially examined in July 2020. Dr. Sanchez reviewed Claimant's medical records and indicated that she "cannot saw with 51% or greater certainty that his knee condition is work related." Dr. Sanchez noted that Claimant did not report knee pain at his initial intake or early follow-ups, and that because the MRI was not performed until approximately five months after the incident, the findings are not able to be "dated" appropriately. Dr. Sanchez stated "one cannot say for certain that his medical meniscal tear is directly related to his [mechanism of injury] on the [date of injury]. Or if perhaps it was present prior and the altered gait from use of the walking boot/rehab has aggravated an underlying condition." (Ex. 5). Claimant continued to follow up with Dr. Sanchez through June 1, 2021.

20. On April 23, 2021, Claimant underwent an independent medical examination (IME) at Respondents' request with Mark Failinger, M.D. Dr. Failinger examined Claimant and reviewed relevant medical records. Dr. Failinger diagnosed Claimant with a right ankle distal fibular fracture, and "right knee exacerbation of pre-existing degenerative joint disease and possible acceleration of a pre-existing meniscus tear." (Ex. K).

21. With respect to causation, Dr. Failinger opined that, had the July 28, 2020 injury cause significant or major pathology, symptoms would have appeared before his first documented knee complaints on September 14, 2020. However, he also noted that the

Claimant's mechanism of injury could have caused an exacerbation or acceleration of a pre-existing meniscal tear or acceleration of pre-existing arthritis. He also indicated it was possible Claimant's symptoms would not have occurred until after Claimant advanced to partial weightbearing on August 18, 2020. Specifically, he noted that although there was no documentation of knee complaints at that time, "[t]here are times when ipsilateral (same-sided) injury occurs, and symptoms do not appear until the patient is weightbearing." Dr. Failinger opined that it was more likely that Claimant sustained an exacerbation of pre-existing issues rather than new pathology. However, at the time of his IME report, Dr. Failinger had not reviewed the Claimant's MRI report or films. He noted that he would need to see the MRI report and films to determine whether Claimant's knee pathology could be reasonably treated by the arthroscopy recommended by Dr. Hewitt. (Ex. K).

22. On May 17, 2021, Insurer denied authorization for Dr. Hewitt's recommended surgery based on Dr. Failinger's IME report. (Ex. 5).

23. On May 28, 2021, Dr. Sanchez saw Claimant and indicated that because Insurer had denied authorization for surgery on Claimant's right knee, she was unable to provide further treatment for the knee. (Ex. 5).

24. On June 1, 2021, Dr. Sanchez placed Claimant at maximum medical improvement (MMI) and provided Claimant with an impairment rating for his right ankle only. Dr. Sanchez did not provide any impairment rating for Claimant's right knee. (Ex. 5).

25. On June 29, 2021, Respondents filed a Final Admission of Liability, admitting for a 6% lower extremity impairment, as assigned by Dr. Sanchez. (Ex. C). Claimant subsequently requested a Division Independent Medical Examination (DIME).

26. On October 28, 2021, John Hughes, M.D., performed a DIME, and issued a report on the same date. Dr. Hughes examined Claimant and reviewed medical records. As relevant to the present issues, Dr. Hughes opined that Claimant sustained a right knee sprain/strain with development of a meniscus tear, meriting arthroscopic surgical treatment proposed by Dr. Hewitt. He opined that Claimant sustained a right medial meniscus tear and that it did not become clinically evident until he started weightbearing. He noted that the surgery recommended by Dr. Hewitt offered a reasonable treatment option, and that Claimant was therefore not at MMI. (Ex. 1)

27. Dr. Hughes testified by deposition in lieu of live testimony. Dr. Hughes testified that he reviewed the December 23, 2020 MRI report and accepted the radiologist's interpretation of the MRI as showing effusion in the Claimant's knee, which he opined was consistent with an active process in his knee. He testified that it "is biologically plausible" that the Claimant's mechanism of injury could have resulted in trauma to the knee. And that he believes Claimant's work injury "accelerated an occult knee process as a result of weight-bearing when he began weight-bearing again." Dr. Hughes further testified that the arthroscopy proposed by Dr. Hewitt was appropriate treatment for Claimant's knee.

28. On November 27, 2021, Dr. Failinger issued an addendum to his original IME report. After reviewing Claimant's MRI, Dr. Failinger opined that Claimant had significant preexisting degenerative medial meniscal tearing and medial compartment degenerative changes prior to July 28, 2020 injury. He indicated that it was not probable that Claimant's injury resulted in further tearing of the meniscus or any accelerated pre-existing condition, based on the delay in reporting knee symptoms and the results of the MRI. (Ex. K).

29. Dr. Failinger was admitted as an expert in orthopedic surgery and testified at hearing. Dr. Failinger testified that MRIs are only reliable to detect a relationship between effusion and a meniscus tear in the first month after an injury, and that an MRI taken five months after the injury would not be reliable to establish any relationship between a meniscus tear and effusion. He further opined that any effusion shown in Claimant's knee would likely be related to his severe arthritis. Dr. Failinger testified that Claimant would not have an altered gait on the ipsilateral leg (right side) that would aggravate or accelerate symptoms in the right knee. This testimony appears to conflict with Dr. Failinger's initial written opinion, and is unpersuasive.

30. He also testified that had Claimant reported knee pain contemporaneous with the July 28, 2020 injury, it would change his opinion regarding causality. From this, the ALJ infers that Dr. Failinger's opinion that Claimant did not sustain a knee injury is not based on the MRI results, but on the delay in reporting of symptoms. Dr. Failinger also opined that he did not believe that Claimant's current knee symptoms were the result of a meniscus injury, but rather that they were the result of his severe, pre-existing degenerative arthritis in the knee. He further opined that the surgery recommended by Dr. Hewitt was not likely to resolve Claimant's symptoms, and that Claimant needed a knee replacement.

31. Claimant testified at hearing that he reported knee symptoms to each of his providers prior to September 14, 2020, and that each of those providers failed to document those complaints. Claimant saw three different providers nine times between July 28, 2020 and September 10, 2020. It is highly improbable that each of these providers would have failed to document complaints of knee pain at every visit. Claimant's testimony that he complained of knee pain prior at every visit prior to September 14, 2020 is not credible. Claimant credibly testified that he had no prior knee injuries and did not sustain any additional injury to is right knee after July 28, 2020.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME - MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is

inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office,* 794 *P.2d 1090 (Colo. App. 1990); Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *In Re Villela,* W.C. No. 4-400-281 (ICAP, Feb. 1, 2001).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* W.C. No. 4-712-812 (ICAO Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents have failed to establish by clear and convincing evidence that Dr. Hughes opinion that Claimant is not at MMI from his July 28, 2020 injury is incorrect. The basis of Dr. Hughes' non-MMI finding is his opinion that Claimant sustained a work-related right knee injury July 28, 2020, in addition to his ankle injury, and that the knee requires further treatment. Dr. Hughes also opined that the arthroscopy recommended by Dr. Hewitt is a reasonable, related treatment option.

With respect to causation of Claimant's right knee condition, Respondents have not established through evidence that is "unmistakable and free from serious or substantial doubt" that Dr. Hughes' opinion that Claimant sustained an injury that accelerated an occult knee process when he began weightbearing is "highly probabl[y]" incorrect. The Claimant's December 23, 2020 MRI shows Claimant had pre-existing severe osteoarthritis and cartilage loss in his right knee. The MRI also showed a complex tear of the body and posterior horn of the medial meniscus. Claimant had not previously received treatment for his right knee and no credible evidence was presented that Claimant's right knee was symptomatic prior to his injury.

While Dr. Failinger opined that Claimant did not likely sustain a new meniscal tear as a result of the July 28, 2020 incident, he did concede that it was possible to exacerbate or accelerate a pre-existing tear or Claimant's pre-existing osteoarthritis. Dr. Failinger also agreed that the reported mechanism could cause a knee injury, in addition to Claimant's ankle injury. Primarily, Dr. Failinger does not believe it is medically probable that Claimant

sustained an exacerbation or acceleration, based on the timing of Claimant's reported symptoms.

Although Claimant did not report right knee symptoms until September 14, 2020, this does not clearly and convincingly establish that his right knee symptoms were not causally-related to the July 28, 2020 incident. Claimant could not bear weight on his right leg until approximately three weeks following surgery, or August 18, 2020, when he began partial weightbearing. Dr. Hughes, Dr. Sanchez, and Dr. Failinger agree that Claimant's knee symptoms may not have manifested until after Claimant resumed weightbearing. Although Dr. Failinger believes Claimant's knee symptoms should have manifested prior to September 14, 2020, his opinion on this does not constitute evidence that is "unmistakable and free from serious or substantial doubt." Moreover, no credible evidence was presented to indicate that Claimant sustained any unrelated injury after July 28, 2020, that would explain the symptoms.

Considering the evidence in its entirety, the ALJ finds that Respondents have not established by clear and convincing evidence that Dr. Hughes' opinion that Claimant sustained an injury to his knee that accelerated his preexisting conditions is incorrect.

With respect to MMI, Dr. Hughes indicated that the arthroscopy recommended by Dr. Hewitt was a reasonable treatment option. In his January 13, 2021 report, Dr. Hewitt indicated he felt arthroscopic surgery was medically reasonable, given Claimant had only minimal improvement in his knee condition. He also recommended other treatment options, such as therapy and a cortisone injection, which Claimant has not received. Although Dr. Sanchez placed Claimant at MMI on June 1, 2021, her assessment of MMI was limited to Claimant's ankle because, in her view, she was unable to provide treatment or restrictions for Claimant's knee due to Insurer's denial of the request for surgery. Dr. Failinger disagrees that the proposed surgery will properly address the cause of Claimant's symptoms, which he attributes to osteoarthritis. Dr. Failinger's opinion that the proposed surgery will not be effective is a difference of medical opinion with Dr. Hughes and Dr. Hewitt, and does not constitute unmistakable evidence that the MMI opinion is highly probably incorrect. Although the ALJ makes no conclusions regarding the propriety of the proposed surgery, Claimant continues to experience right knee symptoms, and treatment options exist which he has not received, and which may reasonably improve his condition or function. Respondents have failed to establish by clear and convincing evidence that Claimant is not at MMI.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant is not at MMI due to his right knee injury is incorrect.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 22, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-088-992-004

ISSUES

The issues set for determination included:

- Did Claimant overcome the opinion of the Division of Workers' Compensation IME ("DIME") physician (Wallace Larson, M.D.) by clear and convincing evidence that he was not at MMI as of January 23, 2018?

- Is Claimant entitled to medical treatment to diagnose and treat his cervicothoracic spine and right shoulder?

- Did Claimant overcame the opinion of the DIME physician by clear and convincing evidence that he sustained a permanent medical impairment as a result of his January 16, 2018 injury?

PROCEDURAL HISTORY

The undersigned ALJ issued a Summary Order on October 28, 2021. Respondents requested a full Order on November 4, 2021. This Order follows.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as an industrial laborer, starting on September 26, 2016.

2. There was no evidence in the record that Claimant suffered injuries to his lumbar spine or cervicothoracic spine prior to May 2017.

3. On May 24, 2017, Claimant suffered a compensable work injury while picking up trim pieces. Claimant testified that he injured his low back that day. He required medical treatment for that injury.

4. An Employer's First Report of Injury was completed on or about May 26, 2017. This confirmed Claimant injured his low back on May 24, 2017 when he picked up pieces of trim.

5. Claimant's treating physicians for May 24, 2017 injury included Michael Striplin, M.D. at Colorado Occupational Medicine Physicians and Nicholas Olsen, D.O. at Rehabilitation Associate of Colorado. Both physicians were ATP-s. Claimant started treating in June 2017 and Dr. Olsen diagnoses on June 14, 2017 were: lumbar spine

sprain/strain with subjective complains of right lower extremity numbness and a clinical examination consistent with somatic dysfunction in the thoracic, lumbar and sacral regions.[1]

6. On July 11, 2017, a General Admission of Liability ("GAL") for medical benefits and TTD was filed on behalf of Respondents for the May 24, 2017 injury.

7. Claimant underwent a lumbar MRI on August 14, 2017 in which the radiologist noted the presence of a large central and right paracentral, right proximal foraminal disc extrusion at L1-L2, associated with moderate facet degeneration and hypertrophy along with moderate to severe spinal canal narrowing. There was also moderately severe right proximal foraminal narrowing. At L3-L4, there was a large left foraminal, left far lateral disc protrusion, with mild facet arthrosis and mild foraminal narrowing. At L4-L5, there was a moderate facet degeneration and hypertrophy, with a mild posterior disc bulge. There was a posterior disc bulge with mild facet arthrosis at L5-S1.[2]

8. Claimant received epidural steroid injections that were administered by Dr. Olsen on August 29, 2017 (right transforaminal ESI L1-L2 and L2-L3), on September 26, 2017 (right transforaminal ESI L1-L2 and L2-L3), and on November 21, 2017 (left transforaminal ESI L3-L4 and right TFESI at L2-L3).[3]

9. Claimant was evaluated Bryan Castro, M.D. on November 6, 2017. Dr. Castro noted the back pain may be a result of the acute herniations at L1-L2 and L3-L4. The ALJ noted that this opinion supported the conclusion that the May 24, 2017 injury caused the disc herniations at L1-L2 and L3-L4. Surgery was not recommended at that time. Dr. Castro recommended continued physical therapy ("PT") for Claimant.[4]

10. Claimant had continuing low back as a result of the initial work injury.

11. Dr. Olsen placed Claimant at MMI on November 30, 2017.[5]

12. On January 16, 2018, Claimant suffered a second compensable work injury when he slipped on ice while carrying construction cables. Claimant testified he fell when his feet went out from under him and he hurt his upper back.[6]

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[1] This report was not admitted into evidence, but was referenced in Dr. Castrejohn's June 26, 2018 DIME report. Exhibit L, p. 38. It should be noted that Dr. Castrejohn did not reference the January 16, 2018 injury.

[2] *Id.*

[3] Exhibit L, pp. 38-39.

[4] *Id*. at p. 39.

[5] *Id.*

[6] Hearing Transcript ("Hrg. Tr."), p. 22:17-20.

13. Claimant testified he kept working but the pain was much worse the next day. Specifically, he felt pain in both his upper and lower back, the areas between the shoulder blades, in his right shoulder and neck and right hand.[7] Claimant said he did not have pain in those areas after the first injury. The ALJ found Claimant to be a credible witness and credited this testimony.

14. Claimant was evaluated by Dr. Striplin on January 16, 2018. Claimant complaints were not identified in any detail, but no acute distress was noted. The examination of Claimant's back showed diffuse tenderness, with no spasm or visible injury. Dr. Striplin's assessment was: back contusion. Claimant was noted to be still under care for the May 24, 2017 injury. The WCM 164 (which referred to the January 16, 2018 date of injury) noted that Dr. Striplin concluded the objective findings were consistent with history and/or work-related mechanisms of injury/illness. Dr. Striplin recommended Aleve and heat. Claimant was placed on modified duty with a 10 pound lifting, pushing and pulling restriction, as well as no overhead reaching.

15. Dr. Olsen evaluated Claimant on January 18, 2018 (in connection with the May 2017 injury), at which time he reported increased pain in his right side. Claimant reported his pain level was 9/10 following the fall whereas during the last visit, his pain level was 3/10 following an ESI. (This was related to the prior injury). Dr. Olsen observed there were discrepancies in the pain complaints reported by Claimant and his pain diary, which did not include a report of pain in his shoulders and upper back. Dr. Stiplin had indicated that this would be a new injury and Dr. Olsen contacted Dr. Striplin to discuss the case. The ALJ noted that this was evidence Claimant had new/ different pain complaints attributable to the second injury. On examination, Claimant', lumbar range of motion ("ROM") was limited. Dr. Olsen's report did not contain specific findings with regard to an examination of the thoracic spine or upper extremities.

16. Dr. Olsen's assessment was: lumbar sprain/strain, with subjective complaints of right lower extremity numbness; mild multilevel degenerative changes on 6/14/17 per plain films; MRI of the lumbar spine completed on 8/14/17 demonstrated a large right paracentral disc extrusion at L1-2, with moderate to severe spinal cord narrowing, large left bilateral disc protrusion; status post diagnostic right L1-2, L2-3 transforaminal epidural steroid injection completed on 8/29/17; status post diagnostic right L2-3 transforaminal epidural steroid injection completed on 9/26/17; post diagnostic right L2-3 left completed on 8/29/17, left L3-4 transforaminal epidural steroid injection completed on 11/21/17; status post and aggravation of lower back pain with recent slip-and-fall; new claim potentially pending regarding right upper quarter complaints.

17. Dr. Olsen expressed a concern about Claimant being a surgical candidate because he had a two level disc protrusion. Claimant was to continue his home exercise program.

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[7] Hrg. Tr., p. 23:9-11.

18. An Employer's First Report of Injury was prepared on or about January 18, 2018, which said Claimant was injured on January 16, 2018 carrying cables.

19. Claimant received a physical therapy PT treatment on January 22, 2018 for the May 24, 2017 injury, but there was no reference to the second injury. This treatment note stated Claimant was treating for two herniated discs which were caused for the first work injury. There was no record of treatment for the mid-upper back in this period of time.

20. Claimant was evaluated by Dr. Striplin on January 23, 2018 in connection with the January 16, 2018 injury. At that time, he complained of diffuse tenderness on the right and left side of the upper thoracic spine down to the lower lumbar areas. On examination, Dr. Striplin said no palpable spasm was found. Right and left shoulder motion was described as normal and Dr. Striplin opined the lumbar ROM was also normal, although there was no indication that he performed actual ROM testing with dual inclinometers. No ROM measurements were documented in Dr. Striplin's report.

21. Dr. Striplin noted Claimant was to have a repeat lumbar MRI, as well as an evaluation with Dr. Castro and would follow up with Dr. Olsen under the prior claim. Dr. Striplin concluded Claimant was at MMI and sustained no permanent impairment from his back contusion. Claimant's 10 lb. lifting restriction from the prior injury was continued.

22. On January 24, 2018, Claimant underwent a lumbar MRI and the films were read by Craig Stewart, M.D. Dr. Stewart's impression was that the lumbar spine had a similar appearance compared with the MRI done on August 14, 2017. Congenital narrowing of the lumbar spinal canal was noted and there was moderate to severe multi-factorial spinal stenosis at L1-L2, not significantly changed. There was a similar appearance of the left foraminal/lateral disc protrusion at L3-L4, contributing to mild to moderate left foraminal narrowing and contacting the exiting left L3 nerve root. Dr. Stewart also noted persistent moderate bilateral L4-L5 and moderate to severe bilateral L5-S1 foraminal narrowing.

23. Claimant was reevaluated by Dr. Striplin on January 25, 2018, at which time he reported low back pain, as well as radiating pain to the upper back. The treatment notes reflected this evaluation was in connection with the May 24, 2017 date of injury.[8] Claimant's lumbar ROM was found to be limited. No specific treatment recommendations were made at that time and Claimant was scheduled for an MRI.

24. Claimant was evaluated by Dr. Olsen on January 31, 2018, after the MRI. Dr. Olsen described the studies as quite similar and he had no new recommendations based on new pathology. The focus of this evaluation was on Claimant's low back.

[8] There was a discrepancy as to this date of injury between Dr. Striplin's records and Dr. Olsen's records (which noted a May 24, 2014 D.O.I. that appeared to be a typographical error). Dr. Olsen's January 31, 2018 WC M-164 reflected a May 24, 2017 date of injury. The E-1 reflected a May 24, 2017 date of injury.

On examination, limitations in ROM, including lumbar extension in forward flexion were noted. Claimant was scheduled for a follow-up with Dr. Castro regarding surgery. Claimant was encouraged to continue his home exercise program. The ALJ found Dr. Olsen evaluated Claimant's low back and did not address other complaints referable to the January 16, 2018 injury.

25. Claimant was evaluated Dr. Castro on February 14, 2018. Dr. Castro reviewed the MRI findings and noted the neural foraminal stenosis at L5-S1 appeared to be improved. There was a mild central disc at L1-L2, without central canal encroachment. The ALJ noted the symptoms of radiculopathy were new and occurred after the second injury. Dr. Castro's assessment was: lumbar radiculopathy, with back pain as the predominant complaint. Dr. Castro did not think surgical intervention was the best option and said he would refer Claimant for other pain management techniques.

26. On February 21, 2018, Claimant returned to Dr. Olsen in connection with the May 24, 2017 injury.[9] Dr. Olsen noted Claimant had completed three epidural injections and he would not recommend more than four ESI-s in a year because of adrenal suppression. Dr. Olsen's assessment was the same as the January 18, and 31, 2018 report with the addition of the MMI date of February 21, 2018.

27. Dr. Olsen assigned a 9% whole person impairment, which included a 7% category II-C impairment (Table 53), plus an additional 2% for loss of ROM. Dr. Olsen noted that Claimant had questions regarding right upper extremity complaints. Dr. Olsen advised Claimant that this case closure was for the lumbar complaints only. The ALJ inferred that Dr. Olsen was of the opinion that at a minimum Claimant should be evaluated to see whether further treatment was required for the January 16, 2018 injury.

28. On February 27, 2018, Claimant returned to Dr. Stiplin, who noted no surgery was recommended and Dr. Olsen had issued an impairment rating. Dr. Striplin found Claimant could heel to toe walk, had 2+ reflexes in the right patellar and Achilles areas and had grossly normal light touch in both lower extremities. Dr. Striplin stated Claimant was at MMI effective February 21, 2018 and said he agreed with Dr. Olsen 9% whole person rating.

29. The ALJ found there was an interplay between the two injuries and Claimant did not receive specific treatment for the new symptoms which resulted from the January 16, 2018 injury.

30. On June 26, 2018, Claimant underwent a DIME for the May 24, 2017 injury, which was performed by Miguel Castrejon, M.D. At that time, Claimant reported intermittent to constant dull to sharp and stabbing pain that he localized to the mid back, specifically from the area of the thoracolumbar junction to approximately L5. He also reported occasional to intermittent dull sensation with them to send both legs, right

[9] Exhibits 2 and K.

greater than left. Claimant said there was a benefit after his last injection and his pain level range from 6–8/10.

31. Examination of the thoracic spine did not produce midline tenderness and full ROM was present. Tenderness was found at the thoracolumbar and lumbar paraspinal musculature. Dr. Castrejon's impression was: chronic lumbar muscular ligamentous strain/sprain; large central, right paracentral L12 foraminal disc extrusion with moderate facet degeneration and moderately severe spinal stenosis per MRI; large left foraminal/left far lateral protrusion L3-4, per MRI; multilevel facet arthropathy contributing to lower limb radiculitis: normal thoracic spine examination; chronic pain.

32. Dr. Castrejon confirmed Claimant was at MMI. He assigned 14% whole person impairment, which included a 4% Table 60 impairment and 6% for loss of range of motion. This evaluation did not address whether Claimant needed treatment for his upper back or sustained any permanent impairment for the second injury.

33. On August 31, 2018, a Final Admission of Liability ("FAL") was filed on behalf of Respondents for the May 24, 2017 injury. It listed the date of MMI as January 23, 2018. The FAL admitted for the 14% whole person impairment and denied medical benefits after MMI.

34. Claimant was evaluated by George Bovadilla, D.C. on September 19, 2018. Claimant was complaining of moderately severe aching upper back and moderately severe constant ache and low back at that time. Dr. Bovadilla said there was a subluxation of T4, 12 leather evolves with segmental fixation. Dr. Bovadilla recommended a treatment schedule of three visits per week.

35. Claimant returned to Dr. Olsen, on September 27, 2018. He advised Dr. Olsen of the chiropractic evaluation and recommendation for treatment. Dr. Olsen was not in favor of the chiropractic treatment, given the MRI findings. On examination, Claimant's lumbar extension showed 25° of mobility and 50° of forward flexion was noted. Right and left lateral bending were full, but increased pain with lateral bending to the right was found. Claimant was given the option of an epidural steroid injection, as well as continuing his exercise program.

36. On October 3, 2018, a Worker's Claim for Compensation was filed for the January 16, 2018 date of injury. The Worker's Claim stated Claimant injured his upper back and both hands.[10]

37. On October 17, 2018, an FAL was filed on behalf of Respondents in connection with the January 16, 2018 injury. It listed the date of MMI as January 23, 2018 and admitted for a 0% whole person impairment.

[10] Exhibit P.

38. Claimant filed an Application for DIME on December 12, 2018 for the January 16, 2018 date of injury.

39. On January 15, 2019, Claimant was evaluated by Dr. Olsen. The evaluation referenced the May 24, 2017 date of injury. At that time, he had pain in his low and middle back, as well as a referral pattern into the right upper extremity.

40. Dr. Olsen's assessment was: lumbar sprain/strain, with subjective complaints of right lower extremity numbness; mild multilevel degenerative changes on 6/14/17 per plain films; MRI of the lumbar spine completed on 8/14/17 demonstrated a large right paracentral disc extrusion at L1-2, with moderate-to-severe spinal cord narrowing, large left bilateral disc protrusion; status post diagnostic right L1-2, L2-3 transforaminal epidural steroid injection completed on 8/29/17; status post diagnostic right L2-3 transforaminal epidural steroid injection completed on 9/26/17; status post diagnostic right L2-3 left completed on 8/29/17, left L3-4 transforaminal epidural steroid injection completed on 11/21/17; status post and aggravation of lower back pain with recent slip-and-fall; new claim potentially pending regarding right upper quarter complaints; MMI on 2/2118; status post completion of a DIME increasing impairment for 9% to 14%.; FAL for 5/24/17 claim on 8/30/18/history of second work-related injury on1/16/18-Dr. Striplin placed him at MMI on 1/23/18 for this claim. The foregoing diagnoses was evidence of evidence that Claimant had increased symptoms as a result of the second injury.

41. At the time of the January 15, 2019 evaluation, Dr. Olsen explained to Claimant that a DIME examination had been scheduled for the second injury and if the DIME Dr. had treatment recommendations and he was referred to Dr. Striplin and then to Dr. Olsen, he would offer an opinion on the second injury. The ALJ concluded that Dr. Olsen was of the belief he was not to provide an opinion on the second injury and potential treatment until after the DIME.

42. Claimant returned to Dr. Olsen, on May 9, 2019 and the report referenced the May 24, 2017 date of injury. Dr. Olsen, reviewed Dr. Castejon's DIME report and noted Claimant was recommended for medical maintenance. Claimant advised that he was not interested in repeating the ESI. Claimant's pain diagram reflected pain and the low back, as well as down both legs. On examination, Claimant's lumbar extension demonstrated 20° mobility, facet loading was positive on the right and left. He had 50° forward flexion with increased pain at termination of forward flexion. No radiculopathy was noted. Dr. Olsen,'s assessment was the same as the January 15, 2019 evaluation. Dr. Olsen opined that Claimant's symptoms were more consistent with a facet hyper mediated component. He offered claimant the possibility of a bilateral L4-5 and L5-S1 facet injection. The ALJ found that Dr. Olson was recommending additional treatment for Claimant.

43. Claimant underwent bilateral L4-5 and L5-S1 facet injection on May 21, 2019. Claimant returned to Dr. Olsen on June 5, 2019, which time he reported in 80% reduction of his symptoms. Dr. Olsen noted Claimant may or may not be a candidate

for radio frequency neurotomy and that the work-up would include serial medial branch blocks in order to determine if he was a candidate. In the follow–up evaluation on June 19, 2019, Dr. Olsen discussed scheduling Claimant for serial medial branch blocks for confirmation and possible radio frequency neurotomy. Claimant wished to go forward with that treatment.

44. Claimant underwent bilateral L3, L4 medial branch and L5 dorsal primary ramus blockade. The diagnosis was lumbar spondylosis, bilateral L4-5, L5–S1.

45. Claimant returned to Dr. Olsen on June 27, 2019. After the medial branch block, Claimant had an immediate reduction in symptoms, but once he got home his pain was 2 out of 10. The pain was the went back to 3/10. Dr. Olsen said Claimant had a non-diagnostic response to medial branch block and it was not clear that he had a facetogenic pain generator. Dr. Olsen did not recommend proceeding with a confirmatory medial branch block and said Claimant was not a candidate for radio frequency neurotomy. Dr. Olsen‘s assessment was the same as the previous evaluation. He talked to Claimant about an exercise program, including a water program.

46. In the follow-evaluation on July 25, 2019. Dr. Olsen noted Claimant had set up an aquatic program, but Insurer had not paid for it. Dr. Olsen encouraged Claimant to participate in the pool program 3 to 5 days per week. No other treatment recommendations were made.

47. The ALJ noted in all of Claimant’s pain diagrams for the evaluations done by Dr. Olsen in 2019, Claimant indicated that he was having pain going down both of his legs. In addition, Dr. Olsen referenced the May, 2017 date of injury in all of the follow-up reports. Although he referenced Dr. Castrejon‘s DIME report, it was unclear whether Dr. Olsen considered the DIME report from Dr. Larson.

48. Claimant returned to Dr. Castro on August 14, 2019. Claimant reported ongoing low back pain and also that he had pain in the lower extremities, which was getting better. Dr. Castro referenced the May 23, 2017 work injury. Dr. Castro‘s assessment/plan was lumbar radiculopathy; back pain ongoing and a new MRI was going to be ordered.

49. Claimant underwent an MRI on August 23, 2019 and the films were read by Frank Crnkovich, M.D. Dr. Crnkovich impression was: disc protrusion and foraminal compromise including at the L2-L3 level, where the cul-de-sac measured 1.13 cm. At L3-L4, the thecal sac was narrowed to 1.04 cm., with ligamentum flavum hypertrophy and facet arthropathy was present. The lateral disc protrusion at L3-L4 level on the left was greater than right and there was contact to the exiting L3 nerve roots, left greater than right. At L4-L5 level, a broad-based disc protrusion was present, with left greater than right central component; no contusion, fracture or infiltrative process of the marrow present. The most prominent interval changewas the visualization of the urinary

bladder with distention of the bladder up to the L5 level. No obstruction or hydronephrosis of either kidneys noted.

50. Claimant testified he didn't really receive treatment for the second injury, including when he saw Dr. Olsen in January 2019. The focus was on his lower back when he had the second MRI and evaluation with Dr. Castro. He did not receive treatment for his upper back and the numbness in his hands. Claimant said he continues to experience symptoms related to the 2018 injury. The ALJ credited this testimony.

51. Claimant was evaluated by Caroline Gellrick, M.D. on February 22, 2019 to evaluate the injuries related to the January 16, 2018 slip and fall. Claimant reported symptoms in the mid back, thoracic, and some cervical pain with radiation into the right upper extremity. On physical examination, Dr. Gellrick noted that Claimant carried the right shoulder higher than the left. Claimant had tenderness to the mid and upper thoracic spine, lower back and right side of cervical paraspinal muscles. Claimant had tight trigger points of the right trapezius, which were painful. Dr. Gellrick diagnosed a cervical strain, thoracic and right shoulder contusions and aggravation of pre-existing low back condition.

52. Dr. Gellrick stated Claimant was not at MMI and required additional medical care (including diagnostic testing) to evaluate his second injury. Dr. Gellrick opined that Claimant required an MRI of the cervicothoracic area, in addition to subsequent MRI's of the low back (which were done under the first claim). She also indicated that an MRI arthrogram of the right shoulder may be necessary to determine if partial tears were present. The ALJ credited Dr. Gellrick's opinions that further diagnostic testing was required.

53. On March 5, 2019, Wallace Larson, M.D. performed the DIME with respect to the January 16, 2018 injury. Claimant reported that he had pain in his back in the area between the scapula, as well as the thoracic spine area. He also experienced numbness in both hands, which came and went. On examination, Claimant had bilaterally negative Tinel's and Phelan's signs. Mild tenderness to palpation of the thoracic spine and bilateral trapezius areas was noted by Dr. Larson. No tenderness to palpation was noted in the cervical spine, however, Dr. Larson found there was a mild restriction of cervical spine ROM. The ALJ noted Dr. Larson did not perform formal measurements with regard to the cervical or thoracic spine. No ROM testing worksheets were included in Dr. Larson's report.

54. Dr. Larson concluded Claimant did not have any identifiable impairment relative to the January 16, 2018 date of injury. Specifically, Claimant was at MMI as of January 23, 2018 without ratable impairment. Dr. Larson stated Claimant did not require additional treatment or maintenance treatment. In coming to these conclusions, Dr. Larson noted that he did not evaluate Claimant or review medical records relative to the May 2017 injury. The ALJ found Dr. Larson's DIME report did not address Dr. Olsen's treatment recommendations for Claimant for the January 16, 2018 injury or the

relationship between the two injuries. The ALJ also found Dr. Larson did not address Claimant's increased low back, mid back and upper extremity complaints which were present after the January 2018 injury. There was no analysis of Claimant's need for treatment in 2019 for radiculopathy, which was present after the second injury.

55. The ALJ found Dr. Larson's failure to perform formal measurements was an error. In addition, Dr. Larson's failure to address Claimant's additional pain complaints after the second injury was an error.

56. On March 25, 2019, an FAL was filed on behalf of Respondents, based upon Dr. Larson's DIME. The FAL denied liability for *Grove*r medical benefits.

57. On October 14, 2019, Albert Hattem, M.D. conducted an independent record review of this claim at the request of Respondents. Dr. Hattem reviewed Claimant's medical records, and found that Claimant was appropriately placed at MMI on January 23, 2018, by Dr. Striplin, without permanent impairment. Dr. Hattem agreed with Dr. Larson's DIME opinion rather than Dr. Gellrick's IME. He cited the comparison of Claimant's post fall lumbar MRI to his prior MRI, which showed Claimant's lumbar condition was unchanged. Dr. Hattem said there were inconsistencies in Claimant's presentation to his providers; particularly on January 18, 2018 and this indicated Claimant was not a credible historian. Dr. Hattem said the records reflected an absence of complaints and symptoms related to Claimant's fall over approximately 8 months' worth of appointments. To Dr. Hattem, this indicated Claimant's complaints to Dr. Gellrick, were unlikely to be related to a January 16, 2018 injury. The ALJ noted Claimant had mid and upper back complaints when he was evaluated by Dr. Olsen on January 18, 2018 and the latter opined that these needed to be treated under a different claim number, which undercut Dr. Hattem's opinion that Claimant had no complaints to these areas of his body. Dr. Hattem's opinions were less persuasive to the ALJ

58. Dr. Hattem testified as an expert at hearing. He is board-certified in Occupational Medicine and Level II accredited pursuant to the W.C.R.P. Dr. Hattem reiterated his conclusions from his report, including that Claimant reached MMI for the second work injury on January 23, 2018. Dr. Hattem opined that the medical records did not support an impairment rating for the January 16, 2018. Dr. Hattem disagreed with Dr. Gellrick's conclusion that Claimant required additional treatment, including for low back pain.

59. Claimant was evaluated by Bruce Evans, M.D. at the Emergency Department of Saint Joseph Hospital on February 7, 2020. He reported increased low back pain, which radiated down both legs with right being greater than left. On examination, Claimant was tender to palpation of the right paraspinal lumbar region with positive right straight leg test. Dr. Evans' clinical impression was: acute right–sided low back pain with right sided sciatica; type two diabetes mellitus without complication. Claimant was prescribed medications and advised to follow up with his PCP. This evaluation was evidence that Claimant's increased low back pain potentially required additional treatment.

60. Claimant met his burden of proof and overcame Dr. Larson's conclusion on MMI by clear and convincing evidence.

61. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME

A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. 2020. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt". *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

Thus, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect. Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. Such evidence must be unmistakable and free from serious or substantial doubt". *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) [citations

omitted]. Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, *supra,* 914 P.2d at 414.

As a starting point, Claimant was initially injured at work on May 24, 2017 in which he hurt his low back. (Finding of Fact 3). At least two medical treatment providers attributed two disc herniations to this injury. (Findings of Fact 9 and 19). Claimant received conservative treatment for this low back injury. As determined in Findings of Fact 7-10, the treatment included epidural steroid injections, as well as an MRI and a surgical consult, which was performed by Dr. Castro. The ALJ found Claimant had continuing low back pain as a result of the initial work injury. (Finding of Fact 10).

Claimant was injured at work on January 16, 2018. (Finding of Fact 12). As found, Claimant reported different symptoms he felt as a result of the second injury. These symptoms included pain in the mid and upper back, as well as upper extremities. (Finding of Fact 15). Claimants low back pain also increased. *Id.* Claimant's ATP's were the same for the second injury as the first and at the time, he was still under both doctors' care for the May 24, 2017 injury. (Findings of Fact 14-16). In particular, Dr. Striplin evaluated Claimant on January 16, 2018, however, Dr. Stiplin did not document Claimant's symptoms in any detail. (Finding of Fact 14).

Claimant was then seen by Dr. Olsen two days later and the ALJ noted Claimant had new and different pain complaints that were attributable to the second injury, which were reflected in Dr. Olsen's evaluation. Claimant continued to receive treatment for his first injury, including PT. In this time frame, one ATP (Dr. Striplin) then concluded Claimant was at MMI (for the January 16, 2018 injury) as of January 23, 2018. (Findings of Fact 20-21). The other ATP, Dr. Olsen evaluated Claimant on January 31, 2018 and had no additional treatment recommendations for the new symptoms. At this time, Dr. Olsen noted Claimant's treatment for the new symptoms would have to be under a different claim. (Finding of Fact 27). The ALJ inferred that Dr. Olsen was of the opinion that Claimant should be evaluated to see whether further treatment was needed for the second injury. *Id.*

Concurrently, Claimant continued to treat for the May 24, 2017 injury with both Drs. Olsen and Striplin. As determined in Findings of Fact 24-28, Claimant's evaluations and treatment for the May 24, 2017 injury continued through February 21, 2018 when Dr. Olsen concluded he was at MMI. There was overlap between the evaluations and treatment for these two injuries and the ALJ concluded Claimant did not receive specific treatment for the new symptoms which resulted from the January 16, 2018 injury. (Finding of Fact 29).

The evidence in the record reflected Claimant underwent a DOWC-sponsored evaluation in connection with the first injury and no further treatment was provided in connection with the January 16, 2018 injury. Claimant testified that he continued to have symptoms and, as found, Claimant was evaluated by chiropractor in September 2018, after which time he returned to Dr. Olson. (Findings of Fact 34-35). In October

2018, a Workers claim for Compensation was filed in connection with the second injury and Respondents then filed an FAL based upon the January 23, 2018 MMI date from Dr. Striplin. As reflected in Findings of Fact 35, 39-49, Claimant then received additional treatment provided by Dr. Olsen, which included specifically addressing radiating pain in his legs, increased low back pain and pain in the thoracolumbar junction. He also underwent an MRI and a surgical evaluation performed by Dr. Castro. *Id.*

It was against this backdrop that Claimant underwent a DIME for the second injury on March 5, 2019. (Finding of Fact 60). As found, Dr. Larson who performed the DIME adopted the finding that Claimant reached MMI within one week of the date of injury. Claimant contested this finding and Respondents argued that Claimant did not meet his burden of proof.

The ALJ determined Claimant met his burden of proof and overcame Dr. Larson's opinion on MMI by clear and convincing evidence. (Finding of Fact 60). This conclusion was based upon the evidence in the record. First, there is a dearth of information/analysis in Dr. Larson's report. (Findings of Fact 54). As found, Dr. Larson conclusorily agreed with the determination that Claimant reached MMI within one week of the injury, but did not address the recommendations by Dr. Olsen regarding Claimant's need for treatment in connection with the second injury. *Id.* Dr. Larson also did not address the potential interplay between the first and second injuries in his DIME report. While his focus was on the second injury, the ALJ found the DIME report prepared by Dr. failed to address Claimant's increased low back pain following the second injury, which were documented in the records admitted at hearing. (Finding of Fact 54). In this regard, Dr. Larson also did not address the continued symptoms Claimant reported through 2019. *Id.*

Second, Dr. Larson did not document performing ROM measurements for the cervical or thoracic spine. (Finding of Fact 53). There was no evidence in the record that these measurements were performed and the ALJ found this was an error. (Finding of Fact 55).

Third and finally, Claimant's testimony, as well as Dr. Gellrick's opinions led the ALJ to conclude Claimant required treatment for the 2018 injury. (Findings of Fact 50, 52). The ALJ concluded that the records admitted at hearing led to the conclusion Claimant was not at MMI and required additional treatment.

The ALJ considered Respondents' argument that Claimant failed to meet his burden to overcome Dr. Larson's opinions. They argued that Dr. Larson's opinions were supported by the great weight of the evidence and were consistent with the opinions of Dr. Striplin and Dr. Hattem. Respondents also contended Dr. Gellrick's opinion that Claimant's January 16, 2018 slip and fall aggravated his preexisting lumbar condition and caused lasting injuries to his thoracic spine, cervical spine, and right shoulder was not persuasive, as she failed to conduct a sufficient causal analysis. The ALJ found Dr. Gellrick's opinion persuasive and also concluded that these arguments

did not obviate the errors found with Dr. Larson's report and his lack of analysis of Claimant's need for treatment following the second injury.

ORDER

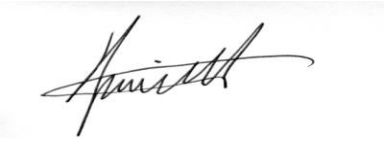
1. Respondents shall provide medical benefits to Claimant, as he is not at MMI.

2. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable injury on October 5, 2020?
- If the claim is compensable, did Claimant prove a right total hip arthroplasty performed on November 15, 2021 by Dr. Michael Schuck was causally related to the work accident?
- The parties stipulated that Dr. Schuck is authorized, if the claim is compensable.
- The parties stipulated to an average weekly wage of $1,423.60.
- The parties stipulated that Claimant is entitled to TTD starting November 15, 2021 if the hip surgery is found work-related.
- The parties stipulated that Claimant received short-term disability benefits under an Employer-paid disability policy. The parties agreed that any TTD benefits awarded are subject to applicable offsets, but did not know whether Insurer or the short-term disability carrier would receive the offset. Counsel expressed confidence they can resolve that issue by mutual agreement, depending on the outcome of the hearing. Any issues related to the specific mechanics of the offset will be reserved for future determination, if necessary.

FINDINGS OF FACT

1. Claimant works for Employer as a broadband technician, repairing data and telephone lines. The job is physically demanding, requiring heavy lifting, awkward postures, and climbing ladders.

2. On October 5, 2020, Claimant was working on a "cross box" to troubleshoot a telephone line problem.[1] Claimant lost his footing while walking around the cross box and fell to the ground. There is conflicting evidence whether Claimant fell on his right side or his left side.

3. Claimant reported the injury to his supervisor and then to an injury hotline at "Unicall." The call was recorded, but portions are inaudible, including approximately 90 seconds while Claimant was discussing the accident and resulting symptoms. Claimant stated, "I tripped and fell on my left side and rolled to my right side." Claimant reported pain in his left lower back and his right hip. He stated the hip was "of more concern right now." Claimant denied any visible bruising or abrasions on his right hip.

[1] A "cross box" is an outdoor enclosure that contains interconnection points for phone and data lines to multiple residences or businesses

4. Claimant's pain was worse the next morning when he awoke so he requested treatment. Employer referred him to Concentra. Claimant saw Dr. Anthony Stanulonis at Concentra on October 6, 2021. Claimant explained, "He fell into a cross box and hurt his back. States the left side of his back hurts a lot and his right hip has been popping since the fall." On further questioning, Claimant described discomfort and popping sensation in the lateral right hip and right groin discomfort when transitioning between sitting and standing. On examination, Claimant's low back was tender to palpation around L3-5 and the left SI joint. Examination of Claimant's right hip showed tenderness in the anterior hip joint, greater trochanter, and bursa. Hip ROM was painful and limited in all directions. Dr. Stanulonis diagnosed a lumbar strain and a right hip contusion. He prescribed a muscle relaxer, NSAIDs, and Lidocaine patches, and ordered a CT scan of the right hip.

5. The hip CT was performed later that afternoon, and showed significant osteoarthritic changes. There was no clearly defined fracture or significant joint effusion.

6. On October 19, 2020, Claimant's back pain was 80% improved, but his right hips was still painful and "cracking." Dr. Stanulonis ordered an MR arthrogram to look for a labral tear.

7. Claimant's low back pain had resolved by November 6, 2020, but he still had hip pain and popping, particularly when exiting his truck.

8. A right hip MRA was performed on November 17, 2020. It showed significant degenerative osteoarthritis and articular cartilage loss. The radiologist noted labral hypertrophy but no labral tear.

9. Claimant returned to Concentra on November 30, 2020. Dr. Stanulonis was noted the MRI showed degenerative changes and impingement syndrome. He referred Claimant to Dr. Michael Schuck, an orthopedic surgeon, for consideration of a steroid injection versus a total hip replacement.

10. Insurer filed a Notice of Contest on December 10, 2020.

11. Claimant saw his PCP on March 20, 2021 for persistent and worsening hip symptoms. He explained he fell on his right hip in October 2020. He initially had pain in his left lower back but subsequently started having hip pain and popping. The report notes, "You have never had right hip pain before the injury." The provider concluded, "The hip symptoms seem to be directly attributable to your fall." Claimant was an orthopedist or physical medicine specialist.

12. Insurer authorized a one-time evaluation with Dr. Stanulonis on June 22, 2021. Claimant described the same symptoms in his hip, but they were slowly getting worse. The hip was particularly bothersome when exiting his vehicle, ascending or descending stairs, or kneeling. Dr. Stanulonis again referred Claimant to Dr. Schuck.

13. Claimant saw Dr. Douglas Adams, an orthopedic surgeon, on July 28, 2021. Claimant described his mechanism of injury as "fell at work on right side." Dr. Adams

opined the physical exam and imaging findings were consistent with femoral acetabular impingement with osteoarthritis and a degenerative labral tear. He recommended an intra-articular injection for diagnostic and potentially therapeutic purposes.

14. Claimant returned to his PCP on August 26, 2021. The report notes, "he [was] injured on the job on 10/5/2020 s/p fall on the job and reported to workman's comp and it was denied [in] December due to pre-existing condition, which [he] denies ever having a previous injury." Claimant reported, "His symptoms have been present and worsening since Oct 2020 after an injury at work . . . at this point, the pain is severe enough that he wants to use his commercial insurance to have this taken care of once and for all." Claimant was referred to Dr. Schuck.

15. Claimant saw Dr. Schuck on September 14, 2021. He explained that his hip problems started "after a fall at work on 10/5/2020. He did land on his right hip while wearing a tool belt. He did notice an onset of pain after that time." The symptoms had progressed and were severely impairing his ability to work and perform routine activities. Based on his exam findings and review of the imaging studies, Dr. Schuck opined Claimants symptoms were caused by a combination of significant degenerative changes, a labral tear, and soft tissue/muscular pain. He thought the labral tear was "at least somewhat degenerative in nature." He explained that a labral repair or debridement would only address part of the problem and Claimant would still have significant symptoms from his underlying osteoarthritis. He estimated arthroscopic surgery would probably provide only six months of relief, at which point Claimant would likely experienced a recurrence of pain in functional impairment. As a result, he concluded that "the only true fix" would be a total hip arthroplasty.

16. Claimant had a pre-operative appointment with Dr. Schuck on November 2, 2021. Dr. Schuck documented, "his symptoms began after a work-related injury in October 2020. At that time, he sustained a fall while wearing a heavy tool belt. He has had persistent right groin pain and hip pain ever since. He states that he had no trouble with the hip prior to this work-related injury."

17. Dr. Schuck performed a right total hip arthroplasty on November 15, 2021.

18. Dr. Timothy O'Brien performed an IME for Respondents and testified at hearing. Claimant told Dr. O'Brien that he tripped and fell to the right, landing on the tool belt he was wearing. Dr. O'Brien noted, "the facts in this case are concordant." He concluded Claimant suffered a minor lumbosacral strain/sprain and a right hip contusion from the fall on October 5, 2020, but opined the injuries were "self-limited and self-healing" without the need for treatment. Dr. O'Brien noted the imaging studies showed pre-existing osteoarthritis but no evidence of a fracture or other acute injury. Dr. O'Brien testified that a significant, direct blow to the right hip from the ground and tool belt would have caused some bruising, swelling, or other visible trauma. The lack of bruising confirmed the injury was minor. He opined the degenerative findings seen on imaging take years to become evident. Dr. O'Brien conceded that Claimant had no prior medical history related to the right hip, but opined there was "virtually 0%" chance Claimant's right hip was functioning normally before the injury. Dr. O'Brien testified that the work accident did not aggravate

or accelerate the underlying pre-existing degenerative changes. He agreed that the only appropriate treatment option was a total hip arthroplasty, because an arthroscopic procedure would not be effective. However, he did not consider the hip replacement related to the work injury in any way. Dr. O'Brien further testified that if Claimant had in fact fallen on his left hip, that would negate any type of right hip injury.

19. Dr. Jack Rook performed an IME for Claimant and testified at hearing. Claimant told Dr. Rook, "He tripped and fell to his right. He stated he was wearing a tool belt with a tool pouch overlying his right hip. He landed on his right side with his hip directly impacting the tool belt as he struck the ground." Dr. Rook opined the work accident substantially aggravated Claimant's underlying pre-existing osteoarthritis, and ultimately necessitated the hip replacement. To support his conclusion, Dr. Rook noted the injury caused a direct trauma to Claimant's right hip, Claimant reported a new onset of hip pain and popping within hours of the work accident, the hip was asymptomatic before the accident, and Claimant had worked a physically demanding job for years with no limitation or indication of hip problems. Dr. Rook agreed that if Claimant actually fell on his left hip instead of the right hip, his conclusions regarding causation would change.

20. In his testimony, Claimant described the accident consistent with his previous reports to Dr. Rook, Dr. O'Brien, and Dr. Schuck. He explained he fell on his right side and landed on the tool pouch he typically wears on his right hip. Claimant confirmed he had experienced no popping, clicking, pain, or other problems with his right hip before the work accident. He agreed the low back injury resolved after a couple of weeks, but the right hip remained symptomatic and became progressively worse. Claimant testified he simply "misspoke" when he referenced falling on his left side during the call with Unicall, "because I fell on my right side, not my left side."

21. Claimant's testimony was credible and persuasive, including the testimony that he "misspoke" during the telephone interview when he stated he fell on his left side.

22. The ALJ finds Claimant probably fell on his right side, rather than his left side. This is supported by his statements to multiple providers describing a fall on his right side. Moreover, Claimant specifically mentioned right hip pain during the interview with Unicall. The reliability of the recorded statement is undermined by the 90-second gap just at the point when Claimant was describing the accident and his symptoms. In any event, the reference to falling on his left side is an outlier and was probably a mistake.

23. Claimant proved he suffered a compensable injury on October 5, 2020. Claimant developed low back and right hip symptoms proximately caused by the accident. He reasonably requested medical treatment, and Employer obliged. Dr. Stanulonis documented findings consistent, at a minimum, with soft tissue injuries. He appropriately requested imaging and prescribed medication. These facts are sufficient to establish a compensable injury.

24. Dr. Rook's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. O'Brien.

25. Claimant proved the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary and causally related to the compensable work injury. All experts agree an arthroplasty was the appropriate procedure to address Claimant's ongoing hip problems. Although Claimant had severe, pre-existing, degenerative osteoarthritis before the injury, it was asymptomatic and caused no functional limitations. The work accident aggravated, accelerated, or combined with the pre-existing condition to cause the need for the hip replacement.

26. The stipulated average weekly wage corresponds to a TTD rate of $949.07 ($1,423.60 x 2/3 = $947.07).

27. The parties stipulated Claimant is entitled to TTD benefits commencing November 15, 2020, subject to applicable offsets for short-term disability benefits.

CONCLUSIONS OF LAW

A. Compensability

To receive medical or indemnity benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury on October 5, 2020. Claimant's fall proximately caused low back and right hip symptoms. He reasonably

requested medical treatment, and Employer obliged. Dr. Stanulonis documented findings consistent, at a minimum, with soft tissue injuries. He appropriately requested imaging and prescribed medication. These facts are sufficient to establish a compensable injury.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment, the claimant is entitled to medical benefits as long as the pain is proximately caused by the employment-related activities and not the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Abeyta v. Wal-Mart Stores, Inc*., W.C. No. 4-669-654 (January 28, 2008). However, the mere fact a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

All the medical experts agree the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary. The dispute relates to causation. As found, Claimant proved the need for surgery was proximately caused by the work accident. Claimant's testimony regarding the accident, and the onset and progression of hip symptoms is credible. Dr. Rook's causation analysis is credible and more persuasive than the contrary opinions offered by Dr. O'Brien. Claimant arrived at work on October 5, 2020 with a severely degenerated but asymptomatic hip. He then fell directly on his right hip and developed pain and popping within a few hours. Regardless of whether the work accident could be characterized as "minor," it was the proverbial "final straw" that pushed Claimant's hip over the edge. The right hip has been continuously and progressively symptomatic since the injury. Although Claimant had severe, pre-existing degenerative changes before the

accident, he was not a candidate for a hip replacement because he was asymptomatic. No one performs arthroplasties on asymptomatic and non-disabling hips regardless of how damaged they might be. The mere fact that Claimant probably would have developed hip symptoms at some point in the future does not negate the fact it became symptomatic on October 5, 2020 as a direct and proximate consequence of his industrial accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for accidental injuries on October 5, 2020 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the right total hip arthroplasty performed by Dr. Schuck on November 15, 2021.

3. Claimant's average weekly wage is $1,423.60, with a corresponding TTD rate of $949.07 per week.

4. Insurer shall pay Claimant TTD benefits, commencing November 15, 2021 and continuing until terminated according to law, subject to any allowable short-term disability offset.

5. Insurer shall pay Claimant's statutory interest of 8% per annum on all compensation not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 22, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II

Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the DIME physician's opinion with regard to permanent medical impairment was incorrect.

II. Whether Claimant proved by a preponderance of the evidence that Claimant is entitled to maintenance medical benefits.

III. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 3, 2021, endorsing as issues for hearing "Overcome the Division IME on the issue of permanent impairment pursuant to W.C.R.P. Rule 5-5(F) and Sec. 8-42-107(8), C.R.S., as well as reasonably necessary and related medical benefits.

Claimant, while still represented by counsel, filed a Response to the September 3, 2021 Application for Hearing on September 15, 2021 listing issues including maintenance medical benefits after maximum medical improvement, temporary total disability benefits as of October 27, 2020 through March 31, 2021, permanent partial disability benefits.

A Hearing was set for February 16, 2022 before the Office of Administrative Hearings. Claimant failed to appear. Respondents were represented by counsel. The official court interpreter was Pablo Silveira of E-Multilingual Interpreting Services. Counsel for Respondents indicated that Respondents were unable to reach Claimant by mail, phone or email. The hearing was conducted via Google Meet at 1:30 p.m. and time was permitted to allow Claimant to appear. This ALJ also, through Spanish/English interpreter Pablo Silveira, attempted to contact Claimant four times by telephone at the number provided to the OAC. This is the phone number provided by Claimant's former attorney in her motion to withdraw as counsel. During the final contact, a person answered the phone and identified herself as "Ms. Maria de Jesus Perez" and stated that she had 'just obtained the phone number from T-Mobile for her son's cell phone. This suggests to the Court that this telephone number at one time belonged to Claimant but no longer belongs to Claimant. Ms. Perez indicated that they had received multiple prior calls at this number asking for Claimant.

As of the date of this Order, the undersigned has received no communication from Claimant explaining his absence at the first hearing. The records support the determination that Claimant had proper notice of the hearing date and time. Former counsel for the Claimant filed a motion to withdraw as Claimant's attorney on October 19, 2021, which was granted on November 29, 2021. Both the motion and the order granting

Claimant attorney's motion to withdraw were sent to Claimant at his address of record filed with the Division of Workers' Compensation and the Office of Administrative Courts. On November 3, 2021, a Hearing Confirmation containing the date and time of day for the scheduled hearing was sent to Claimant at his Marion Street address of record and was also emailed to Claimant at his email on file with the OAC. On February 4, 2022, Respondents filed a Case Information Sheet (CIS) and provided a copy of Respondents' Hearing Submissions to Claimant. The CIS contained the date and time this hearing was scheduled and Respondents' hearing submissions indicated that the hearing was scheduled for February 16, 2022 at 1:30 p.m. via Google Hangouts. Respondents indicated that none of the mailings to Claimant's address on record or any of the emails sent to Claimant at his email of record were returned to Respondents or bounced back to Respondents as undeliverable. This ALJ finds that Claimant had proper notice of hearing.

At the February 16, 2022 hearing, Respondents notified the Court that Respondents were prepared to proceed with their case-in-chief. Respondents requested to put on their case or present an offer of proof. In the alternative, Respondents requested that Claimant's claim be dismissed with prejudice, as Claimant failed to respond to discovery and failed to attend Respondents' Independent Medical Evaluation (IME). The undersigned considered these requests, and instead determined that a new hearing would be set and notice of the hearing would be sent to Claimant by certified mail.

Respondents set the new hearing for March 28, 2021 at 8:30 a.m. in this matter. A Notice of Hearing was sent to Claimant at his email address. This ALJ confirmed that neither this NOH nor the one for the prior hearing was returned as undeliverable to the OAC and are presumed to have reached their intended recipient. Respondents sent by certified mail a copy of the Notice of Hearing advising Claimant of the new date and time of the hearing, and was delivered on March 15, 2022 at 5:45 p.m., utilizing USPS Tracking Plus, Tracking Number 70072560000025614605. The NOH stated that “Claimant's failure to attend the hearing may result in the claim being dismissed” and that the parties’ had the right to be represented by an attorney or other person of their choice at the hearing. It also advised that “Attorneys and non-represented parties must keep the Office of Administrative Courts informed of any change of address pending final disposition of this case.”

FINDINGS OF FACT

Based on the evidence presented, the Judge enters the following findings of fact:

1. Claimant was injured in the course and scope of his employment on August 31, 2020 while lifting a five gallon tub filled with water and flowers, when he felt a pull in his lower back.

2. Claimant was initially seen at Midtown Occupational Health Services on September 1, 2020 by Dr. Lawrence Cedillo and Matthew Edwards, PA-C. Upon exam, Claimant had a fairly normal exam with the exception of decreased extension, rotation and lateral bending, tender to palpation in the paralumbar and sacroiliac and mildly positive Faber test of the back bilaterally. Mr. Edwards diagnosed work related lumbar strain with sciatica, stated that they would proceed with conservative care and assess progress. He stated that the objective findings were consistent with history and work

related mechanism of injury, prescribed physical therapy, massage therapy and medication, a lumbar support, and provided restrictions for modified duty.

3. Claimant returned to see Mr. Edwards on September 8, 2020 stating that he had had some improvement but was still having significant pain and discomfort as well as difficulty sleeping and had not yet started PT. He added prescription medication and noted continued on prior plan for conservative care.

4. On September 11, 2020 Claimant was evaluated by Dr. David Orgel, also from Midtown Occupational Health, who noted unremitting axial back pain, right leg symptoms that did not radiate below the knee, minor tenderness in his axial lumbar spine with moderately limited range of motion with pain in all planes, negative straight leg raise test bilaterally, mildly decreased sensation to light touch at the right Achilles. He stated that Claimant's objective findings were consistent with a work-related mechanism of injury, ordered an x-ray of the lumbar spine and continued therapy.

5. Claimant continued to see Mr. Edwards, Dr. Cedillo and Dr. Orgel over the next few months, reporting some progress with therapy but, that he continued to have symptoms in his low back and into his buttocks. Claimant continued to have a fairly normal exam with the exception of decreased extension, rotation and lateral bending, tender to palpation in the paralumbar and sacroiliac and mildly positive Faber test of the back bilaterally. On September 15, 2020 they added chiropractic care to his treatment.

6. Alexa Sheppard, D.C. evaluated Claimant on September 24, 2020. She found that palpation and myofascial exam of the lumbosacral musculature identifies hypertonicity with mild subjective tenderness and spasm at lumbar paraspinals. His myofascial evaluation of the thoracolumbosacral muscles identified tender trigger points of the lumbar paraspinals, quadriceps lumborum, gluteus medius, gluteus maximus, piriformis that correspond with referral pain patterns and spasms. Intersegmental examination revealed articular fixation and somatic dysfunction at L4-S1. Provocative loading maneuvers incorporating extension and rotation with P-A facet load revealed intersegmental restriction and elicited discomfort from the lumbar facets at L4-S1. The lumbar tests were negative for straight leg raise, positive Yeoman's bilaterally, and positive Kemp's bilaterally. She assessed that findings were consistent with mechanical back pain, with a combination of myogenic and lumbar facet dysfunction. She stated that clinical findings suggested uncomplicated low back pain without any obvious signs of discogenic etiology, instability, or nerve root impingement. She recommended ongoing chiropractic care for up to eight weeks. Claimant continued with approximately ten additional visits during the following weeks.

7. Respondents filed a General Admission of Liability on October 20, 2020 for medical benefits only.

8. Kristine M. Couch, OTR, conducted a Functional Capacity Evaluation (FCE) on November 2, 2020 and a second one on March 29, 2021. Testing was found to be valid and consistent in 22 of 22 tests, for maximum validity criteria and voluntary effort. She noted that Claimant's demonstrated maximum safe weight lifting ability of 20 lbs. from floor to waist on an occasional basis with increased low back pain and a 10 lbs. occasional dynamic safe lifting on an occasional basis.

9. On November 3, 2020 Mr. Edwards stated that he had concerns with Claimant's efforts during the functional capacity evaluation as his abilities were placed in the light duty category. He ordered an MRI of the lumbar spine to rule out significant pathology with regard to the workplace injury and referred Claimant to a physiatrist for evaluation of pain management.

10. On November 19, 2020 Dr. Sheppard stated that Claimant was progressing slower than was expected but that he did obtain temporary relief from the chiropractic care. She further stated that she suspected more pathology was involved in the lumbar spine that was causing nerve compression.

11. The MRI of the lumbar spine was completed on November 23, 2020, and read by Clinton Anderson, M.D., which showed L4-L5 moderate broad-based disc bulge with superimposed central and left paracentral disc protrusion extending caudal to the disc level. This results in moderate effacement of the anterior aspect of the thecal sac; mild compression of the bilateral L5 nerve roots as they exit the thecal sac more marked in the left than the right; mild bilateral L4-5 neural foraminal narrowing without evidence for L4 nerve root compression; mild bilateral L4-L5 facet joint arthropathy; and mild bilateral facet joint arthropathy at the L5-S1 level.

12. Claimant was evaluated by Dr. Levi Miller of Colorado Rehabilitation and Occupational Medicine on December 1, 2020. Subjectively Claimant complained of low back pain, bandlike, that radiated to his right buttock intermittently, however frequently down his left leg to his posterior lateral calf. He denied numbness or tingling in his feet. "Most physical activity" aggravated his symptoms including bending, lifting. He denied focal weakness such as foot slap or difficulty climbing stairs. Neurologic exam was normal except for a positive neural tension sign on the left. From the musculoskeletal exam he noted a lumbar forward flexion at approximately 70 degrees that causes low back pain; extension approximately 5 degrees; poor tolerance of facet loading both to the left and the right; tenderness over the bilateral L5 lumbar paraspinals most prominently, lesser so above and below this level; no tenderness over the SI joints or the greater trochanter. He also noted that Patrick's maneuver bilaterally caused low back pain, but not buttock pain. He assessed sprain of the ligaments of the lumbar spine, radiculopathy, intervertebral disc displacement, and myalgia, with left greater than right leg pain. Dr. Miller recommended L4-S1 transforaminal epidural steroid injection for the lumbosacral radiculopathy and bilateral L4-5 injection to target the disc herniation. He also referred Claimant for psychological evaluation for pain management with Timothy Shea, PsyD.

13. On December 2, 2020 Mr. Edwards stated that Claimant was to proceed with ESI injections, pending authorization and referred Claimant for a psychological evaluation with Dr. Shea.

14. Dr. Miller noted on December 14, 2020 that following the TF ESI that Claimant had a pre-procedure pain score of 8/10 and post procedure pain level was 3/10. Only the L5-S1 level was performed. Dr. Miller later noted that the injection only provided three days of pain relief. Dr. Miller performed a second ESI on February 8, 2021 with a left L4-L5 TF ESI, left L5-S1 TF steroid injection with temporary complete relief of low back symptoms but not leg symptoms, though better than it was prior to the injection.

15. Claimant completed a psychological evaluation with Dr. Timothy Shea on December 22, 2020. He noted that Claimant had participated in multiple conservative care treatments with limited temporary success, including physical therapy, chiropractic care, massage, ESI injections, OTC medications. He noted that Claimant's success has been limited by levels of untreated psychological stressors. In regard to his prior level of activity, Claimant reported being more physically active before his accident, but is currently limited to some light walking. He reported Claimant would perform housework, walking in the park, shovel, which are all difficult for him now. Dr. Shea suspected Claimant would also have difficulty driving long distances. Claimant reported experiencing down mood and increased anxiety following his workplace injury as well as symptoms of depression and concerns with his finances. He had increased emotionality, irritability and decreased energy as well as disrupted sleep. Claimant expressed frustration with regard to his ongoing symptoms and his injury because his life had completely changed. Dr. Shea recommended follow-up psychological assessment given Claimant's reported concerns about increased pain and higher than expected reports of pain experience. Dr. Shea diagnosed adjustment disorder with depressed mood and anxiety, as well as insomnia due to other medical conditions (neuropathic pain, anxiety.)

16. Claimant completed testing on multiple platforms, including a Minnesota Multaphasic Personality Inventory-2 Restructured Form (MMPI-2RF), Tampa Scale for Kinesiophobia, Pain Outcomes Questionnaire, Short Form McGill Pain Questionnaire, Pain Catastrophizing Scale, Pain Quality Assessment Scale, Pain Stages of Change Questionnaire, Beck Depression Inventory-2 and Beck Anxiety Inventory. The MMPI was invalid but all other measures were valid. There was a clear disconnect in his behaviors, reports of pain and his emotions. From the testing results, Dr. Shea noted that Claimant was likely to report experiencing significant physical limitations due to reported moderate to severe pain, despite incongruent physical findings to support the level and ongoing complaints. Dr. Shea reported that Claimant was not malingering but instead was much more likely to be experiencing a large disconnect between his pain, mood, and the interaction and the impact that it has on his overall reported pain experience. He noted that depression and chronic stressors can manifest through physical complaints. He further stated that Claimant's exacerbation of his pain does not negate the pain was likely present at some point but that there is evidence that there were multiple non-organic factors further exacerbating his pain experience above what would be expected. Dr. Shea stated that being able to address his stressors and related factors was to provide Claimant with the opportunity to experience improvements in his ability to manage his pain and ultimately increases his self-efficacy in regard to pain management. Following the testing Dr. Shea recommended cognitive behavioral therapy and was to start cognitive behavioral therapy with therapist Susie Love, M.A. He also made recommendations for scheduling activities, encouraging engagement in physical activities and provide education about pain management.

17. Mr. Edwards referred Claimant to Dr. B. Andrew Castro for a surgical evaluation on January 7, 2021 due to lack of progress, though he expressed doubts Claimant was a good surgical candidate. On January 28, 2021 Mr. Edward indicated Claimant's diagnosis was work related lumbar strain with L4-5 disc protrusion. He stated

that he reviewed Dr. Shea's notes, which indicated that Claimant had significant inorganic components to his pain response.

18. Clamant underwent a final TF ESI at the L4-5 and L5-S1 levels on February 8, 2021. He had low back pain of 4/10 and left calf pain as 8/10 severity. Dr. Miller documented that after 30 minutes from the procedure Claimant had complete relief of the lack pain but still had left leg pain of 6/10 with a 60% improvement.

19. Mr. Edwards noted on February 11, 2021 that Claimant

> … failed conservative treatment and initial round ESI. He was referred to Dr. Castro for surgical evaluation. No surgical indication at this time but Dr. Castro did recommend repeat ESI which patient had been on 2/8/2021. Patient reports he is feeling better than before the injection. He still reporting having some mild numbness and tingling in his legs and some back pain but he is better than he was.

20. Claimant was placed at maximum medical improvement on March 31, 2021 by Dr. Orgel. He noted that the MRI suggested some degenerative changes with a disc bulge that could be causing an L5 radiculopathy but Claimant was not a surgical candidate. Injections (ESI) were not helpful and neither was conservative care, other than for temporary relief. Claimant continued to complain of axial back pain with radiating buttocks pain and pain into the left calf. He noted that the FCE was valid, with a 10 lbs. lifting limitation. He completed an impairment evaluation for a 17% whole person impairment, including 11% whole person impairment for loss of range of motion (which was valid) and a 7% for specific disorder. Dr. Orgel did not recommend maintenance care as treatment in the prior six months was not effective.

21. Respondents arranged for an independent medical evaluation with F. Mark Paz, M.D. of Occupational Medicine of the Rockies, which was conducted on May 18, 2021. Dr. Paz reviewed medical records, took a history from Claimant and performed a physical exam. The exam was substantially normal except for end range of motion, which caused increased low back pain, and found decreased range of motion, which was invalid for flexion, and that Claimant was favoring his left lower extremity. He provided multiple diagnosis including chronic low back pain, left lower extremity paresthesias, lumbar degenerative disc disease, lumbar herniated nucleus pulposus at the L4-5 level, and adjustment disorder. He specifically conducted a causation analysis and determined that the herniated disc or left paracentral disc protrusion at the L4-5 level was proximally related to the August 31, 2020 incident at work. He agreed with Dr. Orgel that Claimant reached MMI on March 31, 2021.[1] He noted that Claimant perceived himself as being severely disabled. Dr. Paz, opined that Claimant should return for a lumbar flexion "reassessment," and that he had a significant amount of non-physiologic findings on the clinical examination. He provided permanent work restrictions, which were in excess of the FCE findings based on his medical judgement, and stated that Claimant did not require maintenance medical benefits.

22. On July 14, 2021 Dr. Brian Reiss, the Division of Workers' Compensation Independent Medical Examination (DIME) physician, issued a report following record review, history and examination of Claimant. Claimant complained of lower back pain

[1] This ALJ concludes that the March 31, 2020 date listed in the report is in error.

following an incident moving up buckets of flowers, which was continuing on the date of the exam, but did not convey any symptoms of the lower extremities. On exam, Dr. Reiss did not notice any pain behaviors or apparent distress, noted some irritation of the left calf with bending as well as lower back pain, some decreased sensation in the left lateral heel and irritation with straight leg raising on the left. Dr. Reiss diagnosed probable herniated disc at the L4-5 on the left, residual deconditioning and back pain. He stated that Claimant was not a surgical candidate and expected the herniation to resolve on its own. Dr. Reiss opined that, from the available information, he did not believe any work restrictions were necessary. He provided a 14% whole person impairment rating in accordance with the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), consisting of 7% for specific disorder under Table 53IIC and 8% for loss of range of motion. He stated that no apportionment was appropriate. Further he stated:

> More likely than not the work injury resulted in a herniated disc with some nerve irritation and back pain. The nerve irritation is essentially resolved with minor residual unlikely to be improved with any surgical intervention. The continued lower back pain should be managed with a home exercise program directed at core strengthening, aerobic conditioning and stretching.

23. On September 2, 2021 Division issued the DIME Process Concluded letter regarding this matter, stating that they had received the DIME report, advising Respondents that they had 20 days to either file an admission consistent with the report or an application for hearing.

24. On November 19, 2021 Dr. Scott Primack issued a record review report. Following review of the medical records he opined as follows:

> Given the discordance between what Mr. Favela Nevarez was telling different physicians regarding how he was doing after the injection, the MMPI-2RF, and the nonphysiologic findings documented by Dr. Paz, I do not believe that there is any residual impairment. Although Dr. Orgel was able to render a 17% impairment of whole person and Dr. Reiss was able to render a 14% of whole person, the substantial medical record documentation does not indicate a specific diagnosis and therefore should not have a permanent impairment. The DIME did not take into account the profound medical data which indicates that there is not any specific injury but more so psychological overlay. This would make the DIME erroneous and not valid. The extreme psychological issues, although not work-related, would also correlate with the extensive areas of fear avoidance noted by Dr. Shea. This fear avoidance and non-work related issues would cloud the physical examination. Therefore, in my opinion, the preponderance of the medical data would suggest that there is no permanent residual impairment.

25. Surveillance of Claimant performing multiple activities in his yard on July 14, 2021 were observed. Claimant is recorded walking, sitting, bending at the waist, carrying various items and driving. He was also observed driving his vehicle to Dr. Reiss' office for the DIME, as well as returning to his place of residence. As found, none of the activities observed were inconsistent with a herniated disc or the determinations that while Claimant has a herniated disc, he was able to return to regular employment according to Dr. Reiss, who is persuasive.

26. As found, Dr. Paz completed range of motion testing and found Claimant's flexion to be invalid, recommending a follow-up evaluation. However, he did provide a diagnosis with regard to the lumbar spine injury that was causally related to the August 31, 2020 workplace event. Dr. Paz indicated on Figure 84 that Claimant was assessed a 7% whole person impairment for specific disorder pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition, (*Revised)*. He further analyzed that only the flexion was invalid and would be "pending." As found, when looking at the range of motion for the remaining testing, according to Dr. Paz's measurements, Claimant would qualify for a whole person impairment for the extension, and lateral flexion measurements, even without the lumbar flexion measurements.

27. As found, both Dr. Orgel and Dr. Reiss, the DIME physician, determined that they were able to complete range of motion testing. As found and concluded, Respondents have failed to overcome the DIME physician's opinion with regard to the Claimant's permanent impairment. Dr. Paz and Dr. Primack simply provide opinions that would qualify for a preponderance of the evidence but not by clear and convincing evidence. Dr. Reiss' opinion with regard to causation is found to be accurate based on the totality of the evidence and therefor the impairment determination of the 14% whole person impairment related to the herniated disc at the L4-5 level is appropriate. Respondents failed to show that either Dr. Paz or Dr. Primack's opinions are anything more than simply different opinions. While this ALJ recognizes that Claimant may have had symptoms in excess of what is normally seen for patients with a lumbar spine injury, which may have interfered with medical care progress and reporting of symptoms, the evidence does not support a finding that Dr. Reiss was incorrect.

28. Of note, while Dr. Reiss' report is brief and concise, addressing only the pertinent issues he was asked to address, it is specifically found that Dr. Reiss accomplished the mandate of the Division in conducting the DIME, including addressing the questions in this case. Dr. Reiss specifically notes he reviewed 412 pages of medical records, including from prior to the injury, and failed to find any records of preexisting conditions or problems. This ALJ reviewed 416 page of documents submitted by Respondents for consideration and concurs with Dr. Reiss that there are no significant records of preexisting conditions. As found, Dr. Reiss complied with the requirements of the AMA *Guides*, the impairment rating tips and the Level II accreditation requirements. While it is helpful to have physicians summarize the medical records, it is not a requirement of the DIME to do so, if time is limited, as did Dr. Primack, who did not list all the records he likely reviewed.

29. Lastly, it is found that Dr. Reiss assessed causality by reviewing the complete records and determining that Claimant's disc injury was clearly defined and caused or aggravated by the work related incident. The records included that Claimant had ESIs that decreased Claimant's pain significantly immediately after the injections, though provided no lasting effect. This is indicative that the disc was likely a pain generator but is not a god candidate for surgery if it provided no lasting effect. Medical science is not black and white, it encompasses a multitude of shades of gray. Dr. Reiss clearly reviewed Dr. Shea's records and considered the medical opinion as he quotes multiple reports, including Dr. Shea's diagnosis of adjustment disorder with depressed mood and anxiety. Dr. Reiss, following examination of the Claimant reached a

conclusion, which as a DIME physician, he is entitled to do. As found, his final determination was that Claimant had a work related specific disorder and provided an impairment accordingly. Respondents failed to show that Dr. Reiss was incorrect.

30. As found, Claimant has failed to show he is entitled to maintenance medical benefits after maximum medical improvement. Drs. Orgel, Reiss, Paz and Mr. Edwards all agree, and are persuasive, that the care that was provided to Claimant was less than effective and that Claimant does not require medical benefits after maximum medical improvement in this matter.

31. As found, Claimant failed to show that there was a wage loss or that he is entitled to temporary disability benefits. Claimant failed to appear at the hearing either in person or through a representative, and failed to submit any evidence or testimony for consideration to support a claim for lost wages. Further, as found, the record does not support that there was a wage loss in this matter.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight,

credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME by Clear and Convincing Evidence

Respondents seek to overcome Dr. Reiss' determination of impairment in this matter. Respondents must prove that the DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the AMA *Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the AMA *Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the AMA *Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the AMA *Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a

question of fact for the ALJ to determine, including whether the physician correctly applied the AMA *Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the AMA *Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA *Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the AMA *Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *Lopez vs. Redi Services.,* I.C.A.O., W.C. Nos. 5-118-981 & 5-135-641 (October, 27, 2021).

Respondents need only prove that any one particular impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AM*A Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the

contents of the AMA *Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

The Impairment Rating Tips promulgated by the Division, under General Principles states in pertinent part:

> Impairment ratings are given when a specific diagnosis and objective pathology is identified. *(Reference: C.R.S. §8-42-107(8)(c))* In cases with multiple symptoms, the clinician must determine whether separate diagnoses are established which warrant an impairment rating *OR* the impairment rating provided for a specific diagnosis incorporates the accompanying symptoms of the patient.

Here, Respondents seek to overcome the DIME physician's opinion. Respondents argue that Dr. Primack was correct in his assessment that Claimant's injury did not result in a herniated disc and therefore there is no specific diagnosis that would allow for application of the AMA *Guides*' specific disorder table, Table 53. They specifically cite to nonphysiologic findings, discordant histories given to different medical providers with regard to ESI results, and psychological overlay as documented by the MMPI-2R.

As found, Dr. Brian Reiss complied with the requirements of the law by assessing causation of the injury, identifying a specific diagnosis, and correctly applying the AMA *Guides.* Dr. Reiss based his opinion on the review of the medical records, his examination of Claimant, the fact that by the time of the DIME Claimant was without an apparent pain behaviors. He was able to perform the examination and comply with Dr. Reiss' cues. Dr. Reiss found that Claimant was able to perform the range of motion testing without complaint other than some left calf irritation and a little decreased sensation of the left lateral heel and some slight irritation of the left calf with straight leg raising test. Dr. Reiss opined that it was more likely than not the work injury resulted in a herniated disc with some nerve irritation and back pain. His ultimately conclusion was that the work related injury of August 31, 2020 resulted in a herniated disc that caused residual impairment. This is supported by objective findings, including the MRI findings and examination. As further found, Dr. Reiss correctly applied the *Guides* and the impairment rating tips in providing the 7% whole person impairment rating for the specific disorder under Table 53IIC. A simple grammatical error is not sufficient to breach this burden of proof. Both Dr. Orgel and Dr. Paz agreed that 7% whole person impairment was the correct impairment to assign for the specific disorder caused by the work related herniated disc which resulted from the August 31, 2020 workplace injury. Dr. Paz provided a diagnosis with regard to the lumbar spine injury that was causally related to the August 31, 2020 workplace event. Dr. Paz indicated on Figure 84 that Claimant was assessed a 7% whole person impairment for specific disorder pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition, (*Revised)*. This is the same impairment assigned by Dr. Reiss and Dr. Orgel, an authorized treating provider, for specific disorder. Dr. Reiss also complied with the requirements of the Division tips which state that "[I]f a spinal impairment rating is provided, both Figure 84 and the appropriate spinal range of motion worksheet are required."

The disagreement among the providers that made a full assessment of the Claimant's impairment is with regard the loss of range of motion. Dr. Paz completed

range of motion testing and found Claimant's flexion to be invalid, recommending a follow-up evaluation. He stated that only the flexion was invalid and would be "pending," further testing. The record is devoid of evidence as to why no further follow up was conducted, but even if it had been performed and was different than the ROM findings of the DIME physician, it would have only constituted a difference of opinion. When looking at Dr. Paz's range of motion findings for the remaining testing, under the *Guides*, Claimant would have qualified for a loss of range of motion whole person impairment for the extension, and lateral flexion measurements. Despite this potential rating, it is not sufficient to overcome the valid measurements and impairment rating issued by the DIME physician in this matter.

The Impairment Rating Tips also state under Spinal Ratings, Sec. 2 as follows:

> Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity.

It is clear that Dr. Primack, the only physician to state that the nonphysiologic findings, the history of response to treatment and the MMPI, justified an impairment of zero. While it is apparent that Claimant had some symptoms that did not correspond to or exceeded the physiologic findings in this matter during his treatment in this case, he is the lone opinion to state that there was no diagnosis at all, which he identifies in his short report, not even non-work related diagnosis. Dr. Paz and Dr. Reiss specifically found that there was a correlation with the workplace injury and the herniated disc. Also, this ALJ is more persuaded by Dr. Shae's analysis that "Claimant was not malingering" and that there was a "large disconnect between his pain, mood, and the interaction and the impact that it has on his overall reported pain experience," and as found, so was Dr. Reiss. Dr. Shae also reinforced that "Claimant's exacerbation of his pain does not negate the pain was likely present." The standard of proof of clear and convincing evidence is high and difficult to achieve. Here, Dr. Primack was the lone physician to state that discrepancies in the record were of significance and his opinion does not rise to the standard of clear and convincing, but is simply a difference of opinion. Based on the totality of the evidence, Respondents have failed to show that the DIME physician, Dr. Reiss, was incorrect in his assessment of impairment in accordance with the AMA *Guides*, the Impairment Rating Tips and the Level II accreditation curriculum.

C. Medical Benefits after MMI

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. In order to receive such benefits, the claimant must present substantial evidence that future medical treatment is or will be

reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Claimant sought maintenance care after reaching maximum medical improvement. However, the persuasive evidence provided by Dr. Orgel, Dr. Reiss and Dr. Paz is that Claimant no longer requires maintenance care in this matter. They specifically addressed the fact that the care Claimant received before reaching MMI on March 31, 2021 was either not effective or was only temporary, not lasting or curative. Therefore, as found from the totality of the evidence, Claimant is not entitled to ongoing medical care to relieve the effects of the injury. Claimant has failed to show that he is entitled to maintenance medical care.

D. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v.*

Stanberg, supra. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

In this matter, Claimant failed to show for the hearing and provide evidence to prove by a preponderance of the evidence that he was entitled to temporary disability benefits. Dr. Reiss in fact stated that, despite his findings of a herniated disc related to the work injury, that he expected the herniation to resolve and in fact had likely resolved with the exception of minor symptoms in his left calf and low back. Dr. Reiss was also persuasive with regard to making a determination that Claimant could return to work without restrictions. As found, Claimant is not entitled to temporary disability benefits.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents have failed to show by clear and convincing evidence that Dr. Brian Reiss, the DIME physician, was incorrect in his assessment of impairment. Respondents shall pay permanent partial disability benefits based on the 14% whole person impairment as provided by Dr. Reiss.

2. Claimant's claim for maintenance medical benefits after MMI are denied and dismissed.

3. Claimant's claim for temporary disability benefits are denied and dismissed.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 25th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-148-906-006

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the November 18, 2021, request by authorized treating provider ("ATP") Michael Lersten, M.D., for a platelet-rich plasma injection ("PRP") into Claimant's left hip bursa is reasonable and necessary, as well as causally related to Claimant's admitted industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant suffered an admitted industrial injury on July 16, 2020, while working as a package handler for Employer. Claimant has worked for Employer, primarily as a driver, and for the last seven years as an article 22 package handler.
2. In Claimant's position as a package handler, he had to handle packages weighing up to 70 pounds and, if the packages exceeded 70 pounds, he had a helper to handle packages up to 150 pounds.
3. On July 16, 2020, Claimant was standing on a conveyor belt walkway, he pulled a tall box off the belt which weighed more than anticipated and, as he turned, felt a pop in his low back and has had persistent pain in his left hip since that time.
4. Claimant demonstrated to the Court that the pain following his injury is above his left buttock cheek, around the belt area, going around the belt area into the seam of his leg on the front and has been constant since his injury.
5. The medical records reflect that Claimant has undergone multiple physical therapy treatments and has had steroid injections, but none of the medical modalities applied have provided long-term relief.
6. On May 6, 2021, Claimant was evaluated at Panorama Orthopedics and Spine by authorized treating provider ("ATP") Michael Lersten, M.D., who at the time noted:

> Nathan Wright is a 60 year old male with a history of L>R pelvic girdle pain that is multifactorial including anterolateral and posterior pain. He is status post a left greater trochanteric bursa injection, which provided significant ongoing pain relief. He is now status post a left ischial bursa diagnostic anesthetic injection that was negative. We then performed a left sided superior cluneal nerve block that provided functionally significant and approximately 60% pain relief. Unfortunately, his insurance company is denying the definitive steroid injection for presumed left superior cluneal nerve

> neuropathy. He was also denied additional physical therapy and an MRI. The patient states that physical therapy can exacerbate his symptoms at times. Leaning forward and to the left makes his pain worse. Dry needling on his left side made his pain worse, too. He states that due to his left sided pan, his right side starts to have pain as well at times. On one occasion, he felt radiating pain all the way to his left foot while twisting.

See Claimant's Exhibit Tab 6, BS 61.

7. On November 18, 2021, ATP Lersten requested preauthorization for a left hip PRP injection.

8. On November 23, 2021, ATP Lersten's request was denied by a record review authored by David H. Elfenbein, M.D., who relied upon medical treatment guidelines related to the hip, indicating that the therapy should be denied, as the "CO guidelines don't specifically apply." See Claimant's Exhibit Tab 1, Bate Stamp ("BS") 5.

9. Dr. Elfenbein, a Level II Accredited orthopedist, performed a Rule 16 Review of the requested PRP injection. (RHE D) Dr. Elfenbein reached out to the office of Dr. Lersten via telephone on November 24, 2021, at 11:33AM and again on November 29, 2021 at 11:21AM to discuss the medical reasoning behind the request. *Id.* However, Dr. Elfenbein did not receive any call back from Dr. Lersten regarding the requested injection. *Id.*

10. Dr. Elfenbein subsequently determined that the requested left hip PRP injection was not medically necessary. (RHE D) Dr. Elfenbein concluded that there was no evidence of tendon damage and no documentation that the next step of management would be an invasive procedure as required by the Colorado Medical Treatment Guidelines. *Id.*

11. Further, to complete his assessment without a response from Dr. Lersten, Dr. Elfenbein referred to Exhibit 4 of the Colorado Medical Treatment Guidelines, which is the medical treatment guideline for the shoulder, to assess the reasonableness of the recommended PRP injection. (RHE D; MTG Exhibit 4) As the Medical Treatment Guidelines do not provide appropriate guidance on PRP injections to the hip, Dr. Elfenbein determined that the shoulder would operate most similarly to the hip in his review. *Id.*

12. Exhibit 4, Section F(4)(b) of the Medical Treatment Guidelines address PRP injections to the shoulder. (MTG Exhibit 4) As cited by Dr. Elfenbein in his Rule 16 Review, the Medical Treatment Guidelines state that "a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy." (RHE D; MTG Exhibit 4) Further, "there is also a lack of standardization of platelet preparation methods, which precludes clear conclusions about the effect of platelet-rich therapies for musculoskeletal soft tissue injuries. The preponderance of the evidence suggests that PRP is not likely to have long term benefits effects." *Id.*

13. Additionally, Exhibit 6 Section F(6)(d), which addresses PRP injections to the lower extremity (though not specifically the hip) further notes that "[s]teroid injections prior to the use of PRP are believed to lower the chance of healing." (MTG Exhibit 6)

14. It was Dr. Elfenbein's opinion, however, that if "PRP is found to be indicated in the select patients, the first injection may be repeated once after 4 weeks when significant functional benefit is reported but the patient has not returned to full function or full-duty work." See Claimant's Exhibit Tab 1, BS 2.

15. Claimant was sent out for a second opinion with ATP Barry Ogin, M.D., at Colorado Rehabilitation Occupational Medicine, who took a history and reached the following conclusions:

> Mr. Wright is a pleasant 61-year-old male presents as a consultation from Dr. Matus, with a chief complaint of left-sided low back and hip pain. He hurt himself on 07/16/20 when he was working at UPS and was lifting a bag off of a conveyor belt that was heavier than he expected. He denies any pre-existing history of back or hip issues. Did physical therapy, for the better part of a year, without benefit. He has been working with Dr. Lerston at Panorama. An injection along his left greater trochanter performed in January was helpful. He had a couple of other injections along his lateral hip and buttock which failed to give much relief. He also saw Dr. Faulkner, who I believe performed a left greater trochanteric injection. This was not helpful. Concern was raised that his pain may be emanating predominately from his spine. He did see Dr. Castro for a surgical opinion, and was told that there is nothing surgical regarding his back.
>
> More recently, he has initiated another course of physical therapy at Select PT, where he has been attending one time per week for six visits. This has proven a bit more helpful, particularly dry needling.
>
> Currently describes aching pain across his left buttock into his lateral hip. He has some pain in his groin, but not as severe. He get some stabbing pain along his left lower back. He denies any significant radicular pain, but gets occasional pins and needles along his posterior upper thigh. Pain is aggravated by standing and walking. Sitting is not bad. He has difficulty sitting more than 1 hour. Difficulty with twisting bending or lifting. Some relief with stretching. On a scale 0-10, worse pain 9/10, least pain 3/10 and current pain 6/10.
>
> * * *
>
> However, his clinical examination is most reflective of localized soft tissue pathology over his greater trochanter. He

> reportedly has had several injections along the bursa, with short term relief only. He reports that Dr. Lerston has suggested PRP to the hip bursa. Given his failure to improve with time, therapies, and steroid injections, this would be a reasonable pursuit. We would be more than happy to set this up, though he seems in capable hands with Dr. Lerston.
>
> If he pursues a PRP injection, an additional 4 weeks of PT may be reasonable for further strengthening and conditioning and materials handling training.

See Respondent's Exhibit Tab Q, BS 383 and 385.

16. On December 17, 2021, after ATP Lersten's request for PRP was denied and after the second opinion with Dr. Ogin occurred, Claimant returned to ATP Brenden Matus, M.D., at Workwell who noted:

> Discussion: Nathan has seen Dr. Ogin for second opinion. He agrees for the greater trochanteric bursitis that PRP is reasonable next option as he had good diagnostic and partial lasting therapeutic benefit to repeat steroid injections. He also agrees lower back injections have had partial benefit, would recommend trial repeat versus facet injection trial. He will continue with Dr. Lerston for now. He has restarted PT, noting some good benefit in pain but still quite functionally limited. We will continue PT and begin to gradually advance some functional lifting. Goal would be advancing to work conditioning over next 12 weeks or so; that would be pending significant gains in the meantime. Recheck 2-3 weeks.

See Claimant's Exhibit Tab 5, BS 31.

17. On January 7, 2022 Claimant returned to ATP Matus who noted:

> Nathan is seen for left lower back and left lateral hip pains. He has been participating in PT, some mild progress with pain at rest and tolerance to light activity but still quite functionally limited for lift/push/pull activities. He reports his PRP injection was denied and now has a pending court date in March. I recommend he recheck with Dr. Lerston to see if any further options are available. He has made limited functional gains to date, has not been able to resume work.

See Claimant's Exhibit Tab 5, BS 32.

18. On January 28, 2022 Claimant returned to ATP Matus who noted:

> Nathan continues with fairly elevated lower back and hip pains. He has restarted PT, reviewed notes and he is showing some slow but objective gains and therapy has recommended continued visits on a weekly basis. He is set

> to see Dr. Lerston on 2/10 for recheck. His hip PRP was denied, he is pending court date for appeal in March. Recheck in a few weeks for progress.

See Claimant's Exhibit Tab 5, BS 33

19. On February 18, 2022 Claimant returned to ATP Matus who noted:

> Nathan continues with PT, reviewed recent notes and he is showing some progress; albeit slowly. Recommend weekly PT for another 6-8 weeks; place referral today. He has seen Dr. Lerston in recheck. PRP still recommended; but no additional injections at this time. PRP is currently denied pending court date. Continue restrictions. Recheck in a few weeks.

See Claimant Exhibit Tab 5, BS 34.

20. Claimant testified that some of the injections he underwent with ATP Lersten provided relief anywhere from 2 to 5 months, but nothing has been permanent in terms of relief for the symptoms stemming from his admitted workplace injury.

21. Claimant credibly testified that he understands the risks associations with PRP injections and desires to proceed with the procedure so that he can return to work.

22. Claimant credibly testified he is not happy with the lack of progress and the slow recovery he is making under physical therapy, as related to his left hip. Claimant indicates he desires to pursue the PRP treatment.

23. The ALJ finds ATP Lersten and ATP Ogin's opinion and rationale for the PRP injections to be credible and persuasive because their opinions are consistent with Claimant's underlying medical records and statements made to his providers regarding his pain and disability, as well as Claimant's completion of conservative care medical treatment – which did not help.

24. Claimant credibly testified he understands the risks of a PRP injection and wishes to pursue it.

25. The opinions of David H. Elfenbein, M.D., have been considered, as well as the medical treatment guidelines, but such opinion is inconsistent with the underlying records, Claimant's testimony, and the opinions of his ATPs. Before the work injury, the Claimant could perform his regular duties and was not suffering from chronic pain. At this point in time, he cannot. In the end, Dr. Elfenbein's opinion does not appear to offer reasonable medical treatment to improve Claimant's condition. It also appears that Dr. Elfenbein's opinion ignores Claimant's pain complaints and current disability. On the other hand, Dr. Lersten and Dr. Ogin, in their medical judgement, have determined that the PRP injection, which was recommended by Dr. Lersten, offers Claimant the best option to cure and relieve him of the effects of his work injury. Medical records submitted at hearing reveal Claimant has had multiple physical therapy visits, corticosteroid injections and other conservative treatments consisting of physical therapy, anti-inflammatories, pain medications and rest without improvement of his symptoms.

26. Claimant remains under the care of ATP Matus, who has not yet release Claimant at MMI and who noted on December 17, 2021:

> Discussion: Nathan has seen Dr. Ogin for second opinion. He agrees for the greater trochanteric bursitis that PRP is reasonable next option as he had good diagnostic and partial lasting therapeutic benefit to repeat steroid injections. He also agrees lower back injections have had partial benefit, would recommend trial repeat versus facet injection trial. He will continue with Dr. Lerston for now. He has restarted PT, noting some good benefit in pain but still quite functionally limited. We will continue PT and begin to gradually advance some functional lifting. Goal would be advancing to work conditioning over next 12 weeks or so; that would be pending significant gains in the meantime. Recheck 2-3 weeks.

See Claimant's Exhibit Tab 5, BS 31.

27. Based on ATP Matus' reports Claimant has not returned to baseline and continues to have chronic and disabling pain that has not been relieved by any of the treatments provided to-date. The ALJ finds his conclusions to be credible and persuasive since they are supported by Claimant's testimony and the opinions of the ATPs.

28. Claimant's testimony and his statement to his medical providers mostly track with the underlying medical records. As a result, the ALJ finds Claimant's statements to medical providers and testimony be consistent and persuasive.

29. The ALJ finds the opinions of Claimant's ATPs to be credible and persuasive because the ALJ finds their opinions are supported by the underlying medical records and Claimant's statements to them as well as his testimony about his pain and disability since the work accident.

30. The ALJ finds that before the work accident, Claimant's left hip was not disabled and did not require any active medical treatment. But the ALJ further finds that after the accident, Claimant's left hip required medical treatment and that the condition is disabling. As a result, the ALJ finds that Claimant's work injury caused the need for medical treatment – including the PRP injections which were recommended.

31. The ALJ further finds that the PRP injection is reasonably necessary to treat Claimant's left hip pain which was caused by his work accident. Thus, the need for the PRP injection is also related to his work accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the November 18, 2021, request by authorized treating provider ("ATP") Michael Lersten, M.D., for a platelet-rich plasma injection ("PRP") into Claimant's left hip bursa is reasonable and necessary, as well as causally related to Claimant's admitted industrial injury.

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa*

Tanklines, Inc., W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company, W.* C. No. 4-445-060 (February 22, 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines ("MTG") because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians and medical providers, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra.* The ALJ Also considered the MTG.

Respondents contend that the left hip PRP injection recommended by ATP Lersten and concurred in by ATP Ogin is not necessary or related because the MTG indicate it is contraindicated. This is in fact not the case as the ALJ has found that the symptoms have been present since Claimant's injury.

The Administrative Law Judge ("ALJ") next considered the broader question of whether the MTG applied to the requested PRP injection. The MTG are contained in W.C. Rule of Procedure 17-2(A), 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the MTG adopted by the Division of Workers' Compensation (Division). The Division's MTG were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office,* 74 P.3d 459 (Colo. App. 2003) the Court noted that the MTG are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The MTG are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the MTG in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual,* W.C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward,* W.C. No. 3-757-021 (October 30, 1998) (MGT are a reasonable source for identifying the diagnostic criteria). However, an ALJ is not required to award or deny medical benefits based on the MGT. In fact, there is generally a lack of authority as to whether the MGT require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the MGT. *Madrid v.Trtnet Group, Inc.,* W.C.4-851-315 (April 1, 2014).

W.C.R.P. 17-5(C) provides in relevant part:

> The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9.

Claimant's ATPs maintain the PRP injection is a reasonable treatment to pursue at this time in light of the fact that conservative care has failed. There is credible and persuasive evidence that Claimant had no symptoms in his left hip which required medical treatment or caused any disability prior to his admitted industrial injury. Claimant testified that since the admitted industrial injury the pain in his hip has not resolved.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). In this case, the evidence leads the ALJ to conclude that while Claimant may have had underlying asymptomatic conditions, it was the admitted industrial injury that caused his symptoms and the need for medical treatment.

The ALJ finds and concludes that the PRP injection recommended is reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes Claimant has satisfied his burden by a preponderance of the evidence that the PRP injection is reasonable, necessary, and related to his work accident.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay the cost, pursuant to the medical fee schedule, of the PRP injection to Claimant's left hip recommended by ATP Lersten and concurred in by ATP Ogin.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the respondents have overcome the opinion of the Division sponsored independent medical examination (DIME) physician on the issue of maximum medical improvement (MMI), by clear and convincing evidence.

2. The issue of permanent partial disability (PPD) benefits was also endorsed for hearing, if the DIME opinion was overcome. At the hearing, the parties agreed to hold the issue of PPD in abeyance pending the ALJ's initial decision.

FINDINGS OF FACT

1. On October 14, 2019, the claimant suffered an injury to his right shoulder while working for the employer. On October 25, 2019, the respondents filed a General Admission of Liability (GAL) regarding the October 14, 2019 work injury.

2. During this claim, the claimant has treated with providers a Roaring Fork Family practice.

3. On January 20, 2020, a magnetic resonance image (MRI) of the claimant's right shoulder showed, *inter alia*, a moderately sided acromial spur, mild infraspinatus tendinosis, a bursal tear of the mid distal fibers, an articular tear of the distal anterior fibers, moderate acromioclavicular joint osteoarthritis, and mild atrophy of the teres minor muscle.

4. On June 1, 2020, the claimant was seen by Dr. Ferdinand Liotta for a surgical consultation. Dr. Liotta noted that the claimant was a candidate for shoulder surgery. Thereafter, surgery was scheduled for July 7, 2020.

5. The claimant has Type 2 diabetes. On July 3, 2020, the claimant was seen by Ivy Chalmers, PA-C for a pre-operative appointment. On that date, it was noted that the claimant's hemoglobin A1c level was at 12.8. As a result, the recommended rotator cuff repair surgery was not performed. Dr. Liotta communicated to PA Chalmers that he will not perform the surgery until the claimant's A1c level is less than 8.

6. The claimant's primary care physician is Dr. Christopher Tonozzi. The medical records entered into evidence demonstrate that Dr. Tonozzi attempted to work with the claimant to lower his A1c levels. On July 20, 2020, the claimant's A1c level was 13.9. On December 8, 2020, it was 10.8. On January 19, 2021, the A1c level was 10.9. On March 31, 2021, it was at 9.3. On July 27, 2021, the claimant's A1c level was at 12.5.

7. These same medical records demonstrate that the claimant was not compliant with Dr. Tonozzi's instructions regarding insulin use. For example, on March 31, 2021, Dr. Tonozzi instructed the claimant to increase his insulin to 80 units in the morning and 50 units in the evening. However, on July 27, 2021, the claimant informed Dr. Tonozzi that he had not increased his insulin, and continued at 60 units in the morning, and 45 units in the evening. The claimant also reported that he "had heard lots of insulin might do damage, so he actually decreased. Hoped tea he was taking would help." As noted above, the claimant's A1c level was 12.5 on that date.

8. On April 4, 2021, the claimant was seen by Dr. Andrew Gisleson. On that date, Dr. Gisleson noted that the claimant's diabetes was poorly controlled and he could not undergo surgery. Dr. Gisleson recommended that the claimant be placed at maximum medical improvement (MMI).

9. On June 14, 2021, Dr. David Lorah determined that the claimant reached MMI as of April 6, 2021. Dr. Lorah noted that although the claimant is a potential surgical candidate, he cannot undergo surgery until he is able to lower his hemoglobin A1c levels. Specifically, Dr. Lorah noted that the claimant's A1c would need to be less than 7 prior to undergoing surgery. Dr. Lorah rated the claimant's permanent impairment for his right upper extremity as nine percent (which converts to five percent whole person).

10. On September 10, 2021, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Lorah's June 14, 2021 report.

11. Following the FAL, the claimant requested a Division sponsored independent medical examination (DIME). On November 16, 2021, the claimant attended a DIME with Dr. Frank Polanco. In connection with the DIME, Dr. Polanco reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Polanco identified the claimant's diagnoses as a right shoulder strain, tendinosis with biceps tearing, and "subacute on chronic" quadrilateral space syndrome. Dr. Polanco opined that the claimant was not at MMI and needed additional treatment including physical therapy and surgery.

12. During his deposition testimony, Dr. Polanco stated that the claimant has adhesive capsulitis (also called "frozen shoulder"). Dr. Polanco recommends the claimant undergo manipulation under anesthesia. It is Dr. Polanco's opinion that this procedure would improve the claimant's function.

13. On January 26, 2022, the claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Primack opined that the claimant was at MMI. Dr. Primack noted that the claimant has adhesive capsulitis, secondary to diabetes. In addition, Dr. Primack opined that the treatment recommendation by Dr. Polanco would not address the claimant's condition. Dr. Primack assessed permanent

impairment of 11 percent for the claimant's right upper extremity (which converts to whole person impairment of seven percent).

14. Dr. Primack's deposition testimony was consistent with his report. Dr. Primack explained that due to the claimant's diabetes, he has developed a diabetic shoulder. Specifically, the tendons and soft tissue in the claimant's shoulder have thickened and created adhesions. Therefore, manipulation under anesthesia (as recommended by Dr. Polanco) would not work to improve the claimant's shoulder function. In fact, that procedure would likely worsen the rotator cuff tear.

15. The claimant testified that he would like to undergo the treatment recommended by Dr. Polanco. The claimant also testified that he has tried to reduce his blood sugar levels.

16. The ALJ credits the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack over the contrary opinions of Dr. Polanco. The ALJ finds Dr. Gisleson's determination that the claimant reached MMI on April 6, 2021 is correct. Dr. Polanco's statement that the claimant was not at MMI is incorrect. The claimant has a torn rotator cuff and could benefit from surgery. However, due to his uncontrollable diabetes, the claimant cannot undergo surgery at this time. Therefore, the ALJ finds that it is highly probable and free from substantial doubt that the claimant is at MMI unless and until he can reduce his A1c level.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the respondents have overcome the DIME physician's opinion by clear and convincing evidence. As found, Dr. Polanco's statement that the claimant was not at MMI is incorrect. The claimant reached MMI on April 6, 2021. As found, the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents have overcome the DIME physician's opinions by clear and convincing evidence.

2. The claimant reached maximum medical improvement (MMI) on April 6, 2021.

3. The issue of permanent partial disability (PPD) benefits is reserved for determination by the ALJ. Within twenty (20) days after this Findings of Fact, Conclusions of Law and Order becomes final, the parties shall notify the ALJ of a date mutually convenient for the parties to submit position statements on the issue of PPD benefits.

Dated this 27th day of April 2022.

Cassandra M. Sidanycz
Administrative Law Judge

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[Redacted],** Claimant, v. **[Redacted]** Employer, and **[Redacted],** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-168-949-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on March 22, 2022. The proceeding was digitally recorded in Courtroom 1 of the Office of Administrative Courts in Colorado Springs, Colorado between 1:00 and 1:34 p.m.

Claimant was present and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq. Testimony was taken from Claimant. In lieu of presenting his live hearing testimony, Respondents elected to take the pre-hearing deposition of Dr. Marc Steinmetz. A transcript of the March 8, 2022, deposition of Dr. Steinmetz was lodged with the OAC prior to the hearing and was admitted into evidence by the ALJ along with the following exhibits: Claimant's Hearing Exhibits 1-8 and Respondents' Hearing Exhibits A-E.

Following the presentation of evidence, the ALJ held the record open through April 5, 2022 to allow counsel time to submit written position statements in lieu of closing argument. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this Summary Order [Redacted] will be referred to as "Claimant". [Redacted] will be referred to as "Employer" and AIU Insurance will be referred to as "Insurer". The term "Respondents" refers to Employer and Insurer collectively. All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2020); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3

ISSUES

The issues addressed by this decision involve a determination of Claimant's average weekly wage (AWW) and his entitlement to a period of temporary total disability (TTD) benefits extending from July 3, 2021 to November 15, 2021.

PROCEDURAL MATTERS

At the outset of hearing, Respondents agreed that Claimant's AWW of $486.88, as reflected on the Final Admission of Liability (FAL) was incorrect. Respondents agreed that Claimant's AWW should be increased to $597.22 based upon wage records reflecting Claimant's earnings from September 5, 2020 through April 3, 2021. Respondents also agreed that temporary total disability (TTD) benefits were due and payable from July 3, 2021 through July 21, 2021, subject to an offset due to Claimant's receipt of short-term disability benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Steinmetz, the ALJ enters the following findings of fact:

1. Claimant suffered a compensable injury to his left wrist on April 2, 2021, while helping a co-worker who was having a seizure.

2. Claimant was referred to Concentra Medical Centers for treatment. Dr. Douglas Bradley oversaw Claimant's care. Claimant was also treated by Nurse Practitioners (NP) Antonio Ramos and Brandon Madrid.

3. Claimant was assigned work restrictions on April 5, 2021 of no lifting, pushing, pulling or carrying greater than two (2) pounds. He was then released to return to modified duty work.

4. Claimant worked in a modified duty capacity from April 2, 2021 through July 2, 2021, at which time Employer placed him on leave due to their policy of offering only 12 weeks of modified duty. Claimant was restricted when Employer placed him on leave. Consequently, Claimant was paid $4,219.75 in short term disability on November 18, 2021 for his Employer's imposed leave of absence extending from July 3, 2021 through November 15, 2021.

5. Dr. Timothy Hart performed an orthopedic evaluation on May 20, 2021. Following his examination, Dr. Hart did not believe that surgery was warranted.

6. Claimant's work restrictions were liberalized to permit lifting, pushing, pulling and carrying up to ten pounds on June 2, 2021. Nonetheless, he remained restricted through July 13, 2021.

7. On July 13, 2021, Claimant reported tingling and grinding in the left wrist. Consequently, Claimant returned to Dr. Hart for further evaluation.

8. On July 22, 2021, Dr. Hart noted that therapy had been helpful in "resolving a significant portion of pain in other parts of the wrist, but the first dorsal compartment pain [remained]". Dr. Hart explained that Claimant's ongoing symptoms were consistent with de Quervain's tenosynovitis, which may respond to a cortisone injection. Claimant consented to the injection and Dr. Hart proceeded to inject the wrist based upon his assessment of left wrist de Quervain's tenosynovitis.

9. Respondents sought an opinion from Dr. Marc Steinmetz regarding the relatedness of Claimant's de Quervain's tenosynovitis to his April 2, 2021 industrial injury. Dr. Steinmetz conducted a records review on July 26, 2021. Following his records review, Dr. Steinmetz opined that Claimant's ongoing symptoms were "more likely related to a preexisting left wrist fracture and not the 04/02/2021 incident".

10. On July 27, 2021, Dr. Bradley lowered Claimant's lifting, pushing, pulling and carrying capacity from 10 pounds to 1 pound.

11. On August 12, 2021, Dr. Hart recommended surgery to address Claimant's persistent left wrist symptoms. Dr. Hart requested pre-authorization to perform a first dorsal release surgery on August 16, 2021.

12. Respondents denied the surgery and requested an independent medical examination (IME) with Dr. Steinmetz. Dr. Steinmetz completed the examination on September 9, 2021. Following his IME, Dr. Steinmetz opined that Claimant's ongoing left wrist symptoms were related to de Quervain's radial wrist tendinitis, which is a cumulative trauma disorder "completely" inconsistent with the pronated flexion and grasping mechanism of injury described by Claimant as occurring April 2, 2021. Dr. Steinmetz concluded that Claimant was suffering from left radial wrist and thumb de Quervain's syndrome that was unrelated to the 04/02/2021 incident. He also opined that Claimant reached maximum medical improvement (MMI) for April 2, 2021 injury on July 22, 2021.

13. Claimant returned to Dr. Bradley on September 22, 2021. Dr. Bradley opined that Claimant was "not at MMI, but [was] anticipated to be at MMI on 11/15/2021".

14. Dr. Richard Trifilo assumed Claimant's care on October 19, 2021. On this date, Dr. Trifilo noted that Claimant was "approximately 25% of the way toward meeting the physical requirements of his job". Dr. Trifilo indicated that Claimant had "restrictions for [the] left hand", indicating specifically that Claimant could lift, push, pull and carry 0 pounds. Finally, Dr. Trifilo noted that Claimant was not at MMI, but was anticipated to be so on December 30, 2021.

15. On November 16, 2021, Respondents sent a copy of Dr. Steinmetz' September 9, 2021 IME report to Dr. Trifilo along with a request regarding his opinions concerning MMI, impairment, restrictions and Claimant's ongoing treatment needs. Dr. Trifilo opined that Claimant had reached MMI without impairment or need for maintenance care. He fixed the date of MMI as of November 16, 2021 and returned Claimant to full duty work without restriction.

16. Respondents filed a medical only FAL consistent with the opinions of Dr. Trifilo on November 29, 2021. Claimant objected to the November 29, 2021 FAL. He requested a Division Independent Medical Examination (DIME). He filed a separate Application for Hearing endorsing, among other things, "Average Weekly Wage" and "Temporary Total Benefits from July 3, 2021 to Continuing".

17. Wage records submitted into evidence document that Claimant earned a total of $17,916.74 between September 5, 2020 and April 3, 2021, which Respondents contend supports an AWW of $597.22. Claimant asserts that because he got several raises between his date of hire and the date of injury, Respondents' method of calculation, i.e. including wages back to his date of hire, is an unfair reflection of his AWW. Claimant argues that the most accurate method of calculating his AWW is to look at the wage on the date he was injured and use a 40-hour workweek since he was hired to work 40 hours per week.

18. The ALJ agrees with Claimant that calculating his AWW by using pre-injury wages at substantially lower hourly rates going back to his date of hire results in an inherently low AWW that does not accurately reflect his wage loss and diminished earning capacity. Based upon the evidence presented, the ALJ agrees that Claimant's AWW should be calculated based upon his earnings at the time he was injured. The records reflect that Claimant's hourly rate at the time of injury was $19.57 per hour, which, when multiplied by 40 hours per week yields an AWW of $782.80.

19. While the ALJ agrees that Claimant's AWW should be computed based upon the wages he was earning at the time of his injury, he is not convinced that the calculation should be grounded on a 40-hour workweek. Here, the wage records support a finding that in the 30 weeks between September 5, 2020 and Claimant's April 2, 2021 date of injury, he only worked a 40-hour pay period eight (8) times. Consequently, the Claimant's suggestion that his contract for hire supports a reasonable expectation of working 40 hours/week is unpersuasive.

20. Based upon the evidence presented, the most fair method by which to calculate the average number of hours Claimant worked per week is to average his time over the entire period extending from September 5, 2020 to the last full pay period ending March 27, 2021. The wage records reflect that for this period, Claimant worked a total of 897.25 hours or 30.78 hours per week. (897.25 hours ÷ 204 days × 7 days/week = 30.78 hours). Multiplying Claimant's average number of hours worked per week by his hourly rate of $19.57 yields an AWW of $602.36, which the ALJ finds most

closely approximates his wage loss and diminished earning capacity at the time of his April 2, 2021 work related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Average Week Wage

A. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of an injured workers wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993); *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

B. Sections 8-42-102(3) and (5)(b), C.R.S. (2020), gives the ALJ discretion to determine an AWW that will fairly reflect the loss of earning capacity. It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993). The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. As found, Respondents methodology in calculating Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's true wage loss and diminished earning capacity. Based upon the findings articulated above, the ALJ concludes that Claimant's AWW should be based upon his earnings at the time of his injury rather than including significant periods where he was earning less wages shortly after being hired, as Respondents have done here. Indeed, even **post-injury** raises can form the basis for an increase in a claimant's AWW for periods of disability occurring after the initial period of disability where "manifest injustice" would result if the claimant's benefits are calculated based on lower earnings at the time of the injury. *Campbell v. IBM Corp., supra; see also Lozano v. Grand River Hospital District*, W.C. No. 4-734-912 (ICAO, February 4, 2009); *Marr v. Current, Inc.*, W.C. No. 4-407-504 (ICAO, September 20, 2000). While the question presented does not involve a post-injury wage increase, Respondents are effectively using Claimant's lower wages for periods preceding his industrial injury to artificially lower his AWW, which the ALJ concludes will result in "manifest injustice" should Claimant experience a subsequent period of disability. As found, the ALJ determines that Claimant's average weekly wage is $602.36 as this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his April 2, 2021 compensable work related injury.

Claimant's Entitlement to Temporary Total Disability

C. To receive temporary disability benefits, Claimant must prove that his injury caused a disability, that he left work as a result of the injury and that his temporary disability is total and lasts more than three regular working days. Sections 8-

42-103(1)(a) and (b), 8-42-105(1), C.R.S. 2020; *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). The term "disability" connotes two distinct elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant's inability "to resume his or her prior work." *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Disability may be evidenced by the complete inability to work, or by restrictions, which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy and Co.*, 964 P.2d 595 (Colo. App. 1998); *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo.App. 1991); *See also, McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo.App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with § 8-42-105(3)(a)-(d), C.R.S. 2020.

D. In this case, the evidence supports a conclusion that Claimant was under restrictions and working modified duty when Employer elected to place him on leave on July 3, 2021. Indeed, at the time he was placed on leave, Claimant was working modified duty with a ten (10) pound lift, push, pull and carry restriction as evidenced by the June 2, 2021 report of NP Madrid. Unfortunately, persistent symptoms resulted in a change in Claimant's restrictions on July 27, 2021, when Dr. Bradley amended Claimant's lifting, pushing, pulling and carrying capacity from 10 pounds to 1 pound. By September 22, 2021, Dr. Bradley precluded Claimant from any lifting, pushing, pulling or carrying with the left hand. The zero lift, push, pull and carry restriction remained in place until November 16, 2021 when Dr. Trifilo placed Claimant at MMI and returned him to full duty work.

E. The ALJ credits Claimant's testimony that his wrist injury precluded him from performing the full range of duties required in his position and beyond that, that he received help from his co-workers and supervisors to complete some duties while working modified duty. Claimant's testimony combined with the content of his medical records persuades the ALJ that Claimant's wrist injury resulted in medical incapacity as evidenced by a loss/restriction in bodily function, which restriction reduced his wage earning capacity as demonstrated by his inability to return to full duty employment based on the imposition work-related restrictions. Consequently, the ALJ concludes that Claimant has established that he is "disabled" within the meaning of section 8-42-105, C.R.S. Moreover, the evidence presented supports a conclusion that Claimant has suffered a wage loss as a direct result of his disabling wrist injury. Indeed, Claimant was placed on leave on July 3, 2021, after Employer could no longer accommodate the modified duty schedule he required as a direct result of his work injury. While the evidence supports that Claimant received short-term disability for the time he was on leave, he earned no wages and his short-term disability did not amount to wage replacement. Consequently, the ALJ concludes that Claimant has established an actual wage loss directly related to his industrial injury. Because Claimant has established that his injury caused a disability, that he left work as a result of the injury and that his temporary disability was total and lasted more than three regular working days, he is entitled to TTD. Sections 8-42-103(1)(a) and (b), 8-42-105(1), C.R.S. 2020; *Culver v.*

Ace Electric, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

F. Once the claimant has established a disability and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d).

G. C.R.S. § 8-42-105(3) provides in pertinent part: Temporary total disability benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the employee a written release to return to regular employment; or

(d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

H. As noted, Respondents agree that temporary total disability benefits are due and payable from July 3, 2021 through July 21, 2021 subject to a short-term disability offset. However, Respondents urge the ALJ to terminate Claimant's entitlement to TTD on July 22, 2021 based upon the opinions of Dr. Steinmetz that Claimant reached MMI for his work related injury on July 22, 2021. Indeed, Respondents argue that because Dr. Steinmetz credibly testified that the cause of Claimant's ongoing symptoms and disability after July 22, 2021 were related to his non-industrial de Quervain's syndrome rather than the April 3, 2021 wrist sprain, Claimant is not entitled to TTD beyond July 22, 2021. The ALJ is not persuaded.

I. Although the ALJ may not disregard the attending physician's report releasing a claimant to regular employment, if there is a conflict in the record regarding the claimant's release to work, "the ALJ must resolve the conflict." *Imperial Headware, Inc*. *v. Industrial Claim Appeals Office*, 15 P.3d 295, 296, (Colo. App. 2000). It is also well established that if the record contains conflicting opinions from multiple attending physicians concerning the claimant's ability to perform regular employment, the ALJ may resolve the conflict as a matter of fact. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Diary*, 911 P.2d 661 (CoIo.App. 1995).

J. Where there are no conflicting opinions from physicians regarding a Claimant's release to work, the ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment. *Burns Robinson Dairy, Inc*., 911 P.2d at 662. However, if there is a conflict in the record regarding a

Claimant's release to return to regular employment, the ALJ must resolve the conflict. *Imperial Headware*, 15 P.3d at 296.

K. In this case there is no conflict among the authorized treating physicians regarding the date of MMI and Claimant's full duty work release. It is clearly November 16, 2021 per the report of Dr. Trifilo. Dr. Steinmetz is not an authorized treating physician, but is instead a retained expert hired by the Respondents to opine as to causation and Claimant's need for additional treatment, i.e. surgery directed to the left wrist. Pursuant to C.R.S. § 8-42-107(8)(b)(I), "[a]n authorized treating physician shall make the determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5). Accordingly, the ALJ agrees with Claimant that Dr. Steinmetz's MMI opinion cannot be used to terminate Claimant's entitlement to ongoing TTD.

L. When Respondents filed the Final Admission of Liability, they had an opportunity to disagree with the date of MMI by filing for a DOWC IME but chose, instead, to agree with the date of MMI of Dr. Trifilo. Since Claimant was under restrictions from the authorized treating doctors up to the date of MMI he is entitled to be paid temporary disability if, as here, the Employer was unable to accommodate his restrictions. Here, the Employer offered no testimony to contradict Claimant's statements that this is what occurred when he was no longer afforded light duty beginning July 3, 2021. Claimant's testimony and the supporting exhibits persuade the ALJ that he is entitled to TTD extending from July 3, 2021, when Employer elected to place him on leave, through November 15, 2021, since he was placed at MMI and released to full duty work by Dr. Trifilo on November 16, 2021.

M. Because Claimant's period of disability lasted longer than two weeks from the day he left work as a consequence of his left wrist injury, Claimant is entitled to recover disability benefits from the day he left work in this case, i.e. July 3, 2021. Section 8-42-103(1)(b), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $602.36.

2. Respondent shall pay Claimant TTD benefits from July 3, 2021 through November 15, 2021, at the appropriate TTD rate associated with Claimant's average weekly wage of $602.36. Respondents are entitled to offset Claimant's TTD benefits based upon payment of short-term disability benefits to Claimant for his leave of absence from July 3, 2021 through November 15, 2021. The parties shall determine the amount of the offset. If the parties are unable to reach an agreement regarding the amount of the offset, either may apply for a hearing to determine the same.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

DATED: April 28, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing Error! Reference source not found. by U.S. Mail, or by e-mail addressed as follows:

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Date: April 28, 2022

/s/ Laverne Romero
Court Clerk

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained a work related injury or occupational disease in the course and scope of her employment on October 5, 2020.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to received medical benefits that are authorized, reasonably necessary and related to the injury, if Claimant is found to have sustained a work related injury.

III. Whether Claimant has proven entitlement to reimbursement of out of pocket expenses related to obtaining medical care, if the claim is found compensable and medical benefits are determined to be reasonably necessary and related to the claim.

STIPULATIONS

The parties stipulated that all other issues listed by the parties in their pleadings but not addressed by this order, shall be held in abeyance pending the determination of the above issues, with the exception of penalties for failure to comply, which was withdrawn by Claimant.

If the claim is found compensable, Respondents stipulated that they had not issued a Rule 8 letter and Claimant had selected as her authorized treating provider (ATP) her personal treating physicians (PCP), including but not limited to Dr. Jennifer Hepp and Dr. John Papilion, her orthopedic surgeon.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

a. Claimant's testimony

1. Claimant was 55 years old at the time of the hearing, right handed and approximately 5'1" tall. Claimant worked as a merchandiser, or field support representative, for Employer hired on January 15, 2014. Her job included distributing product to approximately 150 kiosks, machines that rent movies, in her assigned territory, and would do approximately 30 kiosks per day, but the quantity varied depending on the location and other duties she was required to complete during any particular week. She would work Monday through Friday but the hours varied depending on the quantity of kiosks that she would service on a given day.

2. Claimant would obtain the merchandise from the warehouse once or twice per week, meeting the trucks and locating the appropriate pallets of products. She would

break down and build boxes, sort the stock, break it down by day and retrieve the boxes to load into her car. She would also deliver to the warehouse the merchandise that was taken out of the kiosks. The day boxes were 12”x12”x6” in size, and would weight from approximately two to twenty pounds. Claimant would take the full boxes out of her car and organize them on a table in her garage across from her residence. She would handle a lot of day boxes every day, at least 150 per week.

3. The job also included logging into the machines, pulling out movies from the kiosk machines, cleaning them, doing minor maintenance, and loading the kiosk with the new merchandise. If there were any stickers, she would put the stickers on the kiosks.

4. The merchandise she would retrieve from the machines she packed in large shipping boxes that were 24”x15”x15” rectangles and would weight up to approximately forty pounds when full. She would keep these full ones in her garage until the next time she went to the warehouse, where she would deliver them for shipping. When she retrieved the new merchandise from the warehouse, she would keep them in her garage on a table which was organized by everyday boxes (new products) and shipping boxes (old products). She would handle approximately two to five full shipping boxes per day. By the end of the week Claimant would have anywhere from five to twenty five shipping boxes loaded. She loaded the shipping boxes herself, meaning no one helped her to load them up into her vehicle, and she delivered them generally on Friday. In general, in this position, Claimant would use her personal vehicle to maintain an assigned merchandising route and was authorized to store merchandize in her garage.

5. She considered the work she performed to be repetitive in nature and the work performed at each kiosk was similar. She agreed with the descriptions of the jobs generally to be similar as those assessed by the Job Demand Analysis issued for a different employee on February 25, 2019, but it did not contain all details of her job. She disagreed that the job she performed was not repetitive in nature.

6. On October 6, 2020 she began her day at approximately 6 a.m., clocking in using a phone app. She had to move some shipping boxes out of the way to get to her everyday boxes for the day. She had already moved one shipping box aside when she lifted a full shipping box to stack it upon the first one. She had the box at above shoulder height during the lift, lifting from the bottom of the box, when she felt a pop in her right shoulder and immediate onset of pain in her shoulder. She recalled that the pain was a sharp stabbing pain. Claimant rubbed at the shoulder and waited several minutes before she could continue sorting her merchandise.

7. Claimant called her supervisor to inform her of the incident, telling her that she hurt her right shoulder by picking up a box and that she was in pain. Claimant informed her supervisor that she had taken some Aleve to relieve some of the symptoms by then. Her supervisor informed her that workers’ compensation would not take any steps to help her with regard to the shoulder problem because they would just look at it as a repetitive motion issue. Her supervisor did not offer her any medical care or to complete a report of the injury. The conversation lasted approximately 20 minutes. She then took approximately 30 everyday boxes to her car, continuing to work that day.

8. Claimant continued working full duty after her date of injury on October 6, 2020. She continued to worsen and was having difficulty moving her shoulder because it was so inflamed. She had to use her left upper extremity to compensate.

9. Claimant stated she completed the online form on Employer's website with regard to the injury on the same day of the injury, October 6, 2020, but did not receive a call back or any information from Employer or their workers' compensation insurer.

10. Claimant conceded that she had had prior problems with the right shoulder, specifically achiness. She did not recall for what period of time, but had discussed it with her primary care physician (PCP) at Advanced Integrative Medicine, was examined but was not offered any medical treatment, including diagnostic testing or referrals to specialists or physical therapy. Claimant would take over the counter medications and the symptoms would subside.

11. She explained that two days after the accident she had an appointment with her PCP but was instead seen by a nurse practitioner. The appointment was originally scheduled to treat a personal problem. Claimant stated that she advised the nurse that she had injured her shoulder by lifting a box, was asked to mobilize her arm, told to use ice on it, but was advised that the nurse did not handle work related injuries.

12. She later returned to her PCP and was seen by Dr. Jennifer Hepp. Claimant relayed that she had been moving a box when she heard a pop and had pain, which continued throbbing throughout the day, continuing to get worse as the days went by from performing repetitive activities as she continued to work. She stated she was having problems moving her shoulder and showed Dr. Hepp that it was inflamed. She advised that it was different and much worse than what she had been experiencing previously.

13. Claimant testified that Dr. Hepp first sent her for x-rays, then an MRI and eventually referred her to Dr. John Papilion, an orthopedic specialist. Claimant testified that Dr. Papilion encouraged her to seek workers' compensation benefits for her right shoulder injury and treatment.

14. She stated that when she saw Dr. Papilion, he recommended surgery right away, since injections and physical therapy were unlikely to help. Claimant recalled telling Dr. Papilion that she was hurt lifting a box at work and Dr. Papilion recommended she apply for workers' compensation benefits as she was likely to be out of work for some time.

15. Claimant continued to work until the Thursday she was seen by Dr. Papilion. Then she proceeded with the surgery and post-operative care, including physical therapy but had to discontinue it when she found out her parents had COVID-19 and she went to them in New Mexico, where, eventually her mother was sent home but her father eventually passed away in the hospital at the end of December, 2021. She was unable to return to physical therapy because she could no longer afford it. However, she reported that her right shoulder was much better following the surgery.

b. Medical Records Prior to Alleged Injury

16. Claimant was evaluated by Dr. Jennifer Hepp on October 16, 2015 regarding right shoulder, elbow, forearm and hand pain as well as joint pain. On physical exam there was no musculoskeletal tenderness, though Claimant was tender to palpation

of the bilateral epicondyles and flexor muscles of the right forearm. She stated that Claimant required supportive care for epicondylitis, including ice, rest and topical agents.

17. On August 9, 2017 Dr. Hepp again noted Claimant had increased joint pain, stiffness and fatigue and commented that Claimant was concerned due to a family history of rheumatoid arthritis (RA). Dr. Hepp ordered some lab work at that time. In a follow-up on October 19, 2019 Dr. Hepp remarked that Claimant had complaints of right shoulder, upper extremity pain. Dr. Hepp noted Claimant was having shoulder pain for some time and was using OTC medication as the pain moved down the arm. She observed that the musculoskeletal pain was likely related to overuse strain caused by her repetitious actions at work and did not note a serious injury. The lab work came back negative for RA.

18. On August 28, 2020 Claimant was seen at Denver Integrated Spine Center by Michael Schnider, D.C., where she complained of multiple issues of the cervical, thoracic and lumbar spine as well as continuous aching and throbbing discomfort in the right trapezius with a VAS scale pain of 5/10 approximately 90% of the time. She was provided with manual therapy including manual traction, trigger point therapy and myofascial release to her upper right quadrant including right trapezius, levator scapula, and rhomboid muscles. She was assessed with cervical, thoracic and lumbar joint dysfunction with associated myospasms. Claimant continued with at least one more session of chiropractic care on September 3, 2020 when her shoulder discomfort decreased to a 3/10 only 40% of the time.

c. Medical Records After Alleged Injury

19. Claimant was seen by Heath Rooney, a nurse practitioner at her PCP's office, on October 8, 2020 for a possible urinary tract infection (UTI). The nurse did not document any report of the work related injury in the medical records. She documented an exam consistent with the UTI and ordered lab tests.

20. Dr. Hepp evaluated Claimant on November 16, 2020 regarding the ongoing right shoulder pain. She reported that Claimant advised her PCP that she had been trying to reduce the repetitive motion she was performing and had her chiropractor treat it, which provided some relief. Now the pain had increased and worsened. Claimant had significant pain on testing, with a positive drop arm test on the right and loss of range of motion. Dr. Hepp questioned the integrity of the rotator cuff for either moderate tear or complete tear. She diagnosed right shoulder pain and right rotator cuff syndrome, and ordered an MRI of the right shoulder.

21. The x-rays were completed at Health Image Cherry Creek and read by Erik Handly, M.D. on December 3, 2020. They showed an apparent moderate calcific tendinitis over the rotator cuff, most likely the supraspinatus tendon.

22. An MRI was performed on January 8, 2021 and read by Dr. Handly. The technician took a history that the MRI was being performed due to the "lifting injury" and "limited range of motion" of the right shoulder. Dr. Handly identified a full-thickness tear of the supraspinatus tendon with medial retraction of 1.4 cm, moderate subacromial and subdeltoid bursal fluid and no rotator cuff muscular atrophy or edema. He also noted mild acromioclavicular arthropathy with mild to moderate active edema, superior labral fraying and degeneration, without discrete tear, and mild glenohumeral chondromalacia.

23. Claimant was first evaluated by Dr. John Papilion of Orthopedic Centers of Colorado, LLC, on January 21, 2021. Claimant reported symptoms of the right shoulder with a gradual onset with now symptoms interfering with sleep, activities and worsening. The pain was deep, throbbing and frequent, exacerbated by motion of the shoulder. She provided a history of a right shoulder injury in October 2020 doing repetitive lifting of boxes in her home office for Employer and developed onset of right shoulder pain with progressive weakness and loss of motion. Claimant advised she reported it to her Employer "but did not make a work comp claim." Dr. Papilion noted specifically that the MRI showed a full thickness tear of the supraspinatus tendon with retraction and "no significant muscular atrophy", which indicated that this was "an acute tear." On exam he noted mild right supraspinatus tenderness, and positive Hawkins-Kennedy and impingement tests. He assessed that Claimant had a traumatic complete tear of the right rotator cuff, specifically stating that it was not degenerative in nature. Dr. Papilion noted that there were no other hobbies or recreational activities other than work to account for the traumatic injury and rotator cuff tear. He recommended surgery and scheduled it for February 1, 2021.

24. Dr. Hepp attended Claimant on February 8, 2021 to complete short term disability forms, reported Dr. Papilion's opinions with regard to her need for surgery and that she was not able to perform her job. On March 18, 2021, Claimant returned to Dr. Hepp, where she reported to Dr. Hepp that she had hurt her shoulder in October 2020. Dr. Hepp reviewed shoulder exercises and stretches, as well as provided education and precautions.

25. Dr. Papilion proceeded with the surgery on May 28, 2021 at DTC Surgery Center for the full thickness rotator cuff tear, supraspinatus tendon tear of the right shoulder, the chronic biceps tendon rupture and chronic impingement of the right shoulder. The procedure included debridement of the superior labrum and rotator cuff, decompression and releases of the coracoacromial ligament and repair of the cuff. During the surgery, Dr. Papilion noted that Claimant had a chronically disrupted and retracted biceps tendon, the superior labrum had a small stump that was debrided to a stable rim excising the stump. The undersurface revealed a full-thickness tear of the supraspinatus tendon without retraction. There was marked thickening and inflammation of the bursa and the edges of the cuff were smoothed to a stable rim. Dr. Papilion performed a subacromial decompression where the coracoacromial ligament was released from the AC joint and the acromion hook was smoothed and then he proceeded to repair the rotator cuff, including placement of the suture anchors into the greater tuberosity.

26. On July 6, 2021 Dr. Papilion saw Claimant in follow up with good recovery and minimal pain but was still using a sling. Claimant reported engaging in physical therapy with increases in range of motion. She was instructed to wean off of the sling, continue with PT but was limited to no use of the right upper extremity. Claimant was again seen on August 24, 2021. Dr. Papilion specifically noted that "It remains my opinion that this was a work-related injury posttraumatic as well as repetitive. She had no antecedent problems with the shoulder and no other recreational or vocational activities to account for her symptoms." Dr. Papilion noted on September 30, 2021 that Claimant was "doing well 4 months post arthroscopy rotator cuff repair right shoulder. She still has

some residual weakness but I believe her repair is intact." He ordered more aggressive therapy for strengthening with a work conditioning program. He changed her work restrictions to 10 pound lift limit overhead. By November 2, 2021 Claimant only had mild discomfort after PT and some difficulty with overhead lifting.

27. Dr. Allison M. Fall of Colorado Pain and Rehabilitation examined Claimant on August 18, 2021 upon Respondents' request. Claimant provided a history that was consistent with her testimony, including the reports of achiness in the right shoulder prior to the work injury, which she thought was arthritis. Claimant reported a specific incident to Dr. Fall occurring on October 6, 2020. Dr. Fall opined that the medical records support a repetitive motion and gradual onset of the rotator cuff pathology and not a specific incident. She reviewed the job demands analysis for a field support representative (merchandiser) and concluded that the work Claimant performed did not fall within the risk factor assessment for a repetitive motion shoulder injury under the causation analysis of the Cumulative Trauma Conditions Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 5, effective March 2, 2017. Dr. Fall specifically stated that she was unable to opine within a reasonable degree of medical probability that Claimant sustain an acute traumatic injury on October 6, 2020. However, if found that Claimant did have an acute injury, then Claimant was not at maximum medical improvement and required further care.

28. John Hughes, M.D. of Hughes Medical Consulting evaluated Claimant on January 20, 2022 upon Claimant's request. He noted a similar history as provided to Dr. Fall and through testimony, that Claimant was lifting a box which weight approximately 40 lbs. when she felt her right shoulder "popped." She advised that she did not go in for immediate treatment but that her symptoms got progressively worse after the date of the injury, over time as she continued working. He noted that Claimant continued to have some symptoms of pain in the right shoulder of 3/10 and weakness that limited her ability to lift. Dr. Hughes noted that Claimant did not engage in activities or sports other than riding a motorcycle, which she had not done since her injury. He diagnosed a calcific tendinitis, which is documented prior to her injury and not work related, and is a known complication of diabetes. This condition can cause weakening of the affected tendons making an individual vulnerable to sustaining frank rotator cuff rupture, as Claimant suffered on October 6, 2020 while lifting a box at work. He opined that the shoulder injury sustained on October 6, 2020 developed into a full-thickness rotator cuff tear and was related to the work injury. He also stated that the post arthroscopic repair, decompression and debridement performed on May 28, 2021 by Dr. Papilion was a reasonably necessary treatment caused by the work related October 6, 2020 workplace injury.

29. Dr. Hughes agreed "with Dr. Papilion that the lack of atrophy seen on the MRI and at the time of surgery is consistent with an acute rotator cuff rupture." He further noted that "[A]lso, consistent with acuity is the reactive bursitis seen on the MRI of January 8, 2021." His ultimate opinion is that Claimant "sustained an acute work-related rupture of the right supraspinatus tendon as a result of her lifting activities of October 6, 2020." He opined that the treatment under Dr. Papilion, including the additional physical therapy was reasonably necessary and related to the October 6, 2020 work place injury.

30. On February 27, 2022 Dr. Fall issued an addendum report with further medical records review, including Dr. Hughes' IME report. She noted she did not disagree

with Dr. Hughes' opinion that the MRI findings were consistent with an acute rotator cuff rupture. She noted that other providers opined that Claimant's injury was from repetitive motion, in conflict with the history Claimant provided Dr. Hughes and Dr. Fall identifying a specific incident. However, she stated that nothing in the new records she reviewed changed her opinion.

31. On March 2, 2022 Dr. Papilion stated the following within a reasonable degree of medical probability:

> It is my medical opinion that she did sustain a work-related injury to her right shoulder. She was doing repetitive lifting of heavy boxes. Although she had a pre-existing history of calcific tendinitis this was not symptomatic. She was fully functional. After this incident she had significant weakness and loss of motion. An MRI confirmed a full-thickness tear in the rotator cuff. There was no muscular atrophy. This is consistent with an acute tear.
>
> She has performed this type of work for over 7 years. This repetitive heavy lifting is likely a source of her pre-existing shoulder complaints. She was fully functional until this incident on 10/6/2020. It is therefore my opinion that she did sustain an acute exacerbation in this lifting incident to her underlying rotator cuff pathology from repetitive lifting.
>
> Mechanism of injury in rotator cuff tears include repetitive lifting with rotator cuff fiber failure over a period of time. A traumatic injury would be direct impact from a fall or very commonly lifting incident. This is direct force on the rotator cuff tendon that ultimately fails. The tendon is full-thickness and has some retraction. In an acute tear there is no muscular atrophy of the rotator cuff muscles and no fatty infiltration. This is all consistent with an acute tear.
>
> It is precisely this mechanism that, in my opinion occurred with [Claimant].
>
> I agree with Dr. Hughes's report. He is correct in his conclusion that while this patient had underlying shoulder problems that she had no antecedent trauma nor any vocational or recreational activities that would account for rotator cuff tear. In addition she did repetitive lifting for over 7 years and had an acute event which ultimately was diagnosed with a full thickness rotator cuff tear. He concurs with my opinion that the MRI revealed an acute rotator cuff tear consistent with a traumatic event. He also agreed that surgical indication was reasonable and medically necessary. He also agreed that she was not at MMI and required additional physical therapy to reach MMI. This was opined by Dr. Hughes in his IME and Dr. Fall in her IME. I wholeheartedly concur.

d. Dr. Allison Fall Testimony

32. Dr. Fall testified at hearing and was accepted as an expert in physical medicine and rehabilitation, noting that she had examined Claimant previously, taken a history and reviewed medical records, which she documented in her two written IME reports. Dr. Fall explained primary and secondary risk factors for cumulative trauma conditions based on the determinations of a panel of physicians and experts that reviewed research and studies regarding the effect of repetitive work on the body. She stated that based on the Claimant's description and the demands analysis that Claimant did not have any risk factors. Dr. Fall testified consistent with her reports, stating that the medical records did not support a determination of a specific event occurring on October 6, 2020.

However, she stated that Claimant required the surgery performed by Dr. Papilion. She established that the Medical Treatment Guidelines were guidelines for physicians to assess causation and risk but that not every injured worker fit within the guidelines and had to be assessed on a case by case basis. Dr. Fall specifically acknowledged that an acute on chronic condition is where there is a chronic condition and later something acute also happens on top of the chronic condition. .

e. Other evidence

33. Respondent Insurer issued an Employer's First Report of Injury on October 9, 2020. It stated that Insurer received the report on that same day. The report specifically notes that Employer was notified on October 9, 2020 that Claimant advised she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. It does not specify the mechanism or any object that injured Claimant. It specifies that Claimant was treated at a clinic.

34. Respondents submitted a document that appears to represent a payment log for unemployment insurance payments and entitlement after reported earnings were deducted. The log identified that Claimant's entitlement began as of August 23, 2020 but that benefits started as of the week ending September 19, 2020 with some weeks with no payments. The issues of TTD and offsets were reserved by the parties and this ALJ need not go into the details of the evidence.

35. A Job Demands Analysis and Risk Factor Analysis of the Field Support Representative job was conducted by Howard Fallik of Genex on February 25, 2019. Another Claimant was listed on the document and Respondents agreed that the Claimant was not the subject of the evaluation. However, Claimant stated that the descriptions of the job were similar to the job she performed. Essential functions included collecting the supplies needed for the cleaning and stocking of the kiosks, which were carried from the warehouse to the employees personal vehicle, use of personal vehicle to transport to each kiosk location, cleaning the kiosks surfaces, collecting the merchandise from the kiosks, replacing signs and displays, loading the merchandise, securing the kiosks, receiving pallet delivery and moving boxes and maintaining positive relationships with customers. The job required lifting boxes of approximately 3 to 38 lbs., and other supplies, push a merchandising cart, reaching to perform the job, and the physical demands of job, including lifting force, positional tasks, upper extremity tasks, and total body tasks. Mr. Fallik opined that the job did not include the risk factors for a cumulative trauma as the primary and secondary factors were not present for force, repetition, awkward postures, computer work, and handheld vibratory tools. He noted that the secondary risk factor of cold environments was present. He specifically analyzed the repetitive nature of wrist motions, which are not relevant here.

36. The Division issued a letter to Claimant on April 22, 2021 advising that Respondents had denied the workers' compensation claim and could apply for a hearing.

f. Decisive Findings

37. As found, Dr. Papilion and Dr. Hughes are more credible and persuasive than Dr. Fall in her analysis of the Claimant's history and medical records.

38. As found, Claimant clearly had calcific tendinitis, which is documented prior to her injury and not work related, as it is a known complication of diabetes per Dr. Hughes opinion.

39. Also as found, Claimant sustained an acute rotator cuff tear, specifically the full-thickness 11-14 mm tear of the supraspinatus tendon with minimal medial retraction, moderate subacromial and subdeltoid bursal fluid and no rotator cuff muscular atrophy or edema. Dr. Papilion is persuasive that the critical signs here is that Claimant had no muscle atrophy and no fatty infiltration, all of which indicated an acute tear. Claimant is credible and persuasive in her testimony that, while she did have some tenderness previously to her injury, that on October 6, 2020 she felt a pop in her shoulder and an acute, specific, sharp, stabbing pain. As found, this particular event of lifting the approximately 40 lb. box to above shoulder level from the table to be placed on top of a second box, proximately caused the acute rotator cuff tear. Claimant continued to work and the repetitive motion continued to incite the pain, but the acute specific injury was already present. Dr. Hughes and Dr. Papilion persuasively noted that Claimant did not engage in activities or sports other than riding a motorcycle, which she had not done since her injury. Dr. Papilion persuasively noted that Claimant worked full duty without limitations until the work related injury despite her intermittent prior shoulder pain due to the preexisting calcification. As found, Dr. Papilion is credible and persuasive in his opinion that Claimant's weakness, pain and loss of motion are related and caused by the specific injury of October 6, 2020 when she sustained the acute rotator cuff tear.

40. As found, Claimant received reasonably necessary care from Dr. Hepp and Dr. Papilion, including the May 28, 2021 rotator cuff surgery, the arthroscopic repair, decompression and debridement, and the subsequent physical therapy and follow up care.

41. As further found, Claimant continues to require medical care that is reasonably necessary and related to the claim. Dr. Papilion, Dr. Hughes and Dr. Fall are found credible and persuasive in this matter with regard to Claimant's ongoing need for care, including continued physical therapy in order for Claimant to achieve maximum medical improvement.

42. Lastly, as found, Claimant is entitled to reimbursement of any payments made to the authorized treating providers, Dr. Hepp, Dr. Papillion, and the related care Claimant received for the rotator cuff injury including but not limited to Health Images Cherry Creek, DTC Surgery Center/Colorado Perioperative Medicine, Orthopedic Centers of Colorado, and Advanced Integrative Medicine as well as the physical therapy provider, which was not identified.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

(2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by Sec. 8-40-201(14), C.R.S. which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. The mere fact an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). The question of whether a claimant has proven that a particular disease was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether there is a sufficient causal relationship between the claimant's employment and the injury or disease is also one of fact, which the ALJ must determine based on the totality of the circumstances. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The Division has adopted *Medical Treatment Guidelines* (MTG) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. W.C.R.P. 17, 7 Code Colo. Regs. 1101-3. The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See Sec. 8-42-101(3.5)(a)(II), C.R.S. Exhibit 5 of Rule 17 specifically addresses Cumulative Trauma Conditions (CTD MTG), and was most recently updated in December 2016 (effective March 2, 2017). Shoulder Injury Medical Treatment Guidelines adopted December 8, 2014 and effective February 1, 2015. Pursuant to Sec. 8-42-101(3)(b) and W.C.R.P. 17-2(A), medical providers must use the MTG when furnishing medical treatment. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. The ALJ may consider the MTG as an evidentiary tool but is not bound by the MTG when making determination of causation or when determining if requested medical treatment is reasonably necessary or injury related. Sec.8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). However, the compensable nature of the claimant's industrial injury or disease is not controlled by the application of the Guidelines. In determining the compensability of a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Indus. Commission v. Riley*, 165 Colo. 586, 591, 441 P.2d 3, 5 (1968*); Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). Rather, the determination of the compensable nature of an alleged occupational disease remains controlled by the

Workers' Compensation Act and by relevant case law. The claimant sustains an occupational disease when the injury is the incident of the work, or a result of exposure occasioned by the nature of the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment. While it is appropriate to consider the Guidelines on the question of diagnosis and cause of the claimant's condition, even assuming there might have been some deviation from the Guidelines, it does not compel the fact finder to disregard the opinion of that medical expert on the issue of the causal connection between a work-related injury and a particular medical condition. See *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (May 5, 2006).

Here, Dr. Papilion and Dr. Hughes' opinions are persuasive and much more credible over the contrary opinions of Dr. Fall with regard to the causation analysis in this matter. Claimant is further credible and persuasive as to the mechanism of her injury. Dr. Papilion and Dr. Hughes are found specifically credible with regard to the fact that Claimant sustained an acute injury, when Claimant lifted the box and felt a pop in her right shoulder, causing the acute right rotator cuff tear. The lifting of the box was a specific act and incident that caused the rotator cuff tear and is the proximal cause of the October 6, 2020 injury within the course and scope of her employment with Employer. As found, Claimant was performing one of the essential functions of her job, retrieving the day boxes from her garage, where her Employer authorized their storage, for Claimant to complete the tasks of her job as a merchandiser. In the course of retrieving the day boxes, she had to move the larger storage or shipping boxes out of the way. Claimant has shown by a preponderance of the evidence that there is a direct causal relationship between her employment duties for Employer and the injury. Claimant has shown that there is a direct nexus and causal relationship between a Claimant's employment and the injury. Claimant did not sustain an occupational disease in this matter. Claimant proved by a preponderance of the evidence that she sustained a compensable specific injury on October 6, 2020 within the course and scope of her employment.

Respondents argue that this claim involves an occupational disease claim. This is not persuasive. The MTGs for Cumulative Trauma Conditions do not address shoulder pathology or rotator cuff tears. In fact Exhibit 5 makes mention of the shoulder only with regard to the examination of the upper extremity,[1] education[2] for therapeutic procedures and the exercises of the upper extremity involving nerve gliding.[3] In this ALJ's assessment of the CTC and Shoulder Injury Medical Treatment Guidelines, it is most appropriate to assess causality for Claimant's shoulder injury under the Shoulder MTG, which specifically address causation issues. Sec. 2, MTG, Rule 17, Exh. 4, specifically states in pertinent part as follows:

> **RELATIONSHIP TO WORK AND OTHER ACTIVITY:** This includes a statement of the probability that the illness or injury is medically work-related. If further information is necessary to determine work relatedness, the physician should clearly state what additional diagnostic studies or job information is required.

[1] CTC, Exhibit 5, Sec. D(1)(d), p. 10.
[2] CTC, Exhibit 5, Sec. H(3), p. 127
[3] CTC, Exhibit 5, Sec. H(13)(c), p. 162

Principles of Causation of Occupational Shoulder Diagnoses

Causation is a medical/legal analysis in the workers compensation system. The information in the Medical Treatment Guidelines pertaining to causation addresses only the evidence related to the medical analysis of causation. Actual cases may vary from the evidence presented based on specific circumstances of the claim. Work-related conditions may occur from the following:

- a specific incident or injury,
- aggravation of a previous symptomatic condition, **or**
- a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

All of these conditions must be determined based on the specifics of the work related injury or exposure.
...
Cumulative work-related causation for shoulder disorders is difficult to quantify given 1) the variable techniques used to measure work exposures and the paucity of studies which have measured exposures, 2) the lack of verified clinical exams and 3) the lack of prospective studies.
…
There is some evidence that jobs requiring heavy lifting, heavy carrying, above-shoulder work, and handheld vibration, are likely to be associated with an increased risk of symptomatic supraspinatus tendon lesions, either partial or full thickness tears.

Given all of this information, it is reasonable to consider that there is some evidence for the following causative risk factors for shoulder tendon related pathology:

1. Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.

…
It is also likely that jobs requiring daily heavy lifting at least 10 times per day over the years may contribute to shoulder disorders.
…
Given the lack of multiple high quality studies it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology.

Dr. Papilion made a causation analysis in this matter, looked at the evidence, both prior and following the surgery and his opinion that Claimant's injury was caused by both the specific injury of October 6, 2020 is more persuasive and credible than any contrary evidence. It is specifically found that he complied with the Medical Treatment Guidelines in this matter. He initially made the assessment when he reviewed the MRI diagnostic testing, which is an objective measure and finding. He later reiterated that opinion upon viewing, personally, Claimant's tissue during the surgery and continuing to opine that the rotator cuff tear was acute, not chronic, in nature. This opinion if further strengthen by Dr. Hughes' analysis. Dr. Fall, on the other hand, fails to address both of these objective measures and simply relies on the MTG for CTC for failure to meet primary and secondary factors, which is not credible.

Respondents' argument that the lack of medical providers documenting the specific incident is not persuasive as Claimant herself may not have understood the pathology of the injury in light of the preexisting prior conditions. Further, Claimant credibly testified that she explained to her providers of the incident of October 6, 2020 but was likely more focused on the fact that she continued to work and her shoulder continued to worsen due to the nature of lifting boxes and working overhead causing her increases in symptomology. This is further supported by the fact that the Employer's First Report of Injury dated October 9, 2020 stated that Employer was notified on October 9, 2020 that Claimant advised she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. There is no mention in the FROI that Claimant was making a claim for an occupational disease. This ALJ has considered the lack of documentation by providers in properly documenting the mechanism of injury and has made a conscious decision with regard to this in favor of Claimant's testimony as the more likely scenario. Based on the totality of the evidence, the fact that Claimant did not have any muscle atrophy, and the opinions of Dr. Papilion and Dr. Hughes that Claimant suffered an acute rotator cuff tear, and Claimant's testimony, Claimant has proven by a preponderance of the evidence, that it is more likely than not, that the Claimant's rotator cuff tear was proximately caused by the traumatic event on October 6, 2020, within the course and scope of her employment with Employer and is compensable.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that she sustained a work related injury on October 6, 2020, causing the rotator cuff tear, specifically the full-thickness tear of the supraspinatus tendon. Respondents stipulated that both Dr. Hepp and Dr. Papilion were Claimant's authorized providers if Claimant was able to prove compensability of the claim. Claimant was initially diagnosed by MRI findings as having a full thickness rotator cuff tear. Dr. Papilion persuasively opined that Claimant required rotator cuff surgery, which took place on May 28, 2021. Therefore, the medical care

Claimant received for the compensable injury, including the diagnostic work up, surgery and physical therapy are found to be reasonably necessary and related to the October 6, 2020 accident that Claimant sustained in the course and scope of her employment.

Both Dr. Fall and Dr. Hughes also opined that Claimant was not at maximum medical improvement and required further care, including further physical therapy. Claimant continues to require medical care that is reasonably necessary and related to the claim. Dr. Papilion, Dr. Hughes and Dr. Fall are found credible and persuasive in this matter with regard to Claimant's ongoing need for care, including continued physical therapy in order for Claimant to achieve maximum medical improvement. Claimant has proven by a preponderance of the evidence that she continues to require ongoing medical care in order to achieve MMI, including physical therapy.

D. Reimbursement of Medical Benefits Payments Upon a Findings of Compensability

Claimant is entitled to reimbursement for out of pocket expenses where she paid the providers prior to the determination of compensability.

The Act, under Sec. 8-42-101(6)(a) states as follows:

> If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud

Here, Claimant is found credible that she reported the accident to her employer immediately on October 6, 2020 when she called her supervisor to explain she had been injured as she lifted a box. The Employer's First Report of Injury dated October 9, 2020 stated that Claimant advised Employer she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. While it does not specify the mechanism, it is found that Claimant did not understand the extent of her injury only that it was pain that was different and much worse than the pain she had felt in the past. The FROI also specifies that Claimant was treated at a clinic. Respondents conceded that they had not issued a W.C.R.P. Rule 8, Section 8-2 letter and Claimant selected as her ATP her PCP, including but not limited to Dr. Hepp and Dr. Papilion, her orthopedic surgeon. Claimant stated that she made payments and is out of pocket funds she paid to her providers during the pendency of the determination regarding compensability. Claimant has shown by a preponderance of the evidence she is entitled to be reimbursed for any funds that she paid out of pocket to her providers.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's October 6, 2020 claim for her right shoulder injury of a rotator cuff tear is found compensable.

2. Respondents shall pay for all reasonably necessary and related medical care caused by the October 6, 2020 compensable accident, including for Dr. Hepp, Dr. Papillion, Health Images Cherry Creek, DTC Surgery Center/Colorado Perioperative Medicine, Orthopedic Centers of Colorado, and Advanced Integrative Medicine as well as the unidentified physical therapy provider, or other providers within the chain of referral.

3. Claimant shall submit to Insurer receipts of any out of pocket funds for purposes of reimbursement within 60 days of this order and Respondents shall have 30 days from the date of receipt to reimburse Claimant for her out of pocket expenses paid to the providers who provide reasonably necessary and related medical care to Claimant as stated above.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 29th day of April.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-144-896-001

ISSUES

I. Whether Respondents have overcome the opinion of the DIME physician by clear and convincing evidence that Claimant is not at Maximum Medical Improvement ("MMI").

II. If the DIME opinion has been overcome by clear and convincing evidence, what is Claimant's impairment rating.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant sustained an admitted work-related injury to his lower back, while working for Employer.
2. Claimant was hired to work for Employer on August 19, 2019. Employer is a meat processing and packaging facility. Claimant was hired as a box handler and machine operator for Employer. In that position, he was tasked with lifting and unloading boxes that weighed between 35-99lbs. to a conveyor belt. (Hearing TR. pp. 20. 1-5; Claimant's Exhibit 7, pg. 28).
3. On March 28, 2020, Claimant experienced an injury to his low back, which also resulted in radicular pain radiating into his left leg. He did not begin to experience the symptoms until after he got home that night after taking a shower, when he experienced the onset of pain to his left side near the buttocks area. (Hearing TR. pp. 20. 13-20; Respondents' Exhibit C, pg. 57).
4. Claimant reported his injury the following Monday, March 30, 2020, to a nurse for Employer. (Claimant's Exhibit 23, pg. 87).
5. Claimant began to develop low back and left buttock pain that went down his left leg. He was determined to have sciatica. (Respondents' Exhibit B, pg. 48; Claimant's Exhibit 1, pg.4).
6. Claimant first treated with Daniel Hatch, DPM, complaining of pain in his left leg and foot along with a burning sensation. (Claimant's Exhibit 1, pg. 3).
7. When a nurse from Employer spoke with Claimant via telephone on May 16, 2020, about his low back, thigh, and posterior knee pain, he reported he was no longer having any pain and declined any further treatment. (Claimant's Exhibit 23, pg. 89).
8. However, on May 18, 2020, Claimant underwent an EMG. At the visit, he reported he had noticed left low back/button pain that started on March 28, 2020. He reported the pain slowly got worse that day, eventually travelling down the back of his leg to his foot. At this visit, Claimant's symptoms had returned, and he did not decline treatment.

(Claimant's Exhibit 2, pg. 10). The EMG demonstrated Claimant had a left L5 radiculopathy. Based on the EMG findings, Claimant was prescribed gabapentin and amitriptyline. (Claimant's Exhibit 2, pg. 9).

9. On May 23, 2020, and because of ongoing symptoms, Claimant underwent an MRI of the lumbar spine that revealed L5-S1 disc degeneration, a 5mm extrusion on the left posterior side of the L5-S1 disc, multilevel foraminal narrowing, and degenerative left L5 pillar edema. (Claimant's Exhibit 5, pg. 23). And based on the MRI findings, and Claimant's symptoms, Dr. Alexandra Garnett referred Claimant to neurosurgery for consideration of a microdiscectomy. (Claimant's Exhibit 5, pg. 22).

10. On June 2, 2020, Claimant had an initial visit with Carlos Cebrian, M.D. (Cebrian depo. pp. 5. 19-21).

11. Dr. Cebrian is Employer's onsite medical clinic medical director and Claimant's authorized treating physician.

12. Claimant complained of low back pain with radiation down his left leg to his foot, with some sensory complaints in the left leg. (Cebrian depo. pp. 5. 24-25; pp. 6. 1-2).

13. Dr. Cebrian recorded the pain had begun on March 29, 2020, while Claimant was in the shower, and he began to notice that his low back was hurting. Although Claimant's job involved lifting and moving boxes, Claimant did not recall a specific incident at work that had led to his pain. (Claimant's Exhibit 7, pg. 28). Despite there being no credible and persuasive evidence that Claimant previously had a 5mm disc extrusion/herniation, Dr. Cebrian opined Claimant had sustained a work-related aggravation of a preexisting and asymptomatic lumbar disc extrusion at L5-S1. (Cebrian depo. p. 6. 16-18; p. 28. 21-23). In the record from the visit, but without much explanation regarding his conclusion that the disc herniation was not caused by Claimant's work, Dr. Cebrian did conclude that it was aggravated by work. (Claimant's Exhibit 7, p. 29).

14. Claimant was referred to see Samuel Chan, M.D. for an evaluation of his reported symptoms with the possibility of an epidural steroid injection ("ESI"). (Cebrian depo. p. 7. 1-2).

15. On June 22, 2020, Claimant saw Dr. Chan for the first time. Claimant reported his back pain was still present, with radiation into his left lower extremity and affecting his second and third toes. (Claimant's Exhibit 9, pg. 33).

16. Dr. Chan reviewed Claimant's medical records and diagnosed radiculopathy of the lumbar region, a lumbar sprain, and low back pain. Dr. Chan opined Claimant had L5-S1 discogenic issues. (Claimant's Exhibit 9, pg. 34). As a result, Dr. Chan recommended a transforaminal ESI at the L5 left on the left side. (Claimant's Exhibit 9, pg. 35).

17. On July 7, 2020, when Claimant was seen by Dr. Chan again, Claimant alleged his "neurologist" was adamant he would require surgery otherwise he would not have any improvement. He was also concerned about proceeding with the ESI rather than surgery. (Claimant's Exhibit 10, pg. 37). At this appointment, Dr. Chan referred Clamant to Dr. Castro for a surgical evaluation and treatment. (Claimant's Exhibit 10, pg. 38; Exhibit 24, pg. 309).

18. At hearing, Claimant testified he disagreed with the treatment being recommended by Dr. Chan. Specifically, that he was, "made to understand that [he] would need surgery, not just the pain management." (Hearing TR. pp. 28. 3-6).

19. Claimant was of the opinion surgery was the only medical option to treat his work-related injuries. Contrary to that opinion, Dr. Chan had recommended pursuing more conservative treatment modalities, such as therapy, injections, and time, which Claimant disagreed with. (Fall depo. p. 40. 6-10).

20. On July 8, 2020, Claimant voiced his disagreement to Dr. Cebrian with the treatment recommended by Dr. Chan. Dr. Cebrian noted Dr. Chan had spent considerable time with Claimant to explain the medical treatment guidelines and his recommendation to proceed with the ESI. (Claimant's Exhibit 11, pg. 41). Based on Claimant's disagreement with the treatment recommended by Dr. Chan, Dr. Cebrian referred Claimant to see John Sacha, M.D. (Cebrian depo. p. 8. 5-7).

21. On August 14, 2020, Claimant saw Dr. Sacha. At this visit, he reported low back pain with radiation down his left leg and foot numbness and tingling. (Claimant's Exhibit 12, pg. 44). Dr. Sacha diagnosed Claimant with lumbar radiculopathy and also recommended an L5-S1 ESI, as had been recommended by Dr. Chan. (Claimant's Exhibit 12, pg. 45).

22. On September 22, 2020, Claimant returned to Dr. Cebrian. At this visit, Claimant reported his radicular symptoms down his left leg had improved. (Claimant's Exhibit 13, pg. 50). Due to ongoing nerve irritation, Dr. Cebrian recommended Claimant proceed with the ESI to help with his nerve irritation. (Claimant's Exhibit 13, pg. 50).

23. On October 8, 2020, Dr. Sacha administered the L5-S1 ESIs. (Claimant's Exhibit 15, pg. 52). Claimant had greater than 80% relief of his symptoms. As a result, Dr. Sacha concluded that Claimant had a diagnostic response to the injections. (Claimant's Exhibit 15, pg. 53).

24. At Dr. Cebrian's November 3, 2020, visit with Claimant, he could go up and down on his toes ten times. He could also move without discomfort and did not show any motor deficits. (Cebrian depo. p. 12. 22-23; p. 13. 7-12). Therefore, Claimant had some relief from the ESIs.

25. Despite Claimant having some relief from the ESIs, Dr. Cebrian opined the injections had in fact did not provide any relief of his pathology. (Cebrian depo. p. 12. 8-9). As a result, Dr. Cebrian did not recommend additional injections. (Claimant's Exhibit 16, pg. 55).

26. On November 6, 2020, Claimant was seen by a nurse at Employer for ongoing back pain. On visual examination Claimant was noted to have full range of motion and the ability to ambulate without difficulty, including bending, twisting, and pulling a sweater around his body without hesitation. (Claimant's Exhibit 23, pg. 147).

27. Claimant returned to Dr. Sacha, on November 19, 2020. Dr. Sacha determined Claimant's neurological examination was normal, demonstrating he was not having any worsening neurological symptoms. (Fall depo. p. 8. 8-15). Dr. Sacha documented while Claimant did have ongoing low back pain, he did not have as much radiation of that pain to his buttocks or leg. Dr. Sacha did not recommend repeating the injections

or any other interventional procedures and discharged Claimant back to Dr. Cebrian. (Claimant's Exhibit 17, pg. 57).

28. Claimant presented to Dr. Cebrian on December 29, 2020. Claimant specifically told Dr. Cebrian that he had an improvement in his symptoms and no longer had any lower extremity pain, but still had symptoms in his toes. (Respondents' Exhibit B, pg. 48; Cebrian depo. p. 14. 11-16). Upon physical examination, Claimant was noted to have full range of motion, no swelling, bruising, or redness of the lumbar spine, with only mild discomfort of the lumbar paraspinal muscles. (Respondents' Exhibit B, pg. 49). On physical examination there were no neurological findings such as weakness, sensory abnormalities, or other indications of nerve root compression at that time. (Cebrian depo. p. 14. 20-24). Claimant's range of motion measurements were all within normal limits. (Cebrian depo. p. 16. 6-7). Dr. Cebrian placed Claimant at maximum medical improvement ("MMI") that day and determined based on his level II training, Claimant sustained a 7% whole person rating based on permanent impairment of his disc pathology at the L5-S1 level pursuant to Table 53 II(C) based on disc abnormality given the L5-S1 disc extrusion. (Respondents' Exhibit B, pg. 49; Cebrian depo. p. 16. 12-17).

29. At his post-hearing deposition, Dr. Cebrian testified Claimant was found to have no neurological permanent impairment when he was placed at MMI. (Cebrian depo. p. 16. 23-25).

30. Dr. Cebrian did recommend permanent work restrictions but opined no maintenance care was necessary to maintain Claimant at MMI. (Respondents' Exhibit B, pg. 49).

31. At hearing, Claimant alleged to still be experiencing lower back pain, swelling in his toes, and radiation of the pain down his leg prior his placement at MMI on December 29, 2020. He also felt as though his second and third toe were, "crossing over each other and that [he] still had the burning and the tingling sensation in [his] toes." (Hearing TR. pp. 30. 10-12; 22-24).

32. Dr. Cebrian testified that the type of symptomology Claimant reported involving his toes is not consistent or associated with L5 radiculopathy. (Cebrian depo. p. 38. 24-25; p. 43. 4-9).

33. Some of Claimant's testimony at hearing is contradicted by the medical records entered into evidence, which document Claimant's denial of any radiation of his pain. (Hearing TR. pp. 34. 17-20). On the other hand, Claimant still complained of some radiating symptoms into his left lower extremity at some of his appointments.

34. When asked about that contradiction at hearing, Claimant testified that he believed Dr. Cebrian was not telling the truth in his documentation of Claimant's denial any of radiation of his pain. (Hearing TR. pp. 34. 20-21). Again, while Claimant might not have had pain radiating into his left lower extremity, he had ongoing symptoms radiating into his left lower extremity.

35. Claimant testified that the radiation of pain continued through January 2021. That testimony was contradicted by Dr. Cebrian's notes in the medical record from his January 26, 2021, visit with Claimant. (Hearing TR. pp. 36. 20-22). But at that visit Claimant did report an increase in his back pain complaints with some tingling in his

foot. (Cebrian depo. p. 17. 13-16; Claimant's Exhibit 23, pg. 233). Therefore, while Claimant did not have radicular pain, he still had radicular symptoms.

36. On April 29, 2021, Claimant was seen by a nurse in Employer's medical clinic. At this visit, Claimant reported he had gone to Boondocks amusement park over the prior weekend and then experienced an onset of pain following the weekend – on Monday. At this visit, Claimant complained of low back pain. (Claimant's Exhibit 23, pg. 300).

37. On May 4, 2021, Claimant was seen by Dr. Cebrian for a one-time follow-up visit. (Claimant's Exhibit E, pg. 69). Dr. Cebrian noted in the record from the visit Claimant told him he had an increase in pain, specifically in his left leg, after going to Boondocks amusement park over the weekend with his son. (Respondents' Exhibit E, pg. 69; Cebrian depo. p. 18. 13-15). Claimant also told Dr. Cebrian he had not been performing his home exercise program but that his modified work was aggravating his symptoms. (Respondents' Exhibit E, pg. 69-70; Cebrian depo. p. 24. 9-11).

38. Dr. Cebrian offered to watch a video of the bone-sorting position Claimant had been working in with Employer to determine whether it had been causing his discomfort. Dr. Cebrian opined the video appeared to require Claimant to perform work within his assigned permanent work restrictions. (Respondents' Exhibit E, pg. 69; Cebrian depo. p. 19. 1-19). Despite Claimant working within the restrictions provided by Dr. Cebrian, the job still aggravated his condition and made his symptoms worse. That said, Dr. Cebrian opined Claimant remained at MMI. (Respondents' Exhibit E, pg. 69).

39. Dr. Cebrian testified there was nothing that had significantly changed in Claimant's medical condition that warranted reversing his placement at MMI. (Cebrian depo. p. 20. 9-14).

40. Dr. Cebrian testified during his post-hearing deposition, there was nothing specific to Claimant's work-related injury that suggested he was no longer at MMI. (Cebrian depo. p. 20. 17-18).

41. Although Claimant had told Dr. Cebrian and his nurse during the visit that he had a recurrence of his left leg pain after going to Boondocks, Claimant testified at hearing that he had lied to Dr. Cebrian about the trip to Boondocks, "to see what they would say." (Hearing TR. pg. 38. 11-19). Claimant testified that "that they would take anything I was saying to them and run with it and make it seem like [he] was doing something wrong." (Hearing TR. pp. 39. 9-11).

42. Claimant explained at hearing that by lying to the nurse and Dr. Cebrian, it would cause him to be referred for additional treatment. (Hearing TR. pp. 42. 12-13).

43. Respondents filed a Final Admission of Liability ("FAL") on February 10, 2021, admitting for Claimant's placement at MMI on December 29, 2020, the 7% whole person rating assigned by Dr. Cebrian, $25,758.58 in PPD benefits, and no maintenance medical care pursuant to Dr. Cebrian's recommendations. (Respondents' Exhibit B, pg. 40).

44. After his placement at MMI, Claimant continued to work for Employer in a job position that required duties within his assigned permanent work restrictions. During that time, he did not seek any medical treatment to obtain a follow-up opinion on whether he remained at MMI. (Fall depo. p. 10. 16-25)

45. Claimant's employment with Employer was terminated on May 25, 2021. (Hearing TR. pp. 33. 21-22).

46. Claimant requested – and attended - a DIME with Ranee Shenoi, M.D. on September 28, 2021. (Claimant's Exhibit 20, pg. 68).

47. Claimant told Dr. Shenoi he had pain in his left leg and low back. He also reported pain in his left big toe, second, and third toes along with burning in his left third toe. (Claimant's Exhibit 20, pg. 70).

48. Dr. Shenoi opined Claimant was not at MMI based on his acute L5-S1 disc herniation that required additional treatment including physical therapy, additional ESIs, a surgical consultation, and a follow-up EMG. (Claimant's Exhibit 20, pg. 71).

49. Although Dr. Shenoi opined Claimant was not at MMI, he was assigned a provisional permanent impairment rating of 20% whole person based on a 6% rating for lumbar range of motion deficits, a 7% rating for specific disorders of the spine under Table 53(II)(C), and a 9% rating for neurological deficits for Claimant's L5-S1 disc herniation and left L5 radiculopathy. (Claimant's Exhibit 20, pg. 72).

50. Dr. Shenoi did not explain the difference in her opinion about Claimant's proximity to MMI and permanent impairment from those determined by Dr. Cebrian.

51. In a September 28, 2021, addendum to the DIME report, Dr. Shenoi opined it was unlikely Claimant has S1 radiculopathy. (Claimant's Exhibit 20, pg. 78).

52. Allison Fall, M.D., a Level II accredited medical expert in physical medicine and rehabilitation, performed an independent medical examination ("IME") of Claimant on December 8, 2021. (Respondents' Exhibit C, pg. 57).

53. At the IME, Claimant told Dr. Fall that "his back hurts 24 hours a day, seven days a week." He also described an incident in which he was changing a tire that caused, "his whole left side and leg [to go] into a 'frenzy" for a period of time. (Respondents' Exhibit C, pg. 57). According to Dr. Fall, Claimant provided no other explanation for his recurrence of pain, to that extent and at that time, other than the incident related to the tire. (Fall depo. p. 27. 15-18).

54. He also alleged that on some mornings, he had radiation of pain down his leg, but that it was not as severe as the pain in his low back. (Respondents' Exhibit C, pg. 58).

55. Dr. Fall reviewed the medical records related to the treatment Claimant received prior to and after the injury in this case. She also reviewed Dr. Shenoi's DIME report. Dr. Fall also noted that Claimant smokes a half-pack of cigarettes every day and has done so for the past nine years. (Respondents' Exhibit C, pg. 60).

56. Dr. Fall's assessment was a left L5-S1 disc extrusion with left L5 radiculopathy, for which he had been placed at MMI on December 29, 2020. (Respondents' Exhibit C, pg. 61). She stated that on that date, Claimant had resolution of his leg pain symptoms, there was no indication for additional injections, surgery was unlikely to have improved his condition, and his condition was overall stable. (Fall depo. p. 9. 2-7).

57. Dr. Fall also opined Dr. Shenoi erred in determining Claimant had not yet reached MMI, as the medical records documented Claimant had much better range of motion and no leg symptoms when he was last treated by Dr. Cebrian. (Respondents' Exhibit C, pg. 61).

58. At her pre-hearing deposition, Dr. Fall testified there was no objective medical evidence contained in the medical records through December 29, 2020, that Claimant did not reach MMI on that date. (Fall depo. p. 8. 13-18). She also testified that there was no objective medical evidence that Claimant's work in the six months after he was placed at MMI aggravated, accelerated, or exacerbated his work-related condition. (Fall depo. p. 10. 12-15). Additionally, Dr. Fall testified Claimant's weight, being 5' 10" and weighing 271lbs., does place more stress on his lumbar spine and plays a role in degeneration as well as disc bulges, protrusions, and extrusions. (Fall depo. p. 14. 22-25; p. 16. 19-21).

59. Dr. Fall also opined Dr. Shenoi had erred in not accounting for the difference in her range of motion measurements and examination findings compared with those of Dr. Cebrian. (Respondents' Exhibit C, pg. 61). As the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition ("AMA Guides") state, "if two medical evaluators have a difference in impairment rating, this needs to be accounted for." (Respondents' Exhibit C, pg. 61; Fall depo. p. 25.13-17). Dr. Fall stated that Dr. Shenoi had failed to account for the alleged worsening of Claimant's symptoms and decreased range of motion. (Respondents' Exhibit C, pg. 61).

60. The ALJ finds that Claimant's back and leg symptoms waxed and waned. For example, on May 16, 2020, Claimant stated that his symptoms had resolved and that he did not want any additional treatment. But just a couple of days later, on May 18, 2020, he presented for an EMG for ongoing pain and radicular symptoms and was diagnosed with radiculopathy. As a result, the ALJ finds that when Claimant was placed at MMI by Dr. Cebrian, his symptoms were better. But, shortly afterward, his symptoms returned and that the return of his symptoms was due to his underlying work injury that resulted in a herniated disc.

61. While Claimant told his providers he got worse after going to Boondocks, Claimant stated that he lied about going to Boondocks. Despite Claimant's contention that he lied about going to Boondocks, the ALJ does not discredit all of Claimant's testimony. In the end, the ALJ finds that Claimant's symptoms waxed and waned, and he was placed at MMI during a time when his symptoms were better - temporarily.

62. The ALJ also finds that Claimant did go to Boondocks, but that such activity did not cause his symptoms to get worse. Claimant merely had symptoms after going to Boondocks. The ALJ finds that Claimant did have a temporary increase in symptoms after changing his tire. But the ALJ finds that changing the tire did not aggravate his underlying condition and sever the causation connection between his work injury and need for medical treatment. The increase in symptoms was merely a consequence of his underlying work injury – a herniated disc.

63. The opinions of Drs. Cebrian and Fall regarding Claimant being at MMI is merely a difference of opinion between them and the DIME physician, Dr. Shenoi.

64. Dr. Shenoi's opinion, that Claimant is not at MMI, is supported by the medical records and Claimant's testimony. As previously found, Dr. Chan did refer Claimant to Dr. Castro, a surgeon, for evaluation and treatment. Plus, Dr. Garnett also recommended a neurosurgery evaluation for a possible microdiscectomy. Such evaluations, however, did not occur.

65. A surgical evaluation is reasonably expected to define Claimant's current condition and suggest further treatment to cure Claimant from the effects of his work injury.

66. The ALJ credits the opinions expressed by Dr. Shenoi in her DIME report that Claimant is not at MMI because he needs additional medical treatment that is intended to define the extent of his injury as well as cure Claimant from the effects of his work injury. This includes physical therapy, additional ESIs, a follow-up EMG, as well as a surgical evaluation. As a result, the ALJ finds that Respondents have failed to overcome that opinion by clear and convincing evidence.

67. The ALJ reviewed the deposition testimony of Dr. Cebrian and Dr. Fall. Regarding Dr. Cebrian's testimony, it would appear that Dr. Cebrian is essentially in agreement with Dr. Shenoi's "Clinical Diagnosis." In particular, the pain generator was L5 radiculopathy resulting in the Claimant experiencing symptoms in his left foot. (Dr. Cebrian's deposition transcript P.37 L. 5-12 P. 32 L. 23-25 and P. 33 L. 23- 25 and P. 33 L.1-25). It is noted there is agreement between Dr. Cebrian and Dr. Shenoi that S1 is not the pain generator. (Dr. Cebrian's deposition transcript P. 33 L. 14-25, P. 34 L.1-25, P. 35 L. 1-12). Dr. Cebrian agreed that Dr. Sacha's injection at L5-S1 was diagnostic. (Dr. Cebrian's deposition transcript P. 12 L.13-17). Of relevance, when Claimant was placed at MMI by Dr. Cebrian, he was experiencing symptoms in his left foot and when he was being reassessed by Dr. Cebrian on January 29, 2021, he was continuing to experience symptoms in his left foot. Per Dr. Cebrian, throughout his treatment of Claimant, this was a consistent complaint. (Dr. Cebrian's deposition transcript P. 38 L14-25, P. 39 L.1-25 P. 40 L.1-12). Dr. Cebrian placed the Claimant at MMI on December 29, 2020, indicating there were no neurological findings or examination, including weakness, sensory abnormalities, or any indication the Claimant was having any nerve root compression at that time. (Dr. Cebrian's deposition transcript P. 14 L.17-25). However, Dr. Cebrian's documentation of Claimant experiencing ongoing left foot symptoms is inconsistent with his deposition testimony, particularly in regard to Claimant not having nerve compression problems when he was placed at MMI. Regarding Dr. Fall's testimony, the ALJ notes that Dr. Fall agreed based on the findings of the MRI as well as the EMG – that referral to neurosurgery was reasonable. (Dr. Fall's deposition testimony P. 36 L. 15-25*)*. In addition, Dr. Fall agreed that Dr. Chan's referral to Dr. Bryan Castro for surgical evaluation and treatment was reasonable. (Dr. Fall's deposition transcript P. 39 L. 5-23*)*. Dr. Fall indicated in her IME report, "A repeat MRI and EMG nerve conduction studies may be helpful to see if there has been improvement in the MRI and/or acute EMG findings." In addition, Dr. Fall testified that these diagnostic findings would indicate one way or the other whether the Claimant was a surgical candidate. (Dr. Fall Deposition Transcript P.54 L. 24-25, P. 55 L. 1-25, and P. 56 L. 1-25). It is noted Dr. Cebrian agrees with Dr. Fall about the MRI and EMG nerve conduction studies. (Dr. Cebrian's Deposition Transcript P. 23 L. 9-23). The ALJ also notes that Dr. Fall under

"Review of Systems" states, "significant for numbness or tingling at the left foot and first three toes." Dr. Shenoi in her DIME report concerning the results of her physical examination stated. "Neurological exam revealed decreased sensation on the top of the left foot and left calf to light touch." Both Dr. Fall and Dr. Shenoi are reporting neurological deficits in Claimants left lower extremity. It is also noted both Dr. Fall and Dr. Shenoi are reporting positive pain findings when testing Claimant's left SLR. Dr. Fall agreeing with Dr. Cebrian's opinion about the Claimant achieving MMI on December 29, 2020, because of normal neurological examination and normal range of motion etc. is inconsistent with her own findings regarding deficits in range of motion, positive neurological findings, and her recommendation for additional diagnostic testing to rule in or rule out surgical intervention.

68. In this case, based on the review of the DIME report from Dr. Shenoi, the deposition testimony of Drs. Fall and Cebrian, Claimant's testimony, and the corresponding medical records, the ALJ finds and concludes Respondents have failed to establish that it is most likely true and free from substantial doubt that Dr. Shenoi erred in finding Claimant not at MMI for the effects of his March 28, 2020, work related injury.

69. The ALJ will not address what whole person impairment rating should be assigned because Dr. Shenoi's medical impairment rating was "provisional" as Claimant is not at MMI. Since Claimant is not at MMI, the Claimant's permanent medical impairment rating is not ripe for adjudication.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See*

Bodensleck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents have overcome the opinion of the DIME physician by clear and convincing evidence that Claimant is not at Maximum Medical Improvement ("MMI").

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Based on the review of the DIME report issued by Dr. Shenoi, which the ALJ credits, plus the testimony of Dr. Cebrian, Dr, Fall and Claimant, and the medical records entered into evidence, the ALJ finds and concludes that Respondents have failed to overcome by clear and convincing evidence the opinion of Dr. Shenoi that Claimant is not at MMI. Claimant's symptoms waxed and waned. Therefore, the fact that his symptoms were not as bad when he was placed at MMI does not mean that he was at MMI at that time.

It was medically documented that Claimant suffers from chronic radiating pain and symptoms into his left leg and foot due to his L5 disc herniation. Prior to Claimant being placed at MMI, there were two referrals for surgical evaluations which were never completed. It is noted that Dr. Fall, the IME physician, agreed these referrals were reasonable. A surgical evaluation is reasonably expected to define Claimant's current condition and suggest further treatment to cure Claimant from the effects of his work injury. As a result, the need for a surgical evaluation is inconsistent with a finding of MMI. Plus, Dr. Shenoi is of the opinion that Claimant needs additional physical therapy and ESIs before he can be placed at MMI. Thus, the ALJ finds and concludes that Respondents have failed to overcome Dr. Shenoi's opinion that Claimant is not at MMI by clear and convincing evidence. Therefore, Claimant is not at MMI.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is not at MMI.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 29, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury to his low back on April 2, 2018.[1]

FINDINGS OF FACT

1. Claimant began working for Employer as a relief operator in 2013. Claimant's job duties involved lifting, bending and twisting.

2. Claimant has a prior history of low back problems and treatment, including a surgery at L4-5 in the mid 1990s and a subsequent surgery at the L5-S1 level in 2003.

3. On December 5, 2015, Claimant suffered a low back injury while working for Employer (WC No. 5-103-240). This was a no lost-time claim.

4. Claimant sought care for his 2015 back injury with his primary care physician, Anna Roth Wilkins, M.D., on December 8, 2015. Claimant reported that he had strained his back at work on December 5, 2015. He conveyed a long history of back pain with surgeries. Claimant reported that the numbness in his great toes was his baseline. Dr. Wilkins characterized Claimant's condition as a recurrent problem.

5. Claimant did not initially report his 2015 back injury as a workers' compensation claim. Claimant testified that when he called off work shortly after the injury and told his manager that he hurt his back at work, the manager required him to report it as a workers' compensation claim.

6. Claimant subsequently underwent treatment with Kevin Keefe, M.D. at Employer's authorized clinic, Workwell. Dr. Keefe placed Claimant at maximum medical improvement ("MMI") on January 4, 2016 with no permanent impairment, restrictions or need for maintenance care.

7. Claimant testified that he received a written warning from Employer for his failure to timely report his 2015 work injury. He further testified that due to his failure to timely report the injury, Employer required him to present a PowerPoint presentation to his

[1] Two claims were consolidated for hearing (WC No. 5-103-242, DOI April 2, 2018, and WC No. 5-103-241, DOI March 29, 2016). After discussion between the parties at the outset of hearing, it was determined that the hearing would proceed only on the issue of compensability under WC No. 5-103-242 (DOI April 2, 2018). All additional issues were held in reserve for future determination.

superiors regarding the injury and how it could be avoided. He testified that this experience was degrading and humiliating, as was working light duty.

8. Claimant alleges he sustained another work injury on or around March 29, 2016 (WC No. 5-103-241) while lifting and shoveling.

9. Claimant did not report a work injury to Employer at the time. He testified he did not report the alleged March 2016 injury to Employer as being work-related because he did not want to go through all the steps Employer had required of him for his 2015 injury. Claimant further testified that his goal was to continue working for Employer and ultimately become a supervisor. Claimant believed from his experience with the 2015 injury he would not be able to achieve those goals if he reported the alleged work injury.

10. Claimant again sought treatment with Dr. Wilkins on March 29, 2016. Claimant reported to Dr. Wilkins that he had ongoing pain in his low back and previous surgeries. He stated that he had an exacerbation of symptoms since the December 2015 injury, and had no improvement with conservative management for three months. Claimant reported a new symptom of weakness in his right leg. Dr. Wilkins' medical note contains no mention of any reported work-related mechanism of injury or any specific incident leading to Claimant's complaints.

11. Claimant testified that he did not report any work event to Dr. Wilkins at the time because he did not want to involve workers' compensation due to his prior experiences.

12. Claimant obtained a certification for leave under the Family and Medical Leave Act ("FMLA") from Dr. Wilkins for his back pain for the period of December 2015 through January 2016.

13. Claimant also underwent evaluation and treatment for his low back with Hans Coester, M.D. At a June 16, 2016 evaluation with Dr. Coester, Claimant described having a long history of intractable pain, tingling, and numbness in his right leg. Dr. Coester reviewed an April 21, 2016 lumbar MRI and recommended Claimant undergo a L3-4 and L4-5 right-sided laminectomy and possible discectomy. He predicted that Claimant would never be pain free. Dr. Coester performed the recommended surgery on Claimant on July 14, 2016.

14. On September 20, 2016, Dr. Wilkins cleared Claimant to return to work beginning October 10, 2016 at a position with Employer that would not require repetitive twisting, bending, or lifting. Claimant underwent a lift test with Employer on October 11, 2016. In the associated questionnaire, Claimant represented that he had no lifting or pulling restrictions from a physician, and that he had not recently had a surgery that would limit his lifting or pulling. Claimant He denied back pain and denied that a doctor ever told him that he had a bone, joint, or musculoskeletal problem that was made worse by exercise, or that he was under medical care for any such condition. He denied being on any medication, despite being on several medications, including cyclobenzaprine and oxycodone, as listed in Dr. Wilkins' September 20, 2016 report.

15. Claimant returned to work performing his regular job duties in October 2016 . He continued to experience back pain. Claimant continued to suffer back pain. On May 25, 2017, the nurse practitioner at his family clinic described Claimant's history of chronic low back pain. Claimant informed her that he would have flare-ups with back spasms that would prevent him from bending and lifting, causing him to miss work, and leading him to again request leave under FMLA.

16. Claimant presented to Alyssa Gonzalez, D.O. on February 26, 2018. He reported new worsening symptoms of right calf pain, right groin pain, and the sensation of cold in his right lower extremity. Dr. Gonzalez was initially worried that the symptoms were coming from an aneurysm, which was later ruled out.

17. On March 15, 2018, Claimant saw William Oligmueller, M.D. with continued complaints of right calf pain. The medical record contains no mention of an injury-causing event. Dr. Oligmueller could not point to a specific cause of the symptoms, but noted he did not feel there was a circulation or nerve issue.

18. Claimant alleges he sustained a subsequent work injury to his low back on or around April 2, 2018. Claimant testified that a pipe burst, causing whey to fall to the floor. Claimant testified he used a five-gallon bucket and shovel to pick up the whey, and then carried the whey up and down stairs. Claimant testified that this involved lifting and carrying up to 80 pounds. Claimant testified that, upon finishing the task, he had significant low back pain, worse than what he had previously experienced from his 2015 and 2016 injuries.

19. Claimant did not work on April 2, 2018.

20. Claimant again did not report the alleged April 2018 injury to Employer. Claimant testified that he did not do so for the same reasons he failed to report his alleged 2016 work injury to Employer.

21. Claimant sought care with Dr. Wilkins on April 2, 2018. Claimant complained of right leg pain and numbness, which had been occurring for about a month. Claimant also reported right groin pain that worsened with physical activity at work. Claimant specifically denied any recent injury. Dr. Wilkins ordered a lumbar x-ray and referred Claimant back to Dr. Coester and a possible MRI. The medical record from this date is devoid of any mention of a specific incident.

22. Dr. Coester's PA evaluated Claimant on April 4, 2018. Claimant reported progressive back pain, right lower extremity radicular pain, and numbness and weakness that had been progressing over the previous two months. Claimant specifically denied any precipitating event, only a progression of symptoms.

23. Claimant last worked on April 9, 2018.

24. Claimant returned to Dr. Wilkins on April 18, 2018. Dr. Wilkins removed Claimant from work for four weeks due to the physically demanding nature of his job, noting Claimant was unable to lift, twist, or bend at that time. Claimant was instructed to follow-up with neurosurgery and review the MRI results with the neurosurgeon. Dr. Wilkins stated in her note of April 18, 2018, that Claimant had chronic low back pain, and an exacerbation, and that the exacerbation started over a month ago. Dr. Wilkins did not specify any work-related incident leading to the exacerbation.

25. On May 1, 2018, Claimant asked Dr. Wilkins to complete FMLA paperwork due to his low back pain.

26. On May 12, 2018, Dr. Coester performed a laminectomy and discectomy at the right L4-5 level, and decompression of the right L5 nerve root. The post-operative diagnosis was recurrent right-sided L4-5 disc herniation with right L5 radiculopathy.

27. Claimant continued to experience low back issues post-operatively despite undergoing a course of treatment. On August 15, 2018, Claimant reported to Dr. Coester's PA a sudden return of back pain and right leg radicular symptoms while working with a therapist two weeks earlier. Examination showed worsening weakness on the right side. On September 5, 2018, Dr. Wilkins referred Claimant to physical therapy for a disability evaluation. On October 29, 2018, Dr. Wilkins noted Claimant was currently on short term disability and was planning on applying for long term disability. Dr. Wilkins continued to keep Claimant off of work due to the physical nature of his job.

28. Claimant received an opinion from William Biggs, M.D. an orthopedic surgeon, on whether an additional surgery would help him to return to work. It was ultimately determined that the Claimant would not proceed with any surgery. Dr. Wilkins ultimately determined that Claimant was unable to work in any capacity due to limitations brought on by his low back condition.

29. On March 22, 2019, Employer notified Claimant that his leave was expiring. Claimant notified Employer that, due to his back issues, he would no longer be able to perform the duties for his job and resigned on April 14, 2019.

30. Claimant testified that during his course of physical therapy in recovering from the 2018 injury, his physical therapist recommended that he report his injuries as work-related.

31. On March 27, 2019, Claimant filed a claim for workers' compensation alleging that he sustained an injury to his low back while at work on April 2, 2018. The injury was allegedly caused by "lifting, shoveling bags of whey powder." (Cl. Ex. 8, p.198).

32. Also on March 27, 2019, Claimant filed a claim for workers' compensation benefits alleging that he sustained an injury to his low back while at work on March 29, 2016. The injury was allegedly caused by "lifting, shoveling bags of whey powder." (Cl. Ex. 9, p.199).

33. Claimant testified that he was unaware of the exact dates of his injuries. He testified that the dates utilized for his dates of injury were the dates he reported to his physician, Dr. Wilkins, for treatment for low back pain which he believes was caused by his work activities for Employer.

34. Respondents denied both claims.

35. On September 7, 2019, Elizabeth Bisgard, M.D. conducted an independent medical examination ("IME") at the request of Respondents. Dr. Bisgard noted that, according to the medical records and the history reported to her by Claimant, there was no evidence of work injuries that occurred around March 29, 2016 or April 2, 2018. She noted Claimant could not recall any specific event that caused an injury, despite her specifically asking him multiple times. Based on the records, including multiple imaging studies, Dr. Bisgard concluded Claimant had a long-standing history of degenerative changes dating back to the 1990s, and that his condition had gradually worsened, and continues to worsen, with increased stenosis and symptoms due to arthritic changes. She opined that the need for further surgery was due to Claimant's ongoing degenerative changes.

36. Dr. Bisgard testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Bisgard testified consistent with her IME report and continued to opine there is no evidence of any April 2018 work-related injury. Dr. Bisgard reiterated her opinion that Claimant's condition and need for treatment are the result of the natural progression of his chronic, longstanding, deteriorating degenerative condition. Dr. Bisgard testified that Dr. Coester performed repeat back surgery in May 2018 due to his belief that Claimant had a reherniated disc. She explained that a disc herniation can result from chronic degenerative changes, opining that Claimant's 2018 back surgery was due to the progression of degenerative changes and not any specific event.

37. The ALJ finds the opinion and testimony of Dr. Bisgard, as supported by the medical records, more credible and persuasive than Claimant's testimony.

38. The ALJ finds that Claimant failed to prove it is more probable than not he sustained an injury arising out of and during the course of his employment with Employer on or around April 2, 2018.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

As found, Claimant failed to meet his burden to prove he sustained a compensable industrial injury on or around April 2, 2018. Claimant has an extensive, longstanding history of chronic low back problems. Claimant alleges that a specific work event on or around April 2, 2018 resulted in increased back symptoms. Claimant did not report his alleged work injury to Employer, nor is there any reference in the medical records to the alleged specific event Claimant now claims exacerbated his condition. Claimant was aware of the expectation that he timely report any work injuries and had been previously reprimanded for his failure to do so. Despite this, Claimant purports that he simply chose not to report the alleged April 2018 injury because he had previously felt demeaned by Employer. The ALJ is not persuaded by Claimant's explanation. A reasonable person under Claimant's circumstances would promptly report such injury. Claimant only chose to report the alleged injury after undergoing extensive treatment and a significant period of disability that caused Claimant to separate from his employment. Claimant's failure to previously report the alleged injury, as well as the absence in the medical records of any mention of the alleged specific event undermines Claimant's contention that he did, in fact, suffer a work injury in April 2018.

Additionally, there is insufficient medical evidence establishing Claimant sustained the alleged work injury. While Claimant may have experienced symptoms at some point at work in April 2018, the preponderant evidence does not establish the requisite causal nexus between Claimant's work and his condition and need for treatment. Dr. Bisgard credibly and persuasively opined that Claimant's condition and need for treatment is the result of the natural progression of his longstanding, deteriorating degenerative back condition. To the extent Claimant suffered a reherniated disc, Dr. Bisgard credibly explained such condition was more likely due to Claimant's chronic degenerative condition and not any acute event. Here, the preponderant evidence does not establish Claimant sustained a compensable industrial injury.

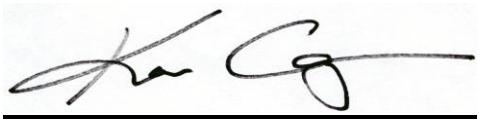
ORDER

1. Claimant failed to prove he sustained a compensable industrial injury on or around April 2, 2018. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits that are reasonably necessary and related to the admitted injury, including up to 24 hours home healthcare or attendant care.

PROCEDURAL HISTORY

This workers' compensation matter is an admitted claim. Two prior hearings in this case resulted in final orders. The first was ALJ Margo W. Jones' Findings of Fact, Conclusions of Law and Order dated September 21, 2016 determining Claimant was injured in the course and scope of his employment on October 23, 2015, suffering a lumbar spine injury while installing solar panels. The second was ALJ Edwin L. Felter, Jr.'s Full Findings of Fact, Conclusions of Law and Order dated February 21, 2018, granting permanent total disability (PTD) benefits.

Respondents filed a Final Admission of Liability on March 28, 2018 admitting for post maximum medical improvement (MMI) medical benefits (*Grover* medical benefits) provided by the authorized treating physician that were reasonably necessary and related to the compensable injury.

Claimant filed an Application for Hearing (AFH) on December 5, 2021 on the issue of medical benefits that are authorized, reasonably necessary, and related to the injury including home health care. The issue was not limited in the pleading to the amount of time for the home health care being requested.

Respondents filed a Response to the AFH on January 4, 2022 on the above issues but added that Respondents were in the process of a Rule 16 challenge of the Rasheed Singleton, M.D.'s undated (received December 6, 2021) request for authorization for 24 hours per day, 7 days a week home health care and Respondents denied authorization of Kyla Oliver or any other family members to provide 24 hours, 7 days a week of home health care.

Respondents objected on the record to proceeding with the issue of home healthcare for anything less than 24 hour care as the Rule 16 denial only entertained a request for that amount and nothing less than that amount, but stated they were ready to proceed despite a ruling that the issue of home health care for any amount of time would be addressed.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant, who was 43 years old at the time of the hearing, was injured in the course and scope of his employment with Employer on October 23, 2015. Claimant explained that while he was climbing a ladder, holding a solar panel, a forceful gust of wind caught the panel, twisting him, he felt a pop in his low back. He continued to work and on October 23, 2015, while bent over installing solar panels on a roof, putting in lag bolts when he felt his back pop again, causing him not to be able to stand. He continued with severe spasms in the low back and pain going down his lower extremities. Claimant described that whenever he attempted to put pressure on his lower extremities, the pain would immobilize him. He stated he had never, before this injury, felt pain and spasming like what he feels now.

2. Before Claimant reached maximum medical improvement (MMI) he would suffer severe symptoms, including severe spasms down his bilateral legs, would have cramps while attempting to walk, had pain in both lower extremities, felt a shock like sensation into his legs and testis, and burning pressure from the low back down the legs. He would wake up twisting in pain from the spasms, and this continues to happen to the present day.

3. He continues to have chronic pain that limits his ability to walk and requires frequent massage therapy and attendant care as he is limited in what he is able to do on his own, including many activities of daily living. The spasms and cramping are a stabbing sensation that run from the back down his legs. His foot would twist from the spasm and he would need assistance to twist it back to alleviate some of the pain. The pain also affects his groin area, sending electrical shocks from the lower back into his testicles.

4. Claimant received treatment from Ms. Rachel Moore, including massage therapy, tens unit treatment, used exercise bands, performing different exercises, and heat therapy. What helped the most was the deep tissue massage. He explained that it assisted him to be able to do more, be more functional for a few hours of relief until the next spasming episode occurred.

5. Claimant stated it was extremely upsetting to continue to have the spasming and cramping, especially in public places. He requires deep pressure massage in the thighs around the groin area, inner thigh and legs to stop the intense spasming. The spasming occurs on a regular basis. The legs tighten up so bad that it makes him cry from the symptoms. He frequently get the severe spasming at least ten times in a day.

6. He tried pain medications but they would make him moody, could not think so he discontinued using them, especially since he did not want to be addicted to them.

7. Claimant relies on his domestic partner of approximately 14 years to assist him with dressing, getting in the shower, preparing his meals, washing his clothes, and basically all the chores he used to do around the house. Claimant states he has become a burden on his domestic partner, including relying on her to do most of the child care, especially if it is a bad day form him.

8. When Claimant has spasming in his low back or lower extremities, he will call his partner and she will massage the body part, whether it is his low back or his shin or his inner thigh or even his ankle, which causes his foot to turn sideways. He noted that

sometimes the spasming is so bad that he will sweat and cry, becoming somewhat claustrophobic, from the intensity, but his partner always knows what to do, how much pressure to apply in releasing the spasming muscle and provide him some relief. When he has these episodes, they are so extreme that he will frequently fall asleep, exhausted, after the massage session. Some of the worst episodes occur in the middle of the night, and they are generally sporadic and spontaneous. He cannot predict when they will occur but he has them every few hours generally.

9. Claimant explained that when his partner is not available to help him during a spasming episode, he uses tools but rarely is able to help relieve the pain very much other than slightly until she returns and can help him with massage, putting her full body force, sometimes even having to use her knee to dig into the muscle to release the spasming muscle. It is most embarrassing when he has a spasming episode in public places, especially if the spasming is in his upper thigh/groin area.

10. His domestic partner has had to take on the greater part of difficult activities of daily living, such as assisting him into the tub to shower, washing his lower half of his body, dressing the lower half of his body, preparing meals, fetching him water or things he needs, perform all household chores like laundry, cleaning and taking care of the children. Claimant believes he is a burden to her. If he attempts to perform these activities on his own, like reaching to put on his socks, he has immediate onset of spasms in his legs. Regardless, he tries his best to be as mobile as possible, does some weight bearing in order to ward off onset of thrombosis and keep nerves firing. Claimant explained that when he places weight on his right leg he frequently has sharp, stabbing, pressurized, throbbing pain going down his leg. Claimant's way of walking changes, depending on the type of pain he is experiencing on any particular day.

11. Claimant stated that he does drive but only for short distances. He started very slowly in 2019, progressing from just driving the car on the driveway, to going around the block, to going to the bank or store that are a few miles away. But he does have to be very careful because if his legs starts spasming, he knows he can be in a dangerous situation. He has also tried to be as mobile as possible though he keeps his crutches with him at all time, trying to progress to a cane but he has been unsuccessful to date.

12. Claimant agreed that he has had physical therapy and medications that did not work and that he declined to proceed with injections, as Dr. Andrew Castro had advised him that they would not work on him because there was too much scar tissue in his low back. Claimant has chosen to manage his pain symptoms with medicinal cannabis and deep tissue massage that his partner does for him.

13. Claimant and his partner both testified that she would leave Claimant on his own when she was performing necessary shopping or taking care of the children. However, while Claimant could manage for short periods of time without her assistance, using the tools at his disposal, he would frequently call her and request she return to assist him, especially if it was a particularly hard day with severe spasming in his back or legs. His partner stated that she had received family tickets to see a game, but had to give them away because she was unable to leave Claimant for such a long time.

14. This ALJ noted that Claimant was extremely emotional and his composure altered while testifying at hearing.

15. The video surveillance of Claimant, which was approximately 24 seconds long, showed Claimant was seen looking out his bathroom window, walking on his porch while holding his crutches, with only a very slight limp favoring his right leg and showed Claimant driving.[1]

16. Claimant's domestic partner testified at the hearing that she has been with Claimant for approximately fifteen years and have three children together, but has only been living with Claimant for the last seven years. She stated that she would help Claimant get somewhat comfortable because, right after Claimant's injury he was in excruciating pain, and had difficulty with thought processing. She would bathe him, dress him, and feed him, trying to make him comfortable. She would also take him to appointments and helped him understand what was happening to him. At the time, she had been continuing her education and home schooling her daughter, but had to drop out because she could not keep up. She would attend Claimant's massage appointments with Rachel Moore, PT and watched Ms. Moore would do to then help Claimant with the frequent spasming when he was at home. She also received some training from the staff at Craig Hospital.

17. Claimant's partner has continued to do deep tissue massage and myofascial release on Claimant to this date, approximately ten to twelve times a day, depending on his level of activity. She will typically have to intervene a couple times at night but she does the therapy, including his leg stretching and massage early in the morning and late into the evening to make sure to ward off the spasming for a while, taking a proactive approach. If she does not do this, Claimant will have spasms and cramping a lot more frequently throughout the day. The morning and evening sessions lasts around one and one half hour, other sessions are shorter between five to fifteen minutes depending on the cramp or spasming level and the activity Claimant is involved in. However, if he has an episode in the middle of the night, or during the day while his partner is away for a few hours, Claimant would require a really long massage session. She continues to help him with meal preparation, showering, dressing, and she has to do the laundry, especially his sheets because Claimant has night sweats frequently. She helps because she has observed how hard it is for Claimant when he tries to do anything that requires him to extend his arm out, causing increasing back problems. She also has to mount the lift onto their vehicle in order to take the scooter with them if they have a family outing, as well as carry out his wheel chair or scooter. She does all the domestic tasks, like carry groceries, taking out the trash, child care, household chores and meal preparation. She even has to wash his feet and clip his toenails.

18. Claimant's partner testified that she was taught by Rachel Moore and the therapists at Craig Hospital how to release the muscles when they are spasming, in order for the nerves to get oxygen. They did so by showing her what to feel for and how much pressure to put into the massage, in order not to injure Claimant. While she does not hold

[1] Respondents' Exhibit K, the video surveillance was presented during the hearing and was admitted into evidence. A hard copy of the video was submitted to the OAC.

herself out to be an expert, she has been giving Claimant massages that help with the spasms since his injury.

19. Claimant was seen by Rachel Moore, PT, from December 2015 through April 2015, frequently documenting a slow and guarded gait and significant hyposensitivity on the right in the lumbosacral spine, as well as an absent S1 Achilles reflex and an intolerance to prolonged positioning. Her main goal was to decrease pain and reduce spasms. Treatment included e-stim, modalities, hot packs, manual therapy to lumbar paraspinal muscles and along the sciatic nerve path.

20. Claimant's authorized treating physician (ATP), Bennett I Machanic, M.D., placed Claimant at maximum medical improvement (MMI) on July 25, 2017.

21. Terry Young, an occupational therapist at Starting Point performed a functional capacity evaluation (FCE) dated October 3, 2017, stating that markers for consistency showed Claimant put forth full effort and indicated no symptom exaggeration. Following testing she found Claimant was limited to sitting for 5-45 minutes, stand from 0-5 minutes and walk only for very short distances due to onset of spasming and increased pain. She noted that he could not bend, crouch, squat, kneel, crawl, or climb stairs. He could not reach above shoulder level and any reaching forward to perform functional tasks for more than a few seconds to a few minutes is extremely limited due to the onset of muscle spasms.

22. In her report of, she documented that the Claimant suffered from pain and muscle spasms in his legs during the testing which were palpable and so severe that Ms. Young had to massage his legs and at one point, Ms. Young had to use both knees on the Claimant's hamstrings to get the spasms to stop. Ms. Young stated that despite multiple attempts on the part of the Claimant to perform any type of productive task during the FCE, he was simply unable. Ms. Young noted that Claimant had no ability to engage in home making chores, family activities, and social functions in any consistent or reliable way. She said that reaching, leaning forward, standing or any type of activity, no matter how sedentary, would prompt spasms within minutes. Even simple reaching caused Claimant to go into painful muscle spasms. Ms. Young noted that Claimant "continues to rely on his wife for assistance with all aspects of care including providing meals, assisting with bathroom transfers, transportation, childcare, and cleaning his lower body," stating that Claimant "relies solely on his wife and has no other caregiver assistance." Ms. Young remarked that Claimant "seldom drives, and it is only to get out of the house and maybe go to the ATM." Ms. Young ultimately opined that Claimant "will require high levels of care life."

23. Dr. Jeffrey Kleiner evaluated Claimant on October 25, 2017, findings significant abnormalities on exam including severe lumbar spine pain and lower extremity cramping with motion, dense numbness below the right knee level, reduced sensation to the level of the groin, decreased sensation to the knee, paraspinal spasms bilaterally and while FABER test was negative, it elicited paraspinal lumbar spasms.

24. Dr. Machanic issued a report on November 27, 2017 that stated that, based on the EMG testing he performed, Claimant had nerve abnormalities at the L5 and S1 levels in addition to scarring, with the right side being worse than the left. He noted that

the nerves were not completely dead, but they were not vigorous either, stating that the H reflexes were not functioning well and that Claimant did not have normal voltage over the peroneal nerve. He opined that there were no real treatment options to restore the nerves to normal function and that the problems were likely permanent. He opined that Claimant required help with activities of daily living and would need assistance for the rest of his life.

25. On February 27, 2019 Dr. Machanic noted that Claimant also had severe weakness of the right leg, stating that massage therapy works well to alleviate some of the pain and spasms and he requires it to maintain his status quo, though it is temporary. On exam he noted that Claimant had foot drop on the right, decreased strength in the L5 distribution, reduced sensation and reduced reflexes. He also recorded some allodynia. Dr. Machanic remarked that the delay in proceeding immediately with surgical intervention caused Claimant's catastrophic disability.

26. Claimant was also evaluated on May 28, 2019 by Dr. Machanic who observed that Claimant's condition was not changed, appeared depressed, withdrawn, and frustrated. He had loss of sensation in the L5 distribution, had weakness in the gluteus medius, tensor fascia lata and foot dorsiflexors. He stated that he had no objection to Claimant using cannabidiols or cannabis tea but also prescribed diclofenac ointment and lidocaine patches. In fact, Dr. Machanic recommended that Claimant continue with cannabidiols and cannabis preparations on January 6, 2020. He also noted on exam that Claimant attempted to stand and had shooting pain down his right leg, causing him immobilization and in turn causing his right lower back to go into spasm. Straight leg raise was impossible to achieve and he had weakness of the right foot. Lastly he observed that Claimant had worsened allodynia and was very impaired.

27. On June 16, 2020 Ms. Young performed a second FCE, where she noted that "]I]t was evident that his [Claimant's] tolerances for sitting, standing, walking, and performing any functional activities using his arms have not changed and he continues to be intolerant of work activity." Ms. Young observed severe muscle spasms in his hamstrings which were also observed during testing in 2017." She noted that when sitting, Claimant must use his arms to push down and relieve pressure off his buttocks/spine, rendering them unusable for functional or sedentary tasks and that standing and walking were still severely limited. She recommended 24 hour caregiver services as Claimant required assistance with most all ADLs, including manual therapy to reduce muscle spasms, as well as an adjustable bed, replacement shower bench, and a track chair.

28. Dr. Rasheed Singleton took over as ATP for Claimant on October 8, 2020. Dr. Singleton discussed potential treatment options but Claimant elected to continue to maintain his status with cannabis products. On exam he noted abnormal findings in the lumbar spine, with diminished sensation in the left lower extremity and negative Waddell's testing. Dr. Rasheed documented that Claimant continued to complain of lumbar spine and lower extremity spasms. He documented on multiple dates that Claimant was awaiting durable medical equipment (DME) that Dr. Rasheed ordered but Claimant had not received. He also documented similar findings on exam during subsequent medical visits, including lumbar spine tender to palpation, and abnormal sensation. On

September 8, 2021 he noted that Claimant had lumbar paraspinal muscles spasm and spasticity in the legs. He also recommended a new PT evaluation.

29. Dr. Singleton issued an undated letter which stated that Claimant required home health care assistance 24 hours per day as a result of the on the work injury. Respondents indicated that they received this letter on December 6, 2021. Dr. Singleton noted that Claimant's domestic partner was currently providing Claimant's home health care and massage therapy, and that someone needed to continue to do so for Claimant. He specifically documented on September 8, 2021, that Claimant's partner was providing approximately eight hours of home care to Claimant, including for home exercise and ADLs.

30. On February 3, 2022, Claimant attended an independent medical evaluation (IME) with Dr. Fall, upon Respondents' request. She reviewed Claimant's medical records and examined Claimant. Dr. Fall observed Claimant walking down a hall and noted that he had the ability to go up and down stairs without assistance. Dr. Fall noted a benign examination and diagnosed Claimant with a chronic pain disorder associated with psychological issues.

31. Dr. Singleton testified at hearing and stated that he was a pain medicine specialist of fifteen years' experience with a fellowship at Stanford University. He had approximately 500 chronic pain patients that he was currently treating. Dr. Singleton was qualified as an expert in pain management and pain medicine. Claimant became Dr. Singleton's patient pursuant to his prior ATP's referral, upon retirement. He documented Claimant had lumbar radiculopathy as a main and prominent diagnosis.

32. Dr. Rasheed noted that Claimant's symptoms included severe pain across his low back, shooting pains, numbness, tingling, electrical-type shock sensations, ongoing cramping and spasms throughout his lower extremities to his feet, all of which are typical for patients with radiculopathy, including derangement or abnormality within the lumbar spine caused by nerve compression. Dr. Rasheed stated he had discussed multiple options for treatment with Claimant, including but not limited to epidural steroid injections, lumbar sympathetic blocks, spinal cord simulator trials, Gabapentinoids, Lyrica, and opiate medications, but documented that Claimant wished to stay with the massage and manual therapy because they had been of the most benefit to him. He explained that massage therapy would break through the muscle spasms by increasing blood flow to the area and allow for the muscle to stretch and release in large muscle groups.

33. Dr. Rasheed explained that throughout all his visits with Claimant and his domestic partner, that Claimant was very dependent on his partner for his activities of daily living. He stated that to remain somewhat functional, Claimant required the physical therapy, manual therapy, massage treatment sessions his partner performs for him throughout the day and into the evening. Based on the totality of evidence before Dr. Rasheed, he concluded that Claimant required assistance, whether it was from his partner or another source, to maintain his level of functionality. Dr. Rasheed opined that Claimant requires home health care assistance for therapy and activities of daily living. He dis stated that it would be best for Claimant to have a professional provide the therapy,

instead of his He stated that the need for home health care was causally related to the October 2015 workplace accident.

34. Dr. Rasheed detailed that factors he looked at are Claimant's ability to accomplish his activities of daily living, including grooming, bathing, changing, upkeep of his home, and ability to feed himself, as well as his medical needs. He stated that, due to the difficulties that Claimant has, during the night especially, with severe spasming, a 24 hour home health care provider would be appropriate to alleviate Claimant's partner's burden of taking care of Claimant. However, it need not be the full 24 hours as a professional licensed therapist may be able to alleviate the amount of treatment he may require during the day. In light of this, Dr. Rasheed opined that Claimant would require at least a 12 hour per day home health care and attendant care services, including the massage therapy.

35. Allison M. Fall, M.D., a board certified physician in physical medicine and rehabilitation, was accepted an expert in that field. Dr. Fall noted that she had examined Claimant on February 3, 2022, and reviewed his medical records. She opined that Claimant did not require either a physical therapist or home heath attendant care services because he needs to learn self-management and use self-management techniques such as use of foam rollers, a Theracane or a Theragun to perform his own massage to alleviate pain as well as learn to perform all activities of daily living on his own as he had no impairment of his upper extremities. She suggested Claimant use techniques of "biofeedback or mindfulness or whatever to – for relaxation, given that he doesn't want to utilize any medications." Dr. Fall further witnessed Claimant crying out in pain during the evaluation, and had his partner get up on the exam table with him to put pressure on Claimant's adductor upper thigh, inner thigh muscle using both her elbow and her knee, to put deep pressure. Despite witnessing this, Dr. Fall did not stop her from performing the muscle spasm release or indicate she took any steps to admonish this activity. Yet she criticized the practice of an unlicensed and untrained individual performing such tasks stating that Claimant did not require the service and should turn to more traditional chronic pain treatments.

36. Dr. Fall did concede that someone with radiculopathy can have lower extremity pain, cramps and spasms, but it is not common for a chronic pain patient out of the acute phase. She stated that for someone that has radiculopathy, the sporadic cramps and spasms can interfere with their ADLs. She stated that she had no evidence that massage therapy relieved or alleviated Claimant's spasm. She agreed that Claimant's current chronic pain condition is related to the October 2015 accident.

37. As found, Dr. Singleton is more persuasive and credible in this matter than Dr. Fall. The medical records document a long history of providers noting muscle spasming. In fact, Ms. Young, while conducting the FCE had to specifically treat the Claimant to relieve the spasming so that she could conduct the FCE, which was valid. Dr. Machanic and Singleton also have noted decreased sensation and mobility limitations. Claimant credibly testified that he required and needed assistance at home to carry out his activities of daily living. Dr. Fall's opinion that only those with severe brain injury and spinal cord injuries should be entitled to home health care or attendant care services is not credible. Claimant clearly continues to suffer from the effects of the injury, which his

providers have stated are permanent neurological impairments that affect his ability to carry out activities of daily living, and requires assistance to maintain and relieve him of the effects of the injury. Claimant has shown by a preponderance of the evidence that he is entitled to home health care including both for massage therapy in order to maintain his level of function and to attendant care to assist with activities of daily living.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131,

134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Respondents have a right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, *supra*. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*; *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and

reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C. No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Here, Claimant's claim for compensation was previously found compensable by ALJ Jones and was permanently totally disabled by a serious lumbar spine and radicular medical condition as found previously by ALJ Felter. The work related injury causes multiple intermittent muscle spasming throughout the day that seriously incapacitates Claimant from being more functional. From the time Claimant was placed at MMI, his life partner has been providing Claimant with the needed attendant care and massage therapy in order to reduce critical spasms that occur throughout the day and night. Claimant and his partner credibly testified that Claimant is able to alleviate some of his own spasming, to warding off the ultimate imminent progression of spasming, by self-care or self-treatment with a thera cane and other tools, but requires someone's assistance, especially if the spasming is severe or involves massaging his lower extremities. They both also credibly testified that Claimant requires assistance to get into the tub, bathing his lower extremities, dressing his lower body, travel to his medical appointments, and performing most activities of daily living, including shopping, making meals other than simple fare, washing his clothes and bedding, which he requires on a frequent basis due to night sweats, and generally taking care of the household and child care duties.

Dr. Rasheed credibly testified that Claimant required attendant care services to relieve his partner of some of the duties she now performs for Claimant, which need is caused by the work injury. He stated that Claimant requires dedicated massage therapy to assist Claimant in relieving the significant and chronic muscle spasming, especially in the thigh, groin area and calves. While Dr. Rasheed prescribed 24 hours of attendant care, seven days a week, to include massage therapy, he testified that the more critical times are the twelve hours between 7 p.m. and 7 a.m. The question, however, that needs to be answered is if such services would be available. It is clear from Dr. Rasheed's testimony that Claimant's domestic partner should not be burdened with all of Claimant's care related to the workers' compensation injuries. However, some of the chores and care directly affecting Claimant should be compensated. Whether it is Claimant's partner or an outside facility, Respondents are liable for care that is reasonably necessary and related to the injury. Here, it is found that, from the totality of the credible evidence, Claimant's partner or an outside provide should be providing for at least 5 hours a day seven days a week of attendant care service, which is found to be reasonably necessary and related to the injury. In addition, Claimant should be attended by a professional massage therapist up to twice a day for up to one and one half hour per session, which is also found to be reasonably necessary and related to the injury. This would provide for approximately eight total hours of care per day.

While Dr. Fall testified that seven years after the work injury, Claimant should be providing himself self-care, and not require attendant care services, this is not found

persuasive. Claimant credibly testified that Claimant's spasms are so bad that they immobilize him and he needs help with deep tissue massage. This is supported by the medical records in this matter that describe a severe injury. See Dr. Machanic's records of January 6, 2020. This is supported by his partner's testimony as well, who credibly testified that she provided both massage therapy and deep tissue massage, frequently in the middle of the night when Claimant wakes up with his leg in such severe spasms that his foot would be turned out and had to be massaged back into place. While Claimant has demonstrated to both Dr. Rasheed and Dr. Fall that he is able to ambulate with and without assistance, he credibly testified that he has difficulty when he places pressure on his right foot and the pain can be excruciating. Claimant has shown by a preponderance of the evidence that his work related injury results in severe limitations of activities of daily living and muscle spasming and Claimant requires assistance to relieve him from the effects of the work related injury. The muscle spasming and limitation are proximately caused by the admitted work injury in this matter as testified by both Claimant and Dr. Rasheed. Dr. Rasheed is found more credible than Dr. Fall in this matter and Claimant has shown that it is more likely than not that continuing home health care should include attendant care services and professional deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner for the services she is currently providing.

Respondents argue that Claimant failed to properly raise the issue of any amount of time for home health care services less than 24 hours per day, seven days a week. This ALJ disagrees. Nowhere on the Application for Hearing does Claimant state how much time he is requesting for home health care services that are reasonably necessary and related to the injury, only that the issue of home health care was an issue set for hearing. Claimant was relying on the request sent by his ATP that recommended the home health care or attendant services for 24 hour care. There are always two avenues to obtain reasonably necessary and authorized medical benefits that are related to a claim. The first is established by W.C.R.P. Rule 16 by a request for prior authorization. The second is to pursue the benefits by applying for hearing to obtain a judicial determination. Further, there was no objection to Dr. Rasheed's testimony when he stated that less than the 24 hour care might be required, "a minimum of ten or 12 hours, perhaps, in that, in that timeframe." In fact, Dr. Fall testified extensively that Claimant did not require any home health care services. It is found that Respondents had notice and an opportunity to be heard in this matter. Respondents' objection to having this ALJ address the issue of quantity of home health care services is overruled.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for home health care services to assist Claimant with activities of daily living up eight hours a day that are reasonably necessary and related to the work injury of October 23, 2015. This shall include both therapy and

attendant care services to relieve him from the effects of the October 23, 2015 work related injury.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 2nd day of May, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-145-493-004

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury to his back on July 16, 2020.

II. Whether medical treatment Claimant received from Joint Chiropractic was authorized.

STIPULATIONS

- The parties stipulated to an Average Weekly Wage of $1,056.00.
- The issue of temporary disability benefits (TTD/TPD) was reserved for future determination.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Medical and Procedural History

1. Claimant is a 59-year-old equipment delivery driver who alleges he sustained an injury to his back on Thursday, July 16, 2020, while driving. Claimant did not experience the onset of symptoms until Friday, July 17, 2020, after he got off work and started pulling weeds at home. Respondents' Hearing Exhibits (RHE) B at 8. Claimant did not report a work injury on Thursday July 16 or Friday July 17, though he worked full shifts on both days. Claimant was subsequently off work for a vacation (July 19 through July 25, 2020). Hearing Transcript (Tr.) at 52.
2. Claimant had prior instances of ambiguous onset of back pain, dating back to 2015, which resolved with brief treatment. RHE 63. Claimant had a minor back injury on November 15, 2019, approximately nine months before the onset of similar pain for this alleged injury. RHE 66. Treatment for this injury ended on December 3, 2019, approximately seven months before this alleged injury. RHE 73.
3. Text messages between Claimant and his supervisor, JB[Redacted], reflect no work-related reports of injury or pain from the period from July 15, 2020, and before July 27, 2020. RHE C at 28-31.
4. On Monday, July 20, 2020, Claimant emailed Kayla Squires at John Hopkins Clinic, complaining of sciatic pain in the right leg. RHE D at 70. Claimant stated that he was "currently on vacation and had completed some stretches recommended from an internet search." *Id*. Claimant stated that he could barely walk and that the "pain got worse after Friday." *Id*. Ms. Squires stated that Claimant may get the most relief by seeing a chiropractor. *Id*. It was noted that Claimant would be leaving for California that evening.

5. The same day, on July 20, 2020, Claimant presented to The Joint Chiropractic and was evaluated and adjusted by Dr. Patrick Hailey. Claimant reported right lower back and leg pain but denied radiating pain in either extremity, numbness, tingling, or any other neurological signs. RHE D at 55. Claimant denied any recent surgery, accidents, hospitalizations, or fractures. *Id*. Claimant did not state the onset of pain at work or mention a mechanism of injury. Despite Claimant alleging he was injured at work just four days earlier - July 16, 2020 - Claimant filled out an intake form specifying his symptoms first began approximately one month earlier. RHE D at 51.

6. Claimant left for California on Tuesday, July 21, 2020. RHE B at 8. Claimant claims his symptoms increased and that when he returned on Monday, July 27, 2020, he felt like there was no way he could work so he let his employer know. *Id*.

7. On Monday, July 27, 2020, Claimant contacted the Pepsi JOBHURT hotline and reported a work-related injury. RHE C at 32. Claimant reported that an injury had occurred on July 16, 2020, at 9:00 a.m. The incident description states that: "While driving the tractor, the seat did not have air in it, the EE hit a pothole on Washington Street, near I70, went airborne and landed very hard on the seat. The EE is feeling pain in his right upper leg and right lower leg." *Id*.

8. Claimant subsequently called his supervisor, JB[Redacted], on July 27, 2020 and reported a work injury. Tr. at 54. Claimant was not sure how he injured himself, stating he may have hurt his back pulling weeds or bouncing on his truck seat. *Id*.

9. Claimant was given a list of designated providers pursuant to W.C.R.P. 8 and chose the John Hopkins Clinic/Pepsi Wellness Clinic. RHE C at 33.

10. On July 28, 2020, Claimant presented to Jennifer Pula, M.D., at the Wellness Clinic for initial evaluation. RHE D at 75. Claimant reported pain in the right leg. *Id*. Claimant stated that he thought the injury happened on Thursday July 16, when he either drove over a pothole or bump, without air in his seat, causing him to land hard and awkwardly. *Id*. Claimant reported "he did not notice anything until Friday afternoon when he went to pull weeds in his yard, then he started noticing pain in his leg." *Id*. Claimant stated, "he did not connect that it could have been connected with the hard landing after hitting the bump in the road, until Monday when he went to see a chiropractor." *Id*. Claimant also reported that "he did not feel an initial injury" and the pain started "the next day [when] he was home pulling weeds when he felt a pain in his right leg/calf." RHE D at 76. It is noted that Claimant was in California from July 21 through July 25, 2020, and felt pain the entire time. *Id*. X-ray studies of the lumbar spine showed mild degeneration, most pronounced at L2-3. RHE D at 77. The sacrum and coccyx were unremarkable. RHE D at 87. Claimant was given restrictions and referred for physical therapy. RHE D at 77.

11. Claimant returned to Dr. Pula on August 6, 2020, where it was noted he had attended physical therapy and continued with the chiropractor. RHE D at 80. It is further noted that Claimant returned to work Tuesday and felt good but was back to where he was before on Wednesday. *Id*. Claimant continued to work under restrictions during the course of treatment at the Wellness Clinic.

12. Respondents filed a Notice of Contest on August 17, 2020, stating a non-related injury. RHE A at 5. Respondents denied further medical care after this time. Claimant's last

treatment at the Wellness Clinic was on August 12, 2020, at which time he was still working under restrictions. RHE D at 83.

13. Claimant subsequently treated through his personal care provider at Kaiser Permanente. On August 20, 2020, Claimant presented for treatment of the back, and it was stated he had been having low back pain/right buttock pain for the past month, radiating down the right let to the ankle. RHE D at 108-110. It is noted that the pain improved from the initial injury but had not gone away. *Id*. Claimant was referred for neurosurgical evaluation.

14. On August 26, 2020, Claimant presented to Zachary Hutzayluk II, M.D., for neurosurgical assessment. RHE D at 113. It was stated that Claimant's back pain was worse since July 17, 2020. *Id*. Claimant reported on July 17, 2020, there was pain after work, severe enough that he couldn't pull weeds. RHE D at 115. Claimant stated that there was "Initially a sharp shocking pain that went all the way down the right leg. Now more of a dull aching pain in the right buttocks." *Id*. An MRI was ordered.

15. On September 8, 2020, Claimant returned to Dr. Hutzayluk and it was indicated he was on light duty from July 17 through August 16, 2020 but had been unable to return to work since because of severe pain. RHE D at 120. It was noted that the pain was "radiating more up into buttocks" than at first. *Id*. It is further noted that "Acute low back pain can be caused by a number of things, but most commonly occurs when you overstretch or pull a muscle in your back." RHE D at 121.

16. An MRI of the lumbar spine from October 21, 2020, showed an L4-5 focal right lateral recess extrusion contacting the right L5 nerve roots. RHE D at 153. There was no other impingement identified. *Id*.

17. On November 23, 2020, Claimant underwent an epidural steroid injection (ESI) at Kaiser at L5-S1. Claimant's Hearing Exhibits (CHE) 5 at 111. Claimant subsequently underwent lumbar traction therapy. CHE 5 at 116. On December 10, 2020, Claimant reported that he was improving each week and would try to return to work for the Employer late next week. *Id*. Claimant returned on December 15, 2020, and reported that the traction had been helpful and that he continued improvement. *Id*. Claimant was still not working but hopeful to return that Thursday. CHE 5 at 119.

18. Claimant returned to work December 12, 2020, and has been working since.

19. Carlos Cebrian, M.D., performed an IME on October 8, 2021. Claimant reported he first developed symptoms on Friday, July 17, 2020, at 5:15 p.m., shortly after he had returned home from work. RHE B at 7. Claimant stated he stopped to pull some weeds that were in the driveway, spent five minutes doing that, and when he attempted to bend down, he noticed that he had pain down his right leg. *Id*. Claimant denied any back pain. *Id*. Claimant stated that he was trying to think about what may have caused these symptoms and recalled that the day prior, Thursday July 16, he hit a bump while driving his work truck, which had no air in the seat, and went down and hit the frame. *Id*. Claimant reported he felt jarred but did not have pain at that time. RHE B at 8. Claimant denied any symptoms until the next day when he was pulling weeds. *Id*. Claimant reported that by mid-December 2020 he was pain free and able to return to full duty on December 21, 2020. *Id*. Claimant stated he never really had any back pain and it was all in his right

leg. *Id*. Dr. Cebrian noted that Claimant had a lumbar strain in November 2019, for which he treated for two weeks and reported resolution of pain without symptoms. *Id*.

20. Dr. Cebrian opined there was no work-related injury from July 16, 2020. Dr. Cebrian stated the mechanism was minimal and there was not sufficient force to cause an injury, occupational disease, or acceleration to the lumbar spine to aggravate a preexisting condition. RHE B at 25. Dr. Cebrian noted that the timeline of the onset of symptoms did not correlate with the timeframe claimed for the injury, referencing no pain at the time of the reported injury but an onset a day later with a non-related mechanism. *Id*. Dr. Cebrian also noted that Claimant told The Joint Chiropractic on July 20 that his symptoms had been present for about one month. RHE B at 26. Dr. Cebrian noted that Claimant had non-related risk factors for low back pain, including a BMI of over 30. Dr. Cebrian concluded that Claimant could work in a full and unrestricted capacity and further treatment under worker's compensation was not medically reasonable, necessary or related. *Id*.

Testimony of Claimant

21. Claimant testified that on July 16, 2020, he drove over a pothole in his truck and it threw him into the air, and the air in his seat was not enough to cushion his fall so he bottomed out "on the bottom of the cab" and basically came down on metal and metal. Tr. at 27. Claimant testified that he felt a shock in his vertebrae but was able to continue working "somewhat pain-free." *Id*. Claimant testified that "it hurt" but subsided immediately. Tr. at 39-40. Claimant did not report an injury on this date. Tr. at 40. This contradicted Claimant's statement in interrogatory responses that indicated that he did not feel pain until the next day. Tr. at 43.

22. Claimant worked on July 17, 2020, and did not report an injury. Id. Claimant did not have symptoms until he was off work and got out of his vehicle to bend down. Tr. at 44. Claimant was not on shift at this time. *Id*. Claimant testified he returned home and was going to bend over to pull some weeds on his driveway but couldn't bend without straightening his leg and "practically had to lay on the ground and get it." Tr. at 28. Claimant testified he was feeling pain in his leg. *Id*. Claimant testified he then went on vacation and didn't report any injury until he returned from vacation. Tr. at 45.

Testimony of JB[Redacted]

23. Mr. JB[Redacted] is Claimant's supervisor at the Employer. Tr. at 48. Mr. JB[Redacted] did not receive notice of the injury until July 27, 2020. Tr. at 49. Claimant called JOBHURT to report the injury on the same day, before reporting the injury to Mr. JB[Redacted] and contrary to Pepsi policy. Tr. at 50. Mr. JB[Redacted] testified that all employees are trained in how to properly report injuries. *Id*. Mr. JB[Redacted] testified that he did not have any interaction with Claimant on July 16, 2020, and did not receive any communication until the next Friday, via text, at which time Claimant did not report any work injury or pain. Tr. at 50-51.

24. Mr. JB[Redacted] testified he wasn't aware of any issues with the truck in question and that all DOT drivers are supposed to do quality checks every morning and report any vehicle issues right away. Tr. at 51. Mr. JB[Redacted] testified that there was another

employee that also drove the same truck and did not report any problems with the vehicle or seat. Tr. at 52-53. Mr. JB[Redacted] testified that Claimant had been driving the same truck up until approximately January/February 2022. Tr. at 53. Claimant had no further complaints about the truck during this time. *Id*.

25. When Claimant reported the injury to Mr. JB[Redacted] on July 27, 2020, he stated he wasn't sure whether he hurt his back at work when the air went out in the seat or if he hurt his back pulling weeds at home. Tr. at 54. Mr. JB[Redacted] gave Claimant a Rule 8 letter upon report. *Id*. Claimant chose John Hopkins/Pepsi Wellness Clinic as the treating provider. RHE C at 33. Mr. JB[Redacted] testified that Claimant worked light duty after the report but was unaware of any lost time. Tr. at 55.

Testimony of Carlos Cebrian, M.D.

26. Dr. Cebrian testified he took a history of the injury from Claimant and that Claimant reported the first onset of pain was when he went to bend to pick up weeds and experienced pain in the right leg. Tr. at 58. Dr. Cebrian testified the initial symptoms did not include back pain. Tr. at 59. Claimant reported he believed he injured himself the day prior, on July 16, 2020, but didn't describe having pain on that date. *Id*.

27. Dr. Cebrian described the MRI from October 21, 2020, as showing an L4-5 disc protrusion contacting the right-sided L5 nerve root. Tr. at 60. Dr. Cebrian testified that there were no acute findings, and that the protrusion was unrelated to the incident on July 16, 2020 described by Claimant. *Id*. Dr. Cebrian concluded that the mechanism was minor and insufficient to cause a protrusion or aggravation of the nerve root. *Id*. Dr. Cebrian testified that if there was an injury, this would have manifested itself earlier than it did for Claimant. Tr. at 61. Dr. Cebrian testified that he felt what was most important was that Claimant did not initially attribute his symptoms to any event on July 16, 2020, but only attributed the alleged air seat event in retrospect weeks after the onset of pain. Tr. at 62. Dr. Cebrian concluded that the cause of the pain was due to non-related factors, including age, obesity, and a diabetic condition, which increases risk of degeneration. Tr. at 63. Dr. Cebrian testified that with degeneration of discs, most people become symptomatic at some point in time and the onset was incidental to pulling weeds. *Id*. Dr. Cebrian credibly concluded that there was no association with what happened on July 16, 2020, and Claimant's back pain. *Id*.

28. The ALJ finds that Claimant developed back pain about a month before his alleged injury. The ALJ further finds that Claimant developed additional back pain and injured his back on July 17, 2020, while pulling weeds at home. The ALJ finds that Claimant did not injure his back on July 16, 2020, while driving his work truck.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at

a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury to his back on July 16, 2020.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant alleges he suffered a work-related back injury with corresponding right leg radicular pain on July 16, 2020, after driving over a pothole in his work truck. It is apparent from the records and testimonial evidence that Claimant experienced the first onset of pain on July 17, 2020, after work was finished when he arrived home and was pulling weeds in his driveway. While Claimant claimed at hearing the first onset of pain occurred after bouncing on the seat of his work truck on July 16, 2020, this is contradicted by his own prior statements in interrogatory answers and medical records. Claimant did not posit a work-related mechanism from the July 16 pothole incident until July 27, 2020, when he first reported the incident to the Employer. In the interim, Claimant was on vacation and had stated to Kayla Squires, PA, that he experienced pain after stretching.

Claimant's first treatment was with The Joint Chiropractic during the time he was on vacation. Claimant denied any specific injury as the cause of back pain. He did not state a mechanism of injury or onset. He stated he had no work-related mechanism and instead stated the onset of pain one month before July 20, 2020, which would have been nearly a month before the claimed July 16, 2020, onset.

Claimant did not report an injury on the date of alleged onset. Instead, Claimant reported a work-related injury on July 27, 2020, after his return from vacation. Claimant's report was in violation of company policy, as it was made first to JOBHURT and then to his supervisor. Claimant did not report any defect in the vehicle before the report of injury. Claimant's colleague drove the same truck during the entire time Claimant was on vacation and reported no defect in the air seat. Claimant subsequently drove the same truck through January/February 2022 with no report of defect or further incident or aggravation, though the vehicle had no known repairs in the seat.

Dr. Cebrian persuasively testified that the timeframe regarding the onset and manner of Claimant's pain complaints were significant in the consideration of causation. The ALJ finds that this portion of his opinion is supported by the fact that Claimant reported the onset of back pain about a month before his alleged injury as well as the day after the alleged injury while pulling weeds. As a result, the ALJ finds persuasive Dr. Cebrian's ultimate conclusion that Claimant did not suffer an injury while driving his work truck.

The ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury at work on July 16, 2020.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise,

the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right upper extremity arising out of the course of his employment with Employer on or about October 5, 2020.

2. Whether Claimant proved by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits causally related to a work-related injury, including past medical benefits.

3. Whether Claimant proved by a preponderance of the evidence an entitlement to temporary total disability benefits from December 24, 2020 through May 4, 2021.

4. Determination of Claimant's Average Weekly Wage.

STIPULATIONS

The parties stipulated to the following facts:

1. The parties stipulated that Claimant's average weekly wage is $1,433,23, with a TTD rate of $955.49.

2. Claimant was released to full duty on May 4, 2021.

3. If the Claimant is found compensable, Mark Fitzgerald, M.D., is an authorized treating physician.

FINDINGS OF FACT

1. Claimant is a 64-year-old right-hand-dominant male who was employed by Employer as a crane operator. Claimant has been employed by Employer on and off for approximately 22 years.

2. Claimant alleges that on October 5, 2020, while working for Employer, he was throwing a canvas rigging strap over a large crane boom that was loaded on a trailer when he heard a "pop" in his shoulder, resulting in a sharp, severe pain in his upper, right arm. Claimant testified he was unable to lift his right arm above shoulder level after the injury.

3. Claimant testified that the injury occurred after his last load of the day, and that he reported to supervisor TS[Redacted] that he "tweaked" his shoulder. Claimant testified that Mr. TS[Redacted] told Claimant to tell another supervisor, DB[Redacted], and that Mr. DB[Redacted] advised Claimant to report the incident to SB[Redacted], the safety manager. Claimant testified that he spoke to Mr. SB[Redacted] 2-3 days later at a safety meeting, and that Claimant told Mr. SB[Redacted] that he (Claimant) needed to complete

paperwork. Claimant testified he continued to request "paperwork" to report his injury, but it was not provided to him until December 2020.

4. Employer's policy requires that after a work-related accident, a written report is to be completed. Approximately six months earlier, in March 2020, Claimant reportedly sustained an injury to his lower back while moving a piece of equipment in the course of is employment. The incident occurred on March 27, 2020, and Claimant completed the incident report within three days. (Ex. B).

5. One month before his claimed injury, on September 5, 2020, Claimant saw his primary care provider, Daniel Grossman, M.D., with complaints of right shoulder pain. Claimant described a "knot" in his right shoulder and reported he was unable to lift his right arm above 90 degrees without pain. Claimant characterized the condition as a "pinched nerve" and reported taking daily ibuprofen was of little benefit. Dr. Grossman noted the etiology was unclear and Claimant's examination was normal. He recommended over-the-counter medications and advised Claimant to follow up if there was no improvement. (Ex. E).

6. Claimant did not seek immediate medical attention for his right shoulder after October 5, 2020, until October 26, 2020, when he saw In Sok Yi, M.D., for a longstanding issue with his hands. Claimant reported right shoulder pain to Dr. Yi. Claimant, but did not report he had sustained any injury at work. Dr. Yi's records do not document a date of injury, mechanism of injury, and do not mention any acute condition of Claimant's right shoulder. Dr. Yi diagnosed Claimant with right shoulder tendinitis, performed a right shoulder subacromial injection, and referred Claimant for physical therapy. (Ex. F). Claimant testified he did not report to Dr. Yi that his injury was work-related because Claimant was "taking care of it himself."

7. Claimant began physical therapy and saw Jill Rechtien, P.T., on November 4, 2020, and attended several physical therapy appointments between November 4, 2020 and December 30, 2020. (Ex. G).

8. According to Employer's records, on October 5, 2020, Claimant submitted a request for days off between November 5, 2020 and November 13, 2020 for an elk hunt. Claimant testified that he went on this hunting trip.

9. On December 7, 2020, Claimant saw Dr. Yi and reported continued pain in his right shoulder. Claimant did not report that the injury was work-related. Dr. Yi suspected Claimant's had rotator cuff tendinitis and possible arthritis of the glenohumeral joint in his right shoulder. Dr. Yi ordered an MRI and referred Claimant to orthopedist, Mark Fitzgerald, M.D. (Ex. F).

10. Claimant saw Dr. Fitzgerald on December 10, 2020. At that visit, Claimant reported increasing pain in his right shoulder since September 2020. While Claimant indicated that working with his arms over shoulder level aggravated his shoulder, he did not mention any specific incident, and did not report that he sustained any work-related injury. Dr. Fitzgerald reviewed Claimant's MRI and diagnosed Claimant with right sided rotator cuff

tendinitis, sprain of the rotator cuff capsule, primary arthritis, and impingement syndrome. He recommended a right shoulder arthroscopy with subacromial decompression, distal clavicle excision, and evaluation of Claimant's rotator cuff. (Ex. F). Surgery was scheduled to take place on January 4, 2021.

11. On December 18, 2020, Claimant saw Daniel Grossman, M.D., for a pre-operative clearance. Although Claimant reported his employment as a crane operator, he did not report any specific work injury to Dr. Grossman. (Ex. E).

12. Claimant continued to work for Employer until December 24, 2020, taking leave before his scheduled surgery due to a pre-surgical Covid quarantine requirement.

13. On December 29, 2020, Claimant was seen for physical therapy at OCC. At that time, Claimant reported he had been dealing with his shoulder pain for a while, and that he "tweaked his arm while at work while tossing heavy items repeatedly when the pain became too much." (Ex. G). Claimant's report is inconsistent with his testimony that he sustained an acute injury while tossing a rigging strap over a boom on October 5, 2020.

14. On December 30, 2020, Claimant filed a Worker's Claim for Compensation (WCC), in which he indicated that he had sustained a "tear" of his right shoulder while throwing a rigging strap on October 5, 2020. On the WCC form, Claimant indicated Employer was notified of the injury on "10/15.20." (Ex. 1),

15. On January 4, 2021, Dr. Fitzgerald performed surgery on Claimant's right shoulder. The procedures performed included an acromioplasty with release of CA ligament, distal clavicle excision, and extensive debridement, bursectomy. The operative report indicates that Claimant's MRI scan showed "signs of chronic external impingement and AC joint arthrosis." During surgery, Dr. Fitzgerald examined Claimant's anterior, posterior, inferior and superior labrums, the intraarticular portion of the biceps, the supraspinatus, infraspinatus, subscapularis, and teres minor (i.e., the rotator cuff) and found no pathology, instability, lesions or tearing of those areas. Examination of the bursal surface of the anterior supraspinatus tendon showed a "delaminating type tear" which was debrided. Dr. Fitzgerald's post-operative diagnosis was chronic external impingement and AC joint arthrosis. (Ex. H).

16. On January 11, 2021, Claimant submitted a Disability Notice: Claim for Weekly Disability Benefits to Employer. (Ex. 12).

17. On January 15, 2021, Respondents filed a Notice of Contest, noting that Claimant's claim was contested for further investigation to determine compensability. (Ex. A)

18. During this time, Claimant continued to undergo physical therapy. Dr. Fitzgerald and Jill Rechtien, P.T., cleared patient to return to work with lifting restrictions approximately 4 weeks after the Claimant's surgery and continued to lighten restrictions as time went on. (Ex. G).

19. On June 10, 2021, Mark Failinger, M.D., performed an Independent Medical Examination at Respondents' request. In his report, Dr. Failinger opined that Claimant's mechanism of injury (underhand throwing of a strap) would not likely result in a rotator cuff injury, and that lack of corroboration of a specific work-related injury indicated that the Claimant's onset of pain was likely insidious and was not work-related. Dr. Failinger was not provided Dr. Fitzgerald's operative report or the Claimant's MRI prior to the IME, and was not able to determine the procedure performed. (Ex. C).

20. Respondents submitted Dr. Failinger's deposition transcript in lieu of live testimony. Dr. Failinger was admitted as an expert in orthopedic surgery without objection. Dr. Failinger reviewed Dr. Fitzgerald's operative report and the MRI report in conjunction with his deposition. He testified that the surgery Dr. Fitzgerald performed included two procedures, a distal clavicle resection involving removal of inflamed or arthritic bone at the end of the clavicle and a decompression, involving removal of bone or tissue impinging or pressuring the rotator cuff. He opined that the surgery performed was to address an arthritic AC joint, not a specific work incident or repetitive work injury. He further opined that it was not a reasonable medical probability that throwing a strap (either overhand or underhand) would create supraspinatus inflammation or partial tearing or affect AC joint arthritis. He opened that the pathology shown on the MRI, including the partial thickness tearing was likely a preexisting degenerative condition. Dr. Failinger's testimony was credible.

21. Dr. Yi testified by deposition in lieu of live testimony. Dr. Yi testified that he had treated Claimant for approximately ten years for hand pain, and that October 26, 2020 was the only time Claimant complained of shoulder pain. Dr. Yi did not recall Claimant reporting the mechanism of injury and did not become aware that Claimant had a workers' compensation claim until he was contacted for his deposition, three or four weeks before December 21, 2021.

22. GT[Redacted], a co-worker was with Claimant on October 5, 2020, and testified he was standing on opposite side of the trailer from Claimant and heard an audible "pop" when Claimant threw the rigging strap. Mr. GT[Redacted] testified that the "pop" sounded like cracking knuckles. Based on the photographs contained in Exhibit 13, and Mr. GT[Redacted] 's testimony, the ALJ finds that Claimant was at least 8-10 feet away from Claimant when Claimant threw the rigging strap. Given the pathology Dr. Fitzgerald identified in Claimant's shoulder, the ALJ does not find credible Mr. GT[Redacted] 's testimony that he heard an audible "pop" from more than 8 feet away.

23. Employer's director of safety, BS[Redacted] testified at hearing. Mr. BS[Redacted] testified that Employer's policy requires injured workers to report incidents immediately no matter how small the injury. He testified that Employer did not learn of Claimant's alleged injury until December 30 or 31, 2020.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City*

of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). “Arising out of” and “in the course of” employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm’n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of the course of his employment on or about October 5, 2020. The evidence demonstrates that one month before Claimant’s alleged injury, on September 5, 2020, he saw his primary care provider, and reported right shoulder pain and the inability lift his arm above 90 degrees without pain. Claimant did not seek medical care again for his right shoulder until October 26, 2020, and continued to work in a physical job until December 24, 2020. When Claimant did seek medical care, he did not report any acute injury occurring on October 5, 2020. The first documented report of a work-related condition was on December 29, 2020, when he reported to physical therapy that his shoulder pain was exacerbated by repeatedly throwing objects.

Claimant testified that he specifically requested “paperwork” from Mr. SB[Redacted] and others within 2-3 days of October 5, 2020. Claimant’s testimony that he reported an alleged injury to multiple supervisors indicates Claimant was aware that if he was injured, “paperwork” needed to be completed to initiate a workers compensation claim. If Claimant sustained a work-related injury on October 5, 2020, expected it to be a workers’ compensation claim, and was merely waiting on paperwork from Employer, one would expect, at a minimum, he would report a work-related injury to one of the health care providers he saw between October 26, 2020 and December 29, 2020. However, no such report exists.

Notwithstanding the lack of timely reporting to health care providers, none of Claimant’s health care providers opined that Claimant’s right shoulder pathology, or the need for surgery was the result of a work-related injury on October 5, 2020. Dr. Fitzgerald’s operative report shows no significant tear the Claimant’s shoulder labrum or rotator cuff, and instead showed chronic conditions, including chronic impingement and

arthritis. Although there is an indication of a "delaminating type tear" of the supraspinatus, Dr. Failinger credibly testified that it was not likely that Claimant sustained a tear as a result of throwing a rigging strap. Dr. Failinger's testimony was unrebutted.

The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he sustained a work-related injury to his right shoulder on October 5, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant's request for medical benefits is denied and dismissed.

TEMPORARY DISABILITY BENEFITS (TOTAL AND PARTIAL)

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant's request for temporary disability benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on or about October 5, 2020.

2. Claimant's claim for medical benefits is denied and dismissed.

3. Claimant's claim for temporary disability benefits is denied and dismissed.

4. All other issues are moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 2, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant's workers' compensation claim is barred by the statute of limitations set forth in Section 8-43-103(2), C.R.S.

2. Which party bears the burden of proof regarding the compensability of the claimant's claim?

3. Whether the party bearing the burden of proof has demonstrated, by a preponderance of the evidence, that the claimant has or has not sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received from Dr. Amir Beshai on August 16 and August 17, 2017 was authorized.

5. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received from Dr. Amir Beshai on August 16 and August 17, 2017 is reasonable, necessary, and related to the compensable occupational disease.

6. If the claim is found compensable, whether the respondent has demonstrated, by a preponderance of the evidence, that any compensation to which the claimant may be entitled should be reduced based on his failure to timely report this claim pursuant to Section 8-43-102(2) C.R.S.

FINDINGS OF FACT

Based upon the testimony and evidence presented at hearing, the ALJ makes the following findings of fact:

1. The claimant began his employment as a firefighter with the employer (and its predecessors) in 1983. The claimant retired from his firefighting position on January 19, 2003.

2. In approximately June 2017, the claimant noted left rib and back pain. Initially the claimant sought chiropractic treatment. However, when his symptoms did not improve, he sought treatment with his primary care providers at Trailhead Clinics. Blood work was done and the claimant's PSA[1] was noted to be 100. Given this elevated PSA,

[1] Prostate specific antigen

the claimant was referred to urologist Dr. Amir Beshai with Urological Associates of Western Colorado.

3. The claimant was first seen by Dr. Beshai on August 16, 2017. At that time, the claimant reported that the last time his PSA was tested was four years prior and his PSA was one. Dr. Beshai noted an abnormal prostate exam and recommended a prostate ultrasound and biopsy. Dr. Beshai performed the ultrasound and biopsy on August 17, 2017.

4. The biopsy revealed prostatic adenocarcinoma. The claimant was 58 years of age at the time of this diagnosis. The claimant immediately began cancer treatment, including radiation and chemotherapy.

5. On November 15, 2019, the claimant filed a Workers' Claim for Compensation. In that document, the claimant identified the date of injury as August 16, 2017.

6. On December 17, 2019, the respondents filed a Notice of Contest denying liability pending further investigation.

7. The employer has continuously participated with the Colorado Firefighter Heart and Cancer Benefits Trust since its inception on July 1, 2017.

8. Shannon Rush is the employer's Human Resources Manager. Ms. Rush credibly testified that she spoke with the claimant on one occasion in 2018. The claimant initiated a telephone call to Ms. Rush and asked for a letter verifying his dates of service and the balance of his retirement account. Ms. Rush authored the letter requested by the claimant. Ms. Rush further testified that the claimant did not say anything to her about his general health or any cancer diagnosis.

9. Although she had no further contact with the claimant, Ms. Rush testified regarding what steps she would have taken if, hypothetically, the claimant had requested additional information. Specifically, Ms. Rush testified that if the claimant had asked if the employer could assist him with his cancer condition, she would have referred him to the Colorado Firefighter Heart and Cancer Benefits Trust and/or to the employer's workers' compensation manager. However, the claimant made no such inquiries to Ms. Rush.

10. The ALJ credits the testimony of Ms. Rush over the contrary testimony of the claimant regarding their communications.

11. The experts in this matter addressed findings of the International Agency for Research on Cancer (IARC). IARC is a division of the World Health Organization (WHO). IARC reviews thousands of substances and then classifies those that are likely to cause various types of cancer. IARC publishes a list of substances in two categories:
1) carcinogenic agents with *sufficient evidence* in humans, and 2) agents with *limited*

evidence in humans *(emphasis in the original).* IARC defines these two categories as follows:

> ***Sufficient evidence of carcinogenicity:*** A causal association between exposure to the agent and human cancer has been established. That is, a positive association has been observed in the body of evidence on exposure to the agent and cancer in studies in which chance, bias, and confounding were ruled out with reasonable confidence.
>
> ***Limited evidence of carcinogenicity:*** **A** causal interpretation of the positive association observed in the body of evidence on exposure to the agent and cancer is credible, but chance, bias, or confounding could not be ruled out with reasonable confidence. *(emphasis in the originaf).*

12. With regard to prostate cancer, IARC has identified no carcinogens with "sufficient evidence" in humans.

13. In the second category of "limited evidence in humans" for prostate cancer, the IARC lists: androgenic (anabolic) steroids; arsenic and inorganic arsenic compounds; cadmium and cadmium compounds; occupational exposure as a firefighter; malathion; night shift work; consumption of red meat; rubber manufacturing industry; thorium-232 and its decay products; and x- and gamma-radiation.

14. On August 20, 2020, Dr. Annyce Mayer issued an independent medical examination (IME) report on the claimant's behalf. In her report, Dr. Mayer opined that the claimant's cancer "meets the medical requirements of the Colorado Firefighter Presumption Statute". In support of this opinion, Dr. Mayer noted that the claimant worked as a firefighter in "unprotected and inadequately protected exposure" to carcinogens. Dr. Mayer further noted that "the risk of age from prostate cancer in Caucasians begins to increase at about 45 years of age, with peak incidence in the 60 to 70 age group, with approximately tenfold risk compared to those in younger age groups."

15. Dr. Mayer's testimony was consistent with her written report. Dr. Mayer testified that she was asked to issue an opinion regarding whether the claimant's cancer diagnosis was covered under Section 8-41-209, C.R.S. Dr. Mayer agreed that there are several well recognized risk factors for prostate cancer, including age, race, family history, and genetic factors. Dr. Mayer also testified that age is the most important risk factor. Dr. Mayer further agreed that prostate cancer was the most common non-skin cancer in men.

16. Dr. Mayer testified that, although not comprehensive, there was general agreement in the scientific and medical community regarding the carcinogens found in firefighting. Dr. Mayer acknowledged that in making her determinations in this case, she relied on studies that have shown the types of substances that are present at fire

scenes and that are found on firefighters' bunker gear. That these studies did not involve the claimant specifically, but were based on other firefighters and their firefighting exposures.

17. Regarding IARC, Dr. Mayer acknowledged that IARC has not identified any carcinogens with "sufficient evidence" of causing prostate cancer.

18. Dr. Mayer testified regarding her understanding of IARC's list of agents with "limited evidence" in humans. Specifically, it is Dr. Mayer's belief that IARC has found that these agents are credible causes of cancer, but do not meet the requirements for the "strong level of evidence" needed to be put into the "sufficient evidence" category. Dr. Mayer testified that she believes that IARC has determined the agents in "limited evidence" category for prostate cancer, (including firefighting occupational exposures), to be credible causes of prostate cancer. Dr. Mayer's opinion in this case is based upon this belief.

19. Although Dr. Mayer discussed several factors and agents in her written report, she testified that she was primarily relying on IARC's listing of firefighting occupational exposures in the "limited evidence" column. Dr. Mayer agreed that early studies of firefighters and cancer did not consistently show an increased rate of prostate cancer in firefighters.

20. At the request of the claimant's counsel, on October 14, 2020, Dr. Sander Orent authored an IME report. Dr. Orient opined that the claimant's prostate cancer is the "direct result" of exposure to carcinogens during his career as a firefighter.

21. Dr. Orient's testimony was consistent with his written report. Dr. Orent testified at length regarding the various inadequacies of the claimant's personal protective equipment (PPE) and the practices employed during the time he was employed as a firefighter. Dr. Orent further testified that if he were evaluating a firefighter with cancer who had an extensive firefighting career, and no other risk factor relevant to that cancer, he would conclude that the firefighting exposure caused the firefighter's cancer.

22. At the request of the respondent, on April 6, 2021, Dr. Thomas Allems issued an IME report. In his report, Dr. Allems opined that the claimant's prostate cancer is unrelated to his career as a firefighter. Dr. Allems noted that IARC has not identified carcinogens with "sufficient evidence" for prostate cancer. Dr. Allems opined that attributing prostate cancer to any specific job or exposure is speculative.

23. Dr. Allems's testimony was consistent with his written report. Dr. Allems testified that causation cannot be ascribed to a person's occupation by default just because there is no other explanation or identified cause for a prostate cancer. Dr. Allems further testified that in the present case, there is nothing unusual about the claimant's prostate cancer presentation as a 58-year old Caucasian male at the time of diagnosis. Dr. Allems testified that the claimant's exposure history confirmed that he

was a career firefighter with the expected range of exposures and personal protective equipment issues.

24. Dr. Allems testified that the epidemiologic literature regarding prostate cancer is extensive and spans decades. Despite this extensive research, the data remains inconclusive, and there are currently no identified prostate carcinogens. Dr. Allems also testified that the vast majority of prostate cancer cases occur without any risk factors being present. With regard to IARC's list of agents with sufficient evidence of causing cancer in humans, there is no carcinogen that has been identified as having "sufficient evidence" for causing prostate cancer.

25. Regarding the literature specific to firefighters, Dr. Allems testified that some of this data is impacted by a "built-in bias" due to a phenomenon involving increased PSA screening in firefighters. Beginning in the early 1990s, general public health recommendations were that PSA screenings should be done annually for males in the general population beginning at 50 years of age. Simultaneous with these recommendations, firefighters also began PSA screenings on an annual basis, as part of employment mandated physicals. As a result of this frequent testing, firefighters tended to get many more PSA measurements over time compared with non-firefighters that did not undergo physical evaluations on such a regular basis.

26. Dr. Allems noted that the claimant's history of PSA testing screenings reflects this phenomenon. Specifically, the claimant obtained regular PSA screenings while he was working as a firefighter, but then after his retirement in 2003, he only got a few of tests over the years.

27. Dr. Allems explained that the issue from an epidemiologic standpoint is that, during the annual PSA years, firefighters had much greater screening and much greater potential for being diagnosed with prostate cancer than non-firefighters. Therefore there is concern in the literature that the epidemiologic data has been skewed, particularly in the number of cases that appear to reflect an increased incidence of prostate cancer in firefighting groups, but no change in mortality rates. On February 25, 2016, the National Firefighters Association dropped the annual PSA screening from annual physicals.

28. Regarding more recent firefighter prostate cancer literature, Dr. Allems testified that the data is "consistently inconsistent". Despite more and more studies, there is still no information that has led IARC to identify a known carcinogen for prostate cancer.

29. Both Dr. Mayer and Dr. Allems testified regarding a 2010 meta-analysis conducted by IARC's working group. Both experts noted that this study found a 30 percent increased risk of prostate cancer in firefighters. Both Dr. Mayer and Dr. Allems recognized that IARC stated that, "Of 20 studies of prostatic cancer, 17 reported elevated risk estimates that range from 1.1 to 3.3; however, only two reached statistical significance and only one showed a trend with duration of employment."

30. Dr. Allems explained that given this explanation from IARC, he considers these findings to be weak. He further explained that in this meta-analysis, study after study was not statistically significant. Two studies were statistically significant, but only one study showed increased risk with duration of employment. Dr. Allems also testified that IARC recognized the weakness of the 30 percent data point as firefighting is identified in the "limited evidence" category.

31. In addition to these recent meta-analyses, Dr. Allems testified regarding a meta-analysis done in 2020 (Casjens), in which no association was found between prostate cancer and firefighting.

32. The opinions of Dr. Allems are found to be more credible and persuasive than the opinions of Ors. Mayer and Orent. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Statute of Limitations

4. Section 8-43-103(2), C.R.S. provides that the right to workers• compensation benefits is barred unless a notice claiming compensation is filed with Division within two years after the injury. However, §8-43-103(2), C.R.S. also provides, in relevant part, that the limitation does not apply to:

> [a]ny claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after

> the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation of benefits within the meaning of this section...

5. The statute of limitations begins to run when the claimant, as a reasonable person, should have recognized the nature, seriousness, and probable compensable character of the industrial injury. *City of Boulder v. Payne,* 426 P.2d 194 (Colo. 1967); *Intermountain Rubber Industries v. Valdez,* 688 P.2d 1133 (Colo. App. 1984).

6. In the present case, the claimant learned of his cancer diagnosis in August 2017. However, he did not report his cancer diagnosis to the employer until he filed his Worker's Claim for Compensation on November 15, 2019. This was more than two years from his date of injury.

7. The ALJ concludes that no reasonable excuse exists for the claimant's late reporting. Here, the claimant was diagnosed with prostate cancer in August 2017 and immediately began treatment. The ALJ finds that in August 2017, the claimant recognized the nature, seriousness, and probable compensable character of this diagnosis. As found, Ms. Rush's testimony regarding her communication with the claimant is credible and persuasive. The ALJ concludes that the claimant made no report of his cancer diagnosis to the employer until November 15, 2019. Therefore, the claimant's claim is barred by the statute of limitations.

Burdens of Proof

8. Notwithstanding the ALJ's determination that the claimant's claim is barred by the statute of limitations, the ALJ also makes conclusions of law regarding the appropriate burden of proof in this matter and compensability.

9. Typically, a claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

10. However, the Colorado legislature has established a specific provision for workers' compensation claims of firefighters with a diagnosis of cancer. Section 8-41-209, C.R.$. provides:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system

and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

(3) Repealed.

(4) **An** employer who participates in the voluntary firefighter cancer benefits program created in part 4 of article 5 of title 29 Is **not subject to this section** unless the employer ends participation in that program. *(emphasis added).*

11. In the present case, the claimant worked as a firefighter for 20 years. Prostate cancer is a cancer of the genitourinary system. Therefore, as an initial matter the firefighter provision shifts the burden of proof from the claimant to the employer.

12. However, the ALJ finds that the employer has demonstrated that they are a participant of the voluntary firefighter cancer benefits program as identified in Section 8-41-209(4) C.R.S. Therefore, the firefighter provision does not apply to the present case and the burden shifts **back** to the claimant.

Compensability

13. Based on the facts of the current case, the ALJ concludes that it is the **claimant's** burden, by a preponderance of the evidence, to demonstrate that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with employer.

14. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent*

Injury Fund v. Thompson, 793 P.2d 576 {Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra.*

15. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

16. Although it is the claimant's burden in this case, the Colorado Supreme Court has provided guidance regarding the analysis of causation in firefighter cancer cases. In *City of Littleton v. Industrial Claim Appeals Office,* 370 P.3d 157, 165 (Colo. 2016), the court discussed the type of evidence that may be used in order to rebut the presumption of compensability under Section 8-41-209 and prove that a claimant's cancer is not work-related.

17. Section 8-41-209(2), C.R.S. does not require the employer "to disprove causation from every conceivable substance." *Id.* In fact, if a firefighter's exposure is "speculative, remote or illogical, then it is not typical of the occupation." *Id.* With regard to general causation, the *City of Littleton* court noted that epidemiological evidence is "highly probative" *Id.*

18. In the companion case of *Industrial Claim Appeals Office v. Town of Castle Rock,* 370 P.3d 151, 157 (Colo. 2016), the Supreme Court further determined that to meet its burden of proof under Section 8-41-209(2)(a), the employer is not required to establish a specific alternate cause of the firefighter's cancer. *Id.*

19. Although the Supreme Court was primarily addressing the issue of how to rebut the presumption of compensability in both *City of Littleton* and *Town of Castle Rock,* the principles articulated in these decisions are applicable to issues regarding causation in cancer claims more generally.

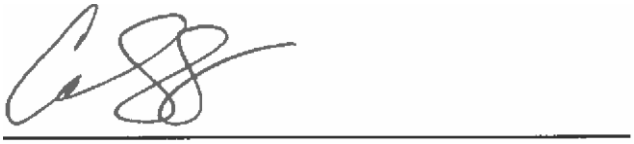
20. The ALJ concludes that the claimant has failed to demonstrate, by a preponderance of the evidence, that his cancer diagnosis is causally related to his employment with the employer as a firefighter. As found, Dr. Allems's opinion regarding the lack of evidence to support a causal association between the claimant's firefighting exposures and his prostate cancer is well supported by the epidemiologic literature. No

clear evidence of causation between firefighting occupational exposures and prostate cancer has emerged, as reflected by IARC's placement of that exposure in the "limited evidence" category.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed. All remaining endorsed issues are dismissed as moot

Dated this 4th day of May 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to continuing maintenance medical benefits that are reasonably necessary and related to the admitted workplace injury of May 26, 2016.

PROCEDURAL HISTORY

Claimant was injured in the course and scope of her employment with Employer on May 26, 2016.

This is an admitted claim that was closed by Final Admission of Liability (FAL) of December 13, 2016, with the exception that maintenance medical benefits were left open for reasonably necessary medical care related to the workplace injury.

On September 17, 2021 Claimant filed an Application for Hearing on issues of medical benefits that are authorized, reasonably necessary and related to the May 26, 2016 workplace injury, including maintenance care as recommended by Dr. Olsen and admitted in the FAL.

Respondents filed a Response to Application for Hearing on October 25, 2021 adding the issues of causation and relatedness to the issues listed by Claimant.

FINDINGS OF FACT

Based on the evidence presented at the hearing and thereafter, the ALJ enters the following findings of fact:

1. At the time of injury, Claimant was seventy-two (72) years old and seventy eight (78) years old at the time of the hearing.

2. On May 26, 2016 Claimant was reaching overhead and pulling down a box to get an "event kit" ready when she experienced a pop and sharp pain in the left side of her neck and upper back. Claimant was ultimately diagnosed with neck pain, a left shoulder strain, and acute left-sided back pain.

3. Claimant was initially seen on May 26, 2016 by a nurse practitioner. Claimant complained of pain in her neck, back, and left arm to her authorized treating physician ("ATP"), Dr. Dean Prok, from June 2016 to January 2017.

4. Claimant had an MRI of the cervical spine read by Dr. Scott Lowe on July 15, 2016. The MRI showed: (1) Central and right paracentral disc protrusion at the C3-4 level with abutment of the cervical cord but no cord compression. Mild narrowing of the central canal down to 10 mm. (2) Degenerative disc changes at C4-5 with posterior disc

and osteophyte complex. Neural foraminal narrowing, right greater than left with mild central canal narrowing. (3) Degenerative disc changes at C5-6 with mild central canal stenosis and right foraminal narrowing. (4) Degenerative disc changes at C6-7 with mild to moderate right foraminal narrowing but no central stenosis or left foraminal narrowing.

5. On June 22, 2016, Claimant's ATP referred Claimant to Dr. Nicholas Olsen for evaluation and treatment. Dr. Olsen recommended steroid injections but the insurer required her to see an orthopedic specialist before they would authorized injections. The request for prior authorization was initially denied on September 16, 2016 by Dr. Frank Polanco.

6. On September 28, 2016 Claimant was evaluated by Dr. B. Andrew Castro for a surgical consultation pursuant to referrals from both Dr. Prok and Dr. Olsen. Dr. Castro stated that Claimant was not a surgical candidate, recommended conservative care and consideration of epidural steroid injections.

7. Dr. Prok recommended Claimant receive facet injections from Dr. Nicholas Olsen to help alleviate the lingering pain Claimant continued to experience. Dr. Polanco authorized the procedure on October 14, 2016.

8. Claimant subsequently received facet injections from Dr. Olsen on October 25, 2016 at the left C5-6 and C6-7 levels to alleviate her lingering pain. Pre-injection VAS[1] score was 4-5 of 10 and a positive axial neck pain increasing to 6-7 pain level with neural foraminal compression. Post-injection, Claimant reported a 0 of 10 on the VAS scale with no aggravation of complaints on exam.

9. On October 28, 2016 Claimant was seen at for physical therapy at SCL Health Medical Group Front Range and therapist Leah Luther reported that Claimant had no pain lately except for end range of motion pain.

10. Claimant commented that she immediately saw a reduction in her symptoms, reporting to Dr. Olsen on November 2, 2016, that she was "95% improved" and that the shot was a "miracle." On exam he found that neural foraminal compression test was negative for axial neck pain and facet loading was also negative bilaterally. They discussed the fact that, if Claimant continued her exercise program and followed correct lifting mechanics, they may not have to offer additional treatment. Dr. Olsen noted Claimant did quite well with the injection, that Claimant may not need additional treatment beyond her assigned exercise program, and recommended Claimant do a trial of full duty work.

11. Claimant returned to see Dr. Prok on November 4, 2016, after the injection and was reporting much less pain but still at 4 out of 10 aching on the left side of the neck and upper back areas. On exam he observed that the cervical spine had near full range of motion in all planes with mild pain reported at the left cervical paraspinals and trapezius and posterior shoulder area with minimal tenderness to palpation in those areas without palpable firmness, hypertonicity or spasm. Dr. Prok noted that Claimant was doing better and gave her a trial of full duty per Dr. Olsen's recommendation. He continued to diagnose neck pain and upper back strain and stated that the diagnosis were related to

[1] Visual Analog Scale

the work injury based on all information available. Lastly, he concluded that the objective findings were consistent with the history and work related mechanism of injury.

12. Claimant had a follow-up appointment with Dr. Olsen on November 30, 2016. Claimant reported that she had "no return of her complaints" and could return to full duty work without difficulty. Dr. Olsen reported Claimant would be a candidate for a repeat injection up to three times per year if needed. Dr. Olsen performed an impairment rating finding that, pursuant to Table 53II-C of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), Claimant had a specific disorder due to moderate spondylosis and facet disease of 6% whole person. Range of motion loss for flexion and extension provided a 4% whole person impairment. This combined to a 10% whole person final impairment. Dr. Olsen discharged Claimant from his care at that time. Dr. Olsen encouraged her to continue her exercise program, remain at full work duties, and advised that if she wished to engage in maintenance care, she was to contact his office.

13. By December 7, 2016 Dr. Prok stated that Claimant was much better, but still had pain of 2 out of 10 in the left upper neck and back areas. Dr. Prok placed Claimant at maximum medical improvement (MMI) based on Dr. Olsen's impairment rating of ten percent whole person impairment and provided for post-MMI medical maintenance treatment consisting of repeat injections up to three times per year and some continuing massage therapy.

14. Claimant attended a post-MMI follow-up appointment with Dr. Prok on January 18, 2017. Dr. Prok noted that Claimant was to continue full duty status without restrictions, as Claimant demonstrated full functionality during the examination, and Claimant remained at MMI. At that time Claimant continued to have neck pain of 2 out of 10. Dr. Prok noted on exam, mild pain in the left cervical paraspinals and upper thoracic region on the left side with mild tenderness to palpation diffusely throughout that region. This is the last record from Dr. Prok in the exhibits.

15. Respondents cite to a February 12, 2019 report allegedly from Claimant's PCP but those records were not in evidence so any statements quoted by other providers is not considered.

16. On May 28, 2019, Claimant returned to Dr. Olsen's office for the first time since November 30, 2016. Claimant relayed to Dr. Olsen that she was continuing to work full duty, denied any new injuries, but noted that her pain returned three to four weeks prior. On exam, Dr. Olsen found neural foraminal compression test negative bilaterally but facet loading was positive on the left side and negative on the right. Claimant requested maintenance care, and Dr. Olsen recommended a repeat left C5-6, C6-7 facet injection, noting Claimant did quite well with the procedure previously.

17. Claimant received a left C5-6 and C6-7 facet injections from Dr. Olsen on June 18, 2019. Claimant's pre-injection VAS score was 5 of 10 and post VAS score of 1 of 10 with a negative exam after the injection. Clamant attended a follow up with Dr. Olsen on July 1, 2019. Claimant stated that her pain had been reduced by "95%," and was following her home exercise program without difficulty. On physical exam, all tests were negative. Claimant was to return to Dr. Olsen's office if she had any further difficulties. There are not further records from Dr. Olsen following this visit.

18. Claimant went to Good Samaritan Medical Center on September 12, 2021. Claimant relayed that she tripped and fell in a King Soopers parking lot and struck a concrete curb. Claimant experienced pain in her right wrist, knees, and lip on the right side of her face. Claimant denied any neck pain at that time. On exam, Physician Assistant Boone Allen noted that Claimant had tenderness of the left shoulder but normal range of motion. He also documented that the cervical spine exam was normal, with normal range of motion and that her neck was supple. Claimant had an x-ray of her left shoulder during her visit at Good Samaritan Medical Center which showed no fracture or dislocation of the left shoulder, and the acromioclavicular joint showed no acute abnormality.

19. Claimant was attended by Dr. Nathalie Nys of the Rock Creek, Lafayette Kaiser Clinic on November 12, 2021. Claimant had had trigger point injections for the bilateral upper back and shoulders on November 4, 2021, had returned for "injections on my neck and also a check on my left hip." Claimant was complaining of left shoulder pain, citing her fall in the King Soopers' parking lot as the source of the pain. Claimant relayed that she had also hurt her lip from the fall and that she had "zinging" pain in her neck which traveled down her left arm. On exam, Dr. Nys noted neck, upper, mid and low back and buttocks pain with muscle spasms and multi tender points. Claimant received trigger point injections in the right and left infraspinatus, right and left levator scapulae, right and left rhomboid major, and right and left trapezius as well as in the neck bilaterally and the cervical paraspinal muscles.

20. Dr. John Burris Performed an Independent Medical Evaluation (IME) upon Respondents' request on December 21, 2021. Dr. Burris reviewed medical records and conducted a physical examination of Claimant. On exam, he found that Claimant's cervical spine was supple and nontender to palpation throughout the suboccipital and bony midline regions, though was diffusely tender in the left paraspinal and trapezius musculature. Otherwise, she had a negative neurological, sensation and motor exam.

21. Dr. Burris found that: (1) Claimant's injury on May 26, 2016 involved a very minor injury mechanism of reaching overhead, which Dr. Burris labeled as a relatively sedentary activity consistent with daily living; (2) the only condition that could have possibly been related to the abovementioned mechanism of injury is a minor soft tissue strain, with the natural course of minor soft tissue strain being a rapid and predictable recovery within days to weeks regardless of treatment; (3) the MRI of the cervical spine Claimant dated July 15, 2016, revealed moderate degenerative changes predominantly at C5-6 and C6-7 with no acute abnormalities; (4) the described May 26, 2016 mechanism was not sufficient to cause, accelerate, aggravate, or contribute in any meaningful manner to Claimant's abovementioned underlying pre-existing condition; (5) Claimant's current symptoms (greater than five years later) are, more likely than not, a result of the natural progression of her underlying degenerative condition and are unrelated and independent from the May 26, 2016 workers' compensation claim; and, (6) no further care is reasonable, necessary, or related to Claimant's May 26, 2016 claim.

22. Respondents took the deposition of Dr. Burris on April 8, 2022. He is a level II accredited physician and board-certified in occupational medicine. He testified consistent with the findings and conclusions of his report. He specifically stated that

Claimant suffered only a minor neck strain on May 26, 2016, which was treated and resolved as expected. He stated that any symptoms Claimant is currently experiencing are due to the natural progression of Claimant's underlying degenerative condition, not the May 26, 2016 work related claim.

23. Claimant testified that she did not have a minor injury to her neck and left shoulder because when she lifted the box, she felt a specific pop in her neck that cause significant pain, which continued after she was placed at MMI and released from care. She stated that, after MMI, she took care of her own pain with massage, exercise and over the counter medications such as Aleve, as she was instructed to do by her ATPs. She only returned to see Dr. Olsen in 2019 when it became unbearable again and the second injection she received from Dr. Olsen decreased her pain back to a manageable level and continued with her exercise program, yoga, massage and stretching to maintain that level.

24. Claimant stated that she attempted to return to see Dr. Olsen after the COVID-19 pandemic started but she was unable to reach anyone in Dr. Olsen's office as they were closed. She called them multiple times without response. She finally received a call back from them a few months later to advise her that her workers' compensation claim was closed and needed to be reopened to obtain further treatment or injections from Dr. Olsen.

25. Claimant was initial told that she only had two years of care and that time had transpired so her case was closed. She later found out that she had up to six years to reopen her claim in order to obtain the care that Dr. Olsen had recommended. She stated that she does not like to take medications and she waited as long as possible to get care. Claimant filed an application for hearing with the Office of Administrative Courts in Denver after reaching out to Dr. Olsen's office for maintenance care and being unable to obtain the requested maintenance care.

26. Claimant stated that the current symptoms are the same symptoms she was feeling when she was injured originally in May 2016 and that they have continued all along. She testified that she did not injure her left shoulder or neck in the incident of September 2021 but that she already had that problem much before the incident of falling in the parking lot as she had attempted multiple times during the pandemic to get her care. This ALJ takes administrative notice that the pandemic closed most businesses around March 2020 through May 2020.

27. As found, Claimant has failed to prove by a preponderance of the evidence that the current symptoms are related to the May 26, 2016 work related injury.

28. As found, Dr. Burris is persuasive in his opinion that the Claimant's current symptoms of neck and left shoulder pain are related to the underlying degenerative disc disease and the natural progression of the degenerative condition, not the May 26, 2016 work related injury. As found Dr. Burris was not persuasive that there was no aggravation of the underlying degeneration caused by the May 26, 2016 event, however, that aggravation reached a baseline and resolved following the reasonably necessary medical care provided by her authorized treating physicians through July 1, 2019.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

B. Reasonably Necessary Medical Benefits after MMI

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The right to workers' compensation benefits, including medical payments, arises only when an injured employee establishes that the need for medical treatment was proximately caused by an

injury arising out of and in the course of the employment. C.R.S. § 8–41–301, C.R.S; *see Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

In a dispute over medical benefits that arises after the filing of an admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. C.R.S. § 8-41-301(1)(c); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *In re Claim of Deane*, 122121 COWC, 4-664-891-001 (Colorado Workers' Compensation Decisions, 2021). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, *supra*.

Here, Respondents admitted by Final Admission of Liability dated December 13, 2016 with a general award of medical benefits that were reasonably necessary and related to the claim after the maximum medical improvement determination. From December 2016 through July 2019 Claimant received no maintenance care other than one steroid injection with Dr. Olsen. Respondents allege that the medical care Claimant now requires is no longer reasonably necessary or related to the May 26, 2016 work related injury. The MRI report by Dr. Lowe dated July 15, 2016 revealed very significant degenerative disc disease from the C3 to C7 levels of the spine. As found, Dr. Burris is persuasive in his report and testimony that the Claimant's current symptoms complex affecting her neck and left shoulder are related to the natural progression of the Claimant's underlying degenerative disc disease at multiple spine levels. Any facts to the contrary are specifically not found to be persuasive in this matter. Claimant has failed to prove by a preponderance of the evidence that the current symptoms are proximately caused and related to the May 26, 2016 aggravation of the underlying spine disease and, therefore, Claimant is not entitled to further maintenance medical care in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for reasonably necessary medical benefits related to the May 26, 2016 claim are denied and dismissed.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 4th day of May, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Did Claimant prove a one-time evaluation with her ATP is a reasonably necessary post-MMI medical benefit?

FINDINGS OF FACT

1. Claimant works for Employer as a department manager. She suffered an admitted low back injury on August 20, 2020 while moving end cap "power panels."

2. Claimant was diagnosed with a lumbar strain and left leg "sciatica." She received conservative treatment including physical therapy, chiropractic, activity modification, and psychological counseling.

3. Dr. Dwight Leggett performed a left SI joint injection on April 5, 2021. Claimant's pain flared badly at first, but subsequently improved significantly. At her April 12, 2021 follow up appointment with Kelsey Walls, PA-C, Claimant reported 90% improvement. Ms. Walls anticipated Claimant's pain would continue to improve over the next 2-3 weeks.

4. On April 21, 2021, Claimant's ATP, Dr. Terrance Lakin noted she had returned to work after the injection and "is functioning pretty well." Claimant was "tagging," which required a lot of bending, kneeling, and squatting. Dr. Lakin wrote, "She got used to the kneeling and squatting but bending seemed to aggravate her low back pain, but not to the point where she feels she needs restrictions." Dr. Lakin referred Claimant to physical therapy for work hardening and instruction on a home exercise program.

5. Claimant returned to Dr. Lakin on May 12, 2021. Her pain was "better just sore any ach[y]." She was "currently working with no restrictions and having no issues." She was still taking naproxen for pain. Physical examination showed mild tenderness at the left SI joint and piriformis areas, and minimal paralumbar muscle spasms. Dr. Lakin stated,

> Patient has resolved SI joint dysfunction very well. She desires to close her case. We reviewed that she had a left SI joint injection in the office with Dr. Leggett. She reported more pain for a week but then gradually cool[ed] down and she is happy with the results. We discussed considering repeat injection in 3-6 months and she is adamant she does not want that again. She believes she is resolved well enough to continue on with home exercise program.

> She has been scheduled for physical therapy for what she thinks is one visit to make sure that she has a home exercise program to continue on with. I believe that is a good preventive visit.
>
> She concurs with closing her case and only medical maintenance for physical therapy next several weeks.

6. Dr. Lakin put Claimant at MMI with no impairment. Regarding maintenance care, Dr. Lakin recommended, "Finish physical therapy 1-3 appointments in next 3-4 weeks to assure good home exercise program."

7. Claimant saw Dr. Wallace Larson for a DIME on August 30, 2021. She described constant pain in her left lower back and buttock. The pain waxed and waned depending on how much lifting or other work she did. He agreed Claimant was at MMI, but thought her residual symptoms and limitations warranted an impairment rating. Dr. Larson assigned a 10% whole person lumbar spine rating. He opined Claimant required no maintenance care.

8. Claimant testified she has daily back pain that worsens with increased activity, particularly at work. Claimant explained she previously told Dr. Lakin she did not want future injections because of the painful flare she experienced after the first injection. She was feeling much better and assumed she would not need more injections. But by the time of the hearing, she felt the injection had "worn off" and she was open to another injection were it recommended by her ATP.

9. Claimant saw her PCP on several occasions after MMI for various personal health issues. The PCP records contain no reference to any ongoing low back or SI joint problems. Claimant testified she did not mention or seek treatment for her low back from her PCP because she was under the impression that Medicaid would not cover injury-related treatment.

10. Claimant's testimony was credible and persuasive.

11. Claimant proved a general award of medical benefits after MMI is reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

12. Claimant proved a one-time evaluation with an ATP to explore maintenance care options is reasonably necessary.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award

of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). A DIME is not entitled to special weight regarding medical treatment after MMI, but is simply another medical opinion to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant established the probability of a need for future medical treatment, which entitles her to a general award of future medical benefits. Although Claimant's injury improved with treatment, she still suffers from residual pain that justified a 10% whole person impairment. At the time of MMI, Claimant was still enjoying the benefit of an SI joint injection. But injections frequently produce temporary instead of permanent relief. This is recognized by the Low Back Pain MTGs, which provide for up to "2 to 3 injections per year" if they are producing at least 80% improvement. *See* DOWC Rule 17, Exhibit 1 § 8.a.iii. Dr. Lakin contemplated additional injections as maintenance, and the ALJ infers he probably would have recommended repeat injections as a potential maintenance care option had Claimant not declined them. Because of her ongoing injury-related symptoms, Claimant's request for a one-time evaluation with an ATP to discuss maintenance care options is reasonably necessary.

ORDER

It is therefore ordered that:

1. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

2. Insurer shall cover a one-time evaluation with an ATP to explore maintenance care options.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review

electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 4, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues addressed in this order concern the calculation of Claimant's average weekly wage (AWW). The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $506.46 to $707.27.

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Claimant suffers from non work-related chronic Crohn's proctocolitis, which has required substantial medical management, including hospitalization and surgery resulting in lost time from work. (See generally, Claimant's Hearing Exhibit (CHE) 1; Respondents' Hearing Exhibit (RHE) D).

2. Claimant's Crohn's disease has proven difficult to control. He underwent surgery on February 13, 2019, consisting of an Ileostomy and segmental resection. (CHE 1, p. 5). He was subsequently discharged from the hospital on February 18, 2019. (Id.). Shortly after his discharge, Claimant experienced complications related to his February 13, 2019 surgery. (Id. at p. 17). He was readmitted to the hospital with a partial small bowel obstruction (SBO) in early May 2019. (Id.) Following his discharge from the hospital on May 3, 2019, Claimant was readmitted to the hospital on May 7, 2019 for recurrent symptoms and low ostomy output for which he underwent additional surgery consisting of a small bowel decompression and mesenteric fixation procedure. (Id.)

3. Claimant developed a post-surgical infection approximately 10 days following his SBO surgery when his incision separated at the bottom. (Id. at p. 28). He was started on antibiotics and by June 6, 2019 was "doing much better." (Id.)

4. Claimant then went to work for Employer. Based upon the evidence presented, Claimant's first pay period under Employer extended from July 26, 2019 to August 8, 2019. He was paid $1,371.06 for 72.72 regular and 2.30 overtime hours on August 16, 2019 for this pay period. (RHE B, p. 5). Claimant was paid the following amounts for the subsequent pay periods:

Period Start	Period End	Pay Date	Current	Reg. Hrs.	OT Hrs.
08/09/2019	08/22/2019	08/30/2019	$1,674.99	79.72	8.89
08/23/2019	09/05/2019	09/13/2019	$1,540.71	67.02	7.05

09/06/2019	09/19/2019	09/27/2019	$1,336.23	62.76	7.65
09/20/2019	10/03/2019	10/11/2019	$ 142.20	6.37	0.00
10/04/2019	10/17/2019	No hours reported- no pay			
10/18/2019	10/31/2019	11/08/2019	$ 138.24	6.16	0.00
11/01/2019	11/14/2019	11/22/2019	$ 597.42	31.66	0.00
11/15/2019	11/28/2019	12/06/2019	$1,154.16	46.59	0.00

5. The symptoms associated with Claimant's Crohn's disease worsened in September 2019. Claimant testified that he was admitted to the hospital on September 23, 2019 and subsequently underwent additional surgery to remove several anatomical structures related to his digestive tract. He requested a leave of absence from September 23, 2019 to October 21, 2019. (RHE C, p. 6). Claimant's leave of absence was approved on September 27, 2019. (RHE D, p. 35). Because Claimant was on leave for much of the pay period extending from September 20, 2019 through October 3, 2019, his wages dropped significantly from the prior pay period. (See, RHE B, p. 5). As noted above, Claimant earned $142.20 for the pay period extending from September 20, 2019 through October 3, 2019.

6. As referenced above, Claimant underwent proctectomy surgery on October 7, 2019. (CHE 1, p. 36).

7. On October 17, 2019, Physician Assistant (PAC) Shanna M. Zwick drafted correspondence indicating that Claimant could return to modified work beginning October 21, 2019. (RHE D, p. 34; See also, RHE D, p. 33). On October 24, 2019, SM[Redacted], HR Specialist for Employer, sent an e-mail message to BD[Redacted] that Claimant had returned to work on October 23, 2019. (RHE D, p. 35). Because Claimant was unable to work for much of the pay period extending from October 18, 2019 through October 31, 2019, he only earned $138.24. (RHE B, p. 5).

8. While Claimant returned to work, he continued to experience residual nerve pain. On November 4, 2019, Claimant sent an e-mail message to SM[Redacted] that he was going to try a new medication to help reduce his persistent nerve pain. In this message, Claimant notes that the plan was for him to return to "full-time" work the following Monday. (RHE D, p. 32). Ms. SM[Redacted] notified KW[Redacted] that Claimant had provided her a "note that says he [could] return to work full-time on 11/11, with a lifting restriction of not more than 10lbs, and is released on 11/22 to normal work duties without restriction." (RHE D, p. 30; See also, RHE D, p. 29). Again, because Claimant was restricted for much of the pay period between November 1, 2019 and November 14, 2019, he only earned $597.42. (RHE B, p. 5).

9. On November 11, 2019, Claimant notified Ms. SM[Redacted] and Mr. BW[Redacted] by e-mail that he was experiencing a flare of his Crohn's disease but that he would do his best to schedule medical appointments and infusion therapy sessions

on Friday's to miss as little work as possible. (RHE D, p. 27).

10. Claimant continued to miss work secondary to medical appointments and being sick through the reminder of November and into December 2019. (RHE D, pp.14-26). On December 16, 2019, Mr. BW[Redacted] forwarded an e-mail message to Ms. SM[Redacted] noting that Claimant came into work for an hour, left for a doctor's appointment and then went home because he had a fever. Mr. BW[Redacted] [Redacted] expressed that the impact of Claimant's absences on Employer were unsustainable and asked Ms. Medsker to call him to discuss the situation. (RHE D, p. 13).

11. Claimant sustained an admitted industrial injury to his low back on December 17, 2019.

12. Respondents admitted liability for Claimant's December 17, 2019 work-related low back injury on March 12, 2020. (CHE 4). As Claimant lost time from work due to his industrial injury between December 18, 2019 and January 26, 2020, it was necessary for Respondents to calculate his AWW to insure proper payment of temporary total disability (TTD) benefits.

13. Respondents used Claimant's earnings from August 9, 2019 through November 28, 2019 to calculate an AWW of $506.46.[1] (RHE A, p. 3 & RHE B, p. 5). As noted, Respondents admitted for this AWW in a General Admission of Liability (GAL) filed March 12, 2020. (RHE A, p. 1).

14. Claimant asserts an AWW of $707.72. In reaching his claimed AWW, Claimant asserts that the three pay periods extending from September 20, 2019 through November 14, 2019 should be excluded from the calculation, as they do not represent an accurate reflection of the wages he routinely earned while working for Employer. Disregarding the three pay periods between September 20, 2019 and November 14, 2019 leaves a ten (10) week period upon which Claimant calculates his AWW. Adding the total wages earned for these ten weeks and dividing the figure by ten yields Claimant's asserted $707.27 AWW. ($1,371.06 + $1,674.99 + $1,540.71 + $1,336.23 + $1,154.16 = $7,077.15 ÷ 10 weeks = $707.72). (CHE 3, p. 50).

15. Based upon the evidence presented, the ALJ finds that it would be

[1] Respondents' counsel represented that the aforementioned period extending from August 9, 2019 – November 28, 2019 comprised 13 weeks and reflected the entirety of Claimant's employment with Employer. Counsel's characterization appears incorrect. Indeed the period Insurer used to calculate Claimant's AWW is 14 weeks long, not 13, which period also does not include a two week pay cycle for October 4, 2019 through October 17, 2019, otherwise the period used would comprise 16 weeks. Moreover, this 14 week period does not equate to Claimant's entire period of employment with Employer as evidenced by the fact that Claimant was paid $1,371.06 for the pay period extending from 7/26/2019 – 8/8/2019 and his admitted injury occurred December 17, 2019. Nonetheless, using Claimant's earnings for the 14-week period extending from August 9, 2019 through November 28, 2019, which, as noted above, excludes the pay period for October 4, 2019 – October 17, 2019 since Claimant earned no wages for these two weeks, yields an AWW of $470.28 ($6583.95 ÷ 14 weeks = $470.28/week).

manifestly unjust to calculate Claimant's AWW by including earnings he made over pay periods that included time he spent in the hospital or in the acute recovery period following his October 7, 2019 surgery when he was unable to work full time. Simply put, the ALJ is persuaded that the pay periods between September 20, 2019 and November 14, 2019 reflect an irregularity in Claimant's proven earning capacity and that these wages should not be included in the calculation of his AWW.

16. Based upon the evidence presented, the ALJ adopts Claimant's methodology in calculating his AWW as $707.27. Accordingly, the ALJ finds that Claimant has proven that his AWW should be increased from $506.46 to $707.27 as this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his December 17, 2019 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[2]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

[2] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

D. Sections 8-42-102(3) and (5) (b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of December 17, 2019 comes from the wage records admitted into evidence. As found here, careful review of the wage records (RHE B) persuades the ALJ that the computation of Claimant's AWW should not include the pay periods between September 20, 2019 through November 14, 2019. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity. Indeed, Claimant earned in excess of $506.46 per week (Respondents admitted AWW) for every pay period included in his wage statement prior to his September 23, 2019 hospitalization and subsequent October 7, 2019 surgery. Based upon the evidence presented, the ALJ is not convinced that Claimant's lower earnings between September 20, 2019 and November 14, 2019 represent an inability to work a full time job, which would have continued indefinitely beyond November 14, 2019. Indeed, the assertion is speculative and dispelled by the fact that Claimant was hospitalized and underwent surgery on February 13, 2019 only to recover sufficiently by June 6, 2019 to return to work for Employer earning in excess of Respondents admitted AWW for every paid period leading up to Claimant's subsequent hospitalization and follow-up surgery in September/October, 2019. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the period between September 20, 2019 and November 14, 2019, when he was hospitalized and/or recovering from surgery, when calculating his AWW. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW is $707.27, as this represents the fairest approximation of his wage loss and diminished earning capacity due to his December 17, 2019 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $506.46 to $707.27.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $707.27 for the time period reflected in the GAL filed March 12, 2020, i.e. from December 18, 2019 thru January 26, 2020.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant suffered a compensable injury to his right knee, and if so, whether Claimant's treatment with Dr. Von Stade is reasonably necessary and related to his admitted claim;

2. Whether Claimant's referral to the hip specialist, Dr. White, is reasonably necessary and related to his admitted claim;

3. Whether Claimant's referral to a spine specialist, Dr. Castro, is reasonably necessary and related to his admitted claim;

4. Whether Claimant's dental issues and care are reasonably necessary and related to his admitted claim;

5. Whether treatment for Claimant's vestibular and balance issues is reasonably necessary and related to his admitted claim; and

6. Whether home health care and home modifications are reasonably necessary and related to his admitted claim.

FINDINGS OF FACT

1. On February 7, 2019, Claimant sustained injuries arising out of the course of his employment with Employer when a horse he was riding slipped on ice and fell. Claimant worked as a "pen rider" which required him to ride through cattle pens and finding sick cattle and pull them out. Claimant testified that he has been working as a pen rider on and off for his entire life.

2. Following his injury, Claimant received extensive medical care from multiple providers for multiple areas of the body. On the date of injury, Claimant initially complained of only left shoulder and lateral neck pain and denied any impact to his head or loss of consciousness. (Ex. 8). The following day, Claimant was sent for a left hip x-ray due to hip pain. (Ex. 11). Over the next two weeks, Claimant reported additional issues, including headaches, upper back pain, pelvic pain, and vision problems. (Ex. 8 & 16). Imaging studies of Claimant's cervical spine, hips, and brain taken within three weeks of his injuries were negative for traumatic injuries. (Ex. 11). In March 2019, Ramon Perez, D.O., at Banner Health diagnosed Claimant with concussion syndrome. (Ex. 16).

3. Over the course of the next year, Claimant received treatment from multiple providers for headaches, neck pain, left shoulder, right hip, pelvic pain, dizziness, tinnitus, memory and cognitive issues, and knee pain.

4. On March 31, 2020, a hearing was held before ALJ Edwin L. Felter, Jr., which addressed whether "Claimant suffered compensable injuries to his head, his hips, and his lumbar spine." ALJ Felter issued his Full Findings of Fact, Conclusions of Law, and Order on April 23, 2020 ("Order"). (Ex. 1). In that Order, ALJ Felter found that Claimant sustained compensable injuries to his head, back, and hips, causally related to Claimant's February 7, 2019 injury. He further ordered that "Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's head, back, hips, blurred vision and headaches caused by the admitted event of February 7, 2019, subject to the Division of Workers' Compensation Medical Fee Schedule." (Ex. 1).

5. On December 18, 2020, the Industrial Claim Appeals Office affirmed ALJ Felter's April 23, 2020 Order regarding the compensability of Claimant's head, back and hip injuries, and Respondents' liability for authorized and reasonably necessary medical treatment for Claimant's head, back, hips, blurred vision, and headaches. (Ex. 2).

6. The ALJ incorporates by reference the Findings of Fact contained in ALJ Felter's April 27, 2020 Order, as if set forth fully herein. (Ex. 1).

7. After issuance of ALJ Felter's Order, Claimant resumed treatment with multiple providers. As relevant to the present issues, on September 27, 2021, Claimant's authorized treating physician, Paul Ogden, M.D., at Workwell, referred Claimant to Brian White, M.D., an orthopedist for evaluation of Claimant's hips. (Ex. 6). Dr. Ogden also referred Claimant for evaluations with Eleanor Von Stade, M.D., for knee issues. (Ex. 6).

8. Following Dr. Ogden's requests for authorization, Respondents requested that Claimant undergo an IME with John Raschbacher, M.D., an occupational medicine physician. Dr. Raschbacher performed the IME on October 22, 2021, and issued a report with his opinions on November 4, 2021. (Ex. T). Dr. Raschbacher testified at hearing and was admitted as an expert in occupational medicine.

9. By letter dated November 18, 2021, Respondents notified Dr. Ogden they were "contesting and denying" the September 27, 2021 request for authorization of the referrals to Dr. Von Stade, Dr. White and Brian Castro, M.D., "as not being reasonable, necessary ad related to Claimant's work injury of February 7, 2019." Respondents' denial was based on the opinions expressed in Dr. Raschbacher's November 4, 2021 report. (Ex. Y).

Vestibular and Balance Issues

10. As a result of his February 7, 2019 work injury, Claimant sustained injuries to his head. (Ex. 1). Multiple providers have diagnosed Claimant with concussion syndrome and post-concussive issues, and have documented issues with gait, balance, and dizziness, although no provider has documented witnessing Claimant falling. Claimant's medical records document a pattern of repeated falls. Claimant has variously attributed the falls to issues with his hips, dizziness, and balance issues. Claimant testified that he did not have a history of falls prior to his February 7, 2019 injury. Claimant testified at hearing that he had no prior issues with balance or dizziness. Given that Claimant's employment required Claimant to spend hours each day riding a horse, the ALJ finds Claimant's

testimony credible. Claimant's friend, Crystal Stevens-Smith also testified that she has known Claimant for five years, and had not previously observed Claimant fall or display balance issues. She credibly testified that she has witnessed Claimant fall on several occasions since February 7, 2019.

11. Beginning in March 2019, Claimant reported experiencing dizziness, tinnitus, initially to Dr. Reichardt. See (Ex. 1, ¶ 11). On April 2, 2019, Claimant saw Dr. Snyder at Orthopaedic and Spine Center of the Rockies, who recommended an evaluation with concussion specialist, and recommended Dr. Wicklund. (Ex. P. 652).

12. Claimant first saw Dr. Wicklund on August 21, 2019, who noted dizziness and other concussion symptoms. Dr. Wicklund performed multiple tests and noted that Claimant was experiencing a protracted recovery from concussion, likely due to vestibular dysfunction, cognitive fatigue, sleep, and emotional dysregulation. (Ex. C).

13. Claimant's post-injury medical records document frequent and consistent complaints of dizziness which persisted but did improve with physical and vestibular therapy (Ex. 6).

14. At her February 23, 2021 appointment with Claimant, Dr. Wicklund noted that Claimant had consistently reported a similar constellation of symptoms over the previous year, including, but not limited to, headaches, balance problems, dizziness, fatigue, sleep dysregulation, ringing in the ears, and vision problems. (Ex. C). Based on her evaluation, Dr. Wicklund recommended that Claimant re-engage in physical therapy and vestibular rehabilitation, an ENT evaluation for tinnitus, and a more extensive neuropsychological testing. (Ex. C). Dr. Wicklund reiterated these recommendations on August 4, 2021, and noted that physical therapy had helped decrease Claimant's falls. (Ex. C).

15. Claimant was also evaluated by Inhyup Kim, M.D., a neurologist at Banner Health Neurology Clinic. Claimant was initially seen by Dr. Kim's nurse practitioner, Reena Dhakal, NP, on May 2, 2019, and diagnosed with concussion syndrome. (Ex. 7). He returned to Dr. Kim on October 24, 2019, and again diagnosed with concussion syndrome. (Ex. 7).

16. On February 16, 2021, Claimant saw Dr. Kim for a neurologic evaluation on referral from Dr. Ogden. In discussing Claimant's reports of frequent falls, Dr. Kim indicated Claimant had "VERY limited ROMs in left arm and both legs, due to shoulder, hip and knee pain. I suspect his joint pain and limited ROM are cause [sic] of his balance problem. - No clear-cut evidence of neurologic disorder responsible for his poor balance." (Ex. 7).

17. In 2021, Claimant was referred to Mark Loury, M.D., for an ENT evaluation. Claimant first saw Dr. Loury on April 28, 2021, and was diagnosed with bilateral tinnitus and inner ear vestibular equilibrium issues. (Ex. 12).

18. On June 24, 2021, Claimant had a consult with Natalie Phillips, Au.D., for vestibular function testing. Dr. Phillips noted that the testing indicated potential central vestibular pathology, however, due to "excessive blinking, poor neck and body mobility, the patient's disposition, and functional results on audiologic tests results may be

inaccurate." Dr. Phillips referred Claimant back to Dr. Loury for further evaluation. (Ex. 12).

19. On July 1, 2021, Dr. Loury indicated that, based on Dr. Phillip's testing, he likely had difficulty with ocular motor function. Dr. Loury recommended both vestibular and ocular rehabilitation. (Ex. F).

20. On November 28, 2021, Claimant saw Lori Perrin, Ph.D., for a psychological evaluation. As relevant to the present Issues, Dr. Perrin indicated that Claimant exhibits symptoms of a traumatic brain injury, including cognitive Issues, vision Issues, ringing In the ears and headaches. (Ex. 23).

21. In his February 16, 2022 report, Dr. Loury recommended continuation of vestibular therapy and tinnitus treatment. Dr. Loury also opined that there may be a cervical component to Claimant's tinnitus and imbalance. (Ex. 12).

22. In his February 21, 2022 letter, Dr. Loury indicated that Claimant demonstrates weakness in the left ear and abnormalities in how his eyes track, which affect balance. He also opined that likely had a labyrinthine concussion which resulted in damage to both hearing and balance functions. (Ex. 28).

23. Dr. Raschbacher opined that Claimant did not sustain any closed head injury, and that even if he did sustain a head injury "it would have been by definition a mild traumatic brain injury, and much more likely than not that symptoms would have cleared long ago and he would have no residual." Dr. Raschbacher also opined that "the medical record clearly indicates [Claimant] did not have a head injury." The ALJ finds Dr. Raschbacher's opinion that Claimant did not sustain a head injury unpersuasive, given ALJ Felter's previous finding that Claimant did sustain a compensable head injury and Dr. Loury's credible opinion regarding the cause of Claimant's vestibular and balance issues. (Ex. T).

24. The ALJ finds that Claimant sustained injuries to his head which have resulted in vestibular and balance issue which require additional treatment.

Right Knee

25. Claimant did not sustain trauma to his right knee in the February 7, 2019 horse accident. Claimant testified that as a result of his work injury, and that he has sustained multiple falls onto his right knee, resulting in injury. Claimant reported numerous falls to his health care providers between July 29, 2019 and September 2021. Claimant testified that his first fall occurred within two months after his injury. He testified that he could not really explain what precipitated falls, and that he cannot anticipate when a fall will occur. Claimant testified that he falls 1-5 times per week and that it has gotten worse over time. Claimant testified that before his work injury, and the subsequent falls, he had no problems with his right knee and had not had any prior injuries to his right knee.

26. On July 29, 2019, Claimant saw Logan Jones, D.O. at Workwell, and reported that he had recently fallen down steps at his home and impacted his right knee, resulting in

swelling which had improved, although Claimant reported popping and grinding of the knee. (Ex. 6).

27. On November 15, 2019, Claimant saw Dr. Snyder for evaluation of his shoulder following shoulder surgery. Claimant noted that he was experiencing problems with his right knee, which claimant contributed to "compensatory pain." Claimant was using a cane for ambulation. Dr. Snyder did not offer any opinion regarding Claimant's knee pain at that time. (Ex. 14).

28. On December 3, 2019, Claimant saw Lloyd Luke, M.D., at Workwell. Claimant marked his right knee on his pain diagram and reported right leg pain. Dr. Luke's diagnoses did not include any diagnosis of the knee, and no examination of the knee was documented. (Ex. 6).

29. On March 5, 2020, Claimant saw Dr. Snyder for evaluation of his shoulder. Claimant reported having "multiple falls" recently, twice directly on his elbow, and reported "blacking out" 3 to 5 times per week. Claimant reported knee pain and was wearing a knee brace on his right knee and requested evaluation of his right knee as part of his workers' compensation claim. Dr. Snyder indicated he believed Claimant's claim only involved the left shoulder, and did not perform an evaluation of Claimant's right knee. (Ex. 14).

30. On April 29, 2020, Claimant was apparently evaluated for right knee pain at Sidney Regional Medical Center in Sidney, Nebraska, after falling on his knee. X-rays performed showed a large right knee joint effusion and chronic degenerative changes with medial compartment narrowing. The only record of this visit offered into evidence is the x-ray report from April 29, 2020. (Ex. 11).

31. On June 11, 2020, Claimant saw Dr. Watson. Dr. Watson noted that Claimant reported popping in his right knee, examined Claimant's right knee and noted some popping in the medial knee and a positive McMurray test. Dr. Watson ordered an MRI of Claimant's right knee, which he later indicated was denied by insurer. Dr. Watson offered no opinion on the cause of Claimant's knee symptoms. (Ex. 6).

32. On November 5, 2020, Claimant saw Dr. Ogden and reported that he continued to have dizziness and had a fall two days earlier and "a number of recurrent falls." Dr. Ogden did not document any specific injuries resulting from Claimant's reported falls. On physical examination, Dr. Ogden noted Claimant was intermittently unsteady on his feet using a walking stick, but sometimes experienced disequilibrium. Dr. Ogden noted that he did not witness any episodes of loss of consciousness. Dr. Ogden noted a bruise on Claimant's left elbow from a recent fall. No injuries to Claimant's knee were documented. (Ex. 6).

33. On November 19, 2020, Dr. Ogden noted that Claimant's reported falls were a safety issues, and that "his falls always seem to be when he is walking, but has never had an episode when sitting." (Ex. 6).

34. On January 18, 2021, Dr. Ogden noted that Claimant reported being unsteady on his feet and a history of falls with "multiple injuries – struck elbow, head, laceration." Dr.

Ogden also documented swelling and pain in Claimant's right knee. He indicated Claimant's left knee was starting to be painful, "because of compensating for right knee injury from earlier falls from dizziness from head injury Feb 2019." He referred Claimant for bilateral knee x-rays. He opined that it was critical for Claimant to be evaluated to address falls and balance issues. (Ex. 6)

35. On February 1, 2021, Dr. Ogden noted that Claimant reported falling on his right knee that Saturday with swelling. (Ex. 6).

36. On February 18, 2021, Claimant underwent a WCRP Rule 16 IME with Kathy McCranie, M.D., following which she recommended that Insurer deny request for bilateral knee x-rays. In her report, Dr. McCranie did not directly address whether Claimant's knee injuries or falls were causally related to his February 7, 2019 injuries. Instead, Dr. McCranie indicated that ALJ Felter's Order did not authorize treatment of Claimant's knees, and indicated that "[a]n objective basis for his falling has not been determined." Consequently, Dr. McCranie's opinion on this issue is not persuasive. (Ex. S).

37. On March 25, 2021, Claimant saw Dr. Ogden and "requested coverage for … the right knee." Dr. Ogden indicated he would wait on evaluation of Claimant's orthopedic complaints pending a rheumatology evaluation. (Ex. 6). On April 15, 2021, Dr. Ogden reported Claimant had seen a rheumatologist who "did not feel multiple pain in the joints was related to an autoimmune condition." Dr. Ogden noted that Claimant was falling less, indicating that this due to physical therapy. (Ex. 6).

38. On June 21, 2021, Dr. Ogden recommended that Claimant undergo a physiatry consult with Scott Primack, D.O., given Claimant's limited progress. Dr. Ogden also noted that Claimant did have improvements with "falling." (Ex. B)

39. On July 16, 2021, Claimant saw Dr. Primack. Dr. Primack noted that when Claimant used a cane in his left hand, he had a steady gait pattern and unsteady when using his right. Dr. Primack noted that Claimant's knees were both painful to movement, and McMurray testing was positive on the right and negative on the left. He further indicated that he did not believe a spine surgical consultation would be appropriate. (Ex. 19).

40. On August 30, 2021, Claimant reported to Dr. Ogden that he had recently fallen on his right knee descending stairs outside his home using the handrail and a walking stick. Claimant did not know why he fell. Dr. Ogden referred Claimant for a home evaluation for fall prevention. Dr. Ogden noted he discussed Claimant' falls and knee pain indicating "there are no clear reasons for repeated falls, and don't seem to be preceded by a syncopal event, vertigo event or something else to further evaluation." (Ex. 6).

41. On September 2, 2021, Claimant was seen at the Torrington Community Hospital in Wyoming, reporting chronic knee pain. Claimant's knee was swollen and had difficulty walking. Claimant reported he had been experiencing knee pain since the horse accident, but did not report any specific recent trauma to his knee. A right knee x-ray showed a large suprapatellar effusion, which "may be infectious, inflammatory or posttraumatic.

Given the history, occult bony pathology not excluded" The x-ray also showed patellar chondromalacia and chondrocalcinosis. Claimant was provided a knee brace and pain medication, and advised to follow up with his primary provider. (Ex. 11).

42. On September 7, 2021, Claimant was seen by Natalie Beck, FNP, at Torrington Family Medicine regarding his right knee. Claimant reported his right knee was injured due to falls related to dizziness after the horse accident. Ms. Beck referred Claimant for an orthopedic evaluation. (Ex. J).

43. On September 9, 2021, Claimant saw orthopedist Eleanor Von Stade, M.D., in Torrington, Wyoming. Claimant reported his knee had become progressively worse since the horse accident. On examination, Dr. Von Stade noted a large effusion in the right knee, tenderness, and limited range of motion. Dr. Von Stade recommended an MRI of the knee to evaluate Claimant for a potential meniscal tear or ACL injury. (Ex. 10).

44. On September 10, 2021, Claimant underwent a right knee MRI which showed large knee joint effusion, and "subtle fraying and irregularity of the free edge of the medial meniscus." (Ex. H).

45. On September 27, 2021, Dr. Ogden requested authorization for a referral to Dr. Von Stade for evaluation of Claimant's right knee. (Ex. 6). Respondents denied authorization based on Dr. Raschbacher's IME report. (Ex. Y).

46. On September 28, 2021, Claimant saw Dr. Von Stade. Claimant reported he had had several falls on his right knee since the horse accident, and was still having pain in his right knee. Dr. Von Stade recommended an arthroscopy with partial medial meniscectomy. (Ex. 10). Ultimately, Claimant underwent a right knee surgery on January 12, 2022. The operative report from the January 12, 2022 surgery was not offered or admitted into evidence.

47. 24. Dr. Von Stade's report of February 10, 2022 indicates Claimant underwent a right knee arthroscopy with subtotal medial meniscectomy, and Claimant was noted to have some instability of his lateral meniscal root, which was repaired with a stitch. (Ex. 10).

48. Claimant testified that his right knee is approximately 70% improved following his surgery, although he has had one instance of Dr. Von Stade draining fluid from his knee.

49. In his November 4, 2021 report, Dr. Raschbacher opined that treatment of Claimant's right knee was not related to his February 7, 2019 work injury and the condition of Claimant's knee was not related to any falls Claimant may have had. He opined that imaging studies of Claimant's right knee were 'benign" and did not show evidence of bone contusion, fracture, acute trauma, or other pathology within the joint. (Ex. T).

Right Hip and Lower Back Referrals

50. As found by ALJ Felter, Claimant sustained compensable injuries to his hips and back as a result of the February 7, 2019 work incident. (Ex. 1). As previously noted, Dr.

Ogden referred Claimant to Dr. White for evaluation of his hips, and to Dr. Castro for a lower back evaluation on September 27, 2020. (Ex. 6).

51. Prior to making these referrals, on July 19, 2021, Dr. Ogden noted he discussed with Claimant his "hips in detail and I explained that from my standpoint any hip procedure is unlikely to result in the changes [Claimant] is hoping for." (Ex. B). After that evaluation, Claimant underwent hip and pelvic MRI arthrograms on September 9, 2021, which showed "slight fraying and irregularity of the anterior superior hip labrum on the left." (Ex. H).

52. In his February 28, 2022 note, Dr. Ogden noted that additional care for Claimant's hip and lower back was "unlikely to be indicated per IME, no further treatment planned." (Ex. 6). The ALJ infers the IME referenced is Dr. Raschbacher's opinion. Other than making the referral to Dr. White, Dr. Ogden did not provide an explanation. (Ex. 6)

53. In his report, Dr. Raschbacher opined that referral to Dr. White for a hip evaluation was not reasonable, necessary, or related to his injury. He noted that Claimant had "fairly benign" MR arthrograms of the hips which showed no labral abnormality, and normal hip x-rays. He concluded that Claimant "does not appear to have any likely surgical condition at all at his hips. Referral on that basis alone should not be authorized." Dr. Raschbacher also opined that imaging studies showed no acute findings at the spine, but showed pre-existing non-work-related degenerative changes. Dr. Raschbacher further opined that Claimant "does not likely have any surgical disease, and my medical opinion is that even if he had surgical intervention he would not likely report significant benefit…" (Ex. T). The ALJ finds Dr. Raschbacher's opinion on this issue credible.

54. In his IME report, Dr. Hughes diagnosed Claimant with bilateral hip sprain/strain injuries with persistent hip joint pain. He noted that Claimant had done poorly after surgeries on his left shoulder and right knee, which provided "a relative contraindication to proceeding with additional spine and hip surgeries." (Ex. 1).

55. On November 15, 2021, Dr. Ogden indicated in a WC164 form, that he had reviewed Dr. Raschbacher's IME stating that referrals for orthopedic evaluations for cervical spine, lumbar spine, and hips were not indicated. Dr. Ogden stated: "while it would be nice to have a second opinion, I'm in agreement that further interventions in those areas are unlikely to have a major impact on in [Claimant's] functional status." (Ex. B).

56. Based on the opinions of Drs. Raschbacher, Hughes, and Ogden, referrals for orthopedic evaluations for Claimant's hip and spine are not reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Dental Treatment

57. At hearing, Claimant testified that he began experiencing pain in his teeth four to six months after the February 7, 2019 horse accident. Claimant did not seek dental care until approximately 18 months after February 7, 2019.

58. On August 4, 2020, Claimant saw Trevor Skinner, DDS at Granite Springs Dentistry. Claimant reported that his last dental visit was 32 years earlier, and indicated that he wanted to get all of his teeth removed to get upper and lower dentures. Dr. Skinner noted that Claimant was not a candidate for dental implants due to periodontal and hygiene issues. He diagnosed Claimant with generalized mild to moderate chronic periodontitis, (> 30% of tooth surfaces), and started the process of preparing Claimant for dentures. (Ex. 22).

59. On September 3, 2020, Dr. Skinner extracted 14 teeth, and noted that Claimant had very dense bone along with very brittle teeth that tend to break. Dr. Skinner extracted the remainder of Claimant's teeth on September 17, 2020, and Claimant was ultimately provided dentures. (Ex. 22).

60. On October 27, 2020, Dr. Skinner authored a letter indicating that when Claimant presented to the dental clinic, many of his teeth were broken, worn down and/or infected with areas of intraoral bone loss. Dr. Skinner noted that Claimant "also informed us that he was involved in a traumatic horse accident within the last couple of years. I cannot guarantee with 100% certainty that the accident was the sole cause of his dental problems, but it likely contributed to it." (Ex. 22). Dr. Skinner's opinion is not credible or persuasive. The records do not demonstrate that Claimant sustained any direct trauma to his face, jaw or teeth, or any other injury that would have resulted in the need for dental treatment. Dr. Skinner offers no rationale for how Claimant's accident caused his teeth to break, wear down or become infected, or how his accident contributed to intraoral bone loss.

61. On March 25, 2021, Dr. Ogden opined that "loss of teeth would be an unusual event related to this injury." (Ex. 6).

62. On June 3, 2021, Claimant saw Blake Ballenger, D.D.S., for an evaluation and to request that Dr. Ballenger write a letter on his behalf. Dr. Ballenger noted that Claimant attributed his dental issues to the February 2019 horse incident. Dr. Ballenger reviewed Claimant's dental records, and stated: "Clinically I cannot comment on the trauma from 2019 causing any maxillofacial damage as I do not have his immediate pre or post x-rays or clinical exams. (Ex. 20).

63. Claimant's need for dental care is unrelated to his February 7, 2019 work injury.

Home Modifications and Home Health Care

64. On August 30, 2021, Dr. Ogden referred Claimant for a home evaluation for fall prevention. (Ex. 6). On or about September 22, 2021, Marnie Herring, DPT performed a safety assessment of Claimant's home. (Ex. 9, p. 463). Ms. Herring is a physical therapist at North Platte Physical Therapy in Torrington, Wyoming, where Claimant received physical therapy and vestibular rehabilitation, and testified at hearing. Ms. Herring testified that she has experience performing home safety evaluations. Based on her inspection of Claimant's home and interview with Claimant, Ms. Herring opined that Claimant's home does require some modifications due to vestibular and balance defects.

Ms. Herring's recommendations are set forth in her report dated September 22, 2021. In that report, Ms. Herring recommended the following modifications to assist in preventing falls:

a. An ADA ramp with railings to enter his front door;

b. Grab bars in shower;

c. . Elevated toilet set with railings on either side;

d. Grab bar on wall across from toilet to assist with transfers and balance;

e. Grab bars strategically placed on 3 sides of garden tub to allow him to get in and out safely;

f. Tub bench to assist with transfers into tup;

g. Option to elevate or place a step in the garden tub to allow him to get out in a graduated fashion.

(Ex. 9, p. 463).

65. Ms. Herring testified that assessment was limited to safety within the home, and she had no opinion regarding the Claimant's need for home health care.

66. On February 7 and 18, 2022, Angie O'Connor, R.N., performed an assessment of Claimant's home and his activities of daily living. (Ex. 4). Ms. O'Connor interviewed Claimant and evaluated his home and completed a report related to her assessment on February 21, 2022. In her report, Ms. O'Connor opined that Claimant required home modifications recommended by Ms. Herring. In addition, Ms. O'Connor recommended Claimant receive home care to include nursing for medication compliance, routine clinical assessment, and caregiver services for activities of daily living, including personal hygiene, bathing, dressing, house cleaning, laundry and assistance with finances and support for outside chores for his dogs, horses, and yard work. (Ex. 4).

67. At hearing, Claimant testified that he would like assistance around his home with activities of daily living. Claimant testified that he has difficulty retrieving cans from his cupboard. Claimant testified that he is able to drive to the grocery store, cook for himself, although these activities are somewhat limited. Claimant testified that he uses crutches when walking. Claimant also testified that he receives help from friends with his horses, and around the house. Ms. Stevens-Smith testified that she assists Claimant with chores around his home, including laundry, housekeeping, cooking, and caring for Claimant's dogs and horses, approximately once every two weeks.

68. On March 8, 2022, Dr. Von Stade completed a form entitled "Physician Progress – Need for Home Care," indicating that Claimant required nursing assistance for "medication help, aid with ADLs," and indicated that the need for such treatment was due to right knee meniscal tear, right knee post-traumatic arthritis, and bilateral hip injuries."

She indicated that Claimant was "unable to walk without crutches and has frequent falls due to his multiple orthopedic injuries." No credible evidence was admitted explaining the meaning of "medication help" or the specific activities of daily living for which Dr. Von Stade is recommending nursing assistance related to his meniscal tear, hip injuries, or post-traumatic arthritis.

69. In his IME, Dr. Hughes opined that the home modifications recommendation from Ms. O'Connor were reasonably necessary. In testimony, Dr. Hughes indicated that "further evaluation was needed to assess [Claimant's] ability to meet the activities of daily living. Much of the home assessment of Angie O'Connor dealt with incapacities in [Claimant's] self-sufficiencies and the activities of daily living, and I felt that a neuropsychological evaluation needed to be done to assess the severity of a mild traumatic brain injury." He further indicated that such an evaluation would "show us the degree of impairment stemming from a traumatic brain injury versus stemming from a lack of motivation." (Hughes, Depo, p. 9-10).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus.l Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY – Right Knee

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that he sustained injuries to his right knee arising out of the course of his employment with Employer. As found, Claimant had no balance issues prior to his February 7, 2019 work accident. Claimant's health care providers documented numerous contemporaneous reports of falls. Taken in its totality, the evidence demonstrates that more likely than not, Claimant sustained injuries to his hip and head which caused issues with mobility, balance, and stability. These injuries resulted in Claimant falling frequently, including at least four separate instances of Claimant falling on and injuring his right knee. Multiple providers found objective evidence of injury in the form of large effusions in his knee, positive McMurray tests, and evidence of grinding and popping in the knee. Claimant credibly testified that he had no knee issues prior to his work injury. ALJ Felter's found Claimant sustained compensable injuries to his head and hip. These injuries resulted in Claimant's mobility and balance issues, which caused his falls. The ALJ concludes that Claimant has

proven that it is more likely than not that he sustained injuries to his right knee as a result of his February 7, 2019 work accident.

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Authorization of Treatment for Claimant's Right Knee

Claimant has established by a preponderance of the evidence that treatment of his right knee is reasonably necessary to cure or relieve the effects of his industrial injury. But for Claimant's industrial injury, he would not have sustained falls resulting in trauma to his right knee, which lead to the need for treatment. Dr. Raschbacher's opinion that Claimant's right knee MRI was benign is not persuasive, given Dr. Von Stade's performance of a right knee meniscectomy and partial meniscal repair. Claimant has established that treatment by Dr. Von Stade was reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Orthopedic Evaluation of Claimant's Hips

Claimant has failed to establish by a preponderance of the evidence that referral to Dr. White for an evaluation of his hips is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, although Dr. Ogden originally referred Claimant to Dr. White for evaluation, he later opined that a referral was not likely to improve Claimant's functional status. His opinion is consistent with both Dr. Hughes and Dr. Raschbacher. No credible evidence was offered to indicate that the slight labral fraying shown on Claimant's September 9, 2021 MRI was causally related to his February 7, 2019 injury, or that referral for a hip evaluation is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Orthopedic Evaluation Of Claimant's Lower Back

Claimant has failed to establish by a preponderance of the evidence that referral to Dr. Castro for evaluation of Claimant's back. As with his referral to Dr. White, after making the initial referral, and reviewing Dr. Raschbacher's IME report, Dr. Ogden indicated that he did not believe referral for an orthopedic evaluation of Claimant's lower back would likely improve Claimant's function. No credible evidence was admitted indicating that Claimant has a surgical condition of the lumbar spine which would reasonably be addressed by an orthopedic surgeon. Again, Dr. Ogden's opinion is consistent with Dr. Hughes, Dr. Raschbacher and Dr. Primack. No credible evidence was admitted demonstrating that referral for an orthopedic evaluation of Claimant' lumbar spine is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Treatment for Dental Issues

Claimant has failed to establish by a preponderance of the evidence that his dental issues are arise out of the course of his employment with Employer. Claimant did not complain of dental issues to his workers' compensation providers until after his teeth were removed in September 2020, and he reported no dental issues to his providers in the nineteen months after the work accident. When Claimant was first examined for dental issues, Dr. Skinner noted significant issues with Claimant's teeth, including periodontitis, worn down teeth, broken teeth, infection, and intraoral bone loss. No credible evidence was offered demonstrating Claimant sustained any trauma to his teeth or other injuries that would cause periodontitis, worn down or broken teeth, infections, or intraoral bone loss. Dr. Ogden acknowledged it would be unusual for Claimant's dental symptoms to be related to his work accident.

Dr. Skinner's opinion that Claimant's injuries "likely contributed" to his dental issues is neither credible nor persuasive. Dr. Skinner's opinion appears to be based solely on Claimant's statement that he had a "traumatic horse accident," but offers no substantive explanation for his causation opinion. No medical or dental provider has credibly opined how these conditions are related to Claimant's work injuries. Claimant has failed to establish by a preponderance of the evidence that dental treatment is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Treatment for Vestibular and Balance Issues

Claimant has established that treatment for vestibular and balance issues is reasonably necessary to cure or relieve the effects of his industrial injury. As found, Claimant has sustained numerous falls over a prolonged period of time. Claimant and Ms. Stevens-Smith credibly testified that Claimant had no prior issues with falls or balance. Given that Claimant's employment required him to ride horses on a daily basis, the ALJ finds credible that Claimant had no prior balance or fall issues. ALJ Felter previously found that Claimant sustained a head injury, and that Respondents are liable for treatment for that injury. The ALJ credits the opinion of Drs. Loury Claimant requires further treatment for vestibular issues to address ocular and vestibular issues. Claimant has established by

a preponderance of the evidence that treatment for vestibular and balance issues is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Home Modifications and Home Health Care

Claimant has established by a preponderance of the evidence that home modifications to address falling issues are reasonably necessary to cure or relieve the effects of his industrial injury. The ALJ finds credible the testimony of Marnie Herring, DPT, that Claimant requires limited modifications of his home to assist with mobility and to prevent falls. As found, Claimant has sustained multiple falls and has balance and mobility issues which prevent fall risks.

Claimant has failed to establish by a preponderance of the evidence that home nursing care recommended by Dr. Von Stade is reasonably necessary to cure or relieve the effects of his industrial injury. No credible evidence was admitted indicating that Claimant requires in-home health care or "medication help." With respect to activities of daily living, no treating provider other than Dr. Von Stade has recommended nursing care for assistance with activities of daily living. No persuasive, credible evidence was offered to establish that Claimant requires in-home nursing care to assist him with cleaning his home, bathing, personal hygiene, tending to animals or other activities.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right knee as the result of his February 7, 2019 industrial injury.

2. Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's right knee caused Claimant's February 7, 2019 industrial injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

3. Claimant's request for authorization of a referral to a hip specialist is denied and dismissed.

4. Claimant's request for authorization of a referral to a spine specialist is denied and dismissed.

5. Claimant's dental issues are not related to his February 7, 2019 industrial injury. Claimant's request for authorization of dental treatment is denied and dismissed.

6. Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's vestibular and balance issues right knee caused

by Claimant's February 7, 2019 industrial injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

7. Claimant's request for authorization of home health care is denied and dismissed.

8. Respondents shall pay the cost of home modifications recommended by Marnie Herring, DPT, as set forth in her report of September 22, 2021, subject to the Division of Workers' Compensation Medical Fee Schedule, were applicable.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 6, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant had demonstrated, by a preponderance of the evidence, that the cervical fusion surgery recommended by Dr. Wade Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 2, 2019 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury to his left shoulder and neck on October 2, 2019. The injury occurred when the claimant's work truck fell off a jack and struck the claimant while he was attempting to change a tire.

2. Since the injury the claimant has undergone physical therapy and two surgeries. On August 4, 2020, Dr. Ferdinand Liotta performed surgery on the claimant's left shoulder. The arthroscopic surgery included anterior capsular release, debridement of labral fraying, biceps tenodesis, subacromial decompression, distal clavicle excision, and suprascapular nerve decompression at that suprascapular notch.

3. Following the shoulder surgery, the claimant continued to experience neck related symptoms and was subsequently seen by Dr. Wade Ceola. On October 2, 2020, Dr. Ceola noted that a magnetic resonance image (MRI) of the claimant's cervical spine showed neuroforaminal narrowing that was consistent with C6 radiculopathy.

4. On January 20, 2021, Dr. Ceola performed an anterior cervical discectomy and fusion at C5-C6.

5. On February 10, 2021, the claimant was seen in Dr. Ceola's practice by Natalie Arena, PA-C. At that time, the claimant reported some neck pain. On exam, PA Arena noted that the claimant had full strength in his bilateral arms. On that same date, x-rays of the claimant's cervical spine showed "excellent position of placement of hardware with no evidence of complicating features."

6. On April 15, 2021, the claimant returned to PA Arena and reported incisional pain with intense pain in his right shoulder radiating to his neck. PA Arena noted that "muscle spasm is largely responsible for his continued pain and difficulty with range of motion." She recommended massage therapy and physical therapy.

7. On May 27, 2021, the claimant was seen in Dr. Ceola's office by Lara Kroepsch, PA-C. At that time, the claimant reported excruciating pain in his left shoulder, with occasional radiation into his left elbow. The claimant also reported a left shoulder injection that dramatically worsened his symptoms. PA Kroepsch opined that

the claimant's issues were due to tightness that was "secondary to his chronic pain which really seems to coming from the shoulder at this time."

8. On July 8, 2021, the claimant was seen by Dawn Kopf, PA-C in Dr. Ceola's practice. The claimant reported that he had ongoing neck and left shoulder pain that had worsened over the last several months. PA Kopf reviewed the prior x-rays and noted that the surgical hardware had good alignment and good body arthrodesis. PA Kopf ordered a cervical spine MRI for further evaluation of adjacent segment disease and possible radiculopathy.

9. On July 12, 2021, an MRI of the claimant's cervical spine showed neuroforaminal stenosis at multiple levels. There was no noted central canal stenosis at any level. There was no noted issue with the surgical hardware.

10. On July 15, 2021, the claimant returned to PA Kopf. On that date, PA Kopf noted that "there is no spinal canal stenosis or evidence of acute injury." PA Kopf opined that the claimant's symptoms could be caused by neuroforaminal narrowing at the C4-C5 level. As a result, she recommended a left-sided epidural steroid injection at that level.

11. On August 18, 2021, the claimant was again seen by PA Kopf. The claimant reported that he had undergone a left sided C7-T1 epidural steroid injection with Dr. Giora Hahn. The claimant also reported that the injection did not improve his symptoms. The claimant further reported that physical therapy had been beneficial in improving his arm strength.

12. On September 16, 2021, the claimant was seen by Dr. Ceola. In the medical record of that date, the claimant reported that the recent injection made his symptoms worse. Dr. Ceola also noted that the claimant continued to experience bilateral occipital pain that radiated into his shoulders. Dr. Ceola opined that this could be indicative of facet disease. At that time, Dr. Ceola explained that possible treatment would include facet blocks and radiofrequency ablation. Alternatively, he could perform additional spinal surgery. This surgery would include: bilateral foraminotomy from C3 to C6, left C6-C7-T1 with instrumented fusion, and removal of spinous process and leave lamina. The claimant informed Dr. Ceola that he did not want to pursue additional injections. Dr. Ceola requested authorization for the recommended spinal fusion.

13. On December 6, 2021, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant reported that his primary complaint was neck pain that radiated from the base of his neck into his skull. In his IME report, Dr. Rauzzino opined that the additional surgery recommended by Dr. Ceola is not reasonable, necessary, or related to the claimant's work injury. In support of this opinion, Dr. Rauzzino noted that the claimant's current symptoms involve axial neck pain, with no radicular symptoms. It is Dr. Rauzzino's understanding that the claimant's radicular symptoms were resolved following the first spinal fusion. Based upon Dr.

Rauzzino's opinions, the respondents denied authorization for the recommended spinal surgery.

14. Dr. Rauzzino's deposition testimony was consistent with his written report. Dr. Rauzzino testified that the claimant does not have significant radicular symptoms in his upper extremities. In addition, during the IME, Dr. Rauzzino was not able to produce radicular symptoms. Dr. Rauzzino reiterated his opinion that the surgery recommended by Dr. Ceola is not reasonable or necessary to treat the claimant's symptoms. In support of this opinion, Dr. Rauzzino noted that the claimant does not have spinal instability or radiculopathy. He further testified that findings of foraminal stenosis do not justify surgery because those nerves are not producing symptoms that can be relieved by surgery.

15. The claimant testified that his current symptoms include sharp and shooting pain in his neck and up into his skull. At times, this pain will also radiate into his left shoulder and left elbow.

16. The ALJ credits the medical records and the opinions of Dr. Rauzzino over the contrary opinions of Dr. Ceola. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the cervical fusion surgery recommended by Dr. Ceola is reasonable medical treatment necessary to cure and relieve him from the effects of the October 2, 2019 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights
of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

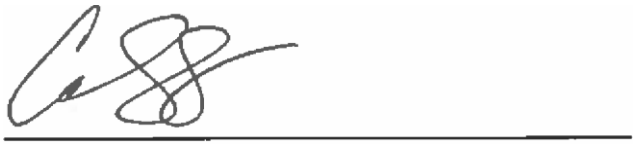
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the cervical fusion surgery recommended by Dr. Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 2, 2019 work injury. As found, the medical records and the opinions of Dr. Rauzzino are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for cervical fusion surgery (as recommended by Dr. Ceola) is denied and dismissed.

Dated this 11th day of May 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email

address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-113-117-001 & 5-113-117-002

ISSUES

1. Whether Respondents have established by clear and convincing evidence that the DIME physician was incorrect when he determined Claimant was not at maximum medical improvement (MMI) on September 9, 2021, and at MMI on February 28, 2022.

2. Whether Respondents have established by clear and convincing evidence that the DIME physician's permanent impairment ratings are incorrect.

3. Whether Claimant has established by a preponderance of the evidence that his right shoulder permanent impairment rating should be converted to a whole person impairment.

PROCEDURAL ISSUES

The parties stipulated to the consolidation of WC 5-113-117-001 & WC 5-113-117-002.

The parties stipulated that the issues of average weekly wage, temporary total disability, and medical benefits, raised in Claimant' Response to Application for Hearing in WC 5-113-117-001, are to be held in abeyance.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on July 14, 2019, arising out of the course of his employment with Employer. The incident occurred when a co-worker operating a boom lift struck a portable metal staircase weighing several hundred pounds, causing it to strike Claimant.

2. Following the injury, Claimant was seen at the UC Health emergency department and discharged. Claimant then initiated treatment with Concentra, which included physical therapy, chiropractic, massage therapy, pain, and anti-inflammatory medications. (Ex. I). Claimant's authorized treating provider (ATP) was Thomas Corson, M.D., at Concentra. Claimant moved between Colorado and Utah at various times, and received treatment and evaluations at Concentra locations in both Colorado and Utah.

3. After several months, Claimant was referred to Craig Davis, M.D., for an orthopedic evaluation on October 8, 2019. On examination, Dr. Davis noted Claimant's right shoulder range of motion was 90% with pain in extremes of motion, good rotator cuff strength, and minimally positive impingement signs. Dr. Davis did not document any specific shoulder test performed, or any specific range of motion measurements. Dr. Davis reviewed x-rays of Claimant's right shoulder and cervical spine, and diagnosed Claimant with myofascial strains of the right neck and shoulder. He stated: "It does not seem to me like he has a

significant rotator cuff injury." Dr. Davis recommended continuing physical therapy and chiropractic visits, and medications. (Ex. E).

4. In December 2019, Claimant was seen at Concentra in Sandy, Utah by Mark Aldrich, FNP, for neck and shoulder pain. Aldrich ordered cervical and shoulder MRIs which were performed on December 27, 2019 and January 9, 2020, respectively. Claimant's right shoulder MRI demonstrated a Type 2 superior labral anterior-to-posterior (SLAP) tear, anterior labral tear, and mild AC degenerative joint disease. It was noted that the findings raised suspicion for impingement syndrome. (Ex. I).

5. Claimant did not see an orthopedic surgeon after his shoulder MRI was performed. However, Claimant continued to receive treatment through Concentra in Colorado and Utah, including physiatry evaluations with Dallin DeMordaunt, M.D., in Salt Lake City. In March 2020, Dr. DeMordaunt indicated several recommended treatment or diagnostic modalities had been denied by insurer. Dr. DeMordaunt indicated Claimant had a potentially severe shoulder injury that was not being treated and may require an orthopedic surgery consult. (Ex. I).

6. On April 22, 2020, Stephen Lindenbaum, M.D., performed an independent medical examination.[1] Dr. Lindenbaum recommended a shoulder MRI and indicated it had been previously denied. Dr. Lindenbaum also indicated Claimant should be seen by an upper extremity specialist. (Ex. I).

7. Over the next several months, Claimant continued to treat with Dr. DeMordaunt, and physical therapy. (Ex. I).

8. On October 23, 2020, Claimant saw Dr. Lindenbaum for a second IME. Dr. Lindenbaum noted that Claimant had a significant delay in treatment, possibly due to Covid. Dr. Lindenbaum also indicated Claimant had a one-time visit with Dr. Davis, and recommended a follow-up visit with Dr. Davis with the MRI being made available. He indicated Claimant could return to work with restrictions until cleared by Dr. Davis. Dr. Lindenbaum opined that Claimant would not be at MMI until he had seen an orthopedic surgeon and completed all treatment. (Ex. I).

9. Claimant continued see his ATP, Dr. Corson, and Dr. DeMordaunt over the next several months. (Ex. I). No credible evidence was admitted demonstrating that Claimant was referred back to Dr. Davis or another orthopedic surgeon as recommended by Dr. Lindenbaum.

10. In November 2020, Claimant participated in a functional capacity evaluation (FCE) at Functional Assessment Rehab in Salt Lake City. Claimant had limited range of motion of the shoulder and neck, and was able to lift and reach overhead, but not able to do so repetitively. With repetitive overhead reaching, Claimant guarded his right arm and showed indications of declining endurance. The FCE also noted that Claimant did not

[1] The record does not contain either of Dr. Lindenbaum's reports, but DIME physician summarized Dr. Lindenbaum's opinions in his September 9, 2021 report.

demonstrate inconsistencies in his effort and gave good effort performing the assessment tasks. (Ex. G).

11. On January 15, 2021, Claimant saw John Sacha, M.D., at Concentra. Dr. Sacha noted that Claimant had completed care and had moved out of state and returned. He indicated that MMI was appropriate, but no date was provided. He deferred to Dr. Corson for assignment of the MMI date. Dr. Sacha recommended work restrictions, and maintenance care, including trigger point injections and a possible and a repeat shoulder injection. He assigned a 5% upper extremity impairment rating, and an 8% cervical spine impairment rating. The impairment ratings assigned by Dr. Sacha correspond to a combined 11% whole person impairment. (Ex. H).

12. On January 25, 2021, Dr. Corson placed Claimant at MMI, and assigned Claimant the permanent impairment ratings determined by Dr. Sacha. Dr. Corson's work-related diagnosis was acute cervical myofascial strain, cervical radiculopathy, partial tear of right rotator cuff, thoracic sprain, right rotator cuff strain, and Type 2 superior labral anterior-to-posterior (SLAP) tear of the shoulder. Dr. Corson recommended permanent work restrictions consisting of a 35-pound lifting restriction and no overhead work with the right arm. He further noted that Claimant would require maintenance care in the form of maintenance medication, trigger point injections, and possible repeat shoulder injections. He further indicated that Claimant should be allowed follow with his ATP and receive medications for the following 6-12 months. (Ex. A).

13. After January 25, 2021, Claimant continued to receive care, including six follow up visits with Dr. Sacha, one visit with Dr. Corson, and physical therapy. (Ex. I). Claimant continued with physical therapy until August 2021.

14. On April 28, 2021, Respondents filed a Final Admission of Liability, admitting for reasonably and necessary treatment recommended by an authorized treating physician, and for an 11% whole person impairment, which corresponded to Dr. Sacha' s combined whole person impairment for Claimant's shoulder and neck. (Ex. A).

15. On May 26, 2021, Claimant filed an objection to the FAL, and requested a Division Independent Medical Examination (DIME). (Ex. B).

16. On August 3, 2021, Claimant underwent an FCE with Colorado in Motion. (No record of the FCE was offered or admitted into evidence). Claimant was assessed as not being able to do above the shoulder reaching or lifting with the right hand, or extend reaching away from the body with the right hand. (Ex. I).

17. On September 9, 2021, Anjum Sharma, M.D., performed a DIME of Claimant. Dr. Sharma indicated that Claimant sustained work-related injuries to his cervical spine and right shoulder. His examination demonstrated "very clearly a significant impairment in the right shoulder range of motion," and he opined that Claimant put forth his best efforts on range of motion testing. Dr. Sharma noted tenderness to palpation along the acromion at the glenohumeral and subacromial joints, and a positive Hawkins-Kennedy test. Claimant

had shoulder weakness in multiple planes. Dr. Sharma indicated that Claimant still had a significant amount of pain and pathology in the right shoulder. (Ex. I).

18. Dr. Sharma opined that Claimant was not at MMI on September 9, 2021, and provided non-binding, provisional impairment ratings for Claimant's cervical spine and right shoulder. Dr. Sharma assigned a 16% scheduled right upper extremity impairment rating for Claimant's right shoulder (which corresponds to a 10% whole person impairment); and 12% whole person impairment for Claimant's cervical spine. If combined as a whole person impairment, Dr. Sharma's provision impairment ratings correspond to a 21% whole person impairment. (Ex. I).

19. In discussing his MMI rationale, Dr. Sharma indicated Claimant had been seen for independent medical examinations by Dr. Lindenbaum twice (on April 22, 2020 and October 23, 2020), in which Dr. Lindenbaum had indicated Claimant would benefit from an orthopedic surgery evaluation. He further opined that even if Claimant has chronic degenerative changes to the shoulder, "there is no doubt that [Claimant] has had an exacerbation, acceleration and aggravation of the underlying condition." Dr. Sharma indicated that based on his review of Claimant's medical records, Claimant had not been seen by an orthopedic surgeon and or been informed whether he would benefit from surgery, and that Claimant's right shoulder had not been addressed. (Ex. I).

20. On December 14, 2021, Claimant returned to Dr. Davis. Dr. Davis reviewed Claimant's shoulder January 9, 2020 shoulder MRI, and noted that Claimant has a right shoulder Type 2 SLAP tear with a para-labral cyst. Dr. Davis examined Claimant's right shoulder and noted tenderness in the posterior aspect of the shoulder, forward elevation of 150 degrees, abduction of 140 degrees, external rotation of 70 degrees, and internal rotation to T11 with slight pain on abduction. Claimant had slightly positive Hawkins and cross body impingement tests, and negative Neer and Speed tests. (Ex. J).

21. Dr. Davis indicated "At the moment, his symptoms are minimal, an therefore, I would recommend simple observation." He indicated that if Claimant become symptomatic, a shoulder injection may be considered. He opined that surgical treatment would be a "last resort." Dr. Davis opined that if Claimant's shoulder "becomes refractory to treatment, it might be worth considering arthroscopic labral repair and excision of the cyst. For now, however, he is doing well and therefore no followup scheduled and no treatment indicated." (Ex. J).

22. Other than the evaluation by Dr. Davis, no credible evidence was admitted demonstrating that Claimant received treatment for his right shoulder or cervical spine after September 9, 2021.

23. On February 28, 2022, Claimant returned to Dr. Sharma for a follow-up DIME. Dr. Sharma reviewed Dr. Davis' December 14, 2021 report, and placed Claimant at MMI effective February 28, 2022. Dr. Sharma noted that based on his examination, Claimant had a worsening range of motion of the right shoulder. Based on his evaluation and measurements taken at the February 28, 2022 follow-up DIME, Dr. Sharma assigned Claimant an 18% whole person impairment his cervical spine. He also assigned an 18%

scheduled impairment for Claimant's right upper extremity which corresponds to an 11% whole person impairment. Claimant's cervical and right upper extremity impairments combine to yield a 27% whole person impairment. Dr. Sharma also indicated that he recommended maximum lifting of no more than 50 pounds, and lifting overhead to no more than ten pounds. (Ex. K).

24. Claimant testified at hearing that over time his symptoms have improved and then declined. Claimant has attempted to return to work in various capacities, and testified that he has difficulty completing tasks that required reaching over head with his right arm. Claimant testified that he continues to experience pain and popping in his right shoulder when he lifts his right arm, he cannot throw overhand, has difficulty driving with his right arm raised, and has difficulty sleeping. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on MMI and Impairment

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's

determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

MMI

Respondents contend that Dr. Sharma incorrectly determined Claimant was not at MMI on September 9, 2021, and that, consequently, his determination that Claimant reached MMI on February 28, 2022 was also incorrect. Both contentions are based on the same premise: That Claimant reached MMI on or before September 9, 2021. Respondents urge the adoption of Dr. Corson's MMI date of January 25, 2021 as Claimant's MMI date.

Respondents have failed to establish by clear and convincing evidence that Dr. Sharma's opinion that Claimant was not at MMI on September 9, 2021 was incorrect. At Dr. Sharma's DIME, Claimant reported continued and ongoing pain in his right shoulder that had not been alleviated with conservative treatment. Dr. Sharma determined Claimant should have an orthopedic evaluation for potential shoulder surgery before being placed at MMI. Although Dr. Sharma incorrectly stated that Claimant had not been seen by an orthopedic surgeon, that mistake does not render his opinion incorrect. Dr. Sharma's opinion is consistent with Dr. Lindenbaum's opinion that Claimant should not be placed at MMI until he had an orthopedic evaluation. Claimant's only evaluation by an orthopedic surgeon was in October 2019, approximately two years before Dr. Sharma's IME. Dr. Davis' October 2019 evaluation was done without the benefit of Claimant's right shoulder MRI, and appears, based on the documentation, to be a cursory examination. Dr. Davis reviewed only x-rays, did not document performance of specific testing (such as those documented in his December 14, 2021 evaluation) and opined only that "it doesn't seem to me like he has a significant rotator cuff injury."

Prior to Claimant's January 9, 2020 MRI, Claimant's only shoulder diagnosis was a shoulder sprain. Claimant's MRI revealed a Type 2 SLAP tear, and an anterior labral tear. Given that Claimant had not seen an orthopedic surgeon after shoulder pathology was identified on the MRI, continued to experience symptoms, and had not improved with conservative care, the evidence does not demonstrate that Dr. Sharma's opinion that Claimant had not reached MMI on September 9, 2021 was incorrect.

Respondents have similarly failed to establish by clear and convincing evidence that Dr. Sharma's assignment of February 28, 2022 as Claimant's date of MMI is incorrect. As noted above, Respondents contend the February 28, 2022 MMI date is incorrect because Claimant reached MMI on or before September 9, 2021. As found, Claimant was not at MMI on September 9, 2021. Respondents have failed to establish by evidence that is highly probable and free from serious doubt that Claimant reached MMI prior to February 28, 2022, or that Dr. Sharma's assigned MMI date was incorrect.

IMPAIRMENT

Respondents next contend that the permanent impairment ratings assigned by Dr. Sharma on February 28, 2022 are incorrect, again urging the adoption of Dr. Corson's and Dr. Sacha's impairment ratings from January 2021. Respondents have failed to establish by clear and convincing evidence that Dr. Sharma's assignment of a cervical spine impairment rating of 18% or a right upper extremity rating of 11% are highly probably incorrect. No credible evidence was admitted that Dr. Sharma misapplied the AMA Guidelines for the Evaluation of Permanent Impairment when assessing Claimant's range of motion or assigning an impairment rating, or that the measurements taken were invalid. Dr. Sharma was cognizant of the fact that Claimant's range of motion had decreased since his prior DIME, and, nonetheless, assigned impairment ratings based on range of motion measurements taken in February 2022. Dr. Sacha's assessment of lower impairment ratings in January 2021 does not constitute clear and convincing evidence that Dr. Sharma incorrectly assigned impairment ratings based on his findings on February 28, 2022. Respondents have failed to present evidence that is unmistakable and free from serious and substantial doubt demonstrating it is highly probable the DIME physician's impairment rating is incorrect.

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S.

The schedule includes the loss of the "arm at the shoulder." *See* § 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO June 11, 1998). Because § 8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). For a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas*

v. Excel Corp., W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *In re Claim of Barnes,* 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that his scheduled impairment rating for his right upper extremity rating should be converted to a whole person impairment. As found, Claimant reached MMI for July 14, 2019 right shoulder injury on February 28, 2022. As demonstrated by Dr. Sharma's DIME, Dr. Corson's assignment of work restrictions including no overhead use of the right arm, the functional capacity evaluations, Claimant has a loss of range of motion in his right arm, inability to use his arm overhead, and experiences pain in his right shoulder. Additionally, Claimant testified that he had difficulty working overhead and difficulty lifting his right arm. These limitations are not determinative of the "situs of functional impairment," but are, instead, manifestations of functional impairment. *See Garcia v. Terumo BCT*, W.C. No. 5-094-514-002 (ICAO, July 14, 2021). Claimant's July 14, 2019, injury resulted in damage to the structures of the shoulder, which are not currently surgical. The ALJ concludes that the Claimant's inability to fully use his right arm overhead and loss of range of motion are manifestations of an impairment of Claimant's right shoulder, beyond the arm. Accordingly, Claimant's right upper extremity impairment rating is converted from an 18% right upper extremity impairment to an 11% whole person impairment. Claimant is entitled to a whole person impairment rating combining his cervical and right upper extremities of 27%, as determined by Dr. Sharma.

ORDER

It is therefore ordered that:

1. Claimant was not at MMI on September 9, 2021.

2. Claimant reached MMI on February 28, 2022.

3. Claimant's 18% permanent impairment rating for his right upper extremity related to his July 14, 2019 work injury is converted to an 11% whole person impairment, and combined with his cervical impairment to yield a 27% whole person impairment.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-139-080-002

ISSUES

The issues set for determination included:

- Did the Court have subject matter jurisdiction to hear Respondents' objection to the findings of the Division Independent Medical Examiner?
- In the alternative, did Respondents' Application for Hearing, dated May 17, 2021, substantially comply with the Workers' Compensation Act to allow the challenge to Dr. Ginsburg's findings?
- Did Claimant prove by a preponderance of the evidence that he should be awarded monetary penalties for Respondents' failure to comply with C.R.S. § 8-42-107.2(4)(c)?

PROCEDURAL HISTORY

A January 5, 2022 deadline for filing post-hearing briefs was agreed upon by counsel for the parties. On or about January 5, 2022, counsel for Respondents filed a Motion for Extension of Time to extend the deadline to January 12, 2022. In the interim, Administrative Law Judge Nemechek was ill during the time this Motion was pending. No response or objection was filed on behalf of Claimant. When ALJ Nemechek returned to the office, the deadline was extended to January 12, 2022 and Respondents' submission, filed on January 12, 2022 was accepted and considered. A Bench Order confirming the action on the Motion for Extension of Time was entered electronically by ALJ Nemechek and no further action was required with regard to the Motion.

The undersigned ALJ issued a Summary Order on March 28, 2022, which was mailed on March 30, 2022. Respondents requested a full Order on April 13, 2022. Respondents submitted an Amended proposed Findings of Fact, Conclusions of Law and Order on April 21, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant is employed by Respondent-Employer as a utility maintenance worker, a position he has held since July 1, 2019.

2. On April 15, 2020[1], Claimant was exposed to Covid-19 while working with a co-employee in a maintenance pit. Claimant notified Employer of the exposure.

[1] The Notice of Injury filled out by Claimant stated that the date of exposure was April 14, 2020. However, the Employer's First Report of Injury listed April 15, 2020 as the DOI. Also, the DIME report stated that Dr. Ginsburg and Claimant agreed that April 15, 2020 was the correct date.

3. Claimant received medical treatment at Advanced Urgent Care from April 23, 2020 through December 7, 2020. On April 23, 2020, Claimant was evaluated by Briana Vieth, PA, at which time he reported fatigue and a sore throat. He confirmed a potential exposure to COVID-19, as he was working in close proximity to a co-worker. PA Vieth stated that Claimant should be tested for COVID-19, due to his clinical presentation.

4. On April 26, 2020, Claimant presented to Yelena Brambila, PA, for a telehealth appointment and reported symptoms of fatigue and a low-grade fever. Claimant was notified that he had positive COVID-19 test results.

5. Claimant's symptoms of low grade fever and fatigue were documented by Morgan Ash, PA at Advanced Urgent Care in the follow-up appointment on April 28, 2020. PA Ash's assessment/plan was: 2019 novel coronavirus; fever; fatigue. Claimant was to continue self-quarantine and take Tylenol as needed. Claimant's symptoms continued, which was documented in the evaluation conducted by PA John Helfen on May 1, 2021. PA Helfen's assessment/plan was: 2019 novel coronavirus; fatigue; loss of taste; loss of smell.

6. On May 7, 2020, Claimant had a follow-up evaluation at Advanced Urgent Care at which time PA Lauren Wenzl noted Claimant's COVID-19 symptoms (cough, fever, shortness of breath) had resolved.

7. An Employee's Notice of Injury (Insurer form) was completed by Claimant on or about May 11, 2020. An Employer's First Report of Injury was completed that same day.

8. Claimant returned to Advanced Urgent Care on May 17, 2020 and the clinic notes stated that his symptoms had resolved and that he had tested negative for COVID-19 on May 13, 2020. Claimant was found to be at MMI by Audra Dust, PA-C and the report was signed by Kevin Chicoine, M.D.

9. On June 1, 2020, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for a closed period of TTD benefits (May 8, 2020 to May 17, 2020).

10. Claimant requested a Division of Workers Compensation-sponsored Independent Medical Examination ("DIME").

11. On September 11, 2020, Claimant contracted Legionella pneumonia while he was working. Two claims were filed for this issue, WC case numbers 5-149-004 and 5-148-269. These claims were merged under claim number WC 5-148-269.

12. Claimant received medical treatment at Peak Performance from January 26, 2021 through August 10, 2021. The focus of this treatment was on the symptoms related to Legionella pneumonia or Legionnaire's disease.

13. On April 8, 2021, Stanley Ginsburg, M.D. conducted the DIME. Dr. Ginsburg's record review chronicled his symptoms and treatment for both COVID-19 and

Legionnaire's disease. Claimant and Respondents stipulated that Dr. Ginsburg was the DIME physician on the COVID-19 claim only. Dr. Ginsburg described the COVID-19 as resolved. With regard to the Legionnaires disease, Dr. Ginsburg believed it to be resolved, but Dr. Ginsburg felt he needed more information. Dr. Ginsburg concluded Claimant was not at MMI. Dr. Ginsburg said he did not see evidence of cognitive impairment leading to an impairment rating. Dr. Ginsburg wished to see opinions from the providers about Claimant's pulmonary situation and any potential residual issues.

14. On April 27, 2021, the DOWC-DIME Unit sent an email to counsel for the parties which confirmed that Dr. Ginsburg concluded Claimant was not at MMI. This letter stated Respondents were required to file an admission of liability.[2]

15. The deadline for either Claimant or Respondents to file an Application for Hearing ("AFH") was May 18, 2021.

16. On May 17, 2021, an AFH was filed at the OAC by Respondents listing the following issues: "compensability, medical benefits, authorized provider, reasonably necessary, permanent partial disability benefits, causation, relatedness, overcome DIME report from Dr. Ginsburg, MMI, impairment rating, overpayments, waivers, offsets, etc".

17. The May 17, 2021 AFH had the correct date of injury, but listed case number WC 5-149-004 (the Legionella pneumonia claim) and also listed compensability as an issue. The AFH was not signed by Respondents' attorney of record. That AFH was rejected by OAC staff.

18. The ALJ determined the May 17, 2021 filing was a nullity, as it was not signed as required by C.R.C.P. 11. The AFH (as filed) did not constitute a timely response to the DIME physician's report and this fact deprives the Court of jurisdiction to hear the merits of Respondents' challenge to the DIME physician's conclusion on MMI. A copy of the AFH was admitted into evidence as Exhibit 6.

19. The filing of the AFH complied with the time requirement for contesting Dr. Ginsburg's findings. However, the AFH was deficient as noted above. Respondents did not comply with the requirements of § 8-42-107.2(4)(c), C.R.S.

20. The DOWC-IME Unit issued a letter on May 18, 2021 to Claimant and Respondent-Insurer that the DIME was complete in which it was noted that the time for filing an AFH had expired and a GAL was required.

21. Respondents did not file a GAL after the May 18, 2021 letter for the DOWC.

22. On June 4, 2021, Respondents filed an AFH at the OAC listing the identical issues noted above. (This occurred seventeen (17) days after the initial AFH was filed.)

[2] Exhibit 4.

This AFH was dated May 17, 2021, which corresponded to the prior AFH and was rejected by the OAC. The AFH was invalid because it was back-dated.

23. The ALJ concluded the June 4, 2021 filing was an effort on behalf of the Respondents to correct the prior filing. This was a reasonable attempt to correct the prior error with the May 17, 2021 AFH.

24. On June 24, 2021, Respondents filed an AFH at the OAC that listed the issue of "substantial compliance accomplished with May 17, 2021 Application for Hearing filed under W.C. No. 5-149-004", in addition to all of the original issues listed in the May 17 and June 4, 2021 AFH-s. Respondents also cited § 8-47-104, C.R.S.[3]

25. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Timeliness of Application for Hearing Contesting the DIME

[3] Exhibit 6. The ALJ noted that § 8-47-104, C.R.S. codifies substantial compliance, as it relates to "orders and awards of the director or industrial claim appeals office" that shall not be declared inoperative, illegal or void for "any omission or a technical nature". This section does not apply to the factual circumstances presented here.

As determined in Findings of Fact 2-6, Respondents admitted liability for both medical and wage benefits after Claimant was exposed to and contracted COVID-19. Claimant received treatment and was placed at MMI by the ATP. (Finding of Fact 8). Claimant then requested a DIME, which was performed by Dr. Ginsburg. (Findings of Fact 10, 13). Dr. Ginsburg concluded Claimant was not at MMI and opined Claimant required additional evaluation. (Finding of Fact 13). As found, the deadline for filing the AFH was May 18, 2021. (Finding of Fact 15). The ALJ determined Respondents' AFH that was filed on May 17, 2021 did not comply with § 8-42-107.2(4)(c), C.R.S., as it had the wrong case number. (Finding of Fact 17). The AFH was not signed as required by C.R.C.P. 11 and rejected by the OAC. *Id.* It also listed the issue of compensability, where Respondents previously filed a GAL. Under these circumstances, the AFH was a nullity and the Court had no jurisdiction to consider the challenge to the DIME physician's conclusions. (Finding of Fact 18).

The provisions of § 8-42-107.2(4)(c), C.R.S. (2021) required Respondents to either (i) file an admission of liability, or (ii) request a hearing before the Division contesting one or more of the DIME physician's findings or determinations contained within the DIME report within 20 days after the date of the mailing of the Division's notice that it had received the DIME report. The use of the word "shall" in this section is mandatory. Additionally, pleadings must be signed by at least one attorney of record. C.R.C.P. 11. As found, Respondents did not meet the May 18, 2021 deadline for fling the AFH and this deprived the Court of jurisdiction to hear a challenge to the conclusion that Claimant was not at MMI. (Findings of Fact 17-19). The ALJ concluded the deadline in § 8-42-107.2(4)(c), C.R.S. is jurisdictional and similar to the one present in § 8-43-203(2)(b)(II) 9A), C.R.S., which requires Claimant to file an AFH or Response within thirty days of the filing of an admission or AFH by Respondents.

The ALJ considered Respondents' argument that substantial compliance with the statute/rules governing their response to the DIME physician's opinion was all that was required. The Court will consider whether the allegedly complying acts fulfill the statute's purpose. *Gandnote Golf and Country Club, LLC v. Town of LaVeta*, 252 P.3d 1196 (Colo. App. 2011). In addition, substantial compliance requires that a party intend to or actually make a good faith effort to comply with the statutory requirements. *Kaur v. King Soopers, Inc.,* W.C. 5-017-566-001 (ICAO January 8, 2020).

The ALJ noted in some contexts, Colorado appellate courts have applied the doctrine of substantial compliance even when the requirements of a particular section of the Act appear mandatory by the use of the word "shall". For example, in *EZ Building Components Mfg., LLC v. Industrial Claim Appeals Office*, 74 P.3d 516, 518 (Colo. App 2003), the Colorado Court of Appeals concluded the statute which required the notice of insurance cancellation to be sent by certified mail (8-44-110, C.R.S.) need not be strictly enforced if actual notice was received and the statute did not treat the method is jurisdictional. In that case, the notice of cancellation was sent by regular mail to both the agent and DOWC. Both confirmed receipt and the rights of the employer were not affected by the method of giving notice. The Court concluded that substantial compliance with the notice requirements was sufficient to effect the cancellation of the policy. *Id.*

This is contrasted with other cases where the doctrine of substantial compliance was not applied. In *Postlewait v. Midwest Barricade*, 905 P.2d 21, 24 (Colo. App. 1995), the Court of Appeals reviewed the requirement in 8-43-102(1)(a), C.R.S. which specifies that an injured employee must notify his or her employer of the injury in writing within four days of its occurrence. In *Postlewait,* Claimant asserted that the employer instructed him not to file a workers' compensation claim, which prevented him from giving written notice of the injury. Claimant argued his oral notice of the injury constituted substantial compliance with the statute. The Court of Appeals declined to apply the doctrine of substantial compliance and held strict compliance with the written notice requirement was necessary. *Postlewait v. Midwest Barricade*, *supra*, 905 P.2d at 24. The Court affirmed the penalty imposed on Claimant for the failure to give written notice of the injury. See also *Pacesetter Corp. v. Colette*, 33 P.3d 1230 (Colo. App. 2001) in which the doctrine of substantial compliance was discussed in the context of admissions filed on behalf of an employer.

Similarly, in *Pinon v. U-Haul,* WC 4-632-044 (ICAO April 25, 2007)*,* the Panel considered the application of the doctrine of substantial compliance in connection with the filing of a Notice and Proposal to Select an Independent Medical Examiner. In that case, Claimant filed a timely objection to an FAL, along with an AFH. However, Claimant did not file a Notice and Proposal to Select a Division Independent Medical Examiner. A panel of potential physicians was issued and Dr. Jenks was selected as the DIME physician. Respondents filed a Motion to Strike which was granted by a Prehearing ALJ. At hearing, the merits ALJ declined Claimant's request for additional PPD benefits (based upon Dr. Jenks' rating), determining that filing of the Notice and Proposal was jurisdictional. On appeal, the Industrial Claims Appeals Office concluded Claimant did not substantially comply with the statutory and regulatory requirements in connection with the DIME, as he did not propose potential doctors to perform the evaluation. The Panel concluded it was unnecessary to determine whether substantial compliance could be invoked in connection with the requirement that a Notice and Proposal to Select a Division Independent Medical Examiner must be filed. The ALJ concluded the *Pinon* case was inapposite to the facts presented in the instant case.

In this regard, Respondents cited several cases (some of which arose under the Workers' Compensation Act) in which substantial compliance was deemed sufficient to satisfy the dictates of the statute. As noted, *Pinon v. U-Haul, supra,* does not provide a basis for relief, as the factual circumstances are difference. *Charnes v. Norwest Leasing*, 787 P.2d 145, 146 [addressing substantial compliance with § 39-26-117(1)(b), C.R.S., which identifies conditions a property owner must meet to exempt its property from a lien filed by the Department of Revenue sought to enforce] did not apply to the circumstances at issues here. Finally, in *Lockyer v. May's Concrete, Inc.* WC 4-623-424 (ICAO November 4, 2008), the Industrial Claim Appeals Office considered another case in which Claimant did not file a Notice and Proposal to Select a Division Independent Medical Examiner. The Panel adhered to the views expressed in *Pinon*, but the facts in the record were insufficient to determine whether Claimant's conduct constituted substantial compliance. Therefore, the case was remanded to the ALJ to make further findings of fact. Once again these facts were distinguished from those present here.

The ALJ found none of the cases cited by Respondents were directly applicable to the instant case; that is, these did not involve a case where Respondents were required to respond to the DIME report within twenty (20) days as required by § 8-42-107.2(4)(c), C.R.S. (2021).

The ALJ determined that Respondents filing of an AFH on May 17 at least nominally complied with the time requirements of § 8-42-107.2(4)(c), C.R.S. (2021). However, the AFH was a nullity (since it wasn't signed) and properly rejected at that time. Thus, while the original AFH was filed on May 17, 2021, since it was ultimately rejected, it was not timely. Respondents then filed the second AFH on June 4, 2021, which was backdated to May 17, 2021 and was also not valid. The mandatory terms of § 8-42-107.2(4)(c), C.R.S. (2021) required the AFH to be filed by May 18, 2021. The ALJ concluded this statute required strict compliance, which did not occur in this instance. Accordingly, the multiple filings of the AFH did not preserve Respondents' right to contest the DIME physician's determination of not at MMI.

Penalties

Claimant sought penalties against Respondents for lack of compliance with 8-42-107.2(4)(c), C.R.S. and the failure to file a GAL after the email was issued by the DOWC-DIME Unit. The imposition of penalties under § 8-43-304(1), C.R.S. is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Workers' Compensation Act, of a lawful duty or of an order. If the ALJ finds such a violation, penalties may be imposed if the ALJ also finds that Respondent(s)' actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601(Colo. App. 2003); *see also Pioneers Hospital of Rio Blanco v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005) [Court required to determine whether insurer's conduct was reasonable].

As determined in Findings of Fact, Respondents attempted to contest the DIME physician's findings by the filing of the AFH-s, the first two of which were not valid. (Findings of Fact 17-19, 22). Respondents did not file a GAL, as required by the letter issues by the DOWC on May 18, 2021. (Finding of Fact 21). However, the filing by Respondents of the last AFH, albeit untimely, was sufficient to apprise Claimant of the issues being controverted. The ALJ found Respondents' efforts to rectify the issues with the May 17, 2021 AFH were objectively reasonable. (Finding of Fact 23). Therefore, Claimant did not satisfy the second prong of the statute required for the imposition of penalties and the claim for penalties will be denied and dismissed.

ORDER

IT IS HEREBY ORDERED:

1. Since Respondents' AFH dated May 17, 2021 did not meet the requirements of § 8-42-107.2(4)(c), C.R.S. (2021), Respondents cannot contest the finding of "not at MMI" by the DIME physician. The ALJ lacks jurisdiction to hear the

merits of the challenge to the DIME physician's findings. Respondents' challenge to Dr. Ginsburg's conclusion is dismissed.

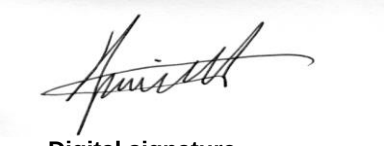
2. Claimant's request for penalties under § 8-43-304(1), C.R.S. (2021) is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-962-003

ISSUE

1. Whether Claimant established by preponderance of the evidence that he sustained a compensable injury arising out of, and in the course of, his employment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 62 year-old man who worked for Employer as a temporary day laborer. Claimant previously worked for Employer, and was rehired on November 8, 2019. (Ex. F).

2. On Friday, November 8, 2019, Claimant was dispatched to work for Epic Construction, at the McDonald's Restaurant on South Colorado Boulevard. TO[Redacted] was the project superintendent. Claimant's responsibilities included clean up and demolition. Claimant alleged that at approximately 8:40 a.m., he was electrocuted while using a sawzall to remove conduit. Claimant found Mr. TO[Redacted] and told him he had been shocked, and described what happened.

3. Mr. TO[Redacted] credibly testified that he asked Claimant if he needed medical attention, but Claimant said he was ok. Mr. TO[Redacted] suggested that Claimant sit down. He did not observe any burns or wounds on Claimant's hands. Mr. TO[Redacted] testified he believed Claimant returned to work and finished his shift. Claimant testified, however, that he did not finish his shift. According to Claimant's time slip, he worked his entire shift from 6:20 a.m. to 2:30 p.m. (Ex. F).

4. Mr. TO[Redacted] credibly testified that on November 8, 2019, he continued cutting pipe with the sawzall Claimant used without any issues.

5. Later that day, Claimant returned to Employer's temporary staffing office where he spoke with Melanie McKenzie who worked for Employer. Claimant had the Sawzall blade he had allegedly been using, and he told Ms. McKenzie he had been shocked.

6. Claimant presented no evidence that he sought medical attention, or that he told Employer he needed medical attention, on November 8, 2019.

7. The following day, Saturday, November 9, 2019, Claimant worked a full shift from 7:00 a.m. to 4:00 p.m. (Ex. F). Claimant presented no evidence that he had any difficulty working on November 9, 2019.

8. JP[Redacted] worked for Employer and was responsible for the morning

dispatch. On Monday, November 11, 2019, Claimant came to Employer's staffing office. Mr. JP[Redacted] was in the office when Claimant came in. Mr. JP[Redacted] credibly testified that Claimant came to the office to "cash out" for the work he performed the previous Saturday. Mr. JP[Redacted] further testified that Claimant held a sawzall blade up over the counter and it was red. Claimant's Exhibit 1 is a photo of the red sawzall blade.

9. CW[Redacted] is the office manager for Employer. Ms. CW[Redacted] was also in the staffing office on Monday, November 11, 2019. She testified that Claimant showed Employer the sawzall blade he allegedly used. Ms. CW[Redacted] further testified that she did not notice any wounds, burns, bleeding, or injuries on Claimant's hands. Ms. CW[Redacted] asked Claimant if he needed medical treatment, and Claimant again denied needing medical treatment.

10. Mr. JP[Redacted] went to the job site the week after Claimant's alleged injury to inspect the area. Mr. JP[Redacted] did not observe any signs of electrical arcing. This is consistent with Mr. TO[Redacted] 's testimony. Mr. Pries also examined the sawzalls at the job site and testified that the sawzalls were Milwaukee brand, and they were double-insulated to prevent against electrical shock. Mr. JP[Redacted] further testified that all of the sawzall blades used at the job site were a different brand and color than the one Claimant presented.

11. Mr. TO[Redacted] also testified that the sawzall Claimant used was double-insulated to prevent against shock. He further testified that Claimant was wearing gloves while working with the sawzall to protect against shock, and there were no live wires in the conduit that Claimant was cutting. Mr. TO[Redacted] testified that the electricians had pulled all of the wires out of the conduit in the area where Claimant was working. He looked in the pipes where Claimant was cutting, and there were no electrical wires in the pipes. Mr. TO[Redacted] testified that if the sawzall had cut a live wire, it would have tripped a breaker, and there were no tripped breakers.

12. The ALJ finds the testimony of Mr. TO[Redacted] and Mr. JP[Redacted] credible. The ALJ finds that the sawzall Claimant used on November 8, 2019 was double-insulated, and there were no electrical wires in the pipes Claimant was cutting that day.

13. Claimant did not request medical treatment until November 13, 2019, five days after the alleged incident. Claimant went to Denver Health and reported that he had been electrocuted at work on November 8, 2013. According to the medical records, Claimant reported he was shocked by electricity when using a sawzall to cut into a pipe with wires inside. Claimant reported that the electricity "entered through his left thumb and exit[ed] through his right middle finger PIP joint area." He said that the wound on his right middle finger was more like a skin crack and initially he "saw flames coming out of the wound." Claimant complained of dizziness, pain and tightness in his left ear, right finger, hand and left thumb. (Ex. 10).

14. Authorized treating physician (ATP), Lileya Sobechko, M.D. evaluated Claimant. She noted in the medical record, '[i]nspection and palpation of skin reveals

visible blood blister on the left thumb disral phalax and skin break (crack) on the right middle finger PIP joint not inflamed." Dr. Sobechko ordered x-rays and performed a "simple laceration repair procedure" on Claimant's right finger. (Ex. 10-13).

15. The November 4, 2019 x-ray of Claimant's left hand showed degenerative changes in the wrist and first and second digit, no acute abnormality, and a metallic foreign body in the soft tissues. (Ex. 18).

16. Claimant returned to Denver Health on November 18, 2019, for a follow-up appointment. Joan Mankowski, M.D. specifically noted that there were "no dermal burn signs." Claimant reported hand numbness and tingling, and dizziness. Dr. Mankowski recommended an EMG if the numbness and tingling continued after 4-6 weeks. (Ex. 19C).

17. Insurer retained Albert Hattem, M.D. to opine as a physician advisor as to whether Claimant's symptoms were causally related to the November 8, 2019 alleged work injury. Dr. Hattem is level-two accredited and board-certified in occupational medicine. On December 9, 2019, Dr. Hatten issued a report opining that it was unlikely Claimant suffered an injury from being electrocuted. (Ex. P).

18. On March 8, 2022, Dr. Hatten testified via deposition. Dr. Hattem testified that an electrical shock injury would cause a burn, and there were no dermal burns observed on Claimant's hands. (Dep. Tr. 8:18-10:9).

19. Dr. Hattem further testified that in cases of electric shock, the symptoms appear immediately, and it is unusual for a patient who has been electrocuted or shocked to wait five days to seek treatment. (Dep. Tr. 7:20-8:17).

20. Prior to this incident, Claimant brought a workers' compensation claim for a January 14, 2019 injury. Claimant alleged injuries to his neck, back, and both hands. Claimant treated for those alleged injuries through May 22, 2019. (Ex. L and Ex. N). As part of his treatment, Claimant was referred to Dr. Chan for an upper extremity EMG on May 1, 2019 due to persistent bilateral upper extremity numbness. The EMG showed that Claimant had severe peripheral neuropathy, most likely, secondary to diabetes with superimposed carpal tunnel syndrome bilaterally. (Ex. N).

21. Claimant continued to complain of tingling and numbness in his hands. He had an EMG on March 10, 2020 that showed an abnormal exam with polyneuropathy most likely on the basis of diabetes. The EMG specifically noted "evidence of bilateral median neuropathy at the wrist (carpal tunnel syndrome overlying neuropathy)." (Ex. K). A repeat EMG was done on August 5, 2020 for Claimant's ongoing bilateral hand numbness. He was diagnosed with bilateral carpal tunnel syndrome and polyneuropathy most likely on the basis of diabetes. (Ex. K). This was the same diagnosis he received in May 2019, while treating under his prior workers' compensation claim. (Ex. N).

22. Dr. Hattem credibly testified that there were no objective findings of an injury from being electrocuted. (Dep. Tr. 11:12-15). He testified that a blood blister, skin crack,

or laceration would not occur from an electrocution injury. (Dep. Tr. 10:10-23). Dr. Hattem testified that Claimant's complaints of tinnitus are pre-existing, and that Claimant had the exact same complaints of neck pain, bilateral numbness, tingling, and weakness in his upper extremities prior to this alleged incident. (Dep. Tr. 6:3-7:19).

23. Based on the testimony and objective evidence, the ALJ finds that Claimant did not sustain an injury at work on November 8, 2019.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Act, he was performing a service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). While a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Rather, the occurrence of the symptoms may be the result of, or the natural progression of, a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Whether the claimant's condition is due to the natural progression of the pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant testified that he was shocked while using a sawzall on November 8, 2019 in the course of his employment with Employer. (Findings of Fact at ¶ 2). There is, however, no objective evidence that Claimant suffered an injury. Claimant told the medical providers that flames were coming out of his hand from the electrocution. (*Id.* at ¶ 13). Mr. TO[Redacted] , however, saw Claimant right after the alleged injury and credibly testified that he did not see any burns or wounds on Claimant's hands. (*Id.* at ¶ 3). When Mr. TO[Redacted] asked Claimant if he needed medical treatment, Claimant said he was ok. (*Id.*). Mr. TO[Redacted] credibly testified that Claimant worked the following day without any issues. (*Id.* at ¶ 7). Ms. CW[Redacted] also credibly testified that on November 11, 2019, she did not see any burns or wounds on Claimant's hands, and he again declined medical treatment. (*Id.* at ¶ 9). Claimant did not seek medical treatment until November 13, 2019. (*Id.* at ¶ 13). Dr. Hatten credibly testified that in cases of electric shock, symptoms, namely dermal burns, appear immediately. (*Id.* at ¶ 18).

The medical records demonstrate that Claimant did not have any dermal burns. He had a blood blister and simple laceration repair. (*Id.* at ¶¶ 14 and 16). Claimant's other complaints of numbness and tingling in his hands relate to his pre-existing peripheral neuropathy and carpal tunnel syndrome. (*Id.* at ¶ 21). As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of, his employment with Employer. (*Id.* at ¶ 23). Based on this ruling, Claimant's other endorsed issues are moot.

Penalties

During the hearing, Respondents' moved to strike Claimant's penalties claim. The ALJ took the Motion under advisement. In any application for hearing for any penalty pursuant to § 8-43-304(1) C.R.S. "the applicant shall state with specificity the grounds on which the penalty is being asserted." Claimant failed to plead his penalty with specificity, and has alleged a compensability determination as the basis for his penalty. Claimant bears the burden of proving that he sustained a compensable injury, and denial of a claim is not a valid penalty. Claimant has asserted no violation of a statutory provision, order, or rule, and has set forth no evidence supporting a penalty in this case. Claimant's penalties claim is stricken.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work injury and his claim is dismissed. Accordingly, the remaining endorsed issues, other than penalties, are moot.

2. Claimant's claim for penalties is stricken.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 12, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[Redacted].,** Claimant, v. **[Redacted]** Employer, and **[Redacted]** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-957-002-003**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on December 15, 2021. Because of COVID-19 related restrictions, the hearing was conducted remotely via video/teleconference. The hearing was digitally recorded on the Google Meets platform between 1:10 and 3:00 p.m. Claimant proceeded *pro se*. Respondents were represented by [Redacted], Esq.

At the outset of the hearing, the ALJ addressed Claimant's renewed motion for deposition subpoenas and other forms.[1] Claimant is incarcerated and argued that he had been unable to secure the proper subpoena forms necessary to compel the testimony of the medical proividers who had attended to his alleged injury. Given the multiple delays in convening the hearing in this matter, the ALJ denied Claimant's oral motion for an extension of time and instead indicated that the subpoena forms and the Colorado Workers' Compensation Fee Schedule would be mailed to him so he could decide whether to schedule the depositions of his claimed experts. The ALJ then ordered any despositions be taken post-hearing and advised Claimant that the record would be kept open until the depositions were complete and lodged with the Office of Administrative Courts (OAC), but in the interim the ALJ would proceed by securing Claimant's testimony and the testimony of [Redacted, hereinafter EN] and Dr. Annu Ramaswamy.

Testimony was then taken from the aforementioned witnesses. In addition to the testimony of Claimant, Ms. EN[Redacted] and Dr. Ramaswamy, the ALJ admitted Respondents' Hearing Exhibits A-I into evidence. Claimant did not submit additional exhibits to the ALJ for inclusion in the record; however, questioning at hearing prompted

[1] This issue was previously addressed by ALJ Edie who, on November 29, 2021, ordered the hearing to proceed as scheduled on December 15, 2021.

the ALJ to order the production of and identify the Workers' Claim for Compensation form allegedly completed by Claimant as Claimant's Exhibit 1. The exhibit has been received. Following the presentation of evidence, the ALJ held the record open for 60 days to allow Claimant time to prepare for and take the depositions of his proposed expert witnesses.

On February 14, 2022, the ALJ convened a status conference to determine the posture of Claimant's requested depositions. During this status conference, Claimant advised the ALJ that he had elected not to take the depositions and reiterated that access to the law library necessary to prepare his post-hearing position statement was limited. Given Claimant's limited access to the prison's law library, the ALJ extended the due date for submission of post-hearing position statements up to and through March 31, 2022. The parties' position statements have been received.

Although he did not submit exhibits at hearing, Claimant attached several records consisting of "Exhibits A-D" to his post-hearing position statement. Because the ALJ received no objection from Respondents regarding the admission of the aforementioned documents and because they could be outcome determinative, the ALJ admitted the documents into the evidentiary record as "Claimant's Hearing Exhibits 1-4", rather than A-D to avoid confusion with Respondents similarly labeled hearing exhibits. As noted, the ALJ had previously ordered the production of the Workers' Claim for Compensation form, which was marked as Claimant's Exhibit 1. Given the subsequent admission of the exhibits attached to Claimant's Position Statement as Claimant's Hearing Exhibits 1-4, the Workers' Claim for Compensation form previously marked as Claimant's Exhibit 1 has been remarked as Claimant's Hearing Exhibit 1(a).

On April 22, 2022, the ALJ issued a Summary Order that the OAC served upon the *pro se* Claimant and Respondents' counsel. On April 28, 2022, Claimant filed a "Motion for Extension of Time" to file a "Petition of Rehearing" and a "Motion for a Full Order". The described motion was received by the OAC in Colorado Springs on May 2, 2022. On May 5, 2022, the Colorado Springs OAC received Claimant's "Request for a Rehearing" which pleading included a specific "Request for a Full Order". The ALJ considers Claimant's May 5, 2022, "Request for Rehearing" that included an entreaty for a Full Order as a request Specific Findings of Fact, Conclusions of Law and Order. Accordingly, the ALJ enters the following Findings of Fact, Conclusions of Law and Order pursuant to C.R.S. § 8-43-215 (1).

In this Order, [Redacted], Jr. will be referred to as "Claimant"; [Redacted] s will be referred to as "Employer," and [Redacted] will be referred to as "Insurer". Employer and Insurer may be referred to collectively as "Respondents". All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2021); the "Act" refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., C.R.S; "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1 and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reopen his claim based on a change of condition, an error or a mistake.[2]

II. If Claimant established that he is entitled to reopen his claim, whether he also established, by a preponderance of the evidence, that he sustained a compensable injury, which arose directly from his employment or the conditions under which his work was performed for Employer.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer operates as a restaurant. In June 2014, the owner/operator of the restaurant contracted hepatitis A prompting all employees of the restaurant to be vaccinated against hepatitis A prophylactically. (Claimant's Hearing Exhibit (CHE) D).

2. On June 16, 2014, one week after receiving his vaccination, Claimant developed a fever and chills.[3] His symptoms progressed and around 5:30 in the evening, he was noted to be lethargic and cognitively impaired. His roommate called 911 and Claimant was transported to Poudre Valley Hospital. (CHE D).

3. On presentation to the Emergency Room, Claimant reported nausea and subsequently developed a petechial rash on his face and tongue swelling. He was worked up for possible bacterial meningitis and started on antibiotics. Workup was expended to include testing for West Nile virus and herpes simplex viral infection. MRI was completed which ruled out brain tumor, abscess or intracranial bleeding. Based upon Claimant's diagnostic testing, viral meningitis/encephalitis and seizure was suspected. Claimant was assessed with "encephalitis due to infection" and admitted to the hospital for further treatment. (CHE D).

4. Upon admission, Claimant was evaluated by the hospitalist, Dr. Adam Mack. Dr. Mack opined that the results of Claimant's MRI scan pointed to herpes simplex virus (HSV) meningeal encephalitis as the most likely "culprit" for his symptoms. While he noted that Claimant had been vaccinated against hepatitis A, Dr. Mack noted that vaccination had a less than 1% incidence of encephalitis development. He was "unclear" if Claimant's vaccination was contributing to Claimant's symptoms. (CHE D).

5. On June 17, 2014, Claimant was evaluated by Dr. Scott Strader of the hospital's neurology service. Dr. Strader noted that Claimant worked at a restaurant

[2] Claimant did not allege fraud as a basis for reopening the claim.

[3] Given that Claimant developed symptoms on June 16, 2014, one week after his vaccination, supports a finding that Claimant was likely vaccinated on or about June 9, 2014.

where all employees were vaccinated for hepatitis A because the owner had contracted a case of hepatitis A. Following his vaccination, Dr. Strader noted that Claimant did well until June 16, 2014, when he developed a fever and chills and was found around 5:30 with an "altered mental status and a bloody tongue". He noted further that Claimant underwent an MRI, which demonstrated "intensity in the right medial lobe suspicious for herpes simplex encephalitis". After review of Claimant's chart, including his diagnostic workup Dr. Strader reached the following impression:

> MRI findings demonstrate signal intensity in the right mesial temporal lobe. Lumbar puncture demonstrates a mild lymphocytic pleocytosis. Overall, the pattern is certainly concerning for herpes simplex encephalitis and I would suspect that this is the underlying diagnosis. Other viral encephalitides are possible, but these typically do not result in such severe neurologic dysfunction or seizures.

(CHE D).

6. Claimant was also evaluated on June 17, 2014 by the infectious disease service of the hospital. Dr. Jacob C. Liaoong completed the consultation. At the outset of his evaluation, Dr. Liaoong noted that he was asked to see Claimant in an effort to determine "other possibilities of infection nature" after the neurology service determined that Claimant had experienced a possible viral-related encephalitis. (CHE D).

7. After review of the available record/diagnostic testing results, Dr. Liaoong reached the following impressions:

> Combined with his low-grade fever and also, per history, some type of fever prior to admission, this might be a viral-related process that includes herpes, although patient has not had any recent or known episode of herpetic breakout preceding above, or this could by any other viruses, like enterovirus or Coxackie or other community type virus. The CSF panel is not consistent with a bacterial infection as well as imaging study. I cannot rule out HIV encephalitis, although this seems atypical. I do not think this is hepatitis A active infection with encephalitis. In less than 1%, there are reported cases of encephalitis, but nothing specific to temporal lobe, has been noted under the hepatitis A vaccination adverse events. I am not sure if we can totally rule this out, but it is so rare, that it is likely an exclusion diagnosis.

(CHE D).

8. Claimant was released from the hospital and returned to work. According to Claimant, he notified Employer of his assertion that the hepatitis A vaccine caused his encephalitis on June 21, 2014. Claimant testified that Employer refused to file a claim so

he filed one on July 31, 2014. Claimant then retained [Redacted], Esq. of [Redacted] to prosecute his claim.

9. EN[Redacted] testified that she was assigned the claim on August 8, 2014. She confirmed that Claimant filed a "Workers' Claim for Compensation" form on July 30, 2014. As noted, the ALJ ordered that the Workers' Claim for Compensation form be produced as Claimant's Hearing Exhibit 1. (Subsequently remarked as Claimant's Hearing Exhibit 1(a) given the admission of Exhibits 1-4 as attached to Claimant's Position Statement). In the Workers' Claim for Compensation form Claimant asserts that his injury occurred as a reaction to the hepatitis A vaccine. He also identifies the date of injury as June 16, 2014. (CHE 1(a)).

10. Respondents filed a "Notice of Contest" denying liability for Claimant's alleged injury/occupational disease on August 11, 2014. (Respondents' Hearing Exhibit (RHE) I).

11. On October 6, 2014, Respondent requested opinions from Dr. Annu Ramaswamy regarding the relatedness of Claimant's encephalitis to his receipt of the hepatitis A vaccine. Dr. Ramaswamy completed a medical records review after which he opined that he was unable to "implicate" the hepatitis A vaccine as the cause of Claimant's encephalitis. In support of his conclusions, Dr. Ramaswamy noted that there were "no clinical studies that implicate the hepatitis A virus as the cause for encephalitis". While there had been reported cases of encephalitis in individuals who had received the hepatitis A vaccine, the vaccine insert information noted, "Because these reactions are reported voluntarily from a population of uncertain size, it is not possible to reliably estimate their frequency or establish a causal relationship to a vaccine exposure". Dr. Ramaswamy concluded by indicating that "[m]ore times than not, an etiologic agent is not identified in encephalitis cases". (RHE H).

12. Based upon the evidence presented, it appears that Claimant's claim sat idle for many months after Dr. Ramaswamy's records review until October 2, 2017, when Respondents filed a Motion to Close Claim for Failure to Prosecute. (RHE G). By the filing of the motion to close, Claimant was incarcerated.[4] Nonetheless, the motion was mailed to Claimant's counsel of record, [Redacted] on October 4, 2017. (Id.).

13. On October 19, 2017, the Division of Workers' Compensation, through Director Paul Tauriello issued an Order to Show Cause advising Claimant that he must advise the Division of Workers' Compensation "what recent effort [he had] made or [was] making to pursue [his] claim for workers' compensation benefits and why [he thought] the claim should remain open". (RHE F). The order further advised that if Claimant did not demonstrate good cause why the claim should remain open within 30 days of the date the Show Cause Order was mailed, his case would automatically be closed. (Id.). The order was mailed to Claimant's counsel of record, Robert Weinberger, Esq. at the above referenced address. (Id.).

[4] Claimant indicated that he was incarcerated on February 1, 2017.

14. On November 28, 2017, Director Tauriello issued an "Extension of Time to Show Cause" suggesting that Claimant took action to keep the claim from closing.[5] (RHE E). The November 28, 2017 order instructed Claimant that his claim would automatically be closed unless it was set for hearing before an Office of Administrative Courts ALJ within 100 days of the mailing of the Order granting the extension of time. (Id.). In the alternative the order provided that the parties could file a stipulation indicating that they had agreed to keep the claim open while specifying the purpose and the time the claim would remain open. (Id.). Finally, the November 28, 2017 order explicitly indicated that if the parties were unable to schedule a hearing within the 100 days mandated by the order or if for any reason the hearing does not take place as scheduled, the claim would automatically close, unless Claimant filed a motion seeking an additional extension of time. (Id.). The November 28, 2017 order was not only mailed to Claimant's counsel of record, but also to Claimant directly. (Id.).

15. Claimant, through counsel, [Redacted] withdrew his previously filed Application for Hearing and cancelled an April 3, 2018 hearing on March 30, 2018. (RHE D). Because Claimant withdrew his Application for Hearing and did not attend the April 3, 2018 hearing within the 100-day deadline provided for in the November 28, 2017 order, his claim automatically closed. Nonetheless, the claim was subject to reopening pursuant to C.R.S. § 8-43-303.

16. Following cancellation of the April 3, 2018 hearing, the claim again sat idle until July 2020. On July 22, 2020, in response to a letter written by Claimant regarding the status of his claim, the Office of Administrative Courts directed correspondence to him attaching a "Petition to Reopen" form with instructions on how to complete and submit the form to the Division of Workers' Compensation (DOWC) along with an Application for Hearing to litigate the issue of reopening the claim, if it had indeed closed. (CHE 2).

17. Claimant filed a Petition to Reopen based upon error on August 21, 2020. (RHE C). Accompanying his Petition to Reopen was a hand written statement outlining the basis for the request to reopen the claim. (Id. at p. 3).

18. On August 27, 2020, Claimant filed an Application for Hearing endorsing, among other things "Compensability" and "Petition to Reopen Claim". (RHE B). Similar to the Workers' Claim for Compensation form completed July 30, 2014, Claimant listed the date of injury as June 16, 2014 in his August 27, 2020 Application for Hearing. (Id. at p. 1).

19. EN[Redacted] testified that the last payment of medical billing associated with Claimant's June 16, 2014 hospitalization was paid September 29, 2014. She also confirmed that no indemnity benefits have been paid to Claimant under the claim.

20. Ms. EN[Redacted] testified that she received the only Petition to Reopen the claim in her file on August 31, 2020. She also testified that she has never received

[5] The evidence presented, particularly Respondents' Hearing Exhibit D, supports a finding that Claimant's counsel responded to the October 19, 2017 Order to Show Cause by filing an Application for Hearing.

any indication from the Division of Workers' Compensation that the claim has been reopened.

21. Dr. Ramaswamy testified consistently with his medical records review report. He reiterated his opinion that the available medical data failed to support a causal connection between Claimant's receipt of the hepatitis A vaccine and his encephalitis and subsequent development of seizures. According to Dr. Ramaswamy, if a causal relationship between the hepatitis A vaccine and the development of encephalitis existed it would be known to the medical community because the hepatitis A vaccine is widely used around the world, yet there is no evidence-based medicine to support a correlation between receipt of the vaccine and the development of encephalitis. Indeed, Dr. Ramaswamy reviewed up to date research before testifying. That review failed to reveal any objective data to support the suggestion that there is a causal relationship between the development of encephalitis and the hepatitis A vaccine leading Dr. Ramaswamy to testify that he could not support the even remote 1% chance of such correlation referenced by the other medical providers in this claim. Regardless, he testified that it was very unlikely that Claimant's encephalitis and subsequent seizures were related to Claimant's receipt of the hepatitis A vaccine. Rather, the totality of the medical record lead him to conclude that Claimant's encephalitis was idiopathic in nature.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve

conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). While the ALJ is convinced that Claimant's testimony is sincere, the medical evidence, including the testimony of Dr. Ramaswamy persuades the ALJ that his diagnosis and need for such treatment is not causally related to his June 2014 hepatitis A vaccination.

Reopening in General

D. Section 8-43-303(1), C.R.S. provides in pertinent part that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition . . ."

E. Section 8-43-303(2)(b), C.R.S. provides that "[a]t any time within two years after the date the last medical benefits become due and payable, the director or an administrative law judge may, after notice to all parties, review and reopen an award only as to medical benefits on the ground of an error, a mistake or a change in condition . . ."

F. The party seeking to reopen the claim shoulders the burden of proof to establish grounds for the reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (August 13, 2004); C.R.S. § 8-43-303(4). In this case, it is clear from the evidence presented that Claimant seeks to reopen the claim based upon an assertion that it was closed in error or by mistake. Although not specifically endorsed, this Summary Order also addresses any inference that Claimant is entitled to a reopening of his claim based upon a change of condition.

G. Respondents argue that Claimant's petition to reopen should be denied and dismissed for two reasons. Respondents first point out that the claim closed by order of the Director for failure to prosecute without a finding that Claimant suffered a compensable injury or occupational disease. Absent a finding of compensability, Respondents contend that a change in condition cannot form the basis for reopening the claim. Second, Respondents assert that Claimant did not file his petition to reopen until expiration of the above referenced statutes of limitation. Accordingly, Respondents argue that Claimant's request to reopen his claim for any reason is time barred. Claimant counters by arguing that because no "payments" were awarded to him, the statute of limitations, does not apply to this claim. Claimant argues further that even if the above referenced statutes of limitation apply in this case, a letter he authored on July 15, 2020, which was sent to the OAC requesting a status of the claim was sufficient to toll the running of the statute. According to Claimant, this letter requested that the OAC reopen the claim if it had closed. These arguments along with Claimant's endorsed reason(s) for reopening are addressed separately below.

Statute of Limitations

H. The time limits set forth in § 8-43-303, C.R.S.2005, as cited above, operate as a statute of limitations, *City of Colorado Springs v. Indus. Claim Appeals Office*, 89 P.3d 504 (Colo.App. 2004); Garrett v. Arrowhead Improvement Ass'n, 826 P.2d 850 (Colo. 1992); Valdez v. United Parcel Serv., 728 P.2d 340 (Colo.App.1986).

I. As noted, C.R.S. § 8-43-303(1), and (2)(b), provide that a claim may be reopened within six years after the date of injury or within two years after the date the last medical benefits become due and payable. Because these statutes allow the respondent to avoid liability for additional benefits, the time limitations for reopening a claim constitute an affirmative defense. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). An affirmative defense must be explicitly plead and is deemed waived if not raised at a point in the proceedings, which affords the opposing party an opportunity to present rebuttal evidence. See C.R.C.P. 8(c); *Kersting v. Industrial Commission*, 567 P.2d 394 (1977); *Terry v. Terry*, 387 P.2d 902 (1963); *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo.App. 1995). This principle protects the parties' due process rights to notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo.App. 1990); see also OAC Rule of Procedure 12(A), 1 CCR 104-1 ("After the hearing date is confirmed, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown"). Based upon the evidence presented, the ALJ is convinced that Respondents raised the affirmative defense of "Statute of Limitations" and Claimant has been afforded the proper notice and given the right to be heard concerning the issue. (RE A).

J. In this case, Claimant contends that his vaccination against hepatitis A resulted in the development of encephalitis, a seizure and his subsequent need for hospitalization/treatment. Review of the available evidence supports a finding that Claimant was vaccinated on or about June 9, 2014, one week before presenting to the Emergency Department at Poudre Valley Hospital (University of Colorado Health) on June 16, 2015, with chills, headache and progressive cognitive sequelae. Claimant was hospitalized for what was identified as "encephalitis due to infection". As noted, Claimant contends that his hepatitis A vaccination caused his encephalitis and need for treatment. Nonetheless, he did not suffer any alleged ill effects from the vaccine for a week. The delay between Claimant's vaccination and the development of his symptoms raises questions with regard to when the limitation period under C.R.S. § 8-43-303(1) begins to run. Indeed, Claimant seemingly raised the question in his August 27, 2020 Application for Hearing when he endorsed: "Actual date of Injury".

K. Based upon the evidence presented, the ALJ concludes that Claimant's onset of disability is an appropriate test for determining when the limitation period pursuant to C.R.S. § 8-43-303(1) begins to run in this case. The onset of a disability occurs when the injury/occupational disease impairs the claimant's ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim*

Appeals Office, 62 P.3d 1015 (Colo.App.2002). In this case, the medical records support a finding that the first appreciable manifestation of Claimant's injury/disease occurred June 16, 2014. Although Claimant contends that the limitation period should begin to run as of July 31, 2014 when he filed his claim, he actually asserted a June 16, 2014 date of injury when filing his Application for Hearing on August 27, 2020. It is reasonable to infer based upon his Application for Hearing that following his hospitalization, Claimant recognized that as of June 16, 2014, his medical condition precluded his ability to effectively and properly discharge his duties to his employer. In short, the evidence presented supports a conclusion that Claimant recognized that June 16, 2014, represented the date he was actually injured and disabled as a consequence of his vaccine. Accordingly, the ALJ concludes that the limitation period for reopening this case began on June 16, 2014, not June 9, 2014 when he received his vaccination or July 31, 2014, when he filed his claim as Claimant now suggests. Even if one were to accept Claimant's argument that the limitation period did not begin to run until July 31, 2014, when he filed his claim, the evidence presented supports a conclusion that Claimant did not file his "official" Petition to Reopen until August 21, 2020, which represents a period of more than six years from July 31, 2014.

L. As noted, Claimant contends that he sent a letter to the OAC on July 15, 2020, which included a request to reopen the claim if it had closed. While Claimant did not include a copy of the letter including the request to reopen the claim in his exhibits, the ALJ is convinced that he probably did sent such a letter. Indeed, an answer letter referencing that Claimant's letter regarding the procedural posture of his claim had been received was sent to him by the OAC on July 22, 2020. (CE 2). Although the July 22, 2020 letter generated by the OAC does not reference/acknowledge Claimant's request to reopen the claim, it does provide a form to do so along with a "packet of instructions for completing the form". (Id.) Accordingly, it is reasonable to infer that on July 15, 2020, Claimant requested that his claim be reopened if it had closed. Citing *Mascitelli v. Giuliano & Sons Coal Company*, 402 P.2d 192 (Colo. 1965), Claimant contends that his July 15, 2020 letter which included a request to reopen the claim should be construed as his petition to reopen the claim which was sufficient to toll the statute of limitations. Simply put, Claimant contends that he petitioned to reopen his claim on July 15, 2020, which request was followed by his "official" petition on August 21, 2020.

M. In *Mascitelli*, Claimant sustained an injury to his right foot while working as a coal miner on March 5, 1956. He was awarded a 35% disability as a consequence of the injury; however, he sought to reopen the claim based upon his contention that he was entitled to 50% disability due to the accident. On March 3, 1962 (two days before the date the statute was scheduled to run) Claimant wrote a letter to the Industrial Commission asking that his claim be reopened. The letter, which the Commission accepted as Claimant's petition to reopen, was received on March 5, 1962; however, the Commission did not issue an order to reopen until May 1, 1962, which order admittedly was more than six years after the accident and therefore outside the statute of limitations. Consequently, the respondent-insurer objected to the reopening and alleged that the Commission was without jurisdiction to act. On appeal, the Court rejected respondent-insurer's contention that the Commission must act within the six-year limitation or is

without jurisdiction to do so. Rather, the Court agreed with claimant that the filing of the notice (petition) **prior** to the termination of the statute of limitations, tolls the running of the statute. In concluding as much, the Court stated ". . . once a claimant properly files his notice within the statutory period, he is within its protective folds".

N. Accepting Claimant's representation that he sent a letter to the OAC, which included a petition to reopen his claim on July 15, 2020, affords him no relief based upon the facts of this case. Construing Claimant's July 15, 2020 letter as his petition does not change the fact that the letter/petition was sent **after** the running of the six-year period provided for by statute. The distinguishing fact between the instant case and the facts presented in *Mascitelli* is that Mr. Mascitelli's letter predated the running of the statute whereas Claimant's letter was sent after the six-year statute had run out, given the above conclusion that the six-year limitation started to run on June 16, 2014. Thus, while the ALJ agrees that Claimant's letter can/should be construed as his petition to reopen, which would serve to toll the statute while a determination of the claim is pending as per the holding in *Mascitelli*, the statute in this case had already run by July 15, 2020. Accordingly, the ALJ concludes that Claimant's reliance on *Mascitelli,* for the proposition that his July 15, 2020 letter tolled the statute from running in this case, is misplaced.

O. Aside from the general six-year limitations period in § 8-43-303(1), the statute distinguishes between disability and medical benefits. The latter are specifically covered by C.R.S. § 8-43-303(2)(b), which provides a two-year limitations period from the date the last medical benefits are due and payable. As the evidence presented supports a finding that the last medical benefits paid in this case on September 29, 2014, the ALJ concludes that Claimant's petition to reopen, whether that be July 15, 2020 or August 21, 2020 is beyond the two-year limitation, which would have run by September 30, 2016. Because Claimant's petition to reopen was not filed within the applicable limitations period set out in either C.R.S. § 8-43-303(1) or (2)(b), the ALJ agrees with Respondents that his petition to reopen must be denied. See *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998)(claim was barred from reopening where it was filed more than six years after onset of disability). Even if Claimant had established that he had filed his petition within the applicable limitations period, he failed to prove that he is entitled to reopen the claim based upon an error, a mistake or a change of condition.

Claimant's Request to Reopen Based on Error and/or Mistake

P. As noted Claimant contends primarily that he is entitled to reopen the claim as the matter was closed in error or by mistake given that he was incarcerated, had limited access to a law library, experienced Covid-19 lockdowns, had no access to forms, suffered delays in mailing and because his attorney of record stopped communicating with him. When a claimant alleges that an error or mistake justifies the reopening of a claim, the ALJ must engage in a two-step analysis concerning that assertion. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo.App. 1981).

Q. First, the ALJ must determine whether there has been an error or mistake. If there is an error/mistake, then the ALJ must determine whether it is the type of

error/mistake that warrants a reopening. *Travelers Insurance Co. supra; Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo.App. 1984). As is pertinent here, when determining whether a mistake warrants reopening, the ALJ may consider whether the mistake could have been avoided by the timely exercise of available remedies. *See Fisher v. Wal-Mart Stores,* W.C. No. 4-247-158 (August 20, 1998); *Travelers Ins. Co v. Industrial Comm'n, supra*.; *Industrial Commission v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Industrial Commission*, *supra*.

R. In *Klosterman v. Industrial Commission*, claimant filed a claim for compensation against her non-insured restaurant employer (Klosterman). The Division forwarded a copy of the claim to the employer at its address of record. Mr. Klosterman responded by denying that claimant had been injured. A hearing was held at which the employer (Mr. Klosterman) failed to appear. The hearing officer found that claimant had sustained a compensable injury. Much later, the claimant requested a hearing on indemnity benefits and a copy of the Application for Hearing (AFH) was sent to Mr. Klosterman at the address where the pervious notice was sent. Mr. Klosterman did not appear at that hearing. The hearing officer awarded substantial benefits and uninsured penalties against him as employer. Thereafter, Mr. Klosterman filed a petition to reopen alleging error or mistake. Klosterman alleged that he did not receive notice of either hearing due to changing addresses and communication issues with an attorney he had consulted. The hearing officer determined that the error or mistake in the case was Mr. Klosterman's "neglect." Accordingly, the hearing officer found no basis for reopening and denied Klosterman's motion to reopen. The Industrial Commission affirmed.

S. The Court of Appeals reviewed the Panel's decision in Klosterman only as to the bases in the statute for determining a reopening of the claim under Colo. Sess. Laws 1975, ch. 71, § 8-53-119 at 307, the predecessor statute to § 8-43-303, C.R.S. This section provided in pertinent part that an award could be reopened "on the ground of an error, a mistake, or a change in condition." The Court analogized the provisions of C.R.C.P. 60(b) for setting aside a judgment. Klosterman contended that excusable neglect falls within the definition of error or mistake and that his conduct met the criteria for excusable neglect as that term had been applied in cases decided under C.R.C.P. 60(b) and therefore, his petition to reopen should have been granted. The Court rejected these contentions stating:

> The procedure for reopening set forth in the WC Act is complete and definitive and need not be supplemented by the Colorado Rules of Civil Procedure or principles applicable thereto. The statute specifically enumerates the grounds upon which the director may reopen an award. Excusable neglect is not included among those grounds, and, therefore, we may not read it into the statute.

T. Here, the evidence presented persuades the ALJ that despite having knowledge concerning the procedural posture of his claim, Claimant took no action to prosecute his claim for more than two years after his prior counsel withdrew his Application for Hearing on March 30, 2018. Indeed, after Claimant's counsel withdrew

the Application for Hearing on March 30, 2018, the available record supports a finding that Claimant did not take action in furtherance of prosecuting his claim until August 21, 2020 when he filed the pending Petition to Reopen. Claimant subsequently filed an Application for Hearing endorsing reopening on August 27, 2020. (See generally, Respondents' Hearing Exhibits (RE) B, C, and D). While Claimant contends that he wrote the OAC on July 15, 2020 "asking about the status of the claim and to reopen the claim if it had been closed", he did not provide a copy of the purported letter to the ALJ for inclusion in the evidentiary record. Even assuming that Claimant initiated contact with the OAC on July 15, 2020, such contact occurred more than two years after Claimant withdrew his Application for Hearing without taking additional steps to prosecute his claim. Based upon the totality of the evidence presented, the ALJ is convinced that, regardless of his incarceration, the Covid-19 pandemic or the myriad of other reasons Claimant cites for his inaction to prosecute the claim, such inaction, on his part or the part of his attorney[6] in excess of two years following the withdrawal of his Application for Hearing constitutes neglect rather than error/mistake for purposes of reopening the claim. Where the putative error/mistake concerning claim closure actually stems from a party's own neglect, as it does here, that neglect should not be construed as an error/mistake for purposes of reopening. See, *Goodman Assocs., LLC v. WP Mountain Properties, LLC*, 222 P.3d 310 (Colo. 2010)(loss of pleadings due to deficient office practices and procedures amounted to neglect, not mistake). Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that an error or mistake of law or fact occurred in this case. Rather, the evidence presented supports a conclusion that Claimant and his prior counsel neglected the case for a significant period of time, which neglect ultimately resulted in closure of the claim. Accordingly, Claimant's request to reopen the matter on the grounds of error or mistake must be denied and dismissed. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo.App. 1996).

Reopening Based upon a Change of Condition

U. Although not specifically plead, to the extent that Claimant contends that the evidence presented supports a claim for reopening based upon a change in condition, the ALJ agrees with Respondent that Claimant is precluded from doing so. In reaching this conclusion, the ALJ finds the claim of *Amin v. Schneider National Carriers*, W.C. No. 4-881-225-06 (November 9, 2017), instructive. On facts strikingly similar to those before the ALJ in this case, Mr. Amin's case closed by order of the Director of the Division of Workers' Compensation without a determination that he sustained a compensable injury. Following the closure of his claim, Mr. Amin filed a petition to reopen the claim based upon a change of condition. He subsequently filed an Application for Hearing endorsing "Petition to Reopen" and a hearing was set. Citing the Colorado Court of Appeals decision in *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo.App. 2002), the ALJ granted a Motion for Summary Judgment filed by Respondents arguing that because they had never admitted liability for the claim and it was undisputed that the

[6] It is unknown if or when Claimant's prior attorney withdrew as his counsel of record. Rather, the evidence supports only that as of June 19, 2020, more than two years after he withdrew Claimant's Application for Hearing, Claimant's counsel noted that his office was "no longer able to pursue your claim." (Claimant's Exhibits (CE) 1).

claim was contested and never found compensable, there was nothing to reopen. The ALJ concluded that in order for Mr. Amin to reopen his claim on the basis that his condition had changed, he was first required to establish that the underlying injury forming the basis for reopening was compensable. Because compensability had not been determined in the first instance, the ALJ dismissed Mr. Amin's Petition to Reopen. Mr. Amin appealed. On appeal, a Panel of the Industrial Claim Appeals Office affirmed. Because the Director's Order closing the claim amounted to an "award" bringing the claim for reopening under the purview of the statute[7] and because there had been no original determination of compensability before the claim was closed, the Panel reasoned that Mr. Amin was precluded from reopening his claim based upon a change of condition. *Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780, 784 (Colo.App. 1994); *See also, City and County of Denver, supra*. In this case, the evidence supports a conclusion that the claim closed automatically by order of the Director following the issuance of his November 28, 2017 order. Consistent with the opinions announced in *Amin* and the *City and County of Denver*, *supra*, the Director's November 28, 2017 order constitutes an "award" bringing the instant case under the reopening statute. Accordingly, while Claimant is not precluded from attempting to reopen his claim on the grounds of error or mistake as he has done, he is precluded from reopening the claim based upon a change of condition. *Amin v. Schneider National Carriers, supra.* Consequently, any claim for reopening based upon a change in condition must be denied and dismissed. Even if Claimant had established that he was entitled to reopen his claim, the evidence presented persuades the ALJ that he failed to prove that he suffered a compensable injury.

Compensability

V. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I) (b), C.R.S.*

W. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

X. The "arising out of" element is narrower and requires Claimant to show a causal connection between her employment and the injury such that the injury has its

[7] The portion of the ALJ's decision holding that no award of "any sort" had been issued because compensability had not been determined was set aside

origins in her work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and Claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996).

Y. In this case, Claimant contends that he suffered encephalitis and seizures requiring hospitalization as a consequence of being vaccinated against Hepatitis A imported into the work place by his supervisor. Because he was "100% healthy" prior to taking the Hepatitis vaccination and all diagnostic testing returned negative results for pathogens/conditions known to cause symptoms consistent with those manifested by Claimant, including seizures, Claimant contends that it is "logical to make a causal connection between the Hepatitis A vaccination, his hospitalization and his ongoing seizures. Indeed, Claimant contends that the only "possible cause not ruled out" is the vaccination.[8] As support for his contention that his medical condition was caused by the Hepatitis A vaccination, Claimant relies on a passage in Dr. Mack's June 17, 2014 report which indicates: "He also recently was vaccinated against hepatitis and this has less than a 1% incidence of encephalitis and could be a possible source". The ALJ finds the aforementioned passage to be poorly written and susceptible to misinterpretation. Indeed, it is unclear if Dr. Mack is suggesting that the vaccine creates less than a 1% chance of developing encephalitis or if hepatitis itself gives rise to a less than 1% incidence of development of encephalitis. Based upon the statements of Claimant, it is clear that he interprets Dr. Mack's June 17, 2014 report as indicating that the vaccine creates a 1% chance of developing encephalitis. This question was clarified by Dr. Jacob C. Liaoong in a report dated June 17, 2014, when he noted:

> I do not think this is hepatitis A active infection with encephalitis. In less than 1%, there are reported cases of encephalitis, but nothing specific to [the] temporal lobe, [that] has been noted under the hepatitis A vaccination adverse events. I am not sure we can totally rule this out, but it is so rare that it is likely an exclusion diagnosis.

Z. Dr. Liaoong went on to note that Claimant's encephalitis "might be a viral-related process that includes herpes although [Claimant] has not had any recent or known episode of herpetic breakout preceding above or this could be any other viruses, like enterovirus of Coxsackie or other community type virus".

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[8] Dr. Ramaswamy rebutted this contention by testifying that not all potential avenues of infection were actually tested for while Claimant was hospitalized. Rather, Claimant was tested for the most probable pathogens capable of causing his encephalitis and placed on antibiotics. The evidence presented supports a conclusion that once Claimant responded to treatment, further testing to identify a cause for his encephalitis stopped, leading Dr. Ramaswamy to conclude that the actual cause of Claimant's encephalitis was unknown.

AA. When viewed in its totality, the ALJ concludes that the evidence presented supports Dr. Ramaswamy's expert medical opinion that Claimant suffered an idiopathic, non-work related episode of meningeal encephalitis caused by an unknown infectious origin. While it is possible that Claimant's encephalitis may be related to his Hepatitis A vaccination, the ALJ credits the testimony of Dr. Ramaswamy to find and conclude that Claimant's clinical picture and the more likely causes of his encephalitis render it medically improbable. A coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between his alleged injury and his work. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), To the contrary, as noted by the Panel in *Scully* "correlation is not causation." As noted, the ALJ credits the content of Claimant's medical records and the opinions of Dr. Ramaswamy to find/conclude that Claimant's encephalitis is more probably than not idiopathic in origin and unrelated to his Hepatitis A vaccination as he alleges. Because Claimant has failed to establish the requisite causal connection between his hepatitis A vaccine and his encephalitis, he has failed to carry his burden that he suffered a compensable "injury" as defined by the above referenced legal opinions. Accordingly, his claim must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: May 13, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your

Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER were served by placing same in the U.S. Mail, or by e-mail to:

Gary Baumann, Jr. #166014 (*pro se*)
P.O. Box 6000
Sterling, CO 80751

Joe M. Espinosa, Esq.
joe.espinosa@farmersinsurance.com

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: May 13, 2022

/s/ Matthew Chavez_____
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-186-986-001

ISSUES

I. Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination resulting in termination of wage loss benefits?

II. Whether Respondents have proven by a preponderance of the evidence that they are entitled to an overpayment of wage loss benefits?

STIPULATIONS

- The parties stipulated that Claimant has been receiving temporary total disability benefits since at least November 2, 2021, and such benefits have not been terminated.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On October 10, 2021, Claimant was working for Employer as an inline inspector in the quality department. **TR. 13:22-25**. The job required Claimant go up and down the production line, inspecting parts as they were produced. **TR. 14:1-3**.
2. Before working in the quality department, Claimant worked for Employer as a production operator. **TR. 14:10-12**.
3. On October 2, 2021, Claimant sustained an admitted work-related injury from lifting a box. **Ex. A:2; B:12**. She complained of pain in her upper and middle back, left shoulder and arm, and neck. **Ex. A:2**.
4. On October 15, 2021, Claimant was seen by Dr. Drapeau at Workwell. At this visit, Claimant complained of pain in her neck, upper and middle back, as well as her left shoulder and arm. After evaluating Claimant, Dr. Drapeau assigned work restrictions. The work restrictions included no lifting, pushing, or pulling greater than 10 pounds and avoid bending, kneeling, and squatting. **Ex. A:2**.
5. On October 28, 2021, Claimant returned to Workwell for additional medical treatment. At this visit, Claimant was evaluated by William E. Ford, ANP-C. Claimant reported that her symptoms were getting worse. Claimant complained of pain in her neck and her right posterior and anterior shoulder. She also complained of pain in her right arm with any movement. Claimant did not, however, have any mid or lower back pain at this visit. Claimant also stated that her pain got so bad, she went to Long's Peak Hospital. At this appointment, Mr. Ford continued Claimant's restricted duty through November 1, 2021. But he also excused Claimant from working until her follow up

appointment – which might have been scheduled for November 1, 2021. **Ex. A:5-8**. There is not, however, a medical report for a follow up appointment until November 12, 2021, in which Mr. Ford continued Claimant on restricted duty. Therefore, despite the Employer and adjuster discussing Claimant having a November 1st or 2nd medical appointment, there is not a corresponding medical report from such visit. Therefore, the extent of Claimant's work restrictions between November 2nd and November 11th is unclear. Based on the reports of Dr. Drapeau and Mr. Ford, the ALJ finds that Claimant was restricted from performing her regular job duties from October 15, 2021, through November 12, 2021.

6. On November 2, 2021, Claimant returned to work and began working her modified job as an in-line inspector. During the morning portion of her shift, LJP[Redacted], her immediate Supervisor, asked her to meet in the conference room with SMK[Redacted], who works in Human Resources. **TR 26:4-12, Ex. B:14.**

7. For the conversation which occurred in the conference room, LJP[Redacted] served as the translator. The Claimant would speak in Spanish. Ms. SMK[Redacted] would speak in English. Ms. SMK[Redacted] was relying on LJP[Redacted] to give a correct interpretation of the Claimant's position regarding the transfer to the molding department. **HT 16:2-8, 29:13-15, 30:1-2, 50:2-13**. There is no information about the ability of Mr. LJP[Redacted] to act as an interpreter.

8. Ms. SMK[Redacted] testified that when the Claimant returned to work on November 2, 2021, the company needed to make a reduction in "head count." She said that Claimant was identified as one person that the company needed to reduce out of the quality department. Rather than terminate Claimant, she was offered a position in the molding department. **HT 5:14-22**. Ms. SMK[Redacted] testified that when the Claimant was offered the position in the molding department the Claimant's response was that the position was not within her restrictions. **HT 58:3-8**. Ms. SMK[Redacted] had LJP[Redacted] explain that the company was attempting to have Claimant remain employed rather than be terminated. Ms. SMK[Redacted] thought the Claimant was not happy about the offer. **HT 16:9-25, 17:1-5**. Ms. SMK[Redacted] said the Claimant did not ask for an accommodation. **HT 17: 9-11**. But, on the other hand, it does not appear that Ms. SMK[Redacted] conveyed to Claimant that they would accommodate her restrictions. Ms. SMK[Redacted] stated the Claimant conveyed to LJP[Redacted]she wanted some time to think about it. **HT 17:12-16**. Ms. SMK[Redacted] testified the Claimant left the plant and she subsequently called LJP[Redacted] and informed him she was going to quit and heal her back. **HT 17: 17-21**.

9. On November 3, 2021, Ms. SMK[Redacted] communicated with the adjuster via email. Ms. SMK[Redacted] provided the adjuster the dates Claimant missed work. She also advised the adjuster that they moved Claimant to another job. Ms. SMK[Redacted] did not, however, advise the adjuster that Claimant had called in and quit. **Ex. B:14**.

10. Ms. SMK[Redacted] also testified that she did not tell the adjuster that Claimant quit in that email because she must have learned about Claimant quitting after she wrote the email. Ms. SMK[Redacted] did not, however, tell the adjuster Claimant quit until

the adjuster asked Ms. SMK[Redacted] about Claimant's work status a month later, on December 5, 2021. **HT 44:24-25, 45:1-6.** Nor did Employer submit any credible and persuasive documentation that was generated on November 3, 2021, or shortly thereafter, documenting Claimant quit on November 2, 2021. In other words, there was no concurrent documentation documenting Claimant quitting. As a result, the ALJ does not find persuasive the testimony of Ms. SMK[Redacted] that Claimant called Mr. LJP[Redacted] and quit.

11. Claimant testified about her understanding of the conversation which occurred in the conference room. The Claimant stated that Ms. SMK[Redacted] offered two options: 1) stay in the plastics department working as an operator, or 2) go home. Claimant's response was " I- - I told her that I knew what was the job like in plastics and I could not do that job because of my restrictions, that I could not do them because of my restrictions" **HT 56:14-25, 57:1-25, 58:1-8, 60:13-16**. Therefore, Claimant left work and went home. Claimant testified that during the conference room conversation she never indicated that she quit or refused to do her job. **HT 58:9-17**. Claimant also testified that she did not have a subsequent telephone conversation with LJP[Redacted] telling him that she was quitting. **HT 58: 18-23, 61:4-7.** The ALJ credits Claimant's testimony and finds that Claimant was given the option of working as an operator or not working and further finds that Claimant chose to not work so she could get better from her work injury. Thus, Claimant went home that day and did not return to work.

12. Based on the testimony, there is a dispute over whether Claimant called her supervisor, Mr. LJP[Redacted] and whether she told him that she was quitting at any time. Mr. LJP[Redacted] did not, however, testify at the hearing. Therefore, the ALJ is left with trying to determine whether Claimant told Mr. LJP[Redacted] that she was quitting without being able to judge the credibility of Mr. LJP[Redacted] as to whether Claimant called him - and what was said. Moreover, without Mr. LJP[Redacted]'s testimony at hearing, the ALJ cannot determine whether there were any issues with the interpretation at any time. For example, without his testimony, there is no way to determine how well he speaks English. Or, even if the call occurred, whether he considered Claimant's choice to stay home – as offered by Ms. SMK[Redacted] – as Claimant quitting, even though Claimant never said she was quitting. As a result, this is another basis to not credit Ms. SMK[Redacted] 's testimony that Claimant called Mr. LJP[Redacted] and said that she quit.

13. The ALJ finds that on November 2, 2021, Claimant was provided the option of accepting the molding position or going home. Claimant chose to go home so she could get better. Thus, Claimant did not quit, and she was not terminated. As a result, Claimant was not working due to her work injury.

14. On November 12, 2021, Claimant returned to Workwell and was seen again by Mr. Ford. At this appointment, Claimant complained of ongoing upper and lower back pain as well as neck pain. During his physical examination of Claimant, Mr. Ford noted Claimant had decreased range of motion of her left shoulder because of pain in all planes. Mr. Ford continued Claimant on restricted duty through November 22, 2021. At this appointment he returned her to work – with restrictions. The restrictions were no lifting, pushing, or pulling greater than 10 pounds and avoid bending, kneeling, and

squatting. He also restricted her from no bending of her neck and reaching with her arms. Ex. A, pp. 8-10. The ALJ finds that these restrictions continued to preclude Claimant from performing her regular job duties.

15. Based on the evidence, the ALJ finds that Claimant is not responsible or at-fault for her wage loss.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination resulting in termination of wage loss benefits?

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

As found, Claimant was given the option to accept the transfer to another job or go home and not work. Due to her work injury, Claimant chose to go home and not work so she could recover from her work injury. At no time did Claimant quit and at no time did Employer terminate Claimant. Moreover, Claimant's injury has continued to preclude her from performing her regular job duties. As a result, Respondents failed to establish by a preponderance of the evidence that Claimant is at fault for her wage loss and not entitled to temporary disability benefits.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents failed to establish that Claimant quit and is responsible, or at-fault, for her wage loss. Therefore, Claimant's temporary total disability benefits shall continue until terminated by law.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on August 5, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of medical benefits to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

1. Claimant is an undocumented Honduran immigrant who was employed by Employer as a temporary worker from June 2021 until August 5, 2021. Claimant does not speak, read, or write English, and cannot read Spanish. Claimant provided Employer with a fictitious name, and worked under the alias "NN[Redacted."

2. Employer is a temporary staffing company that provides workers for various positions in the Denver area. Generally, employees who wish to work on a given day appear at Employer's office located on 6th Avenue in Aurora, Colorado for work assignments. Employer then assigns individual employee to daily temporary assignments which take place at client locations away from Employer's office. Employees are required to travel from Employer's Office to the location of the daily assignment. Because none of the temporary jobs assigned by Employer take place on Employer's premises, employees must travel to off-site locations.

3. Employer's "Assignment Memo," to which Claimant's alias electronic signature was affixed on June 21, 2021, informs employees of Employer's requirements both before and after the completion of job assignments.[1] (Ex. M, p. 133 (Spanish language version) and p. 134 (English language version). The Assignment Memo indicates that employees seeking work on a given day must present to one of Employer's offices and "be available and prepared to work immediately. Being available and prepared means that you must be dressed appropriately, have all transportation and child care arrangements taken care of and be willing to accept suitable work." (Ex. M, p. 134).

4. Notwithstanding the Assignment Memo's instruction that employees have all "transportation … arrangements taken care of," in practice, employees were not required to provide their own transportation to off-site locations. Employer owns two vans used to transport some workers to off-site locations. However, Employer typically does not have the capacity to transport every worker to a job assignment. In such instances, Employer's branch manager, DMN[Redacted], or another employee, assign individual employees to

[1] Claimant testified that she informed Employer that she was not able to read, and that one of Employer's employers – "Carla" – completed the forms on Claimant's behalf.

ride with co-employees who have transportation (in the co-employee's personal vehicle) to the off-site job assignment.

5. Ms. DMN[Redacted] initially testified that Employer does not assign employees to ride to job sites with specific people. Ms. DMN [Redacted]'s later contradicted this statement, when she testified that Employer does arrange for workers without transportation to ride to job sites with co-workers. (Tr., p. 83: 13-20; p. 84:4-7). Although Employer facilitates and arranges for employees to ride with co-workers to job sites, Employer does not compensate employees for time while traveling to job assignments, or for transportation expenses.

6. Employer's business thus requires temporary employees to appear in-person at Employer's office to obtain a job assignment; travel from Employer's office to an off-site location to perform the job assignment; have transportation available, or be willing to travel either in Employer's vans or with a co-worker to an off-site location. The ALJ finds that Employer's employment contract necessarily contemplates that employees will travel as part of their employment. That travel also provides a benefit to Employer beyond the employee's mere arrival at the work place, because Employer cannot fulfill its obligations to its customers without employees traveling off-site to job assignments.

7. The Assignment Memo also provides that "On condition of employment with [Employer], you as the employee, are required to contact our office immediately upon completion of an assignment." (Ex. M, p. 134) (emphasis original). The Assignment Memo also provides "If you do not contact our office immediately upon completion of an assignment, or fail to comply with this written notice in any manner, you will be deemed to have voluntarily terminated employment with [Employer]. Failure to contact our office at the end of every assignment may result in reduction of unemployment wage claims." (Id.).

8. Employer offers its employees different options for payment of wages, including daily or weekly payment. One of Employer's procedures for paying employees is the use of an Employer-issued debit card. Employer electronically adds funds to an employee's debit card to pay wages after receiving and processing the employee's timecard for a given assignment. When employees elect to be paid daily, Employer is able to transfer funds to the employee's debit card on the same day that the timecard is submitted and processed.

9. Employees are required to submit timecards to Employer to received payment for a job assignment. Employer permits employees to submit timecards through various methods, including in-person delivery at Employer's office, email, or text message. Employer does not require employees to submit timecards on the date that they work, or on any specific schedule.

10. On August 5, 2021, Claimant reported to Employer's office for a job assignment, and was assigned to work at a rental car company located near Denver International Airport (DIA). Claimant's work assignment was to provide labor for an entity called "MLS" which is a staffing agency that services rental car companies at DIA. Claimant does not own a vehicle and does not drive, and thus required transportation to the off-site job

assignment on that day. Claimant either elected to or was assigned to ride with two other employees to the off-site job assignment at DIA. (Although the parties dispute whether Claimant knew the co-employees with whom she rode to DIA prior to being assigned to ride with them, Claimant's familiarity with the co-workers with whom she rode that day is not relevant to the determination of the issues before the ALJ).

11. After leaving Employer's office, Claimant was transported to the off-site job assignment and worked from 8:00 a.m. until 3:42 p.m. at the rental car agency, as assigned by Employer. (Ex. M, p. 163-165).

12. After completing her assignment, Claimant rode in the same car with the co-employees, to return to Employer's 6th Avenue office to turn in her timecard for the day. Claimant credibly testified that after every shift where she received transportation from a co-worker, she returned back to the 6th Avenue office in the same vehicle. Once Claimant returned to Employer's office, employer did not transport or arrange transportation back to Claimant's home. Claimant also testified that she was returning to Employer's office on August 5, 2021, to submit her timecard, because submission of the timecard was a requirement for payment for shifts worked.

13. At approximately 4:30 p.m., the vehicle in which Claimant was a passenger was involved in a collision with another vehicle. When police arrived at the scene, the vehicle's driver and other passenger, fled the scene, leaving Claimant in the car.

14. As a result of the accident, Claimant was seen at the UC Health emergency room on August 5, 2021, and diagnosed with a left eyelid laceration, lip laceration, injury to left facial nerve, abrasion and closed fracture of tooth. (Ex. H).

15. On August 27, 2021, Claimant filed a Workers' Claim for compensation, alleging injuries to her face, head, neck, upper back, lower back, upper extremities, and lower extremities. (Ex. A). On September 27, 2021, Claimant saw David Yamamoto, M.D., and diagnosed with neck pain, left shoulder pain, lower back pain, blurry vision, face lacerations, jaw pain, weakness of left arm, headache, memory loss and dizziness. (Ex. J). On December 13, 2021, Claimant saw Robert Messenbaugh, M.D., for an independent medical examination at Respondents' request. Dr. Messenbaugh indicated that as a result of the motor vehicle accident, Claimant sustained injuries including a laceration of the left eye, broken tooth, cervical and lumbar sprain, left shoulder strain with possible labral tear, and possible lingering cognitive issues. (Ex. K).

16. On September 17, 2021, Respondents filed a Notice of Contest, indicating that Claimant's injuries are not work-related. (Ex. B).

17. On October 4, 2021, Clamant filed an Expedited Application for Hearing. (Ex. C). Respondents timely filed their Response on October 8, 2021. (Ex. D). Claimant contends her injuries are work-related. Respondents contend that Claimant's injuries are not work-related asserting that Claimant was traveling to-and-from work when the accident occurred and that her injuries did not, therefore, arise out of the course of her employment with Employer.

18. Between June 17, 2021 and August 5, 2021, Claimant worked 27 days for Employer, as reflected on timecards she submitted to Employer and in Employer's payment ledger. (Exhibit M, p. 137-164). For the majority of days Claimant worked, she submitted her timecards to Employer in person. Although on June 18, 2021, June 24, 2021 and June 27, 2021, Claimant's timecards were emailed to Employer by an unidentified sender. (Ex. M, p. 139, 141, & 140). Claimant testified that does not know how to use email. Given that Claimant can neither read nor write, the ALJ finds credible Claimant's testimony that she does not know how to use email.

19. Ms. DMN [Redacted] testified that prior to August 5, 2021, Claimant had also texted Ms. DMN [Redacted] her timecard on multiple occasions. However, no credible evidence exists that Claimant texted timecards prior to August 5, 2021. Claimant testified that she does not know how to text on her phone, although it was possible that her son had texted information on her behalf. The one timecard Respondents contend Claimant is a timecard submitted on July 16, 2021. (Ex. M, p. 151, Timecard #283843). The timecard is for eight hours of work from 7:00 am until 3:30 p.m., on July 12, 2021. (Timecard #283843). The timecard, however, does not bear Claimant's name, and is signed by a supervisor with last name of "D[Redacted]." In contrast, Ex. M, p. 150, is a different timecard for July 12, 2021, (Timecard #287368), which does bear Claimant's name, shows Claimant worked from 7:00 am to 3:30 p.m., and is signed by a supervisor named "AS[Redacted]." Because no other credible evidence was presented that Claimant texted timecards to Employer, the ALJ finds that Claimant did not submit any timecards by text message prior to August 5, 2021.

20. Claimant submitted the remainder her pre-August 5, 2021 timecards in person at Employer's 6th Avenue office. This is consistent with Claimant's testimony and Ms. DMN [Redacted]'s testimony that most of the time Claimant returned from the jobsite and submitted her timecards in person. To do so, Claimant required transportation from the off-site temporary job assignment to Employer's 6th Avenue office.

21. During the first four weeks Claimant worked for Employer, she was paid weekly, by check, four days after the end of the corresponding week (*i.e.*, the weeks ending June 20, 27, July 4 and 11). (*See* Ex. M, p. 137). After the week ending July 11, 2021, Claimant was paid daily (and remotely) through the debit card Employer provided, and payment was issued within 2 days of the date she worked. Comparison of Claimant's timecards to the payment ledger demonstrates that from July 16, 2021 through July 28, 2021, Claimant was paid on the date she worked. From this, the ALJ infers that Claimant submitted her timecards from July 16, 2021 through July 28, 2021 on the dates she worked.

22. Ms. DMN[Redacted] testified that she first learned of Claimant's accident around 4:30 p.m. on the afternoon of August 5, 2021. She testified she called Claimant on her cell phone because Claimant had not sent in a picture of her timecard for that day (either through text or email). DMN [Redacted]'s testimony that she called Claimant because she had not texted or emailed in her timecard was not credible because Claimant had not previously texted in her timecards. Instead, Claimant had submitted her timecards in person for each of the 22 days she had worked since June 28, 2021, and submitted them in person on the date she worked for the previous three weeks. More likely, Ms. DMN

[Redacted] called Claimant because she had not returned to the office to personally deliver her timecard to the office, as was Claimant's normal practice.

23. Respondents also imply that Claimant did not actually work on August 5, 2021. The evidence does not support this inference. When Ms. DMN[Redacted] spoke with Claimant, Claimant reported she had been in an automobile accident. Ms. DMN[Redacted] walked approximately four minutes from the office to the location of the accident. Ms. DMN[Redacted] testified that she looked in the vehicle and saw the timecards for Claimant and the other two co-employees, and that the timecards did not have the time Claimant worked for the day completed on the card. Ms. DMN[Redacted] also testified that she could not get in the car, and that she could not see what was written on the timecards. Ms. DMN [Redacted]'s testimony that the Claimant's timecard did not contain the hours Claimant worked when she looked into the vehicle is inconsistent and not credible.

24. Ms. DMN [Redacted] also testified that when she received the timecard from Claimant on August 6, 2021, by text, the timecard was not signed by a supervisor. Claimant testified that at the rental car location, she gave her timecard to a person at the start of her shift, and he returned it to her with the hours filled in. She testified that the person did not sign the timecard as a "supervisor" because "he didn't understand anything about that." Ms. DMN[Redacted]testified that she called a supervisor, "Kirill" who could not confirm, and did not know if Claimant worked on August 5, 2021. The ALJ infers that Kirill was a supervisor at MLS, not the rental car agency where Claimant worked that day. No credible evidence was admitted indicating that Kirill would have had personal knowledge of whether Claimant worked at the rental car agency that day. Moreover, "Kirill" did not tell Ms. DMN[Redacted]that Claimant did not work on August 5, 2021, only that he did not know. Notwithstanding the lack of confirmation, Employer paid Claimant for 7.25 hours of work on August 5, 2021. Considering all relevant evidence, the ALJ finds that Claimant did perform work at a rental car agency on August 5, 2021, as assigned by Employer.

25. At hearing, NL[Redacted], Insurer's claim representative assigned to Claimant's claim testified. Ms. NL[Redacted]'s testimony related primarily to Insurer's rationale for contesting Claimant's claim. Ms. NL[Redacted] has no direct knowledge of the events of August 5, 2021, or Claimant's employment with Employer. Insurer's rationale is not relevant to the issues before the ALJ.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability

or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold d/b/a Atlas Logistics*, WC 4-960-513-01, (ICAO Oct. 2, 2015).

Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id*. at 864. In ascertaining whether "special circumstances" exist, the following factors should be considered: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. *Id.* Whether meeting one of the variables, by itself, is sufficient to create a "special circumstance" warranting recovery depends upon whether the evidence supporting that variable demonstrates such a causal connection between the employment and the injury to bring the travel within the course and scope of employment. *Id*. The question of whether Claimant presented "special circumstances sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Electric, Inc.*, W.C. 4-939-901-03 (ICAO February 22, 2016).

Here, neither the first, second, or fourth factors have been established. Claimant's accident arguably occurred outside working hours because Claimant was not being compensated while traveling and Claimant had completed her off-site job assignment for the day; it occurred off Employer's premises; and the obligations of employment did not create a special zone of danger. The primary issue is whether the travel in which Claimant was engaged at the time of her injury was contemplated by the employment contract.

In considering whether travel is contemplated by the employment contract, the critical inquiry is whether the travel is a substantial part of service to the employer. *Madden*, 977 P.2d at 865. Travel may be contemplated by the employment contract when the employer delineates the employee's travel for special treatment as an inducement to employment. *See Staff Administrators Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in the travel at the express or implied consent of the employer, and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Labs v. Indus. Claim Appeals Office*, 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risk of travel become the risk of the employment. *Briedenbach v. Black Diamond, Inc.*, W.C. No. 4-761-479 (ICAP Dec. 30, 2009). Where a "temporary service requires the employee to travel to a fixed location, then dispatches the employee to another work site to perform services, the travel between the temporary service employer's premises and the remote site is an 'integral part of the employment." *Schutter, supra, citing* 1 *Larson's Workers' Compensation Law*, §14.03 (2001). "Thus, injuries sustained during travel between remote job sites and the

employer's premises have been found compensable." *Schutter v. Outsource Int'l/Tandem Staffing*, W.C. No. 4-520-338 (ICAO Feb. 21, 2003), citing *Benson v. Colorado Compensation Ins. Auth.*, 870 P.2d 624 (Colo. App. 1994); and *Tatum-Reese Develop. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971). Moreover, "an employee who is away from home on business remains under continuous workers' compensation coverage from the time of the departure until the employee returns home." *SkyWest Airlines v. Indus. Comm'n*, 487 P.3d 1267 (Colo. App. 2020).

Claimant has established by a preponderance of the evidence that the injuries she sustained as a result of the August 5, 2021 automobile collision arose out of the course of her employment with Employer. Employer's business contemplates that its Employees will travel to off-site job assignments as a condition of employment. Employee travel to off-site job assignments is the *sine qua non* of Employer's business. Absent such travel, Employer could not provide services to its clients. Thus, because of the nature of temporary employment, travel to and from remote job sites confers a benefit on Employer beyond the mere fact of arrival at work. Whether an employee traveled to an assignment in their own vehicle, in Employer's van, or with another co-worker does not alter the fact that Employer's contract contemplated employee travel to off-site assignments.

As found, on August 5, 2021, Claimant presented at Employer's office and received an assignment to work at a rental car agency at DIA. Claimant did not have her own transportation to the assignment, and rode to the assignment with two co-employees. Claimant worked that day as assigned by Employer. Claimant credibly testified that she returned to Employer's office each day after completing an assignment with the person who drove her to the assignment in the morning. Claimant was in the process of returning to Employer's office to submit her timecard in person, and sustained injuries in an automobile accident. Employer required employees to submit timecards as a precondition to payment. While no specific means of submitting timecards was required, the overwhelming majority of the time, Claimant submitted her timecards in person, and submitted them on the day she worked for the three weeks preceding August 5, 2021.

No credible evidence was admitted to demonstrate that Claimant was engaging in any distinct departure on a personal errand or that she was not returning to Employer's office. The ALJ concludes that Claimant was in "travel status" while traveling between Employer's office and the off-site job assignment. Claimant's travel status ended when she returned to the office at the end of the day.

Based on the totality of the evidence the ALJ concludes that Claimant has established by a preponderance of the evidence that she sustained injuries arising out of the course of her employment with Employer on August 5,2021.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has to establish that she sustained a compensable injury, Claimant is entitled to an award of general medical benefits for all authorized treatment that is reasonable, necessary and related to the injuries sustained as a result of the August 5, 2021 automobile accident.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable injuries arising out of the course of her employment with Employer on August 5, 2021.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery {as recommended by Dr. Norman Lindsay Harris) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury at work on December 27, 2018. The body parts injured at that time were the claimant's neck and right shoulder. The respondents have admitted liability for the claimant's December 27, 2018 injury.

2. The claimant has undergone various surgical procedures during this claim.

3. On February 28, 2019, Dr. Norman Lindsay Harris performed an arthroscopic repair of the claimant's right rotator cuff. The claimant had a second right shoulder surgery on May 21, 2020. At that time, Dr. Harris performed biceps tenodesis.

4. On August 17, 2020, the claimant underwent surgery to his cervical spine. That surgery was performed by Dr. Wade Ceola. The procedure included C3-C4 anterior microdiscectomy, nerve root decompression, anterior interbody arthrodesis, cage placement with plating for stabilization. The surgical note identifies the use of Gardner-Wells tongs with ten pounds of traction.

5. The claimant testified that prior to the August 17, 2018 cervical surgery he had no left shoulder symptoms. However, immediately following the August 17, 2020 cervical surgery, the claimant began to experience pain in his left shoulder. The claimant also testified that he continues to have pain in his left shoulder.

6. The claimant testified that it is his understanding that during the cervical surgery additional traction was placed on his left shoulder. The claimant further testified that because he had recently undergone right shoulder surgery, more traction was placed on the left.

7. In a medical record dated October 9, 2020, Dr. Michael Campian identified a diagnosis of left rotator cuff tendinitis. At that time, Dr. Campaign recommended physical therapy for the claimant's left shoulder.

8. On February 2, 2021, a magnetic resonance image {MRI) of the claimant's left shoulder showed a high grade partial thickness articular sided tear, a partial

thickness tear of the mid and superior subscapularis tendon, moderate osteoarthritis of the AC joint, and a small subacromial spur.

9. On February 23, 2021, Dr. Harris reviewed the MRI results and recommended left shoulder surgery. Specifically, Dr. Harris recommended a diagnostic arthroscopy with rotator cuff repair.

10. On March 2, 2021, Dr. James Ferrari reviewed the request for left shoulder surgery. Dr. Ferrari opined that the requested surgery was reasonable and necessary to treat the condition of the claimant's left shoulder. However, Dr. Ferrari also opined that the condition of the claimant's left shoulder is not related to the work injury or to the August 2020 spine surgery. In his report, Dr. Ferrari noted that during the spinal surgery there was no traction on the claimant's left arm. Based upon Dr. Ferrari's opinion, the respondents denied the left shoulder surgery.

11. On March 9, 2021, Dr. Harris authored an appeal regarding the respondents' denial. Dr. Harris referenced that the claimant has experienced "migratory pain affecting his bilateral shoulders." Dr. Harris also noted the claimant's report that during surgery his left arm was held "with about 10 pounds of traction". Dr. Harris opined that the condition of the claimant's left shoulder could have been caused by the initial work injury and then worsened by the cervical spine surgery.

12. On March 19, 2021, Dr. Jon Erickson reviewed the request for a left shoulder surgery. Dr. Erickson opined that the claimant could not have suffered a left rotator cuff tear during the spinal surgery. It is Dr. Erickson's opinion that the MRI findings are degenerative in nature and secondary to age. Dr. Erickson further opined that the claimant's left shoulder was not injured on December 27, 2018 or on August 17, 2020. Based upon this opinion of Dr. Erickson, the respondents continued to deny the left shoulder surgery.

13. Subsequently, on November 15, 2020, Dr. Harris requested a repeat left shoulder MRI.

14. On November 22, 2021, Dr. Erickson reviewed the MRI request. Dr. Erickson recommended denial of the requested MRI. He also recommended denial of any treatment of the claimant's left shoulder

15. At the request of the respondents, Dr. Erickson conducted a review of the claimant's medical records. In his January 2022 report, Dr. Erickson opined that the abnormalities found in the left shoulder MRI are likely age-related and degenerative. Dr. Erickson reiterated his opinion that the claimant's left rotator cuff was not torn during the August 17, 2021 cervical spine surgery.

16. Dr. Erickson's testimony was consistent with his written reports. During his testimony, Dr. Erickson explained how a patient's shoulders are placed during an anterior cervical spine surgery. Specifically, a patient's shoulders are pushed down and then are held in position by wrapping their arms in a drape. Dr. Erickson also testified

that there is no traction applied to either arm during this type of surgery. Dr. Erickson further testified that the act of holding the claimant's arms during spinal surgery would not aggravate a pre-existing left shoulder condition to cause it to become symptomatic.

17. Natalie Arena, PA-C, testified by deposition. PA Arena was Dr. Ceola's assistant during the claimant's treatment, including the August 17, 2020 cervical surgery. PA Arena explained the standard process used in placing a patient for the type of spinal surgery the claimant underwent in August 2020. The patient is in the supine position (on their back) with their arms tucked at their sides. PA Arena explained that this is necessary to keep the shoulders down and away from the neck. The patient's arms are not held with traction. Rather they are wrapped in a sheet to the patient's sides. PA Arena also explained that Gardner-Wells tongs are used to hold the patient's cervical spine. The tongs are connected to the patient's skull and traction is used.

18. With regard to the spinal surgery, the claimant would have experienced the process as described by PA Arena. The claimant's arms and shoulders would have been placed in the same manner, regardless of the claimant's recent right shoulder surgery. PA Arena explained that it is necessary to place the arms the same way during this surgery to ensure that the cervical spine can be adequately reached. PA Arena further testified that it is her recollection that the claimant first reported left shoulder-related symptoms to her approximately two months after the surgery.

19. The ALJ credits the medical records, the testimony of PA Arena and the opinions of Drs. Ferrari and Erickson over the contrary opinions of Dr. Harris. The ALJ specifically finds that the claimant's arms, and therefore his shoulders, were placed in the same manner during the cervical spine surgery. In addition, there was no "traction" placed on either of the claimant's arms or shoulders during that surgery. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the left shoulder surgery recommended by Dr. Harris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury. The ALJ further finds that the claimant did not suffer an aggravation of a pre-existing left shoulder condition during the spinal surgery.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201,
C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights

of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Harris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury. As found, the medical records, the testimony of PA Arena and the opinions of Ors. Ferrari and Erickson are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a left shoulder surgery (as recommended by Dr. Harris) is denied and dismissed.

Dated May 18, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained injuries in the course and scope of his employment on April 5, 2021.

ONLY IF THE CLAIM IS COMPENSABLE:

II. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to authorized, reasonably necessary medical benefits that are related to the alleged workplace injury of April 5, 2021.

III. Claimant's average weekly wage (AWW).

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits from April 5, 2021 until terminated by law subject to offsets, if appropriate.

STIPULATIONS

The parties stipulated that, if the claim is found compensable and that Claimant was eligible for temporary disability benefits, Respondents are entitled to an offset for the time Claimant received unemployment insurance (UI) benefits. The ALJ approves and adopts this stipulation of the parties.

The parties also stated that, if the parties did not communicate with the ALJ that the issue of AWW had been resolved, this ALJ should make that determination.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was working for Employer as a window, glass, and shower door installer and technician for both commercial and residential projects. He had worked for Employer for over two years and had been doing the same kind of work for other employers for approximately 20 years. His job required both a mix of technical work, window and door delivery and installations. The job required lifting, pushing, pulling anywhere from one to 200 lbs., depending on the thickness of the product, type of window and depending on the job. They would sometimes have to carry the product up multiple flights of stairs, for blocks, or just a few feet.

2. Claimant had no prior issues with his back immediately before his work injury, other than a back injury approximately twenty years before. Claimant recalled that

the day before the alleged injury incident was Easter Sunday and he spent it with his family and had no issues. He did have a prior work related right knee injury that was feeling "pretty good," after his September 16, 2020 right knee surgery. He had returned to work full duty, full time as of January 2021. Claimant is 5'4".

3. On April 5, 2021 Claimant bent down to open a large garage bay door in order to load windows into the back of his box truck. The truck Claimant drove required a clearance of approximately twelve feet to fifteen feet high. Claimant bent down to yank the dock door up utilizing enough force and momentum to make the door go up above the catch lines at about two feet and eight feet. Claimant described the door as an older door, approximately ten feet wide and about twenty feet tall. The door was a manual door and did not open smoothly, that is did not glide up to the required twelve feet on its own. It would typically stop at approximately eight or nine feet high but that was not high enough for his box truck.

4. Claimant felt a pop in the right knee and immediate pain. Claimant's first concern was the right knee because he had surgery the previous year and was finally feeling better. Claimant waited for the knee pain to subside, which it did after resting a few minutes, though it did swell up, which worried him as well. Claimant started feeling pain in the low back after he got up from resting and he tried to lift a window to load onto his truck. He was unable to do it as he started having back spasms. This was approximately ten minutes after he opened the dock door. He had to have coworkers load his truck for him. Claimant did work the full day but only performed the driving and two other co-workers, one of whom does not have a drivers' license, went with him to unload the truck.

5. Claimant stated that he advised his supervisor when the initial accident happened and told him about his knee. Claimant did not initially mention the low back as he did not immediately perceive or understand the seriousness of his injuries. Then, when he started having spasms in the low back, he told his supervisor about that as well. He asked where he should go for care. His supervisor indicated he would contact the HR representative in Phoenix, where the company's main office was located. When Claimant returned from deliveries, his supervisor had still not heard back from HR about where Claimant should seek medical attention.

6. Claimant's back got worse throughout the day. Claimant followed up with his supervisor but did not receive any instructions about how to proceed with medical care. Claimant left work at approximately 4:15 p.m. that afternoon but after getting home he decided he required immediate medical attention because of the severe pain. The most concerning problem was that Claimant was having difficulty walking because he would take three to four steps and his back would immediately go into spasms.

7. Claimant went to the emergency room at North Suburban Medical Center and was attended that evening. He was treated and released. Before he was released, they took an MRI of his lumbar spine but did not provide him the results by the time he was released. Claimant stated he received a call the following day[1] and was instructed

[1] While Claimant stated that he was called the following day, he was actually called on April 6, 2021 in the afternoon, which was the same day he was released at 2:35 a.m. in the morning.

to return to the emergency department, which he did, as the pain in his back was severe whenever he put pressure on his leg or walked for more than a few steps.

8. Claimant stated that he texted his supervisor his statement regarding the injury as follows:[2]

> On 4/5/2021 I arrived to work about 7:00 am I clocked in, grabbed my paperwork and proceeded to locate my materials. I opened my box truck and lowered the ramp then came inside to lift the garage door. I bent and gave it a good hard yank trying to get it high enough to load my truck and immediately felt pain in my right knee. I was able to walk on it but it hurt. I waited for Braun to help load the large window and rested. When we pulled it from the rack and dragged it to the ramp I was unable to lift it and Bob, Lou or Dom and Braun finished loading. We were really shorthanded that day so I continued with my route knowing that Dom and Braun would do most of the physical work. Throughout the day my lower left back began to spasm and eventually I could only go a few steps before having to stop and let the pain subside. After we returned to the shop I asked Doug to contact HR to find out what I should do. After an hour or more I decided to have Doug call me at home when he heard something. Then eventually after no reply from HR, Doug and I decided that I would go to my own Dr.

9. Employer completed an Incident Report on April 6, 2021. The supervisor testified that he completed the report. He acknowledged that Claimant had notified him of the incident on April 5, 2021. He noted that the "Employee's Statement" was attached and that Claimant had a "[P]inched nerver." [sic.]. This ALJ infers that the above statement was the attached statement. The supervisor's statement says as follows:

> I was in the office and did not witness or see anything. He was worried he had hurt his knee. When he returned to the shop, he said it was also in his back now and he needed to see a doctor. I reached out to HR as we thought his was a continuation of his previous workers comp claim. Mario left at 4:15pm and apparantly [sic.] went to the emergency room that night.

The supervisor also noted that Claimant "initially thought he had hurt his knee and was limping. Later, he said his back hurt and was spasming." He noted that Claimant was taken to North Suburban for medical care by his wife.

10. Claimant was initially seen at North Suburban Medical Center on April 5, 2021 at 6:04 p.m. Claimant provided a history that he had had no trauma to the low back and that he had a history of a lumbar spine herniation 20 years before that resolved with physical therapy. Claimant presented to the emergency department complaining of acute onset low back pain, radiating down his left leg and that his left leg felt numb. The ED physician ordered an MRI to rule out possibility of epidural abscess and significant neurologic deficits. The differential diagnoses were cauda equina, epidural abscess, spinal stenosis, disc herniation, lumbar pain. Claimant was discharged with narcotic pain

[2] Respondents' Exhibit E, identifies this as Claimant's "statement regarding injury" on April 5, 2021. Original was texted to his supervisor. See April 13, 2022 Hearing Transcript p.30:4-12; p. 30:22-25 & p. 31:1.

medication on April 6 at 2:35 a.m. by PA Bryce Holland with instructions to see a neurosurgeon.

11. At approximately 8:40 p.m. on April 6, 2021 PA Holland reviewed the images and MRI report and added an addendum to her medical report stating that she called the patient to follow up. She noted that Claimant could take a few steps but was "exquisitely painful." She recommended that Claimant return to the ER if he was having worsening pain, foot drop or weakness. Claimant indicated that if he could he would wait until the following day to see the workers' compensation doctor.

12. The MRI read by Dr. Kevin O'Connor stated that Claimant had degenerative changes at L5-S1, resulting in impingement of the descending left S1 nerve roots and bilateral high-grade neural foraminal narrowing. He recommended the attending correlate the findings for a left S1 and/or L5 radiculopathy as the both the right and left foraminal narrowing was severe at the L5-S1 level with probable effacement of the descending left S1 nerve root.

13. Respondents, through the HR department authorized an appointment with the workers' compensation provider. Claimant was scheduled for Thursday, April 8, 2022 but Claimant never made the appointment.[3]

14. Claimant was re-admitted to the ED on April 6, 2021 at 10:02 p.m. by Dr. Simi Varanasi who took a history that Claimant was seen at the emergency room the day before for acute onset low back pain and presented to the ER for worsening pain and weakness in his left leg. He documented that Claimant developed symptoms after lifting a heavy door at work causing pain and weakness going from the low back, into the left buttock down the left leg, causing numbness from the knee down with some weakness. He stated that Claimant was able to make a virtual appointment with the neurosurgeon for the following Thursday and he was scheduled to see the Workmen's Comp. physician the following day but the pain was too severe for him to wait. Dr. Varanasi noted that Claimant was unable to walk due to the discomfort and the weakness in his left side and that he had foot drop. Dr. Varanasi stated Claimant was admitted due to significant findings from MRI and musculoskeletal findings. He consulted with Dr. Richard Kim of Colorado Brain & Spine Institute, who recommended steroid treatment and reevaluation the following morning.

15. On April 7, 2021 PA Stephanie Tu stated that Claimant was a 52 year old male with back pain and left lower extremity pain and weakness which started after lifting heavy two days prior. On neurologic exam she found left EHL/DF/PF[4] weakness, which was consistent with the MRI findings of acute disc herniation at the L5-S1 level. They discussed treatment options and concluded that Claimant should proceed with surgery scheduled for 5:00 p.m. with Dr. Kim given his weakness and intractable pain.

16. Claimant proceeded with the surgery on April 7, 2021 by Dr. Kim with a post-operative diagnosis of left L5-S1 herniated disc. He performed a microdiskectomy removing a large disc fragment and decompressed the nerve. During the procedure, Dr.

[3] April 13, 2022 Hearing Transcript, p. 37-38.
[4] Extensor Hallicus Longus (Big toe extension)/Dorsiflexion/Plantar Flexion weakness.

Kim stated that the "[T]he herniated disk was obvious." He also stated that they were "able to remove a large fragment of disk in a single piece" and decompress the nerve.

17. Upon discharge on April 8, 2021 Dr. Alexandra Grieb diagnosed Claimant with acute left lumbosacral radiculopathy status post left L5-S1 microlumbar discectomy with discharge instructions to follow up with Dr. Richard Kim, the neurosurgeon and his PCP, Dr. Sharry Veres.

18. Claimant was seen by Dr. Samantha Matney of Rocky Mountain Medical Group on April 13, 2021, who took the following history:

> 52 y/o male presenting for a new work comp injury. Pt states he was at work on 4/5/2021 loading his truck. Pt went to open the dock door open (sic) and he felt immediate pain in his right knee. Pt states he went to sit down for a little bit. Pt states he got up and his lower back started to spasm. Pt drove the rest of the day and did not lift anything. Pt states he could not get out of his truck by the end of the day. Pt went to the ER that evening. Pt states they did an MRI which he was told he had pinched L5-S 1. Pt was called back to the ER the next day and had surgery on his back. Pt states his left foot and leg is numb and he has pins and needles in his left leg. Pt states certain positions makes his symptoms worse. Pt does not have feeling in his toes. Pt has a hard time sleeping. Pt denies ant genital numbness, stool/urinary incontinence. Pt continues to have pain radiating down his left leg. Pt states the surgery helped a lot. Pt is taking ibuprofen as needed now. Pt has been doing hot and cold packs. Pt is not doing PT. Pt was advised to walk which he has been doing short walks. Pt is not working. Pt reports having a herniated disc about 20years ago. Pt denies any previous back surgery. Pt states his right knee is now fine.

19. Dr. Matney found an abnormal gait and sensation in left lower extremity, advised Claimant not to lift anything, avoid climbing and squatting, crawling and kneeling, advised Claimant to take Tylenol and ibuprofen and to follow up in three weeks after he saw the surgeon. She opined that the objective findings were consistent with the history and/or work related mechanism of injury.

20. On April 29, 2021 Dr. Matney noted that Claimant was having difficulty with sleeping due to pain, continued to have left leg pins and needles sensation with symptoms that continued to radiate down his left leg, for which he was taking OTC[5] medication. She diagnosed L5-S1 herniated disc s/p microlumbar diskectomy on 4/7/2021 and was improving as expected.

21. He followed up at the Rocky Mountain Medical Group workers' compensation (WC) clinic, where primary WC services were provided initially by Dr. Matney and currently by Dr. Ramaswamy. Dr. Matney continued to see Claimant from April through November 23, 2021. Claimant had a no lifting restriction as of April 13, 2021. She increased Claimant's restrictions to 10 lbs. lifting as of June 10, 2021,

[5] Over the counter medication.

increased to 20 lbs. on July 1, 2021, to 75 lbs. on July 28, 2021 and reduced lifting back to 50 lbs. on November 23, 2021.[6]

22. On April 13, 2021 Dr. Matney noted that Claimant was not working. On April 29, 2021 Dr. Matney noted that Claimant was working with restrictions, though noted that he was ambulating slowly, and had a slight difficult getting up out of the chair.

23. On October 26, 2021 Dr. Matney noted that Claimant had followed up with his surgeon who ordered an MRI. Claimant continued with left buttocks pain going down his left leg with occasional sharp stabbing pain. Dr. Matney noted that the October 20, 2021 MRI showed a recurrent disc extrusion at the L5-S1, thickening of the ligamentum flavum, severe bilateral recess stenosis, left worse than right foraminal stenosis at the L5-S1, as well as joint arthritis. She recommended that Claimant follow up again with the spine surgeon.

24. Despite the April 7, 2021 surgery and physical therapy, Claimant continued to experience low back and left leg pain, left leg numbness, and drop foot on the left. Claimant proceeded with a second surgical procedure on December 30, 2021 with Dr. James Stephen, of Colorado Brain & Spine Institute, when symptoms in his low back and left lower extremity did not improve. At some point, his claim was denied and he did not receive additional physical therapy after the second surgery. He stated he has follow-ups scheduled with both Dr. Stephen and Dr. Ramaswamy and would like to continue care with the workers' compensation providers.

25. Claimant underwent an independent medical evaluation (IME) at Claimant's request, with Dr. Anjmun Sharma on March 21, 2022. Dr. Sharma reported that Claimant stated he had been lifting heavy windows and shortly after he developed acute low back pain and sudden weakness in the left leg. Claimant provided Dr. Sharma a prior history that approximately 20 years before he herniated a disc that did not require surgery and resolved with physical therapy. Dr. Sharma reviewed the medical records. On exam he noted some left quad atrophy with intermittent ongoing radiculopathy but much better than prior to the surgical intervention. This was correlated to the findings on neurologic testing with slightly decreased anterior and posterior compartments of the left lower extremity.

26. Dr. Sharma took a history that after the last appointment with Dr. Matney, Claimant proceeded with a second surgery due to an extruded disc fragment. He indicated that Claimant had been working prior to the second surgery and that he returned to work on February 4, 2022, which Dr. Sharma noted should be done with caution not to lift anything heavy. Dr. Sharma opined that Claimant was injured due to heavy lifting, had no history of back pain in the intervening years after the initial back injury 20 years prior and continued to work for many years in the same kind of employment. He noted Claimant had a predisposition to injury and the heavy lifting at work caused the current need for medical care and the injury. He cited to a Spine I peer reviewed medical article that concluded that an inciting event is not necessary in order to develop a lumbar spine herniation, but rather that any event, even a common every day event may cause a herniation to become symptomatic. He specifically noted that, while the article cited to

[6] November 23, 2021 is the last report in the records presented to this ALJ from Dr. Matney.

specific events listed by injured individuals as inciting events tended to prolong the disability, but that here, Claimant returned to work very quickly after both surgeries.

27. Dr. Sharma noted that Claimant was not at maximum medical improvement as he continued to require physical therapy after his second surgery, as well as a functional capacity evaluation and impairment rating assessment. He recommended against releasing Claimant to heavy lifting over 50 lbs. Finally, he concluded that "greater than 51 % probability that the mechanism of injury is directly related to have caused the resultant work injury accident and activities the patient had been doing just prior to presentation to emergency department for emergency room evaluation."

28. Dr. Sharma testified at hearing as an expert in family medicine, occupational medicine and as a Level II accredited physician hired by Claimant. Dr. Sharma opined that as a cause of lifting something heavy, a door they had been having problems with in the past, in the normal course of Claimant's work activities Claimant began to have pain and back problems, which eventually required emergency surgery for the acute disc herniation. He explained that Claimant had an acute disc injury that took a little time to extrude and impinge on the nerve and that is why Claimant did not have immediate onset of back pain but it took a few minutes to cause the effect and the direct causally related act of lifting the door was the cause of Claimant's injury on April 5, 2021, and was not related to the chronic changes.

29. Dr. Sharma opined that the work related incident was the proximate cause of the Claimant's injury, it was the inciting event that caused the acute disc herniation. He further opined that the microdiscectomy performed on April 7, 2021 was reasonably necessary and related to Claimant's April 5, 2021 work related injury. Dr. Sharma stated that since the disc was an acute herniation, without the emergency surgery it was likely that Claimant would have had severe, debilitating, long-term issues, including bowel problems, bladder problems and difficulty ambulating. Dr. Sharma noted that, while Claimant had a preexisting degenerative changes in his spine, what occurred on April 5, 2021 was an acute disc herniation.

30. With regard to the need for the second surgery, Dr. Sharma specifically stated that:

> More likely than not, it was probably a fragment that may not have been completely removed when he had his first surgery. And so -- and because it was at a similar level, it is related to the first surgery because he didn't have symptoms anywhere else in his back.

He stated that Claimant, at the time of his examination, was much better compared to how he was doing right after the work injury. On exam he found good strength, no foot drop, no numbness or tingling, normal reflexes. He opined that the second surgery was also reasonably necessary and related to Claimant's work related injury of April 5, 2021, was not at maximum medical improvement yet, and he required physical therapy post surgically. Lastly, her recommended that a functional capacity evaluation be performed after the PT was accomplished, to determine permanent work restrictions, if any, are necessary.

31. Dr. John Burris was contracted by Respondents to perform an independent medical evaluation (IME). Dr. Burris issued two reports, the first was dated March 22,

2022. Dr. Burris reviewed the medical records and obtained a history consistent with Claimant's testimony at hearing. He opined that, based on the Claimant's history and the medical record review as well as following examination, he opined that Claimant's disc injury was causally related to the events of April 5, 2022.

32. On March 25, 2022 Dr. Burris issued a supplemental report following receipt of a video of the garage door. At that time, he changed his opinion based on viewing the video provided by Respondents, which showed the supervisor opening the large garage bay door. He stated that in his opinion the function of the garage door required only minimal effort and categorized it in the sedentary category or consistent with activities of daily living.

33. Dr. Burris testified at hearing in this matter as a board certified occupational medicine physician and as a Level II accredited provider hired by Respondents. He provided his procedures for conducting an IME. Dr. Burris stated that at the time he issued the original IME report, he opined that the described event, which was consistent with Claimant's testimony, was the proximate cause of Claimant's work related condition. However, viewing the video tape, he changed his opinion based on information he obtained from the Division that if an event was sedentary or consistent with activities of daily living, that it usually means that the event did not cause a work related condition. He also stated that the Claimant's action of opening the bay door was not a special hazard or condition on the workplace that would have caused or been the proximate cause of his condition. He stated that his opinion continued to be, based on the video that he saw, if that truly represented the nature of opening the garage door, his opinion to a reasonable degree of probability.

34. Dr. Burris acknowledged that he could not pinpoint the cause of Claimant's low back condition. He stated that Claimant's testimony at hearing was very consistent with what Claimant told him during the IME. He acknowledged that, considering Claimant's described serious foot drop that the need for the first surgery was likely necessary as well as the second surgery, when the first one failed to resolve the ongoing symptoms. He also conceded that Claimant required ongoing treatment, including physical therapy following the second surgery.

35. The wage records prior to the work injury are limited to one check for a week for pay period from March 28, 2021 through April 3, 2021 showing earnings in the amount of $1,207.36. The second check earnings record is for pay period from April 5, 2021 through April 10, 2021 for $1,144.36. Since Claimant was injured on April 5,2021, was admitted to the hospital on April 6, 2021 and had surgery on April 7, 2021, Claimant's wages for that time period cannot be used to calculate average weekly wage. As found, Claimant's AWW is $1,207.36.

36. Claimant was off due to his surgery from April 6, 2021. The wages for pay period ending (PPE) April 17, 2021 were reduced. There are no earnings for PPE April 24, 2021 and reduced earnings for PPE May 1, 2021 forward. PPE May 1, 2021 showed wages earned for 30.37 hours. Claimant stated that he returned to work as of April 29, 2021 with limitations but that his employer paid him his vacation time.[7] Dr. Matney noted

[7] April 13, 2022 Hrg Tr. p. 42:1-25 & p. 43:1-3.

that Claimant was not working on April 13, 2021 but by April 29, 2021 she noted that Claimant returned to work with limitations. As found, since the wage records show some earnings for PPE May 1, 2021 that Claimant has shown that he is entitled to temporary total disability benefits from April 6, 2021 through April 28, 2021 and temporary partial disability benefits from April 29, 2021 through December 29, 2021. This is supported by Claimant's testimony that he returned to modified work in the office filing, making copies and shedding, following his first surgery.

37. Claimant stated that he received his vacation pay while off due to his surgery. As found this vacation time off should be reinstated as Claimant was due temporary total disability benefits during this time.

38. Claimant also received some unemployment benefits from May 2021 through March 2022, which Respondents are entitled to offset pursuant to statute.

39. Claimant proceeded with physical therapy, following his first surgery, at Rocky Mountain Medical Group. However, when Claimant reached a point where he was not having any progress with physical therapy, around September, 2021, the therapist recommended Claimant return to the surgeon to be evaluated. Claimant returned to see Dr. Kim, who ordered a second MRI, which showed that there was still a fragment impinging on the sciatic nerve, causing pain running down his leg.

40. Claimant continued to work until his second surgery, which took place on December 30, 2021. Claimant was off work from December 30, 2021 until February 4, 2022, when he returned to work light duty. Claimant was working light duty at least to the date of the hearing. He is now assisting the shop manager and runs errands while on light duty.

41. Claimant also continued to see the workers' compensation providers through the date of the hearing. The last physician Claimant saw was Dr. Annu Ramaswamy at Rocky Mountain Medical Group on April 13, 2022. Claimant has not received physical therapy following his second surgery. He stated that he wished to continue with his workers' compensation providers to obtain the treatment he requires.

42. Claimant stated that he had lubricated the dock door but it still has some sticking points and that he believed the shop manager has done it as well. Now Claimant raises the door in a different manner, standing in the middle of the door, lifting with his arms, not his back. Now, when he is unable to reach he uses a stick to make the bay door go all the way up, instead of using force bending down and pushing it up.

43. Claimant's supervisor and the General Manager for Employer's Colorado location testified at hearing. He confirmed that Claimant reported the incident to him on April 5, 2021, including that while he was lifting the garage bay door he felt a pop in his knee. Claimant did not initially mention the low back. Claimant had help that day and the supervisor advised Claimant that he did not have to do anything that he was unable to do. The supervisor and Claimant speculated that the back condition was being caused by overcompensating due to the knee injury caused by the incident of opening the door.

The supervisor reached out to the HR representative in the corporate office in Phoenix, to clarify whether to send Claimant to the same providers he had previously seen for the knee claim or as a new claim.

44. The supervisor testified as to the conditions of the garage bay door, that it was functional and not difficult to operate. He had the shop manager take a video of him opening the garage bay door on April 12, 2021. To his knowledge no one had oiled or lubricated it between the day of the incident and the day of the video recording. After the recording took place, the garage door was mangled a little bit because a technician drove into the door, so it was not operating in the same manner as it did the day of the incident. He further stated that they do not normally open the door all the way every day.

45. Respondents submitted Exhibit I, which was a video of Claimant's supervisor opening the garage bay door. The supervisor was standing upright at the middle point of the door and lifted the door with ease. The supervisor only lifted the door to the height it would open without additional help.

46. Claimant testified that the supervisor is approximately six feet tall, compared to his five foot four. As his truck is over twelve-foot-tall, the door had to be open to that level in order for Claimant to back it up into the bay to have it loaded. This ALJ observed that, if the supervisor was approximately six feet tall, then each panel of the garage door was approximately two feet tall. When the supervisor raised the door, the video only showed that the door opened to approximately the fourth panel, which would mean it raised only to around eight-foot-tall and not the twelve-foot height required.

47. As found, the video is an inaccurate representation of how Claimant lifted the garage bay door by bending down, and raising the bay door by giving the garage door a good hard yank to get it high enough to load his twelve-foot plus box truck. While Claimant would likely not have injured himself if he had lifted the door in the same manner as his supervisor, that does not change the compensable nature of the work related injuries to Claimant given that Claimant bent down, and gave the garage bay door a good yank, causing injury to his low back by herniating his disc by this mechanism of injury. As found Claimant has proven the claim to be compensable.

48. As found, Claimant was attended at North Suburban Medical Center on an emergency basis on April 5, 2021 and was advised to return to the ER on April 6, 2021 after the ER physician reviewed Claimant's MRI films and communicated with Dr. Kim. Dr. Kim performed emergency surgery on April 7, 2021. All of this care was reasonably necessary and related to the injury. Claimant was sent to Rocky Mountain Medical Group where he was treated by Dr. Matney and Dr. Ramaswamy as well as for physical therapy. These providers are designated authorized providers within the chain of referral. As found Claimant obtained reasonably necessary and authorized care from these providers.

49. As found, Dr. Matney recommended Claimant continued to follow up with his neurosurgeon, especially in light of the October 20, 2021 MRI findings of a recurrent extruded disc and severe stenosis at the L5-S1 level. Claimant continued to have foot drop, neurological findings and symptoms in his low back as documented by Dr. Sharma

in his medical records review. Claimant returned to the surgeon and was attended by Dr. Stephen, who performed a second lumbar spine surgery on December 30, 2021. All of this care and treatment was related to the April 5, 2021 work injury as well as reasonably necessary and authorized.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Sec. 8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

The mere fact a claimant experiences symptoms while performing work activities does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a

coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

As found, Claimant has established by a preponderance of the evidence that he suffered a compensable injury on April 5, 2021 during the course and scope of his employment with Employer. Claimant was at work when he bent down to lift the garage bay door. He credibly stated that he needed to use force to lift the dock door with sufficient impact to cause a herniated disc. Following the incident, he immediately had a swollen right knee that had popped during the incident. While the knee problems resolved, the impact on his low back did not resolve, causing him to report the injury to his employer. The written report to Employer credibly stated that Claimant bent and gave the garage door a good hard yank to get it high enough to load his twelve-foot height box truck. As found, Claimant's testimony is more credible with regard to the actions taken by Claimant while lifting the garage bay door than those presented by the video of the supervisor opening the door or the supervisor's testimony. As found, Dr. Sharma's testimony is credible in determining that Claimant's herniated disc was proximately caused by the actions by Claimant while opening the bay door. Dr. Burris testified that he relied on the mechanism of opening the door provided by Claimant before he changed his opinion. Dr. Burris' initial findings that the Claimant's injuries were causally related to and proximately caused by the events described by Claimant was credible.

Respondents' emphasis on the emergency room (ER) records is misplaced when determining a mechanism of injury. ER personnel are focused on identifying injuries and pain generators and stabilizing the patient. Causation is of secondary concern, as is the precise mechanism of injury, unless it helps to target a treatment modality. The patients are in varying degrees of distress, and ER personnel are often multitasking. Leading questions are sometimes asked, certain dots get [mis]connected, and things can get lost in translation in that environment. Further, this ALJ infers that PA Holland did not complete her paperwork until several days later and any statements made with regard to Claimant injuring himself two days before arriving at the ER are simply not credible.

Simply stated, Claimant herniated his disc at work, but his symptoms continued to worsen as the day went on, on April 5, 2021. His pain got progressively worse. The pain and symptoms going into his lower extremity became more prevalent. Immediate symptoms after the initial opening of the door are inconsequential as a herniated disc, as explained by Dr. Sharma, sometimes take some time to start impinging on the nerve. In this case, it only took approximately ten minutes for that to happen and this is the nexus that drives this ALJ to the conclusion that the inciting event was the cause of Claimant's injury and subsequent need for medical care. Claimant's inability to walk without substantial pain was noted by Claimant almost immediately. The fact that Claimant assumed the difficulty with walking was caused by his prior aggravated knee condition is for naught, as Claimant did not have the requisite medical knowledge to determine the cause of his lower extremity problems or that he had a herniated disc. The ALJ finds Claimant sustained an acute injury to his low back, left leg and left foot on April 5, 2021, while at work and performing the duties of his job. Claimant appropriately reported to the ER after he failed to receive instruction from his supervisor with regard to medical care. He was treated by a physician at the first opportunity, apparently not realizing the urgent significance of his condition, and was release. No such severe symptoms had ever befallen Claimant prior to April 5, 2021. Claimant's current condition is not the result of a natural progression of his (admittedly) preexisting condition and the inciting action that proximally caused the injury was Claimant's action of opening the large bay door.

Despite some inconsequential inconsistencies in the ER records, the ALJ actually finds that a more precise mechanism of injury can be described in the calm of a physician's office after the fact, and even more so while being forged in the crucible of cross-examination. This ALJ finds that there is no credible evidence in the record to suggest any material inconsistency by Claimant in describing how he was hurt, and how he felt on the date of his injury. Claimant has shown that the events of April 5, 2021 proximally caused his work injury and the claim is judged compensable.

C. Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his

industrial injury. Claimant reported to North Suburban Medical Center on April 5, 2021 and returned on April 6, 2021 when Dr. Varanasi documented a history of Claimant developing symptoms after lifting a heavy door at work causing pain and weakness going from the low back, into the left buttock down the left leg, causing numbness, from the knee down, with some weakness. This is consistent with Claimant's credible testimony as well as other providers' documentation of the mechanism of the injury. Respondents' recitation of portions of the article submitted by Dr. Sharma as well as pointing to other inciting potential factors are not persuasive. Here, there was a specific incident that occurred to cause the herniation, which compressed the nerve and caused immediate symptoms affecting the lower extremity. Claimant's symptoms are closely tied to the event, even if Claimant did not necessarily understand what was causing the symptoms to occur. Despite other potential inciting events, as found, the specific incident of lifting the bay door while bent over and placing force behind the yanking of the door was the proximate cause of the disc herniation and compression of the nerve. Any evidence to the contrary is not persuasive.

As found, Claimant reported to his supervisor, immediately, that he had injured himself and required medical attention. Claimant sat down to rest for a few minutes, but when he got up to go help load the windows on his truck, he was unable to do so and coworkers proceeded to load his truck. Claimant did report to his supervisor that it was not only his right knee but had low back problems from the incident and requested medical attention. Claimant continued to work on April 5, 2021, only driving, but when he returned he asked his supervisor if he had heard anything from headquarters about medical care. When Claimant did not get any further instruction, he was seen on an emergent basis at North Suburban and his subsequent surgical treatment on April 7, 2021 by Dr. Kim is considered emergent care in light of his neurological findings including drop foot and severe pain related to the herniated disc.

D. Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim."

Bunch v. industrial Claim Appeals Office, 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that the providers at Rocky Mountain Medical Group (RMMG) as well as the neurosurgeons are authorized providers. Initially, on April 5, 2021 Claimant reported his injury to his supervisor. His supervisor prepared a report and provided no instructions with regard to what care Claimant should avail himself. Claimant appropriately sought emergent medical care at North Suburban and the neurosurgeon, Dr. Kim, proceed with emergent surgery. Claimant explained he kept his supervisor informed that he had been admitted to the hospital for surgery, and while the supervisor was surprised that the surgery took place so quickly, instructions regarding medical care follow up took some time. Claimant was supposed to see a workers' compensation provider at Rocky Mountain Medical Group the day following his surgery but he had not been released at that point. Claimant was first seen by Dr. Matney of RMMG on April 13, 2021. The preceding chronology reveals that Employer had some knowledge of the accompanying facts connecting Claimant's injury with his employment and the matter might involve a compensable claim.

As found, the ER providers, North Suburban, RMMG providers as well as the neurosurgeons seen by Claimant at North Suburban are authorized providers either seen for emergent medical care needs or seen within the chain of referral as designated by employer and are authorized providers that tendered reasonably necessary medical care related to the April 5, 2021 work related accident.

E. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several

computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007). Under section 8-40-201(19), C.R.S. the cost of health insurance coverage shall not be included in the Claimant's average weekly wage, so long as the employer continues to provide such health insurance coverage. Under Sec. 8-42-107(8)(d), C.R.S. the AWW *shall* include the amount of the employee's cost of continuing the employer's group health insurance plan upon termination. However, *Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991) holds that where there is ambiguity in the Act we should construe the entire statutory scheme in a manner that gives consistent, harmonious, and sensible effect to all its parts.

An AWW calculation is designed to compensate for total wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Sec.* 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008).

Claimant has shown by a preponderance of the evidence that his average weekly wage is $1,207.36 based on the wage records prior to the work injury submitted into evidence and is limited to one check for pay period from March 28, 2021 through April 3, 2021. Post-injury wage records were not considered in calculating the AWW as they included vacation pay and Claimant's return to modified part time work.

F. Temporary Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont*

Toyota, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. The same is true in order to receive TPD benefits.

As found, Claimant's April 5, 2021 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. The records and testimony reveal that Claimant has established a causal connection between his work-related injuries and subsequent wage loss Specifically, Claimant suffered a complete inability to work or that work restrictions impaired his ability to effectively and properly perform his regular employment. Claimant has been unable to work his regular job since April 5, 2021 and has not reached Maximum Medical Improvement (MMI). Accordingly, Claimant is entitled to receive temporary disability benefits until terminated by statute.

As found, Claimant has established by a preponderance of the evidence that he is entitled to receive temporary total disability benefits for the period of April 6, 2021 through April 28, 2021. Claimant stated he returned to modified work as of April 29, 2021 and this was documented by his treating provider.

From April 29, 2021, Claimant was provided with modified duty in the office. Wage records show Claimant was earning substantially less than his AWW after his work injury. Claimant has shown by a preponderance of the evidence that he is entitled to temporary partial disability benefits from April 29, 2021 through December 29, 2021, as he had his second surgery on December 30, 2021.

Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability benefits from December 30, 2021 through February 3, 2022, which was his period of convalesce following the second surgery.

Claimant returned to modified work on February 4, 2022 through the date of the hearing. For the period February 4, 2022 until terminated by statute Claimant is entitled to temporary partial disability benefits.

Vacation and sick benefits paid to the claimant cannot be deducted from, or credited against, the temporary disability benefits to which the claimant is entitled. *See,* COLO. REV. STAT. § 8-42-124(2); *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990). Section 8-42-124(2) of the Act "reflects a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits. Indeed, it is generally recognized that vacation and sick pay are benefits earned by virtue of past services rendered and that, as such, these 'earned' benefits should not be impaired by the employee's work-related injury. *See* 2 A. Larson, *Workmen's Compensation Law* § 57.46 at 10–164.53 (1989)." *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990) (discussing the former statute 8-52-107(2)&(4), with the same language as the current Section 8-42-124, C.R.S.). If the employer has charged the employee with any earned vacation leave, sick leave, or other similar benefit for any reason when the employee was entitled to receive an award of temporary partial or total disability, then the reduced benefits "shall be reinstated." Sec. 8-42-124(4), C.R.S.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant was injured in the course and scope of his employment on April 5, 2021 and the claim is compensable.

2. Respondents shall pay for all authorized, reasonably necessary and related medical benefits for the treatment of Claimant's lumbar spine, left lower extremity and foot injuries, including but not limited to North Suburban Medical Center, Dr. Richard Kim, Dr. James Stephen, Rocky Mountain Medical Group and other providers within the chain of referral.

3. Respondents shall pay temporary total disability (TTD) benefits for the period of April 6, 2021 through and including April 28, 2021. Respondents shall pay temporary partial (TPD) disability benefits from April 29, 2021 through December 29, 2021. Respondents shall pay TTD from December 30, 2021 through February 3, 2022. Respondents shall pay TPD from February 4, 2022 until terminated by law.

4. Employer shall reinstate any vacation credit, which was paid on or after April 5, 2021.

5. Respondents' are entitled to an offset for Claimant's receipt of any unemployment insurance benefits.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 20th day of May, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to Temporary Total Disability ("TTD") and Temporary Partial Disability ("TPD") benefits for the period February 2, 2021, ongoing.

II. Whether Claimant proved by a preponderance of the evidence medical treatment for her right hip, including the right hip surgery recommended by Dr. Omer Mei-Dan and Dr. James Genuario, is reasonable, necessary and causally related treatment for her July 29, 2020 work injury.

III. Whether Claimant proved Respondents are subject to penalties pursuant to §§8-43-304(1) and 305, C.R.S., and WCRP Rules 5-6(A) and 6-8.

FINDINGS OF FACT

1. Claimant worked for Employer as a Logistics/Inventory Manager.

2. Claimant sustained an industrial injury on July 29, 2020 when she was attacked during a robbery. One of the perpetrators twice struck Claimant with a shopping cart on her right side while another swung a machete at Claimant. The impact of the shopping cart pushed Claimant back approximately 10 feet into a glass wall.

3. Claimant first sought medical treatment on August 13, 2020 at AFC Urgent Care. Claimant reported that she was struck in the shins and right upper thigh with a shopping cart during a robbery. She was diagnosed with an abrasion and cellulitis of the left lower leg, bilateral lower leg contusions, and anxiety. No hip or low back complaints or examinations were noted.

4. Complaints of shin contusions and post-traumatic stress disorder ("PTSD") were noted at follow-up appointments on August 15 and August 20, 2020. The medical records from the aforementioned dates do not address hip or low back complaints or examinations.

5. On September 3, 2020, Claimant attended a follow-up examination with John Vermityen, NP at AFC Urgent Care. Claimant reported pain in her bilateral shins, right lower back and right hip, as well as anxiety. NP Vermityen noted Claimant had a history of lumbar spinal fusions four years prior but that Claimant reported her current back pain was of a different nature. On examination, NP Vermityen noted muscular tenderness to palpation of the lower right lumbar and upper buttock and right posterior and lateral hip. There was no external swelling, ecchymosis, erythema or rash. SLR was negative. There was bilateral mid-shin tenderness and a small scab on the left mid-shin. NP Vermityen diagnosed Claimant added diagnoses of right lower lumbar pain and strain and right hip

strain and referred Claimant for physical therapy. He remarked that Claimant's back and right hip pain were consistent with strain due to the injuries received to the lower extremities.

6. Claimant continued to attend follow-up appointments at AFC Urgent Care with multiple providers. Right hip pain, findings and/or a diagnosis of right hip strain are documented on September 17, 2020 and October 29, 2020. Claimant also attended multiple psychological evaluations with Gary Gutterman, M.D. as well as multiple physical therapy sessions.

7. On January 18, 2021, Claimant presented to authorized treating physician ("ATP") Henry Johnston III, M.D. at AFC Urgent Care with complaints of shin and leg pain. On examination, Dr. Johnston noted both legs had healed with no evidence of swelling or ecchymosis. Claimant was still tender in the right lower leg. No hip or back exam is noted. Dr. Johnston diagnosed Claimant with right shin pain and PTSD. He recommended Claimant complete physical therapy and follow-up with her psychologist. On the WC-164 form, Dr. Johnston noted Claimant's date of maximum medical improvement ("MMI") was unknown at the time because "In progress." (R. Ex. C, p. 54).

8. Dr. Johnston reevaluated Claimant on February 1, 2021, at which time Claimant reported low back pain. Dr. Johnston referred Claimant to a Level II physician for evaluation. He again noted Claimant's MMI date was unknown at the time.

9. On March 30, 2021, the parties attended a hearing before ALJ Peter J. Cannici on the issues of compensability, entitlement to temporary indemnity benefits, and Claimant's responsibility for termination from employment.

10. ALJ Cannici issued a Findings of Fact, Conclusions of Law and Order ("FFCL") on May 14, 2021, finding Claimant's July 29, 2020 work injury compensable. ALJ Cannici further found Claimant was not responsible for termination from her employment and that Claimant was entitled to TPD or TTD benefits from August 27, 2020 to February 1, 2021. ALJ Cannici determined that Claimant's entitlement to benefits ended on February 1, 2020, the day which he found Dr. Johnston placed Claimant at MMI. He noted no Level II impairment rating had been scheduled as of the date of the hearing had been held before him. The parties did not ask ALJ Cannici to address average weekly wage ("AWW"), as such, ALJ Cannici's order did not order a specific dollar amount to be paid to Claimant.

11. Respondents appealed ALJ Cannici's FFCL on June 3, 2021 prior to the issuance of any benefits to Claimant.

12. On May 6, 2021, Gary Gutterman, M.D. performed a permanent mental impairment rating, assigning Claimant 7% whole person mental impairment rating. Dr. Gutterman did not address MMI.

13. On May 19, 2021, David L. Reinhard, M.D. performed an impairment rating. Claimant reported persistent low back and right hip pain. Dr. Reinhard noted that Claimant walked with a limp on her right side due to pain around the right lateral hip extending into the right lower lumbosacral region. On examination, Dr. Reinhard noted decreased right hip range of motion; inguinal pain with passive rotation of right hip and positive Faber pain with range of motion; pain along the right lumbar paraspinal musculature and pain with lumbar flexion and extension. Dr. Reinhard assessed Claimant with a right hip contusion and sprain, right tibia contusion and PTSD. He deferred timing of MMI to Claimant's primary care physician, but opined that Claimant should undergo a right hip MRI and/or orthopedic evaluation to rule out intraarticular pathology. He gave a 21% provisional permanent impairment rating of the right hip.

14. Claimant returned to Dr. Johnston on June 4, 2021 with complaints of right hip and right shin pain. Dr. Johnston noted,

> Patient did acknowledge the shin and some right hip pain but not to the degree she is expressing now and was hardly mentioned in the previous WC visits prior to 1/27/21. She was experiencing PTSD from the event. Still complained of sensitivity to her right shin that was struck with a shopping cart. We were working on Level 2 evaluation for PTSD and then complains of all this pain and discomfort in right hip and shin no better than after the initial injury.

(R. Ex. C, p. 59).

15. Claimant reported to Dr. Johnston having right hip pain since last August, which was improving with physical therapy at end of December, but that she had missed appointments since 1/27/21. On examination, Dr. Johnston noted tenderness and abnormal range of motion in the hips and/or pelvis. Dr. Johnston's diagnoses were PTSD, right shin pain and right hip pain. He referred Claimant for a right hip MRI and orthopedic consultation. Dr. Johnston did not place Claimant at MMI.

16. On June 28, 2021, the parties entered into a stipulation regarding the payment of temporary indemnity benefits ordered in ALJ Cannici's May 14, 2021 FFCL. The parties agreed to an AWW of $1,486.00 (with a corresponding TTD rate of $990.67) for a total of $19,848.00 temporary disability benefits owed for the period August 27, 2021 through February 1, 2021, subject to applicable offsets and credits. The parties further agreed that the stipulation applied only for the temporary disability benefit period as ordered by ALJ Cannici (August 21, 2021 through February 1, 2021). The parties further stipulated that Claimant could still claim additional benefits for additional periods subsequent to February 1, 2021, if applicable, and Respondents reserved the right to claim all defenses or offsets that are applicable for any claimed additional disability period.

17. Claimant testified it was her understanding the stipulation was entered into because she had been placed at MMI due to the impairment rating appointments being scheduled with Dr. Gutterman and Dr. Reinhard. Claimant testified she has never seen a

medical report placing her at MMI, remains on work restrictions and continues to receive referrals and treatment from the ATP, Dr. Johnston.

18. ALJ Susan Phillips approved the stipulation in an order dated July 8, 2021.

19. On July 15, 2021, Insurer filed a General Admission of Liability ("GAL"), admitting for medical benefits and TPD from August 27, 2020 through February 1, 2021 totaling $19,848.00. Under the remarks section, Insurer stated, "MMI and impairment are yet to be determined." (Cl. Ex.11, p.172).

20. Respondents withdrew their appeal of ALJ Cannici's order on July 20, 2021.

21. Claimant subsequently received the payment(s) of temporary indemnity benefits for the period August 27, 2021 through February 1, 2021 in the amount of $19,848.00, as ordered by ALJ Cannici, stipulated to by the parties and admitted by the Respondents in the July 15, 2021 GAL. No evidence was introduced into the record regarding when Claimant received the payment(s).

22. Claimant underwent a right hip MRI on July 1, 2021. The radiologist's impression was: severe macerated degenerative tearing of the superior acetabular labrum of the right hip giving rise to a labral cyst along the superior lateral labral margin; mild peritendinitis involving the right hip abductors.

23. On July 2, 2021, Dr. Johnston referred Claimant for orthopedic evaluation of her right hip with James Genuario, M.D. He again indicated the MMI date was unknown at this time because "In progress." (R. Ex, C, p. 63). On July 8, 2021, Kara Carpino, NP indicated the MMI date was unknown at this time because "In progress." (Id. p. 66).

24. Dr. Genuario first evaluated Claimant on July 23, 2021. Claimant reported that she had experienced right hip pain since the work incident, with no hip pain prior to the work injury. Dr. Genuario physically examined Claimant and reviewed imaging. His impression was status post traumatic incident with acute injury superimposed on hip dysplasia with femoroacetabular impingement ("FAI"). He noted that Claimant had significant right hip dysplasia as well as a cam deformity on her right femoral neck and then had a severe traumatic episode which caused injury to her hip. Dr. Genuario referred Claimant for a CT scan and surgical evaluation with Omer Mei-Dan M.D.

25. On July 26, 2021, Claimant filed an Amended Application for Hearing endorsing, *inter alia*, penalties against Respondents under §8-43-304(1), C.R.S., §8-43-305, C.R.S., and WCRP Rule 5-6(A) from June 15, 2021, ongoing for Respondents alleged failure to issue benefits in a timely manner. Claimant also alleged penalties under §8-43, 304(1), §8-43-305, C.R.S. and WCRP Rule 6-8 beginning February 1, 2021 and ongoing, for Respondents alleged failure to comply with applicable rules which provide TTD benefits may not be suspended, modified or terminated except pursuant to the provisions of the WCRP rule, or an order from the Director or an ALJ.

26. On July 30, 2021, claimant returned to AFC and was seen by Michael Noce, M.D. Dr. Noce noted Claimant has a labrum tear in the right hip and both doctors wanted to proceed with surgery. Dr. Noce did not place Claimant at MMI, noting Claimant would be scheduled for right hip surgery soon.

27. On August 16, 2021, Dr. Genuario recommended injections and physical therapy as a conservative option, or hip preservation surgery.

28. Claimant presented to Dr. Mei-Dan on August 26, 2021. Claimant reported that she had been experiencing right hip pain since a work incident during which an individual drove a shopping cart into her right hip. Dr. Mei-Dan noted Claimant had a known history of hip dysplasia but reported no prior right hip pain. Based on his examination and imaging, Dr. Mei-Dan diagnosed Claimant with symptomatic right hip pain due to hip dysplasia. He recommended Claimant undergo a total hip replacement or periacetabular osteotomy ("PAO"). Dr. Mei-Dan explained Claimant's hip dysplasia condition and noted that a labral tear is rarely the root of the problem, and typically occurred secondary to an underlying abnormality in the shape and mechanics of the hip joint.

29. On September 10, 2021, Timothy O'Brien, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported being struck on the right side with a shopping cart that pushed into her right hip and the front of her thighs. Based on his physical examination and review of the medical records, Dr. O'Brien concluded that the extent of Claimant's work-related injuries resulting from the work incident included bilateral shin contusions and abrasions, which had healed. Dr. O'Brien noted that Dr. Johnston's January 18, 2021 documented that Claimant's abrasions and contusions had healed as of that date with no swelling or ecchymosis on exam and normal range of motion. Dr. O'Brien opined that Claimant returned to her pre-injury level of function on or before January 18, 2021 and did not require further medical treatment as of that date.

30. Dr. O'Brien explained that his physical examination did not evidence any sequelae of the shin injuries, noting fully healed wounds, no swelling, and full range of motion of the knees and ankles. He noted normal exams of Claimant's legs, low back and hips. Dr. O'Brien opined that the medical documentation refutes Claimant's contention that she injured her low back and right hip, noting Claimant did not seek treatment for two weeks, and did not report back or hip complaints at her first or second examinations. Dr. O'Brien further opined Claimant's delayed onset of pain and low back and right hip complaints are a manifestation of her personal health and secondary gain. He concluded that Claimant's congenital hip dysplasia and labrum degeneration are pre-existing. Dr. O'Brien opined that it is "virtually impossible" Claimant tore her labrum as a result of the July 29, 2020 work incident and did not complain of pain. He further opined that the mechanism of injury would not have produced a labral tear. Dr. O'Brien opined Claimant reached MMI on or before January 18, 2021 with no permanent impairment.

31. On November 1, 2021, Dr. Johnston replied to a letter from Respondents' counsel inquiring about his opinion on Dr. O'Brien's IME assessment of Claimant's medical

history. Dr. Johnston opined that there could be a significant component of PTSD with Claimant's work injury, but agreed that her injuries as initially documented did not corroborate with her extensive hip pain and diagnosis of which she was referred for surgery.

32. Claimant continues to receive treatment from her ATP, Dr. Johnston. As of the date of hearing, there is no evidence Claimant has been placed at MMI an ATP.

33. Claimant credibly testified at hearing. Claimant testified that she had right hip pain when she presented to AFC on August 13, 2020. Claimant testified she was under the impression Dr. Johnston did not want to help her get better due to his poor bedside manner after the January 18, 2021 visit. Claimant testified that to her knowledge she has never been placed at MMI by any of her treating physicians nor has she ever seen a medical record indicating she is at MMI. Claimant testified she would like to proceed with the recommended surgeries so she can get back to work and get her life back. Claimant testified she stopped working for a different employer, on or around August 14, 2021. Claimant is not currently working. Claimant testified her unemployment benefits ended on September 2, 2021 and she is not currently receiving unemployment benefits.

34. Claimant has not received any TTD/TPD benefits for lost wages incurred on or after February 1, 2021.

35. Claimant testified she has not returned to her pre-injury level of function physically or mentally. Claimant testified she experiences anxiety, panic attacks, nightmares and is taking medication to deal with these symptoms. The medicine is being administered via the workers compensation carrier. Claimant has sensitivity issues in the right shin and her right hip is in constant pain.

36. No Final Admission of Liability, Application for Hearing, or DIME Application has been filed by Respondents.

37. Claimant proved by a preponderance of the evidence right hip treatment, including the right hip surgeries recommended by Drs. Genuario and Mei-Dan, is causally-related to her July 29, 2020 work injury and reasonably necessary to cure or relieve its effects. It is more probable than not the July 29, 2020 work injury aggravated, accelerated or combined with Claimant's pre-existing degenerative right hip condition, producing disability and the need for medical treatment.

38. Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021, ongoing. Claimant has yet to be placed at MMI for her July 29, 2020 work injury. Claimant's work injury, including injury to her right hip, resulted in disability, which caused Claimant actual wage loss.

39. Claimant failed to prove Respondents should be subject to penalties.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable for medical treatment that is causally-related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved it is more probable than not medical treatment for her right hip, including the surgeries recommended by Drs. Genuario and Mei-Dan, is related to her July 29, 2020 work injury and reasonably necessary to cure and relieve Claimant of the effects of the work injury. Claimant did not solely report a mechanism of injury to her shins. At Claimant's initial evaluation on August 13, 2020, Claimant reported being struck with a shopping cart on her right side and upper right thigh. Although the next evaluation did not document hip complaints or examination, a subsequent evaluation on September 3, 2020 specifically documented right hip complaints and findings. At that time, Claimant was diagnosed with a right hip strain which was noted to be consistent with the injuries Claimant received to her lower extremities as a result of the work injury. While the right hip was not mentioned at each subsequent evaluation leading up to Dr. Johnston's initial evaluation on January 18, 2021, right hip complaints, findings and/or diagnoses were noted on at least two other evaluations prior to January 18, 2021. Level II physician Dr. Reinhard specifically noted right hip findings on his examination and credibly assessed Claimant with a right hip contusion and sprain. Dr. Reinhard recommended Claimant undergo a right hip MRI and/or orthopedic evaluation. He assigned a provisional 21% permanent impairment rating of the right hip, denoting his opinion that Claimant's right hip condition is work-related.

Although Dr. Johnston agreed with Dr. O'Brien that Claimant's injuries as initially documented did not corroborate with her current degree of hip pain and diagnosis, Dr. Johnston acknowledge there was some prior mention of right hip complaints. He did not place Claimant at MMI and instead ordered a right hip MRI and orthopedic evaluation. Dr. Genuario credibly opined that Claimant's work injury resulted in an acute injury superimposed on her pre-existing hip dysplasia. Dr. Mei-Dan assessed Claimant with symptomatic right hip pain due to hip dysplasia. There is no evidence Claimant was experiencing hip issues or limitations prior to the work injury. Claimant credibly testified that since the work injury, she has experienced consistent right hip pain and limitations. Claimant has required right hip treatment and received recommendations to undergo right hip surgery to relieve her pain. Claimant's pre-existing history of a degenerative right hip condition does not preclude a determination that her disability and need for treatment is not work-related. The credible and persuasive opinions of Drs. Reinhard, Genuario and Mei-Dan, as supported by Claimant's credible testimony and the medical records,

establish that it is more likely than not the work injury aggravated, accelerated, or combined with Claimant's pre-existing right hip condition, resulting in disability and the need for treatment. Accordingly, Respondents are liable for the recommended right hip surgeries and other causally-related, reasonably necessary medical treatment for the right hip.

Temporary Indemnity Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

As found, Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021 and ongoing. Claimant has continued to sustain wage loss since such time as a result of disability caused by the July 29, 2020 work injury. As of the date of hearing, there is no evidence Claimant has been placed at MMI by her ATP, nor is there evidence that any other circumstances resulting in termination of TTD or TPD have occurred. The stipulation entered into by the parties specifically provided that Claimant retained eligibility to receive future indemnity benefits if applicable. Claimant remains on work restrictions as a result of the work injury and sustained wage loss. As Claimant's work injury caused a disability lasting more than three work shifts, resulting in Claimant leaving work and sustain full or partial wage loss, Claimant is entitled to temporary indemnity benefits from February 2, 2021 and ongoing, until terminated by operation of law.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-43-305, C.R.S. provides that each day during which any employer or insurer fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title 8 constitute a separate and distinct violation.

WCRP Rule 5-6(A) provides that benefits awarded by order are due on the date of the order. After all appeals have been exhausted or, in cases where there have been no appeals, insurers shall pay benefits within thirty days of when the benefits are due. WCRP Rule 5-6(B) provides that temporary disability benefits awarded by admission are due on the date of the admission and the initial payment shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission.

WCRP Rule 6-8(A) provides that temporary disability benefits may not be suspended, modified or terminated except pursuant to the provisions of Rule 6-8; or pursuant to an order from the Director or pursuant to an order of the Office of Administrative Courts.

As found, Claimant failed to prove Respondents are subject to penalties in this matter. ALJ Cannici ordered Claimant was entitled to temporary indemnity benefits from August 27, 2020 through February 1, 2021. Respondents were not required to pay the benefits ordered by ALJ Cannici at the time due to Respondents filing a timely appeal. During the appeal process and prior to any order issued on appeal, the parties entered into a stipulation regarding the amount of temporary indemnity benefits owed for the temporary disability period ordered by ALJ Cannici. Respondents then filed a GAL on July 15, 2021 admitting for the stipulated amount of temporary disability benefits for the period of disability ordered by ALJ Cannici. Respondents were required to begin paying Claimant such benefits no later than five calendar days after the date of GAL. Respondents subsequently withdrew their appeal of ALJ Cannici's order. Claimant received the payment of temporary disability benefits in the agreed upon amount for the disability period ordered by ALJ Cannici. Claimant did not specify when she received the payments, nor was any other evidence introduced into the record indicating Respondents were late in issuing such payments.

ALJ Cannici specifically ordered Claimant was entitled to benefits through February 1, 2021. No order or admission was offered as evidence indicating that, prior to this order, Claimant was awarded temporary disability benefits from February 2, 2021 ongoing. As discussed, Respondents properly paid Claimant the temporary indemnity benefits owed as ordered by ALJ Cannici, agreed upon by the parties, and admitted to by Respondents. The very issue of Claimant's entitlement to temporary indemnity benefits for February 2, 2021 and ongoing was endorsed as an issue for hearing before this ALJ and is addressed herein on its' merits. As, pursuant to the Act, WCRP, ALJ Cannici's order, the approved stipulation of the parties, and the GAL, Respondents' were not required to pay Claimant temporary disability benefits subsequent to February 2, 2021, their failure to do so does not constitute an improper suspension, modification or termination of benefits, or any other violation warranting penalties.

ORDER

1. Claimant proved by a preponderance of the evidence medical treatment for her right hip, including the surgeries recommended by Drs. Genuario and Mei-Dan, are causally-related to her July 29, 2020 work injury and reasonably necessary to

cure or relieve its effects. Respondents are liable for the costs of the recommended right hip surgery and other reasonably necessary and related right hip treatment.

2. Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021, ongoing until terminated by operation of law.

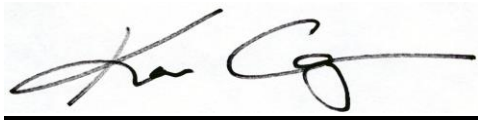
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Claimant's claim for penalties against Respondents is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-134-649-001

ISSUES

The issues set for determination were:

- Did Claimant prove by a preponderance of the evidence that her need for shoulder surgery is reasonable, necessary and causally related to her industrial injury.

PROCEDURAL HISTORY

A Summary Order was issued on July 23, 2021. Following a Status Conference that was held on July 27, 2021, an Amended Summary Order was issued on August 3, 2021. Pursuant to § 8–42–503(3), C.R.S. (2020), the Amended Summary Order issued by the ALJ ordered Respondents to pay for a review of the plain x-ray and MRI films by a board-certified radiologist, who was asked to prepare a written report. James Piko, M.D. was the radiologist who conducted the review and prepared the report. Claimant requested a full Order on or about August 16, 2021.

Dr. Piko subsequently issued a report with regard to the x-rays and MRI-s taken of Claimant's right arm and shoulder, which was filed with the Court on September 24, 2021. The record was then closed and this Order follows.

FINDINGS OF FACT

1. Claimant was sixty-seven (67) years old (D.O.B. 7/27/53) as of the date of injury.

2. Claimant's medical history was significant in that she was treated for right shoulder pain prior to the injury. On June 2, 2017, Claimant underwent a right scapula x-ray for distal medial scapular pain that had been going into her right shoulder in the past month with no known injury.

3. Claimant began working for Respondent-Employer in February of 2018. Her job duties included working in shipping and receiving, putting merchandise in order, stocking product.

4. On June 5, 2018, a right shoulder x-ray was taken after Claimant fell. The radiologist's impression was: mild superior migration of the humeral head with respect to the glenoid; subacromial space narrowing at 6 mm and mild acromioclavicular and glenohumeral degenerative changes. Claimant was noted to have swelling, pain, tenderness by Cristen Mazzella, M.D. at Kaiser Permanente.

5. Claimant was seen for a follow-up evaluation at Kaiser on February 21, 2019 for shoulder pain. She was noted to be doing home exercises and referred for physical therapy ("PT").

6. Claimant testified she injured her shoulder when she fell at work in November 2019. She testified that she did not pursue a workers' compensation claim because she could not afford to go on workers' compensation benefits and take time off. Claimant testified she advised her boss of the injury.

7. On December 5, 2019, Claimant was evaluated at Kaiser after she was injured when she fell on ice (two weeks before) while getting the mail. Claimant was evaluated by Pamela Clift, P.A. at Kaiser and noted in the questionnaire that this was not related to "third party liability-workers' compensation. The exact location of this fall was not identified, however, the ALJ concluded it was not at work.

8. An x-ray of her right shoulder revealed an articular fracture of the humeral head; mild osteoarthritis of the glenohumeral joint; unremarkable acromioclavicular joint, probable rotator cuff tear, with an associated small degenerative bone spur arising from the anterior inferior aspect of the acromium and degenerative subcortical systic and sclerotic bone changes in the superior aspect of the greater tuberosity. Claimant was prescribed oxycodone and a Fentanyl patch.

9. An x-ray was taken of Claimant's right shoulder on January 6, 2020, which showed no interval changes since the previous study (December 11, 2019). The x-ray showed osteoarthritis and narrowing of the subacromial space consistent with rotator cuff pathology and a probable tear. The ALJ found these x-rays were objective evidence of degenerative changes in the right shoulder.

10. Claimant returned to Kaiser on January 29, 2020 and February 20, 2020, related to the right shoulder fracture and reported ongoing shoulder pain and weakness. Claimant was working on her motion and trying to use her left arm as much as possible, instead of her right arm. The ALJ inferred that the osteoarthritis and rotator cuff tear shown in the x-rays were the cause of shoulder pain and weakness.

11. The ALJ found the records from Kaiser before August 2020 documented Claimant's treatment for pain in the right shoulder. The x-rays showed degenerative changes in Claimant's right shoulder, including a probable torn rotator cuff. The x-rays also showed an articular fracture which was the result of trauma from the fall which occurred in November 2019.

12. Claimant denied that she had problems with her shoulder 2-3 months before her work injury. The Kaiser records showed Claimant was complaining of pain in her shoulder six months before the work injury.

13. There was no evidence in the record that Claimant had restrictions related to her prior shoulder injury. Claimant testified she was able to perform all of her job duties before August 2020, including stocking and reaching overhead. No physician recommended shoulder surgery before August 2020.

14. On August 2, 2020, Claimant was injured while working as a sales associate for Employer. She was attacked by a shoplifter and thrown to the ground. Claimant landed on her right side between two flower beds. The ALJ found Claimant injured her neck, shoulder, hips and head. This was a significant injury. Claimant's Employer offered to take her to the emergency department, but Claimant declined to go because she feared catching COVID.

15. Claimant was evaluated by Tiffany Knudsen, P.A. in the Emergency Department at Kaiser Permanente on August 3, 2020. She was complaining of hip and shoulder pain. PA Knudsen noted a hematoma and tenderness to palpation along the IT band bilaterally, with no midline spinal tenderness. Claimant had tenderness to palpation on the right pelvis, as well as scapular winging. Tenderness to palpation was present on the proximal and distal humerus. X-rays taken of the right shoulder showed no acute osseous abnormality, but mild glenohumeral osteoarthritis was present. There was a loss of the acromial humeral distance consistent with a large rotator cuff tear.

16. On August 14, 2020, Claimant was evaluated by Diana Halat, N.P. at Concentra. She had pain in her neck, head, both thighs and right shoulder. On examination, Claimant's right shoulder had tenderness in the AC joint, with no crepitus and no warmth. NP Halat's assessment was: assault, cervical sprain, initial encounter; shoulder dislocation, right, initial encounter; sprain, lumbar, initial encounter; sprain hip/thigh, unspecified laterality, initial encounter. Claimant was prescribed acetaminophen and referred to Cary Motz, M.D. (orthopedic surgeon), as well as for PT. The report was countersigned by Sophia Rosebrook, D.O., who also signed the WCM 164.

17. Claimant was evaluated by Dr. Motz on August 18, 2020, who evaluated her right shoulder. Pain was noted when Claimant abducted and reached across her chest, with Dr. Motz noting significant crepitus in the shoulder. Claimant's range of motion ("ROM") was 100° forward flexion, 0° of abduction, 20° external rotation and 70° of abduction. Dr. Motz' impression was: rotator cuff tear; possible glenohumeral arthritis. Dr. Motz did not have Claimant's X-rays from Kaiser at the time of the evaluation and an MRI was ordered.

18. Claimant returned to Concentra on August 19, 2020 and was evaluated by Kathy Okamatsu, N.P. At that time, she had pain in the head, right shoulder, bilateral hips, both thighs, neck and lower back. Bruising was noted on her legs. N.P. Okamatsu's assessment was the same as the evaluation on August 14, 2020. Claimant was noted to have attended one PT visit and was not cleared for a return to work.

19. On August 21, 2020, Claimant underwent an MRI of the right shoulder. The films were read by Munib Sana, M.D., whose impression was: ruptured and retracted long head biceps tendon; complete tear of the supraspinatus tendon, with significant retraction; high-grade partial tearing of the subscapularis tendon, with severe muscle atrophy; moderate grade interstitial tearing of the interior half of the infraspinatus tendon; high riding humeral head with acromial remodeling; moderate-sized joint effusion with synovitis. Dr. Sana stated those findings were age indeterminate and the ALJ inferred Dr. Sana was offering no opinion as to whether the findings were acute v. chronic, but severe muscle atrophy was present.

20. Claimant returned to Dr. Motz on September 2, 2020. Dr. Motz reviewed the MRI, which he said showed a massive retracted supraspinatus and infraspinatus tear, with significant atrophy. (It was unclear whether Dr. Motz reviewed the actual MRI and x-ray films.) He stated there was a significant loss of the acromiohumeral distance with remodeling of the head and some degenerative changes of glenohumeral joint. Dr. Motz' impression was: acute-on-chronic right massive rotator cuff tear; rotator cuff arthropathy. This description was persuasive to the ALJ.

21. Dr. Motz opined that clearly Claimant had a long-standing rotator cuff tear given the significant remodeling that was noted on the MRI, which was exacerbated with this fall. Dr. Motz performed a subacromial steroid injection at that time. Dr. Motz also noted Claimant had begun PT to work on her function, but there would limitations due to the chronic rotator cuff tear and arthropathy.

22. On September 3, 2020, a General Admission of Liability ("GAL") was filed on behalf of Respondents. The GAL admitted for medical and temporary total disability benefits.

23. Dr. Motz re-evaluated Claimant on September 29, 2020, at which time she reported no significant change following the steroid injection. She was making progress with PT. Dr. Motz‘ impression was the same as the prior appointment. He believed that Claimant would need a reverse total shoulder arthroplasty and characterized this as a chronic issue. Dr. Motz opined that the need for surgery was not related to the work injury two months ago and released Claimant from his care. There was no evidence Dr. Motz saw Claimant after that time. The ALJ inferred that Dr. Motz' opinion was that the surgery was reasonable and necessary, but not related to the industrial injury.

24. Claimant was evaluated by Nathan Faulkner, M.D. on October 2, 2020. At that time, she complained of persistent pain in the right shoulder, especially reaching across her body. She had not worked since the injury and denied any antecedent shoulder pain or dysfunction. This was not an accurate report of her prior medical history by Claimant. There was no evidence Dr. Faulkner had Claimant's prior treatment records from Kaiser at this evaluation.

25. Dr. Faulkner noted the MRI of August 21, 2020 showed a full-thickness tear of the supraspinatus and anterior infraspinatus retracted to the glenoid. There was a high-grade partial thickness tearing of the subscapularis with a large effusion. Grade 2 atrophy of the supraspinatus and subscapularis was present. Dr. Faulkner opined Claimant would benefit from an arthroscopic rotator cuff repair, as she had already ruptured her proximal biceps. In this report, Dr. Faulkner did not offer an opinion on relatedness or causation.

26. A surgery request was made by Dr. Faulkner on or about October 6, 2020. Authorization was requested for a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair, possible subscapular repair.

27. Respondents denied the request for authorization of the surgery.

28. Claimant was examined by John Sacha, M.D. on November 23, 2020. At that time, Dr. Sacha reviewed the MRI of the cervical spine, which showed straightening of her cervical lordosis and some mild disc degeneration at C5-6. On examination, cervical paraspinal spasm was noted, along with segmental dysfunction in the mid to lower cervical spine on the right side, with pain on extension, as well as extension rotation to the right. The examination of the right shoulder showed diminished range of motion and pain with Hawkins and Neer testing.

29. Dr. Sacha's impression was: cervical facet syndrome; history of rotator cuff tear; anxiety with adjustment disorder. Dr. Sacha misidentified the surgery proposed for Claimant-reverse arthroplasty. Dr. Sacha was concerned that Claimant was still wearing a shoulder sling and there was a high risk of Claimant developing adhesive

capsulitis/worsening cervical symptoms due to prolonged use of a sling. Dr. Sacha was going to contact Dr. Faulkner to discuss discontinuing the sling.

30. Claimant returned to Dr. Sacha on December 14, 2020, at which time Claimant had cervical paraspinal spasm and segmental dysfunction was noted. Crepitus with ROM pain was noted with Hawkins and Neer testing. Dr. Sacha recommended right C4-7 facet injections.

31. On December 28, 2020, Dr. O'Brien performed an IME at the Respondents' request and concluded that Claimant had degenerative changes in her right shoulder, as evidenced by a high-riding humeral heard. Dr. O'Brien opined that this was an incurable condition, with symptoms of crepitus or pain that can wax and wane. These symptoms would progressively worsen until a reverse total shoulder arthroplasty is needed. Dr. O'Brien stated that the pre-injury MRI findings were consistent with a longstanding rotator cuff tear, including the findings of the high riding humeral head, re-mottling of the undersurface of the acromion, glenohumeral joint arthritic changes, moderate to severe subscapularis atrophy associated with fatty atrophy. He believed the August 2, 2020 assault was a temporary aggravation and she reached MMI on or before September 3, 2020, which was not a credible opinion to the ALJ.

32. Dr. O'Brien opined that the surgery Claimant required was a reverse total shoulder arthroplasty. This opinion about what procedure was required was consistent with Dr. Motz' opinion. Dr. O'Brien did not believe the arthroscopic surgery would succeed, which would potentially make a reverse total shoulder arthroplasty more difficult.

33. Sander Orent, M.D. was present as a medical chaperone during Dr. O'Brien's IME with Claimant. On January 5, 2021, Dr. Sander Orent drafted a Rebuttal to Dr. O'Brien's IME report. Dr. Orent disagreed with Dr. O'Brien's description of Claimant's functionality prior to the August 2, 2020 injury. Dr. Orent also disagreed with Dr. O'Brien's description of Claimant's current shoulder symptoms. Dr. Orent opined that Claimant suffered a major injury to her right shoulder on August 2, 2020 and that Claimant's need for right shoulder surgery was causally related to her injury on August 2, 2020. The ALJ noted Dr. Orent did not evaluate Claimant.

34. Dr. Faulkner testified by way of an evidentiary deposition that was taken on March 1, 2021. Dr. Faulkner was qualified as an expert in the field of orthopedic surgery and Level II-accredited. Dr. Faulkner testified that 60-70% of his practice is performing shoulder surgeries. Dr. Faulkner stated he reviewed the actual films of Claimant's right shoulder x-ray and MRI and noted that Claimant had a "full thickness tear of the supraspinatus, as well as infraspinatus and she had a high-grade partial tearing of her subscapularis, as well as proximal biceps rupture.

35. Dr. Faulkner said he believed that the findings were acute in a nature. However, Dr. Faulkner did not have Claimant's prior records from Kaiser Permanente to review and she denied any prior injuries when he evaluated her. Dr. Faulkner said that Claimant's rotator cuff tear was acute because she only had a mild amount of atrophy of the rotator cuff. Dr. Faulkner disagreed with the radiologist's reading of the August 21, 2020 MRI and stated the findings of severe muscle atrophy were wrong. Dr. Faulkner was well-qualified and his expertise in the area of shoulder surgery was persuasive to the ALJ. His opinion was hurt by his lack of review of the prior records from Kaiser.

36. Dr. Faulkner recommended Claimant undergo shoulder arthroscopy and rotator cuff repair surgery. Dr. Faulkner stated he recommended this type of surgery because of the acute traumatic nature of the rotator cuff tear and size. Dr. Faulkner said surgery was required to repair the structures in the shoulder. Dr. Faulkner also testified that Claimant had failed conservative treatment in the form of physical therapy and injections.

37. The ALJ found Dr. Faulkner did not discuss how potential contraindications would be addressed. Dr. Faulkner testified the criteria surgeons looked at to see if someone needed a replacement versus rotator cuff repair was the amount of humeral head subluxation versus how high-riding the humeral head was relative to the glenoid. He did not believe Claimant had mild humeral head migration. Dr. Faulkner agreed that in patients with more advanced cases of humeral head migration, these patients will not do well with rotator cuff repair that a reverse shoulder replacement was required.

38. Claimant testified the pain she felt in her right shoulder was worse after the August 2, 2020 fall. Claimant said she wanted to have the surgery recommended by Dr. Faulkner. Claimant was a credible witness when describing her pain.

39. On or about September 21, 2021, Claimant's medical images were reviewed by Dr. Piko, who prepared a report detailing his findings. Dr. Piko reviewed x-rays of the right shoulder from June 5, 2018 which showed osteopenia, a high-riding humeral head and acromial enthesophyte formation contributing to high grade subacromial arch stenosis; Impression-advanced osteoarthrosis. The December 5, 2019 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head. The December 11, 2019 x-ray also showed persistent chronic osteoarthrosis and a high riding humeral head. The January 6, 2020 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head; no acute fracture or dislocation.

40. Dr. Piko reviewed the films of the MRI of the right shoulder done on August 21, 2020, that showed a complete tear of the supraspinatus tendon, anterior infraspinatus tear, subscapularis tendon had diffuse partial thickness tearing, along with attenuated biceps tendon. In addition, the superior labrum at the biceps labral anchor tendon was

torn and the inferior axillary capsule had central disruption. The posterior banc of the inferior glenohumeral ligament was torn, consistent with a P-HAGL lesion. Low grade supraspinatus atrophy was present, along with fibrovascular marrow changes at the superior humeral head.

41. Dr. Piko concluded that Claimant had a chronic appearing rotator cuff tear. Cephalad migration of the proximal humeral head and high-grade subacromial arch stenosis was present, along with a large joint effusion and sub- deltoid/subacromial bursa fluid extravasation. A SLAP tear extended into the biceps tendon. While some fibers were present, this was essentially complete interstitial tear and the origin was indistinct. The subscapularis tendon had intermediate grade partial tearing.

42. Dr. Piko opined these findings appeared long-standing and the serial x-rays confirmed chronic rotator cuff tearing/insufficiency, as well as osteoarthrosis. Dr. Piko stated no significant changes over the course of these exams were present from before and after stated injury. Dr. Piko's opinion that Claimant's shoulder had no changes to the rotator cuff over the course of various x-rays and the MRI was persuasive to the ALJ.

43. Claimant proved surgery was required for her shoulder. Claimant did not prove that her need for arthroscopic shoulder surgery was reasonable and necessary and related to her work injury.

44. The ALJ concluded Claimant's need for surgery was the result of several factors, including her prior trauma, the preexisting degenerative changes in the right shoulder and the work injury of August 2, 2020.

45. The ALJ determined it was more probable than not that Claimant required a reverse total shoulder arthroplasty.

46. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of whether Claimant was entitled to medical benefits turned on the opinions offered by the expert witnesses.

Medical Benefits

In the case at bench, Claimant had the burden of proof to show that the surgery proposed by Dr. Faulkner was reasonable, necessary and related to the industrial injury. Claimant asserted the injuries sustained when she was assaulted aggravated the underlying condition of her shoulder and necessitated the surgery. Claimant relied upon the expert opinion of Dr. Faulkner to support her claim that the work injury caused the need for surgery. Respondents, while admitting that she was injured on August 2, 2020, averred Claimant's need for surgery was because of the degenerative changes in her shoulder. Respondents cited the opinions of Dr. Motz and Dr. O'Brien in support of their contentions. The question of whether Claimant proved by a preponderance of the evidence that they need for the arthroscopic surgery proposed by Dr. Faulkner was reasonable, necessary and related to her work injury required a review of her medical history, the trauma she sustained on August 20, 2020 and an evaluation of the respective opinions offered by the experts. The ALJ found Claimant did not meet her burden of proof that the surgery proposed by Dr. Faulkner was reasonable and necessary.

As a starting point, the ALJ found Claimant had degenerative changes in her right shoulder for which she required treatment before her August 2020 injury. As determined in Findings of Fact 2, 4-9, Claimant treated at Kaiser in 2017 and 2018 for right shoulder symptoms before her work-related injury. Claimant also required treatment in early 2019 and after a fall in November 2019, she treated in December 2019 and January 2020 at Kaiser for right shoulder issues. (Finding of Fact 7). The medical evidence in the record included x-rays taken in 2019 and 2020, in which the radiologist(s) noted the presence of a probable rotator cuff tear and osteoarthritis in the glenohumeral joint. (Findings of Fact 8-9). The ALJ concluded that these x-rays were objective evidence of degenerative changes in the right shoulder that were present before August 2020. No MRI was done before the 2020 injury.

Based upon the totality of the evidence, the ALJ found that the condition of Claimant's shoulder was the result of a combination of factors. (Finding of Fact 44). This included her degenerative changes and traumatic injury, as documented by the prior x-rays and need for treatment. *Id.* The ALJ also concluded Claimant suffered a significant injury on August 2, 2020 that caused an increase in her shoulder symptoms. (Finding of Fact 14). In this regard, the ALJ credited Claimant's testimony regarding her symptoms. (Finding of Fact 38). It is well-settled that a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* (Colo. App. 1990). Therefore, while Claimant's injuries on August 2, 2020 increased the symptoms in her shoulder, the objective evidence regarding damage to the structures of the shoulder showed that these were similar both before and after her injury. (Finding of Fact 42). As such, Claimant's need for surgery was the result of all of these factors.

In this regard, the ALJ concluded that the evidence admitted at hearing established that surgery was required for Claimant's right shoulder. (Finding of Fact 41). However, there was a conflict between the respective experts (Drs. Faulkner, Motz and O'Brien) as to what procedure needed to be performed and whether the condition of Claimant's shoulder was related to the industrial injury. There were issue with regard to all of these experts' credibility. Under the facts of this case, the ALJ concluded Claimant did not prove that an arthroscopic surgery was reasonable and necessary for her shoulder. The ALJ's reasoning was two-fold. First, the ALJ determined that the surgical procedure required by Claimant was a reverse total shoulder arthroplasty. This was based upon the opinions of Dr. Motz (Finding of Fact 23), as well as Dr. O'Brien (Finding of Fact 32). Both experts concluded that Claimant had a high riding humeral head and this was the surgery she required. *Id.* The ALJ found these opinions more credible as to what surgery Claimant required.

The ALJ's conclusion was further based upon Dr. Faulkner's deposition testimony in which he agreed that if Claimant had a higher riding humeral head, a total shoulder arthroplasty was the procedure she required. (Finding of Fact 36). The ALJ determined the objective radiographic evidence established Claimant indeed had a high riding humeral head. This determination was based upon the final expert opinion of radiologist, Dr. Piko who, after reviewing all the films taken of Claimant's shoulder found, as follows:

- June 5, 2018: a high-riding humeral head; advanced osteoarthrosis.
- December 5, 2019: persistent chronic osteoarthrosis; a high riding humeral head.
- December 11, 2019: persistent chronic osteoarthrosis and a high riding humeral head.

- January 6, 2020: persistent chronic osteoarthrosis and a high riding humeral head.
- August 21, 2020 MRI: complete tear of the supraspinatus tendon; anterior infraspinatus tear, diffuse partial thickness tearing of subscapularis tendon; torn superior labrum at the biceps; torn labral anchor tendon; central disruption of inferior axillary capsule; torn posterior banc of the inferior glenohumeral ligament.

Accordingly, because the medical evidence showed that Claimant had a high riding humeral head, the ALJ concluded the proposed arthroscopic surgery was not reasonable and necessary.

Second, the ALJ also considered the DOWC MTG when evaluating the proposed surgery. Dr. Faulkner recommended a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair possible subscapular repair. (Finding of Fact 25). The Colorado Workers' Division of Workers' Compensation Medical Treatment Guidelines ("DOWC MTG") address surgical indications and potential contraindications for the surgery at issue here:

"Shoulder Injury Medical Treatment Guidelines

10. ROTATOR CUFF TEAR:

a. Description/Definition:

Partial or full-thickness tears of the rotator cuff tendons, most often the supraspinatus, can be caused by vascular, traumatic or degenerative factors or a combination. Further tear classification includes: a small tear is less than 1cm; medium tear is 1 to 3cm; large tear is 3 to 5cm; and massive tear is greater than 5cm, usually with retraction. Partial thickness cuff tears usually occur in age groups older than 30. Full-thickness tears can occur in younger age groups; however, they are uncommon. Approximately 25% of asymptomatic patients over 60 have full thickness tears and between 40-60% have partial thickness tears. About 50% of those with asymptomatic full thickness tears will become symptomatic with tear progression in 2 years. This is more common with larger initial tears. Only about 10% of partial tears increase in size over time. Tendons do not repair themselves over time. The patient usually complains of pain along anterior, lateral shoulder or posterior glenohumeral joint."

…

"f. Surgical Indications:

"Goals of surgical intervention are to restore functional anatomy by re-

> establishing continuity of the rotator cuff, addressing associated pathology and reducing the potential for repeated impingement.
>
> **…**
>
> If no increase in function for a partial tear is observed after 6 to 12 weeks, a surgical consultation is indicated. For full-thickness tears, it is thought that early surgical intervention produces better surgical outcome due to healthier tissues and often less limitation of movement prior to and after surgery. Patients may need pre-operative therapy to increase ROM.
>
> Full thickness tears are uncommon in the 40-60 age groups. About 25% of asymptomatic patients over 60 will have a full thickness tear. Full-thickness tears greater than 1 cm, in individuals less than 60 should generally be repaired. Smaller tears appear to show less likelihood of progression (25%). Only about 10 percent of partial tears increase in size over time. The recovery rate for those with a full thickness tear without surgery is 60%. **In patients over 65 the decision to repair a full rotator cuff tear depends on the length of time since the injury, the amount of muscle or tendon that has retracted, the level of fatty infiltration and the quality of the tendon.** For patients with lack of active elevation above 90 degrees, arthroscopic biceps tenotomy may be effective in returning some elevation. The recurrence rate may be up to 50% in older patients with multiple tendon full-thickness tears. Pseudo paralysis or severe rotator cuff arthropathy are contraindications to the procedure." [Emphasis added]

The foregoing section of the DOWC MTG set forth the criteria to be evaluated in patients over the age of sixty-five when rotator cuff repair is being considered. The evidence in the form of the MRI revealed multiple structures within the shoulder joint, which had tears and degeneration. (Findings of Fact 19, 41-42). As found, Dr. Faulkner's testimony did not address these conditions in detail and also did not address the concern about atrophy, other than to say he disagreed with the radiologist's interpretation as to the degree of muscle atrophy. (Findings of Fact 35-36). Dr. Faulkner did not explicitly articulate how potential contraindications would be addressed. In fact, Dr. Faulkner stated he would have additional x-rays taken and agreed if Claimant had a high riding humeral head, a reverse shoulder arthroplasty was required. (Finding of Fact 36). The contraindications referenced by the DOWC MTG were not addressed and the conclusion that Claimant requires a different surgical procedure provide an additional basis for denial. Accordingly, Claimant's request for medical benefits will be denied.

ORDER

It is therefore ordered:

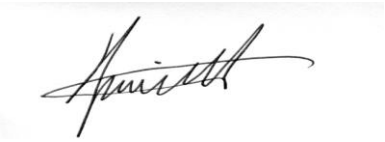
1. Claimant's request for payment of the arthroscopic repair of the torn rotator cuff in her right shoulder is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-163-354-001

ISSUES

1. Whether Respondents have overcome the opinion of the Division Independent Medical Examination (DIME) physician by clear and convincing evidence with respect to maximum medical improvement (MMI).

2. Whether Claimant has proven by a preponderance of the evidence that her total knee replacement is reasonable, necessary, and related to her work injury.

3. Whether Claimant has proven that she is entitled to temporary total disability (TTD) benefits from Respondent.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 64 year-old woman who worked for Employer in November 2019. Her job duties included, but were not limited to, stocking shelves, taking small appliances off of pallets, and handling sales as the cashier. Claimant's typical shift was eight hours, and she was on her feet approximately seven and a half hours per shift. (Tr. 29:9-30:9)

2. On November 25, 2019, Claimant sustained an admitted injury at work when she tripped over a cord and fell on her right knee. Following the fall, Claimant experienced pain and swelling in her right knee, and she had difficulty walking. (Tr. 16:16-24).

3. Claimant credibly testified that prior to her fall at work she had never experienced these symptoms in her right knee. Claimant had never sought medical treatment for her right knee, including never seeing a doctor and never having x-rays or an MRI taken of her knee. (Tr. 31:2-11).

4. Claimant first sought medical treatment two days after her fall, on November 27, 2019, at the emergency room at Lutheran Medical Center (Lutheran). Claimant was treated by David Leventhal, M.D. Claimant reported having steady, non-radiating pain (5/10) since the fall. The pain was worse with weight bearing, and she was having difficulty walking. (Ex. 5).

5. At Lutheran, unilateral x-rays (3 views) were taken of Claimant's right knee. The impression read: "1. Within limitations of osteopenia, no evidence of an acute fracture. 2. Medial compartment predominant osteoarthritis. 3. Moderate-sized joint effusion." Dr. Leventhal concluded that Claimant had "no obvious bone injuries," and he gave Claimant

a knee mobilizer and crutches. He told Claimant to follow-up with her doctor if she continued to have significant pain, and he prescribed her pain medications. (*Id.*).

6. That same day, November 27, 2019, Claimant went to Concentra and was seen by Meryl Wolff, PA-C.[1] Claimant reported her pain level was 2/10. Ms. Wolf diagnosed Claimant with a contusion of the right knee, and released her to full duty work. She advised Claimant to take Ibuprofen and use an Ace wrap. (Ex. B).

7. On Monday, December 2, 2019, Claimant had a follow-up appointment at Concentra. She reported right anterior knee and posterior knee pain after standing for two hours. The pain was worse with flexion of the right knee. Chelsea Rasis, PA-C examined Claimant and strongly recommended physical therapy if there was no improvement in the next few weeks. Claimant had no work restrictions. (*Id.*).

8. Claimant returned to Concentra on December 31, 2019, and reported that her right knee continued to bother her. She had pain in the anterolateral aspect of her right knee. The pain became worse after an hour of walking, or when trying to bend her knee. She experienced swelling in her right knee and distal calf after a normal day of working. Ms. Rasis ordered an MRI of Claimant's right knee. Claimant was restricted to modified duty, where she would be sitting 50% of the time. (*Id.*).

9. At her follow-up appointment on January 7, 2020, Claimant reported tolerating working modified duty. Claimant, however, was having difficulty going up and down stairs, and getting in and out of the shower. Ms. Rasis referred Claimant to physical therapy. Between January 13, 2020 and February 11, 2020, Claimant attended seven physical therapy sessions. (*Id.*).

10. Claimant had an MRI of her right knee on January 14, 2020. The impression read: 1) Severe arthritis of the medial compartment of the knee with full-thickness chondral loss and evidence of eburnation; 2) Diffuse tearing of the body and posterior horn of the medial meniscus and the remnant of the anterior horn is extruded from the joint; 3) Moderate arthritis of the lateral compartment of the knee; 4) Tendinosis of the popliteus tendon; 5) Degeneration of the fibular collateral ligament; 6) The anterior cruciate ligament (ACL) is diffusely torn, and may be a chronic injury as there is no tibial torsion-type bone injury; 7) Degeneration of the posterior cruciate ligament; 8) Arthritis of the patellofemoral joint; 9) Quadriceps and patellar tendinosis; and 10) A bone lesion in the medial femoral metaphysis consistent with an enchondroma. (Ex. 6).

11. Claimant's ATP, Dr. Villavicencio, referred her to an orthopedic specialist. Claimant saw John Papilion, M.D. on February 20, 2022 for a consultation. Dr. Papilion specifically noted that Claimant "tripped over a cord and fell directly on her right knee and had a ***twisting injury***." (emphasis added) He goes on to say Claimant "vehemently

[1] Authorized treating physician (ATP) Theodore Villavicencio, M.D. was the supervising physician.

denie[d] any previous problem with her right knee [and] she has no left-sided symptoms." (Ex. 8).

12. Dr. Papilion reviewed the MRI and explained it confirmed degenerative changes in the medial compartment of Claimant's right knee with a complex tear of the mid body and posterior horn of the medial meniscus with extrusion. He also noted the moderate degenerative changes in the lateral compartment and what appeared to be a complete tear of the ACL. Dr. Papilion's assessment was "likely acute anterior cruciate ligament tear, right knee, with probable complex medial meniscus tear and underlying moderately severe degenerative arthritis." He explained that injection therapy may provide temporary relief, but his recommendation was a right total knee arthroplasty (TKA). (*Id.*).

13. At her follow-up appointment with Dr. Papilion on February 27, 2020, Claimant explained she did not want to start with surgery, and instead opted for a Synvisc injection. (Ex. 8).

14. Respondents retained Adam Farber, M.D. to conduct a Rule 16 records review. Dr. Farber opined that "[b]ased upon a reasonable degree of certainty, there is no evidence of an acute ACL injury causally related to the industrial injury." He also opined that Claimant's "osteoarthritis represents a chronic, degenerative and pre-existing condition that is not causally related to the November 25, 2019 industrial injury." Dr. Farber concluded that right TKA surgery was not reasonable, necessary or causally related. (Ex. H). On March 3, 2020, Respondents denied authorization for a right TKA based upon Dr. Farber's Rule 16 review. (Ex. 13).

15. Claimant returned to Concentra for a follow-up appointment on March 6, 2020. She reported difficulty carrying anything weighing greater than five pounds, and pushing or pulling a heavy cart. Claimant reported that she had been wearing a brace as needed. Ms. Rasis advised Claimant to refrain from further physical therapy. (Ex. 7).

16. Claimant continued treating with Dr. Villavicencio. On March 29, 2020, Claimant was released to full work duty with no restrictions. (Ex. B).

17. Claimant credibly testified that Employer continued to accommodate her previous work restrictions up until the time she was laid off, even though she had been released to full duty work. Respondents presented no evidence to controvert Claimant's testimony. (Tr. 35:1-8)

18. On April 30, 2020, Dr. Papilion again recommended that Claimant undergo the right TKA, particularly in light of the fact that she was not responding to conservative treatment. He recommended, however, that Claimant obtain a second opinion. (Ex. 8)

19. Claimant received a Synvisc injection in her right knee from Dr. Failinger at Advanced Orthopedic and Sports Medicine Specialists on June 2, 2020. Claimant was also prescribed metformin, amlodipine, aspirin, Aleve, and Tylenol for the pain. (Ex. 9).

On June 30, 2020, Claimant saw Dr. Papilion and told him that she only received two weeks' worth of relief from the Synvisc injection. (Ex. 8).

20. Claimant saw William Ciccone, M.D., an orthopedic specialist, for a second opinion. Dr. Ciccone examined Claimant on July 21, 2020. Claimant again denied any issues or restrictions with her right knee prior to the industrial injury. Dr. Ciccone noted Claimant had significant degenerative changes within her knee joint, which he believed caused her symptoms. He further explained that it was difficult to tell from the MRI whether the ACL tear with meniscal tearing was acute or chronic. Dr. Ciccone opined "given the significance of these degenerative changes, I do not believe that any surgical intervention other than a knee replacement would be beneficial to the patient." (Ex. E).

21. Under diagnostic studies, Dr. Ciccone noted, "radiographs – standing views, AP lateral, Merchant, and Rosenberg views show significant degenerative changes in bilateral knees." (Ex. E).

22. Claimant continued treating with Dr. Villavicencio. At her September 25, 2020 appointment, Dr. Villavicencio noted in the medical record that he was unclear regarding the status of an approval for the right TKA, and would follow up with the adjuster. At Claimant's December 10, 2020 appointment, Dr. Villavicencio again noted that he tried to contact the adjuster. (Ex. B).

23. Dr. Villavicencio placed Claimant at Maximum Medical Improvement (MMI) on February 23, 2021, because "no further treatment options besides the TKA are indicated, therefore, she is at MMI" and he gave her a lower extremity impairment rating of 9%, which he converted to a 4% whole person impairment rating. (Ex. C).

24. Respondents filed a Final Admission of Liability on April 30, 2021, consistent with Dr. Villavicencio's report. (Ex. A)

25. Claimant requested a DIME, and Martin Kavelik, D.O., conducted the DIME on August 26, 2021. Under "Scope of Exam" Dr. Kavelik noted he was asked to "address her right knee and consider MMI, impairment and apportionment." (Ex. 4).

26. Dr. Kavelik reviewed Claimant's medical records, including the January 14, 2020 MRI. Dr. Kavelik examined ***both*** of Claimant's knees. He noted that Claimant could ambulate without the brace, but she strongly favored her right knee with a limp. Dr. Kavelik diagnosed Claimant with a right knee contusion, right ACL tear (unknown age), right meniscus tear (probable work relatedness), and right knee osteoarthritis. (*Id.*).

27. Dr. Kavelik opined that Claimant was not at MMI because a right TKA was necessary. He concluded that Claimant suffered an industrial injury that affected her ADLs. Dr. Kavelik further opined Claimant had severe underlying arthritis, "but the injury has pushed her to a point of permanent impairment with the only surgical option being a total knee replacement." Additionally, Dr. Kavelik stated, at the end of his MMI discussion that if Claimant "chooses not to have surgical intervention, she would be at MMI." Dr.

Kavelik issued a lower extremity rating of 5%, which he converted to a 2% whole person impairment rating. (*Id.*).

28. Claimant credibly testified that she wants surgical intervention, and wants to have a right TKA. (Tr. 33:24-34:2).

29. Sometime on or around October 22, 2021, American Freight, the entity that had purchased Employer, laid off Claimant. (Tr. at 39:19-40:11).

30. Claimant testified that she started received unemployment in the amount of $329.00 per week on or around December 6, 2021. (Tr. at 37:14-24). No wage records were submitted into evidence.

31. At the time Claimant was laid off, she had been released to work full duty without any restrictions since March 29, 2020. Claimant credibly testified, however, that from March 29, 2020 until October 22, 2021, she worked full duty and Employer accommodated her prior restriction of only standing 50% of the time. (Tr. at 35:1-25). She further testified that she could not do her original job because she cannot walk or stand for hours, and she cannot lift heavy objects. Claimant credibly testified that she could not have worked for employer without the accommodations. (Tr. 36:1-19).

32. Claimant credibly testified that she has not worked since the time she was laid off. (Tr. 37:14-16).

33. On January 14, 2022, Lloyd J. Thurston, M.D., performed an Independent Medical Examination (IME) of Claimant. In his January 26, 2022 IME report, Dr. Thurston concluded that Claimant reached MMI approximately six months after the fall with no permanent impairment. According to Dr. Thurston, Claimant had "severe tricompartmental osteoarthrosis of both knees." He concluded that Claimant's issues did not stem from her fall but instead resulted from other chronic and degenerative conditions. According to Dr. Thurston, Claimant's mechanism of injury was not consistent with the typical mechanism for an acute ACL tear or an acute medial meniscus tear because, at the time of the injury, Claimant was not weight-bearing on the right leg, and there was no associated torque or twist force applied through her knee. (Ex. J.)

34. Dr. Thurston had several disagreements with Dr. Kalevik's DIME report. Dr. Thurston noted that Dr. Kalevik seemed to be unaware of Claimant's advanced osteoarthritis in her left knee. He also criticized Dr. Kalevik for not reviewing the standing x-rays that Dr. Ciccone reviewed. (*Id.*).

35. Dr. Thurston testified consistent with his report. He emphasized that Claimant's mechanism of injury did not involve twisting, again revealing that it would not result in an injury to the ACL or meniscus that Claimant has sustained. (Tr. 14:4-12).

36. While the ALJ finds Dr. Thurston's testimony regarding the mechanism of injury to be credible, it is not persuasive. At Dr. Papilion's first consultation with Claimant he notes

in the medical record, “she tripped over a cord and fell directly on her right knee and had ***a twisting injury***.” (emphasis added) (Ex. 8).

37. Dr. Thurston also testified that Claimant suffered a temporary exacerbation of a pre-existing condition. He further testified that Claimant is at her baseline. (Tr. 22:17-23:9). The ALJ does not find this testimony persuasive as Claimant credibly testified that she never had knee problems prior to her fall at work. Furthermore, Claimant credibly testified that she cannot do the same work functions as she did prior to the fall.

38. Dr. Thurston further testified that standing x-rays are particularly important because they show the significance of an individual’s osteoarthritis. (Tr. 16:4-10). He testified that Dr. Kalevik did not seem aware of Claimant’s degenerative arthritis, or these x-rays, when he issued his DIME report. *Id.* Dr. Thurston testified that when a doctor focuses solely on an injured knee and attributes all of the degenerative effects to an injury without comparing to the other knee, the physician misses critical information that reveals the degenerative condition in both sides without the presence of the injury. (Tr. 20:20-21:9). The ALJ finds Dr. Thurston’s opinion to be speculative. While there is no evidence that Dr. Kavelik reviewed these x-rays, his DIME report details his examination of ***both*** of Claimant’s knees. Dr. Kavelik’s also noted in his DIME report that Claimant had severe underlying arthritis.

39. Respondents have failed to establish by clear and convincing evidence that Dr. Kavelik’s opinion that Claimant is not at MMI is incorrect. The ALJ finds that Claimant is not at MMI.

40. Claimant credibly testified that she had no known problems with her right knee prior to her fall at work on November 25, 2019. The ALJ credits the testimony of Drs. Papilion, Kavelik, Ciccone, and Villacencio who all agree that Claimant needs a right TKA. The ALJ finds that a right TKA is reasonable, necessary and related to Claimant’s work injury on November 25, 2019.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

DIME Physician's MMI Finding

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Based on the totality of the evidence, the ALJ concludes that Respondents have failed to establish, by clear and convincing evidence, that Dr. Kavelik's opinion that Claimant is not at MMI is incorrect. (Findings of Fact (FOF) ¶ 39). Respondent's expert, Dr. Thurston, disagrees with Dr. Kavelik's opinion for multiple reasons. Dr. Thurston believes Claimant's mechanism of injury is inconsistent with an ACL tear. (*Id.* at ¶ 35). Dr. Papilion, an orthopedic specialist, noted that Claimant had a twisting injury when she fell. (*Id.* at ¶ 11). A twisting injury is consistent with a torn ACL. Dr. Thurston also speculates that Dr. Kavelik did not examine both of Claimant's knees, nor did he acknowledge her degenerative arthritis. (*Id.* at ¶ 38). As part of the DIME, however, Dr. Kavelik examined ***both*** of Claimant's knees, not just her right knee as Dr. Thurston speculated. (*Id.* at ¶ 26). Dr. Kavelik also noted Claimant's severe underlying arthritis, but opined that her only surgical option is a right TKA. (*Id.*). Ultimately, Dr. Villavicencio and Dr. Kalevik agreed with both the surgeon, Dr. Failinger, and Dr. Ciccone that Claimant's torn ACL is related to her work injury, and that she will need surgical repair to reach MMI. (*Id.* at ¶ 40).

As found, Claimant lacked symptoms or any prior treatment to her right knee before the industrial accident. Dr. Thurston, however, disregards the temporal correlation of the injury and Claimant's subsequent symptoms. While Dr. Thurston's testimony was credible, it was not persuasive. Dr. Thurston has a conflicting medical opinion from Dr. Kavelik. The evidence does not demonstrate that Dr. Kavelik's DIME opinion is incorrect. Respondents have failed to establish by clear and convincing evidence that Dr. Kavelik's opinion that Claimant is not at MMI is incorrect.

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant must prove a causal relationship between the injury and the medical treatment for which she is seeking benefits. Even if a work-related injury is compensable, there can still be questions as to whether the claimant's medical treatment is causally related to the work injury, or if proposed treatment is reasonable and necessary.

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*. The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

The ALJ credits the opinion of Dr. Kavelik that Claimant's current symptoms and need for a total right knee arthroplasty is a result of the work injury. (FOF at ¶ 40). The ALJ also credits Claimant's testimony that she never experienced any issues with her right knee prior to her fall at work. (*Id.*). Therefore, this ALJ concludes that Claimant has proved by a preponderance of the evidence that she is entitled to the recommended total right knee arthroplasty because it is related to her work injury, and is reasonable and necessary.

TTD Benefits

In order to establish eligibility for disability compensation including TTD benefits, a claimant must show a causal connection between a work-related injury and a subsequent wage loss. § 8-42-103(1), C.R.S.; *Loofbourrow v. Indus. Claims Appeals Office*, 321 P.3d 548, 555 (Colo. App. 2011). A claimant has the burden of showing that their injury contributed to a subsequent wage loss or termination. *See Warttman v. Colorado Springs*, W.C. No. 4-580-205 (April 2, 2004). When an employee returns to their job and the employer accommodates the work restrictions with no wage loss, a Claimant is not entitled to TTD. *See id.* Any subsequent loss of wages or employment must be shown to be a result of the injury. *Salgado v. The Home Depot*, W.C. No. 4-975-288-02 (June 28, 2016).

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that claimant left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* §§ 8¬42-103(a), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997).

As found, Claimant is not at MMI. (FOF at ¶ 39). American Freight purchased Employer, and subsequently laid off Claimant on October 22, 2021. (*Id.* at ¶ 29). No wage records were entered into evidence. Claimant credibly testified that she has not worked since her employment was terminated, and that she is unable to work without accommodations. (*Id.* at ¶ 32). The evidence shows that Claimant was returned to full duty work with no restrictions on March 29, 2020. Claimant credibly testified, however, that Employer, accommodated her work injury by allowing her to sit 50 % of the time. (*Id.* at ¶ 31). As found, this accommodation was in place until the day Claimant's employment was terminated. (*Id.*). Claimant also credibly testified that she is not able to perform her prior job without accommodations as she is not able to walk or stand for hours at a time, and she cannot lift heavy objects. (*Id.*). Claimant has not worked since October 22, 2021. She began receiving unemployment on December 7, 2021 and receives $329 per week. Respondents presented no evidence to controvert Claimant's testimony. (*Id.* at ¶ 30). The ALJ credits Claimant's testimony that employer accommodated her, and she has not been able to work since her termination on October 22, 2021.

As found, Claimant is not at MMI, and she will not be at MMI until she has a TKA. (*Id.* at ¶ 39). As found, the TKA is reasonable, necessary and related to Claimant's work injury. (*Id.* at ¶ 40). Claimant is entitled to TTD from October 23, 2021, and continuing until terminated by law. Any TTD is subject to offsets.

Disfigurement

Claimant endorsed the issue of disfigurement in their response to the Application for Hearing. The issue of disfigurement is reserved and held in abeyance.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME opinion of Dr. Kavelik regarding MMI by clear and convincing evidence.

2. Claimant has proved by a preponderance of the evidence that she is entitled to medical expenses for her total right knee arthroplasty.

3. Respondents shall pay for TTD benefits as of October 22, 2021, subject to applicable offsets.

4. The issue of disfigurement has been reserved pending surgical intervention of Claimant's knee.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reasonable medical treatment necessary to cure and relieve him from the effects of the work injury

3. The parties stipulated that the claimant's average weekly wage (AWW) is $673.08.

4. The parties also stipulated that the claimant has not suffered any wage loss.

FINDINGS OF FACT

1. The employer operates radio stations under the business name TM[Redacted]. The claimant began working for the employer on March 15, 2022. At all times relevant to the current claim, the claimant worked as an account executive in advertising sales at the employer's Grand Junction, Colorado location. The claimant's job duties included obtaining and maintaining advertising customers in the community. He was paid on a commission basis.

2. The claimant's supervisor is NR[Redacted], Market President and Chief Revenue Officer.

3. Latimer House is a shelter that provides emergency services and counseling for victims of domestic violence in Grand Junction, Colorado. Hilltop Community Resources operates Latimer House. Men in Heels is a community fundraising event for Latimer House. Funds collected from Men in Heels go to providing shelter services and case management.

4. The Men in Heels race involves teams of five men that participate in a relay type race while wearing high heels.

5. The employer is not affiliated with Hilltop Community Resources or Latimer House. The employer is not a sponsor of the Men in Heels race.

6. On August 17, 2021, an email was received by the employer from Hilltop Community resources about the 2021 Men in Heels race. Ms. NR[Redacted] relayed this

information to all employees at the employer's Grand Junction location. At that time, nine men worked at that location.

7. The claimant was one of four male employees that volunteered to participate in Men in Heels. The claimant also volunteered to be the "team captain". The claimant did not raise any funds for the fundraising portion of the Men in Heels event.

8. The team decided to dress as zombies for the race. On the day of the race (October 14, 2021), the claimant volunteered to go to a Halloween store and purchase supplies for the zombie theme. The employer provided a prepaid gift card to purchase these items.

9. On October 14, 2021, the claimant and his teammates donned their zombie costumes at the employer's offices and then traveled to the race location. The race was held at the local airport.

10. The claimant and his three teammates participated in their race. As their team had only four participants, the claimant opted to run an additional lap for the fifth leg of the race. By the time the claimant was to run the fifth lap, his team had already "lost" the race. Despite this, the claimant chose to run that fifth lap. When he was reaching the finish line, the claimant lost his balance and fell forward and sustained an injury to his right arm.

11. Video of the race was played during the hearing and entered into evidence as Exhibit H.

12. Ms. NR[Redacted] testified that the Men in Heels is a fun and voluntary event. Ms. NR[Redacted] also testified that the employer gained no benefit from the claimant's participation in the event. Ms. NR[Redacted] credibly testified that there was no pressure placed on the claimant, or any employee, to participate in Men in Heels. In addition, the claimant was not asked or expected to run the fifth and final lap.

13. The claimant testified that he did not feel comfortable participating in the Men in Heels race. The claimant further testified that as a new employee, he felt pressure to participate. The ALJ does not find the claimant's testimony to be credible or persuasive.

14. After his fall, the claimant was initially assessed by a physician that was also present at the race. The claimant was then transported to Community Hospital by Ms. NR[Redacted] and her spouse.

15. At Community Hospital, the claimant was seen by Dr. Rohn McCune. The claimant reported pain in his right elbow. The claimant also reported that he was "running in a race and tripped falling forward on outstretched arms."

16. The claimant was diagnosed with a coronoid fracture, radial head fracture, and dislocation of the right elbow. The claimant underwent surgery on October 15,

2021. Specifically, Dr. Duwayne Carlson performed an open reduction internal fixation (ORIF) procedure on the claimant's right elbow.

17. On October 18, 2021, the claimant began treatment with his authorized treating physician (ATP) Dr. Theodore Sofish, with Grand Valley Occupational Medicine. At that time, the claimant reported that he injured his right elbow when he was participating in a race for a local fundraiser.

18. On November 1, 2021, the respondents filed a Notice of Contest. The reasons listed for the respondents' contest/denial of the claim are identified as "[t]his is not a work related injury, the cause of injury is related to a voluntary participated event."

19. On February 10, 2022, the claimant returned to Dr. Carlson. At that time, the claimant reported he had started to return to his normal activities (including bowling and golf), which caused a flare of pain from his neck, down the shoulder, and to his elbow.

20. On April 14, 2022, the claimant underwent a second surgery. The purpose of that surgery was to remove hardware from his right elbow, to relieve his pain. The cost of the April 14, 2022 surgery was paid for by the claimant's private health insurance.

21. It is undisputed that the claimant suffered an injury at the Men in Heels race on October 14, 2021. The issue before the ALJ is whether the claimant's participation in that event constitutes "employment". The ALJ credits the testimony of Ms. NR[Redacted] over the contrary testimony of the claimant. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury arising out of and in the course and scope of his employment with the employer.

22. In reaching this conclusion the ALJ notes that the event, Men in Heels is a fundraising event for Latimer House. The employer is not affiliated with Latimer House or Hilltop Community Services. In addition, the employer did not sponsor the event. The ALJ also notes that the claimant volunteered to participate in the event, to be team captain, and to purchase items for the zombie themed costumes.

23. The event occurred off of the employer's premises and outside of the claimant's normal duties. As a commission employee, the claimant was not compensated for his time at the event. The claimant was not required to participate. The employer derived no benefit from the claimant's participation It was the claimant's decision to participate in the race, and to run the fifth lap.

24. The ALJ finds, as a matter of fact, that the claimant voluntarily participated in the Men in Heels race. The ALJ finds that the Men in Heels race is a voluntary and recreational event. The ALJ finds no persuasive evidence that the claimant was forced or coerced to participate in this voluntary event.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990).

5. Section 8-41-301(1)(b), C.R.S., provides that the right to compensation is subject to the condition that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-40-201(8), C.R.S., provides that the term "employment" shall not "include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Similarly, Section 8-40-301(1), C.R.S., defines the term "employee" to exclude any person employed by an employer "while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment."

6. In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning as an activity that "has a refreshing effect on either the mind or the

body." Determining whether an activity is "recreational" depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity, and whether the employer stood to benefit from the employee's participation in the activity. The question of whether an activity was "recreational" is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (I.C.A.O. Oct. 29, 2003).

7. Determination of whether the claimant's participation in a recreational activity was "voluntary" requires consideration of the claimant's "motive" for participation in the activity. Compensability must be denied if participation in the activity was voluntary, even though the employer promoted, sponsored or supported the activity. When determining whether the claimant's participation was voluntary the ALJ may consider various factors. Those factors include: whether the activity occurred during working hours, whether the activity occurred on or off the employer's premises, whether the employer initiated, organized, sponsored or financially supported the activity[1], whether the employer derived benefit from the activity. *Dover Elevator* Co. *v. Industrial Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). Ultimately, the question of whether the claimant's participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *Kvale v. Infinity Systems Engineering,* W.C. No. 4-588-521 (1.C.A.O. March 23, 2005).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. The claimant was injured while participating in the voluntary and recreational Men in Heels race. As noted above, Section 8-40-201(8), C.R.S. specifically excludes voluntary recreational activities from employment.

ORDER

It is therefore ordered that the claimant's claim related to an October 14, 2021 injury is denied and dismissed.

Dated May 24, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414

[1] The current version of Section 8-40-201(8) C.R.S. specifically states that employment does not include participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program."

Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his August 25, 2015 Workers' Compensation claim based on mistake or error, or change of condition pursuant to §8-43-303(1), C.R.S.

2. Whether Respondents have established by a preponderance of the evidence that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a vehicle repossession agent. On August 26, 2015 he sustained an admitted bilateral arm injury while trying to lift a dolly bar out of a truck.

2. Claimant initially visited Concentra Medical Centers for bilateral arm pain. On November 29, 2016 Authorized Treating Physician (ATP) Albert Hattem, M.D. reported that Claimant had undergone a comprehensive course of conservative treatment including occupational therapy, massage therapy, acupuncture and injections.

3. On February 14, 2017 Dr. Hattem expressed concerns about Claimant's significant pain behaviors with minimal objective findings and recommended diagnostic testing for Chronic Regional Pain Syndrome (CRPS). Claimant ultimately was diagnosed with upper extremity CRPS after a March 16, 2017 thermogram and May 4, 2017 quantitative sudomotor axon reflex test (QSART) by George Schakaraschwili, M.D. were consistent with left greater than right CRPS. Dr. Schakaraschwili remarked that Claimant might benefit from bilateral stellate ganglion blocks, but Claimant declined them.

4. Dr. Hattem referred Claimant to psychiatrist Ronald Carbaugh, Psy.D. for perceived pain. On April 28, 2017 Dr. Carbaugh reported that Claimant was in an intense emotional state, had a tendency to catastrophize his injury and was angry because his CRPS diagnosis was "missed." Dr. Carbaugh diagnosed adjustment disorder. He recommended biofeedback and cognitive behavioral therapy. Claimant did not follow up with Dr. Carbaugh.

5. On May 24, 2017 Claimant visited John Sacha, M.D. for an examination. Dr. Sacha recommended a trial stellate ganglion block and, if Claimant declined the procedure, he would be placed at Maximum Medical Improvement (MMI). Claimant declined the block.

6. On July 13, 2017 Dr. Hattem placed claimant at MMI. He noted that Claimant was not interested in stellate ganglion blocks or psychological follow-up. Dr.

Hattem assigned a 15% whole person impairment rating and recommended six months of maintenance care to refill and taper Gabapentin.

7. On August 21, 2017 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Hattem's opinions. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

8. On January 17, 2018 Claimant underwent a DIME with David Yamamoto, M.D. Dr. Yamamoto determined that Claimant was not at MMI because he needed to undergo the following: an evaluation by a specialist familiar with spinal cord stimulators; a psychiatric evaluation to help with medication management; a second opinion by a psychologist to address depression and anxiety; and a functional capacity evaluation.

9. Based on Respondents' application to overcome the DIME, the parties conducted a hearing before ALJ Spencer on July 20, 2018. ALJ Spencer determined that Respondents overcame Dr. Yamamoto's opinion and Claimant reached MMI on July 13, 2017 for his physical injuries. He cited surveillance of Claimant from December 2017 noting that "[c]laimant's appearance in the video was incongruous and raises concerns that claimant may be exaggerating the severity of his condition." ALJ Spencer also found that Respondents failed to overcome Dr. Yamamoto's opinion that Claimant was not at MMI for his psychological condition. Even though Claimant had not followed through with Dr. Carbaugh's recommendations, ALJ Spencer gave Claimant the benefit of the doubt that he did not "connect" with Dr. Carbaugh.

10. On September 7, 2018 Respondents filed a General Admission of Liability (GAL), recognized that Claimant was not at MMI for his psychological condition and reinstated Temporary Total Disability (TTD) benefits.

11. ATP Dr. Hattem referred Claimant to psychiatrist Stephen Moe, M.D. and psychologist Joel Cohen, Ph.D. Both doctors recommended Cymbalta. On January 15, 2019, Dr. Moe reported that Claimant was not interested in psychiatric treatment apart from maintenance Cymbalta and had reached MMI for his psychological condition. Having complied with ALJ Spencer's Order and Dr. Yamamoto's DIME treatment recommendations to reach psychological MMI, Respondents returned Claimant to Dr. Yamamoto.

12. Partway through Claimant's treatment, Dr. Hattem changed medical facilities and became unable to treat Workers' Compensation claimants. On January 21, 2019, Dr. Hattem referred Claimant for a transfer of care to either John Sacha, M.D., Kathy McCranie, M.D., or Allison Fall, M.D. Claimant chose Dr. Sacha.

13. On February 6, 2019 Dr. Sacha noted that Claimant had a history of a mild Workers' Compensation repetitive motion injury of the upper extremity that developed into a mild case of CRPS. He also remarked that Claimant had significant psychological dysfunction and preexisting psychological issues. During this first and only visit, Dr. Sacha reported that Claimant became hostile in the office with him, nursing staff, and the office

administrator. Dr. Sacha remarked that Claimant was asked to leave and would not be allowed to return to the clinic.

14. Dr. Yamamoto performed a follow-up DIME and determined that Claimant reached MMI on March 4, 2019 with a 15% whole person permanent impairment. On April 3, 2019 Insurer filed a FAL consistent with Dr. Yamamoto's DIME opinion and acknowledging that Claimant was entitled to reasonable and necessary medical maintenance benefits. Claimant filed an application for hearing seeking to overcome Dr. Yamamoto's follow-up DIME opinion.

15. On June 17, 2019 Claimant visited George Schakaraschwili, M.D. for an evaluation. Dr. Schakaraschwili explained that CRPS can resolve over time and while diagnostic testing "could" be useful to see if Claimant still had CRPS, Claimant was at MMI "whether repeat testing is positive or not." Moreover, he remarked that "[i]f further testing were to confirm CRPS in either the upper or the lower extremities, this would justify maintenance treatment." On August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant thus had no signs of lower extremity CRPS other than hypersensitivity to touch.

16. Surveillance video from July 11, 21, 26 and 27, 2019 shows Claimant opening the door with his right hand, opening the door of a car with his right and left hands, using his left arm to raise a water bottle to his mouth, putting on his seat belt, driving a vehicle with both hands, walking without any apparent difficulty, lifting his arm and bending his elbows and getting into a SUV without assistance. September 20, 2018, video shows Claimant walking back and forth with his hands in his pocket, holding a newspaper in his right hand and opening the front door of a house with his right hand.

17. On August 24, 2019 ALJ Turnbow conducted a hearing on Claimant's application to overcome Dr. Yamamoto's follow-up DIME opinion regarding MMI and medical benefits, including stellate ganglion blocks and additional CRPS testing. Claimant also sought reimbursement for prescription medication, including Lyrica and penalties against Insurer for dictating medical care by designating Dr. Raschbacher as the ATP when he accepted a transfer of care after Dr. Hattem left his practice. Claimant asserted that he has "never been at MMI" because on August 18, 2019, nine-days prior to the hearing, he changed his mind and was "willing" to undergo bilateral stellate ganglion blocks that he had declined when placed at MMI.

18. On January 23, 2020 ALJ Turnbow found that Claimant failed to overcome Dr. Yamamoto's DIME opinion that he reached MMI on March 4, 2019. She rejected Claimant's assertion that he was not at MMI because he had changed his mind and wanted to undergo the stellate ganglion blocks he had declined before reaching MMI. ALJ Turnbow noted that no ATP had recommended blocks since MMI. She also rejected Claimant's request for medical benefits including a spinal cord stimulator, CRPS testing and stellate ganglion blocks. ALJ Turnbow denied penalties and reimbursement for Lyrica because it was prescribed by unauthorized physicians outside of the claim. The Industrial Claims Appeals Office affirmed ALJ Turnbow's Order on January 27, 2021 and the claim closed except for maintenance benefits.

19. On August 18, 2020 Respondents filed another FAL. Respondents' acknowledged that Claimant was entitled to receive reasonable, necessary and related medical maintenance treatment.

20. On September 8, 2020 unauthorized physician Daniel Koontz, M.D. prescribed Lyrica to Claimant. However, he did not document why he prescribed Lyrica and made no reference to Claimant's work injury.

21. On October 1, 2020 unauthorized provider David R. Conway, M.D., who identified himself as Claimant's primary care physician, prescribed Lyrica and a wheelchair on October 1, 2020. He recommended that Claimant play billiards to help treat balance issues and anxiety.

22. Unauthorized provider Hani Saeed, DPM from the Red Rocks Foot and Ankle Center, evaluated Claimant on October 22, 2020 for soreness of both feet. Based on Claimant's self-report, Dr. Saeed documented that Claimant "has a history of CRPS of the whole body," "has been experiencing CRPS since 2015," and recently had a ganglion injection to help with his CRPS. He also documented Claimant's subjective claims of improvement. Dr. Saeed did not offer an opinion that Claimant's work-related condition objectively changed or improved.

23. Unauthorized physician Andrew Wendahl, D.O. is an anesthesiologist, trained in pain management, who saw Claimant and his mother on February 24, 2021 for evaluation of what "has been previously diagnosed as a severe spreading case of CRPS in all four extremities." Dr. Wendahl referred Claimant for physical therapy and bilateral staged lumbar stellate blocks for CRPS of the lower limb and to Mental Health Center of Denver for coping with pain.

24. Drs. Koontz, Conway, Saeed and Wendahl are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and that he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, did not discuss whether any treatment they provided was work related, did not contend that Claimant's work related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer.

25. On November 9, 2021 Claimant underwent an independent medical examination with Scott Primack, D.O. After reviewing Claimant's medical records, considering surveillance video and conducting a physical examination, Dr. Primack determined that Claimant does not suffer from CRPS. He specified that a workup of Claimant did not reveal CRPS in the lower extremities and no physical diagnosis would correlate to Claimant's bizarre gait pattern on examination. He reasoned that Claimant suffers from significant psychological issues. In fact, Dr. Primack noted that Claimant has far more non-work-related psychiatric symptoms than work-related issues. He concluded that, "[w]ithout question, [Claimant] is still at MMI."

26. On January 14, 2022 the parties conducted the pre-hearing evidentiary deposition of John Raschbacher, M.D. Dr. Raschbacher noted that he became Claimant's ATP on June 10, 2019. He remarked that Claimant had a diagnosis of upper extremity CRPS at the time and had attained MMI. Although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations.

27. Dr. Raschbacher commented that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to self-reported pain to the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. He attributed Claimant's subjective complaints to pain behavior that could constitute malingering for secondary gain.

28. Claimant obtained two lumbar sympathetic blocks of his right side on February 5, 2021, a stellate ganglion block on his left side on April 9, 2021, and a stellate ganglion block on his right side on April 23, 2021. Dr. Raschbacher testified that none of the preceding blocks were related to Claimant's work injury. He summarized that Claimant's condition has not worsened and no additional medical treatment is reasonable, necessary, or related to the August 5, 2015 work injury.

29. Dr. Primack testified at the hearing in the present matter. He maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS. Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

30. Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. Moreover, there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 5, 2015 industrial injury and no ATP has recommended additional treatment.

31. Claimant testified at the hearing in this matter. He explained that he continually suffers pain that varies in intensity over time. Claimant noted that he also suffers psychologically in dealing with his intense pain and difficulties moving. He remarked that on April 23, 2021 he underwent stellate ganglion branch block injections regarding his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. Claimant's father, Richard Laughlin, also commented that Claimant has suffered changing levels of pain since he was diagnosed with CRPS in 2017.

32. Claimant seeks to reopen his claim based on the mistake or error of ALJ Turnbow in denying his request to overcome Dr. Yamamoto's DIME opinion. Claimant claims that he was placed at MMI solely because he initially denied stellate ganglion branch blocks. However, he later stated he wanted to undergo the treatment. He asserts that ALJ Turnbow's determination constituted a mistake because he not only wanted the block, but underwent the procedure and it improved his condition. Claimant remarked that the April 23, 2021 block into his upper extremities reduced his CRPS pain symptoms and improved his arm movement. He thus contends that getting the block completely negated the sole reason he was placed at MMI.

33. On January 27, 2021 the Industrial Claim Appeals Office (ICAO) affirmed ALJ Turnbow's decision that Claimant had failed to overcome Dr. Yamamoto's DIME opinion. The ICAO noted that ALJ Turnbow found that no ATP had requested authorization for Claimant to undergo stellate ganglion blocks. Moreover, Dr. Yamamoto did not recommend stellate ganglion blocks, but instead determined that Claimant was at MMI.

34. ALJ Turnbow's determination did not constitute a mistake or error because neither any ATP nor the DIME physician had requested authorization for Claimant to undergo stellate ganglion blocks. Claimant's decision to subsequently obtain stellate ganglion blocks does not render ALJ Turnbow's determination erroneous. Claimant simply decided, after his claim closed, to pursue treatment outside of the Workers' Compensation system and proceed with stellate ganglion blocks.

35. In *Sadaghiani v. Impressive Cleaners & Laundry*, W.C. No. 4-133-911 (ICAO, Apr. 18, 1997), aff'd *Sadaghiani v. Impressive Cleaners & Laundry*, 97 CA 0820 (Colo. App., Nov. 13, 1997) (not selected for publication) an ATP placed the claimant at MMI after she had refused to appear for multiple medical appointments, A DIME physician agreed that the claimant had reached MMI. Subsequently, the claimant was willing to undergo treatment. However, the ALJ found that the claimant failed to overcome the DIME physician's opinion regarding MMI. The Panel and Court of Appeals, upheld the ALJ's conclusion that the DIME physician's opinion was not overcome by clear and convincing evidence. Regardless of whether further treatment "could have" improved the claimant's condition, the evidence supported the ALJ's finding that the claimant did not demonstrate a willingness to participate in the treatment until a significant time after the determination of MMI. Consequently, the Panel determined there was substantial evidence that the claimant was at MMI as determined by the DIME without regard to whether she needed additional treatment for her neck and psychological conditions.

36. Based on the reasoning of *Sadaghiani*, Claimant here reached MMI on March 4, 2019 regardless of whether he wished to pursue stellate ganglion blocks outside the Workers' Compensation system. Claimant could have chosen to undergo stellate ganglion blocks prior to reaching MMI, but instead waited a significant time after attaining MMI to undergo the treatment. Furthermore, Dr. Raschbacher testified that none of Claimant's blocks were related to his work injury. Drs. Raschbacher and Primack also agreed that no additional medical care, including stellate ganglion blocks, is reasonable, necessary or work related. Accordingly, ALJ Turnbow's decision did not constitute a mistake that justifies reopening Claimant's claim.

37. Claimant contends that his condition has worsened because his CRPS has spread to his lower extremities since he reached MMI on March 4, 2019. He also asserts that, following stellate ganglion blocks in 2021, his condition improved and opened the door to additional work-related treatment modalities. Despite Claimant's contentions', the record reveals that he has failed to demonstrate by a preponderance of the evidence that his condition has changed and he is entitled to additional benefits.

38. The record reflects that Claimant does not suffer from lower body CRPS. Initially, on August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant had no signs of lower extremity CRPS other than hypersensitivity to touch. Dr. Raschbacher explained that, although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing the CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations. Finally, Dr. Primack maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS.

39. Claimant obtained medical treatment from Drs. Koontz, Conway, Saeed and Wendahl. However, they are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. Moreover, Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon specific criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

40. Claimant remarked that on April 23, 2021 he underwent a stellate ganglion branch block injection involving his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. However, Claimant's testimony that his symptoms subjectively improved after undergoing stellate ganglion blocks from an unauthorized physician outside of the claim is not reliable based on his history of pain behavior as documented in the record. Dr. Raschbacher specifically characterized Claimant's pain behavior as possible malingering for secondary gain. Dr. Primack noted that Claimant has far more non-work-related psychiatric issues than "work-related ones." Moreover, Claimant does not meet the criteria for stellate ganglion blocks. Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. He also remarked that there is no need for a stellate ganglion block for Claimant's work injury. Dr. Raschbacher agreed that the blocks were not work-related.

41. Claimant has thus failed to establish that it is more probably true than not that his work related medical condition has changed since he reached MMI on March 4, 2019. The record reveals that his CRPS has not spread to his lower extremities and stellate ganglion blocks through unauthorized physicians have not changed his condition. As Dr. Primack summarized, "[w]ithout question, [Claimant] is still at MMI." Based on a review of the record and persuasive opinions of Drs. Schakaraschwili, Raschbacher and Primack, Claimant's condition has not changed since he reached MMI on March 4, 2019. Consequently, Claimant's request to reopen his claim is denied and dismissed.

42. Respondents have established that it is more probably true than not that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury. Initially, Insurer filed a FAL acknowledging that Claimant reached MMI on March 4, 2019 with a 15% whole person impairment rating and noting that he was entitled to reasonable and necessary medical maintenance benefits. Because Respondents now seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's August 25, 2015 industrial injury or prevent further deterioration of his condition.

43. The medical records as well as persuasive opinions of Drs. Raschbacher and Primack reflect that additional medical maintenance benefits are no longer reasonable, necessary or related to Claimant's industrial injury. Dr. Raschbacher testified that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to the self-reporting of pain with the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. Dr. Schakaraschwili also explained that CRPS can resolve over time. Dr. Primack emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time. He testified that

there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 25, 2015 industrial injury. Furthermore, no ATP has recommended additional treatment.

44. Notably, unauthorized physicians Drs. Koontz, Conway, Saeed and Wendahl did not appear aware that Claimant's work related diagnosis is mild CRPS of the upper extremities and he suffers from significant non-work related psychological issues. The preceding physicians did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. The opinions of the unauthorized providers are thus not persuasive. The preceding chronology and persuasive opinions of ATP Dr. Raschbacher and Dr. Primack reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's work injury. Instead, Claimant's continuing symptoms are attributable to his subjective complaints that do not correlate with objective findings as documented in the medical records. Accordingly, Respondents' request to terminate Claimant's medical maintenance benefits as a result of his August 25, 2015 industrial injury is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reopening

4. At any time within six years of the date of injury, an ALJ may reopen any award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. Claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Off.*, 996 P.2d. 756, 758 (Colo. App. 2000).

Error or Mistake

5. Reopening of a closed claim may be granted based on any mistake of fact §8-43-303(1), C.R.S. Error or mistake refers to a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. *Renz v. Larimer Cty. School Dist.,* 924 P.2d 1177 (Colo. App. 1996). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Insurance Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening the ALJ may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Klosterman v. Indus. Comm'n*, 694 P.2d 873, 876 (Colo. App.1984). The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 189 (Colo. App. 2002).

6. As found, Claimant seeks to reopen his claim based on the mistake or error of ALJ Turnbow in denying his request to overcome Dr. Yamamoto's DIME opinion. Claimant claims that he was placed at MMI solely because he initially denied stellate ganglion branch blocks. However, he later stated he wanted to undergo the treatment. He asserts that ALJ Turnbow's determination constituted a mistake because he not only wanted the block, but underwent the procedure and it improved his condition. Claimant remarked that the April 23, 2021 block into his upper extremities reduced his CRPS pain symptoms and improved his arm movement. He thus contends that getting the block completely negated the sole reason he was placed at MMI.

7. As found, on January 27, 2021 the Industrial Claim Appeals Office (ICAO) affirmed ALJ Turnbow's decision that Claimant had failed to overcome Dr. Yamamoto's DIME opinion. The ICAO noted that ALJ Turnbow found that no ATP had requested authorization for Claimant to undergo stellate ganglion blocks. Moreover, Dr. Yamamoto did not recommend stellate ganglion blocks, but instead determined that Claimant was at MMI.

8. As found, ALJ Turnbow's determination did not constitute a mistake or error because neither any ATP nor the DIME physician had requested authorization for Claimant to undergo stellate ganglion blocks. Claimant's decision to subsequently obtain stellate ganglion blocks does not render ALJ Turnbow's determination erroneous. Claimant simply decided, after his claim closed, to pursue treatment outside of the Workers' Compensation system and proceed with stellate ganglion blocks.

9. As found, in *Sadaghiani v. Impressive Cleaners & Laundry*, W.C. No. 4-133-911 (ICAO, Apr. 18, 1997), aff'd *Sadaghiani v. Impressive Cleaners & Laundry*, 97 CA 0820 (Colo. App., Nov. 13, 1997) (not selected for publication) an ATP placed the claimant at MMI after she had refused to appear for multiple medical appointments, A DIME physician agreed that the claimant had reached MMI. Subsequently, the claimant was willing to undergo treatment. However, the ALJ found that the claimant failed to overcome the DIME physician's opinion regarding MMI. The Panel and Court of Appeals, upheld the ALJ's conclusion that the DIME physician's opinion was not overcome by clear and convincing evidence. Regardless of whether further treatment "could have" improved the claimant's condition, the evidence supported the ALJ's finding that the claimant did not demonstrate a willingness to participate in the treatment until a significant time after the determination of MMI. Consequently, the Panel determined there was substantial evidence that the claimant was at MMI as determined by the DIME without regard to whether she needed additional treatment for her neck and psychological conditions.

10. As found, based on the reasoning of *Sadaghiani*, Claimant here reached MMI on March 4, 2019 regardless of whether he wished to pursue stellate ganglion blocks outside the Workers' Compensation system. Claimant could have chosen to undergo stellate ganglion blocks prior to reaching MMI, but instead waited a significant time after attaining MMI to undergo the treatment. Furthermore, Dr. Raschbacher testified that none of Claimant's blocks were related to his work injury. Drs. Raschbacher and Primack also agreed that no additional medical care, including stellate ganglion blocks, is reasonable, necessary or work related. Accordingly, ALJ Turnbow's decision did not constitute a mistake that justifies reopening Claimant's claim. *See Indus. Claim Appeals Off. v. Cutshall*, 433 P.2d. 765 (Colo. 1967) (noting that ALJ may consider whether the mistake could have been rectified by the timely exercise of a party's rights prior to closure of the claim, not where it is used as a method of circumventing the ordinary adjudicative processes available prior to closure).

Change in Condition

11. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

12. As found, Claimant contends that his condition has worsened because his CRPS has spread to his lower extremities since he reached MMI on March 4, 2019. He also asserts that, following stellate ganglion blocks in 2021, his condition improved and opened the door to additional work-related treatment modalities. Despite Claimant's contentions, the record reveals that he has failed to demonstrate by a preponderance of the evidence that his condition has changed and he is entitled to additional benefits.

13. As found, the record reflects that Claimant does not suffer from lower body CRPS. Initially, on August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant had no signs of lower extremity CRPS other than hypersensitivity to touch. Dr. Raschbacher explained that, although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing the CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations. Finally, Dr. Primack maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS.

14. As found, Claimant obtained medical treatment from Drs. Koontz, Conway, Saeed and Wendahl. However, they are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. Moreover, Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon specific criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

15. As found, Claimant remarked that on April 23, 2021 he underwent a stellate ganglion branch block injection involving his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. However, Claimant's testimony that his symptoms subjectively improved after undergoing stellate ganglion blocks from an unauthorized physician outside of the claim is not reliable based on his history of pain behavior as documented in the record. Dr. Raschbacher specifically characterized Claimant's pain behavior as possible malingering for secondary gain. Dr. Primack noted that Claimant has far more non-work-related psychiatric issues than "work-related ones." Moreover, Claimant does not meet the criteria for stellate ganglion blocks.

Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. He also remarked that there is no need for a stellate ganglion block for Claimant's work injury. Dr. Raschbacher agreed that the blocks were not work-related.

16. As found, Claimant has thus failed to establish by a preponderance of the evidence that his work related medical condition has changed since he reached MMI on March 4, 2019. The record reveals that his CRPS has not spread to his lower extremities and stellate ganglion blocks through unauthorized physicians have not changed his condition. As Dr. Primack summarized, "[w]ithout question, [Claimant] is still at MMI." Based on a review of the record and persuasive opinions of Drs. Schakaraschwili, Raschbacher and Primack, Claimant's condition has not changed since he reached MMI on March 4, 2019. Consequently, Claimant's request to reopen his claim is denied and dismissed.

Medical Maintenance Benefits

17. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.") Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

18. As found, Respondents have established by a preponderance of the evidence that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury. Initially, Insurer filed a FAL acknowledging that Claimant reached MMI on March 4, 2019 with a 15% whole person impairment rating and noting that he was entitled to reasonable and necessary medical maintenance benefits. Because Respondents now seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's August 25, 2015 industrial injury or prevent further deterioration of his condition.

19. As found, the medical records as well as persuasive opinions of Drs. Raschbacher and Primack reflect that additional medical maintenance benefits are no longer reasonable, necessary or related to Claimant's industrial injury. Dr. Raschbacher testified that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to the self-reporting of pain with the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. Dr. Schakaraschwili also explained that CRPS can resolve over time. Dr. Primack emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time. He testified that there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 25, 2015 industrial injury. Furthermore, no ATP has recommended additional treatment.

20. As found, notably, unauthorized physicians Drs. Koontz, Conway, Saeed and Wendahl did not appear aware that Claimant's work related diagnosis is mild CRPS of the upper extremities and he suffers from significant non-work related psychological issues. The preceding physicians did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. The opinions of the unauthorized providers are thus not persuasive. The preceding chronology and persuasive opinions of ATP Dr. Raschbacher and Dr. Primack reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's work injury. Instead, Claimant's continuing symptoms are attributable to his subjective complaints that do not correlate with objective findings as documented in the medical records. Accordingly, Respondents' request to terminate Claimant's medical maintenance benefits as a result of his August 25, 2015 industrial injury is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

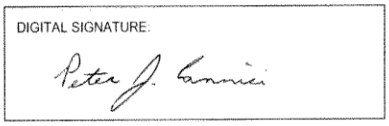
1. Claimant's request to reopen his August 25, 2015 Workers' Compensation claim based on mistake or error, or change of condition is denied and dismissed.

2. Respondents' request to terminate Claimant's medical maintenance benefits is granted.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 25, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the surgery he underwent with Kerry G. Perloff, M.D. at Kaiser Permanente on October 14, 2021 was authorized as emergency care.

2. Whether Claimant has established by a preponderance of the evidence that the follow-up care he received with Dr. Perloff at Kaiser was authorized.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a disfigurement award for his left forearm pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant began working with Employer's police department during June 2016 and transferred to the fire department as a paramedic in January 2019. Shortly before the end of his shift on the morning of October 6, 2021 Claimant suffered an admitted industrial injury. While carrying two large medical kits he felt a "small pop" in his left elbow. Because his shift had ended for the week, Claimant did not immediately report the injury and decided to see if his condition improved during his time off. Claimant engaged in normal day-to-day activities during October 7-9, 2021.

2. On Sunday October 10, 2021 while working in his garage, Claimant extended his arm, lifted it and heard a loud pop that necessitated medical care. Claimant sought treatment at Kaiser Permanente at 2:11 p.m. The Kaiser records reflect that its urgent care department was not an emergency room, emergency department or hospital. The urgent care department characterized the acuity of Claimant's condition as "4 Non-urgent." He was examined by Donna M. Benton, PA. Claimant's examination revealed no edema, deformity, or bony tenderness and he displayed good grip strength, full extension of the elbow, and was neurovascularly intact. PA Benton diagnosed Claimant with left arm pain and a left biceps strain. He underwent an x-ray, received 12 tablets of oxycodone and was discharged to return home. PA Benton recommended "follow-up with the acute orthopedic clinic in the next week or so."

3. After Claimant left the Kaiser offices on October 10, 2021, he reported an on-the-job injury to his supervisor. On Monday, October 11, 2021 he completed a First Report of Injury for Employer.

4. On October 11, 2021 Claimant was evaluated by Employer's designated Authorized Treating Physician (ATP) Jennifer Briggs, PA, at Rocky Mountain Medical Group (RMMG). PA Briggs obtained a patient history and conducted a physical examination. She recommended an MRI of the left upper arm and elbow. PA Briggs assessed the injury as moderate, acute and uncomplicated.

5. On October 12, 2021 Claimant returned to Kaiser where Christopher R. Jockel, M.D. diagnosed a left distal bicep tendon tear. One of the indicators for the repair was whether the date of injury was less than 28 days. Dr. Jockel recommended an MRI to confirm whether the distal biceps tear was partial or complete. He noted "we discussed ongoing treatment options based on this injury including operative and non-operative care."

6. After his visit with Kaiser on October 12, 2021, Claimant had a 45 minute to one hour conversation with Respondent's adjuster BO[Redacted]. Claimant explained that Mr. BO[Redacted] informed him that he could not approve anything until he received medical records from Kaiser. Claimant testified that Mr. BO[Redacted] stated that if it was him "he would do surgery" and not wait for the Workers' Compensation system to determine compensability. Claimant told Mr. BO[Redacted] he had an MRI scheduled through Kaiser.

7. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Kerry G. Perloff, M.D. at Kaiser.

8. Claimant testified that he was very unhappy with the care he had received from ATP Briggs at RMMG. His care was subsequently transferred to Annu Ramaswamy, M.D.

9. Claimant spoke with Mr. BO[Redacted] on October 21, 2021. Mr. BO[Redacted] informed him that his claim had been accepted.

10. On October 21, 2021 Claimant visited ATP Dr. Ramaswamy for an evaluation. He told Dr. Ramaswamy that an MRI had been ordered at RMMG on October 11, 2021. Claimant remarked that "he was told" that the repair had to occur quickly or might not be successful. Dr. Ramaswamy noted that Claimant decided to see Dr. Perloff "on his own." One week later, Dr. Ramaswamy noted Claimant "states that he will see Dr. Perloff probably in 2 weeks as he is noticing more pain."

11. On December 9, 2021 Dr. Ramaswamy noted "patient states the surgeon recommended an EMG which he will have on Monday 12-13-21." Dr. Ramaswamy concluded his notes with the observation that "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic."

12. On January 13, 2022 Dr. Ramaswamy placed Claimant on modified duty effective January 31, 2022 noting that he could return to full duty once he was "able to lift heavy weight without noticing significant neuropathic pain." On January 28, 2022 Dr. Ramaswamy tested Claimant's capacity to lift and determined he was safe to return to work.

13. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel. Dr. Perloff acquiesced to Claimant's request on February 7, 2022. The note specifically provides:

> [Claimant] was seen at Kaiser Orthopedics on October 12/2021. Exam and MRI at that time showed a left distal biceps tendon rupture. Recommendations were made with distal biceps tendon repair in the next week or 2 as the longer post injury 1 waits the more difficult the repair is as the tendon will retract proximally. Surgery was performed on 10/14/2021 with a distal biceps tendon repair.

None of the records submitted by the parties contain any statements from Dr. Jockel regarding the need for surgery within a specific time frame.

14. On March 31, 2022 Dr. Ramaswamy determined that Claimant had reached Maximum Medical Improvement (MMI). He recounted the following:

> The patient was concerned that treatment through the Worker's Compensation system was taking some time and he was concerned about a ruptured biceps tendon. The patient apparently was told that the repair has to occur quickly or the repair may not be successful. He indicates today that he was told that if the repair did not occur within 7-10 days, then he could lose 40% of his arm function. A graft would then have to be performed and he would never reach 100% functional level. Therefore, he started treating with Kaiser.

15. On April 15, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Ramaswamy. Dr. Ramaswamy noted that he treated Claimant for a torn biceps tendon. He remarked that Claimant's torn biceps tendon was not a life-threatening, acute emergency. Dr. Ramaswamy commented that patients "rarely" visit an urgent care facility in an emergent situation. Instead, they tend to go directly to an emergency room.

16. Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering repairing a distal bicep rupture, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021 diagnosis of the retraction. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 injury.

17. Dr. Ramaswamy testified that, if Claimant had followed through with RMMG, an MRI would likely have been obtained within one week. Surgery would likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

18. Dr. Ramaswamy could have requested a stat MRI that would have been performed within 24 hours. Alternatively, an MRI could have been requested through normal channels with Respondent. In his experience, Respondent never gave him problems with delayed authorization and usually approved MRI requests within five days.

19. Dr. Ramaswamy explained that he never referred Claimant to a Kaiser physician. He wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. Dr. Ramaswamy specified that it did not make sense to refer Claimant to a different surgeon who did not perform the surgery. Furthermore, he would not defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. Finally, assuming the presence of a medical emergency, Kaiser treatment would have ended with the surgery.

20. BO[Redacted] testified at the hearing in this matter. He has been employed by Respondent to handle Workers' Compensation claims for the last six years and has a total of 16 years of experience. Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] said he understood Claimant's position, but advised that Kaiser was not an authorized provider for Respondent. He also noted that Kaiser does not handle Workers' Compensation injuries. According to Mr. BO[Redacted], Claimant said that he was proceeding with surgery and the attorneys could sort things out. He specifically recalled the statement because it is unusual for an injured worker to make a reference to litigation in the first call on a claim.

21. On October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant that there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

22. Mr. BO[Redacted] noted that Claimant's claim was not under a full denial, but was instead denied pending investigation. Under a denial pending investigation, conservative medical care, including MRIs, are usually paid. Mr. BO[Redacted] strives to respond to prior authorization requests within a few days.

23. Claimant testified that he was of the understanding and belief that the distal biceps tendon had to be repaired on a timely basis. Moreover, Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, he never discussed retaining an attorney during the October 12, 2021 phone conversation, he took the effort to get the Kaiser records to Mr. BO[Redacted], and he was not notified until October 21, 2021 that the claim had been accepted.

24. Claimant underwent surgery to his left upper extremity on October 14, 2021. The upper extremity surgery resulted in a single, unraised, horizontal, thin white scar of between 2½ and three inches in length and approximately ¼ inch in width across the bicep. Despite much of Claimant's arm being covered in tattoos, the scar is visible and

constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $600.00.

25. Claimant has failed to demonstrate that it is more probably true than not that the surgery he underwent with Dr. Perloff at Kaiser on October 14, 2021 was authorized as emergency care. Initially, Claimant testified that he suffered an injury near the end of his work shift on October 6, 2021. He did not immediately report the injury and engaged in normal day-to-day activities at home on October 7-9, 2021. On October 10, 2021 Claimant extended his arm, lifted it and heard a loud pop, which necessitated medical care. Claimant did not visit an emergency room or hospital. Rather, he sought medical attention through a Kaiser urgent care facility. While Claimant reported pain and discomfort, the x-rays were negative, he displayed good grip strength, was able to fully extend his elbow, and had no physical signs of edema or deformity that suggested a need for medical care. Kaiser assessed his condition as "non-urgent."

26. After being discharged by PA Benton at Kaiser, Claimant documented and reported his injury to Employer. He then scheduled follow-up appointments with Kaiser, attended an initial appointment with PA Briggs at RMMG and had a lengthy conversation with Mr. BO[Redacted]. Claimant met with Dr. Jockel at Kaiser on October 12, 2021. Contrary to Claimant's testimony, Dr. Jockel noted that he discussed operative and non-operative treatment options. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Dr. Perloff at Kaiser.

27. Based on the issue of timeliness in repairing his biceps rupture, Claimant asserts the existence of an emergency. Claimant specifically argues that surgery needed to be performed within 10-14 days from the date of injury. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel and Dr. Perloff acquiesced to Claimant's request on February 7, 2022. Claimant contends that, because he could not have had the surgery within 10-14 days of October 6, 2021 in the Workers' Compensation system, the Kaiser surgery was authorized under the emergency doctrine.

28. In contrast, Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering a distal bicep rupture repair, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 incident according to Dr. Ramaswamy.

29. Dr. Ramaswamy testified that, if Claimant had followed through with authorized provider RMMG, an MRI would likely have been obtained within one week. Surgery would then likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that

window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

30. On October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

31. Although a claimant is not required to seek authorization before obtaining medical treatment from an unauthorized medical provider in a medical emergency, the record reveals that Claimant's need for biceps rupture repair surgery did not constitute a *bona fide* emergency. The medical records and persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted] reflect that Claimant did not immediately require surgery through Kaiser rather than proceeding through the Workers' Compensation system. In reviewing the particular facts and circumstances of the present claim, Claimant could have obtained surgery within two to three weeks of his injury by proceeding through authorized provider RMGG. Accordingly, because Claimant's surgery through Kaiser was unauthorized, his request for reimbursement for the costs of emergency treatment is denied and dismissed.

32. Claimant has failed to establish that it is more probably true than not that the follow-up care he received with Dr. Perloff at Kaiser Permanente was authorized. Dr. Ramaswamy testified that he did not refer Claimant to Dr. Perloff or any provider at Kaiser. He specifically sent Claimant for physical therapy with a provider outside the Kaiser network. Furthermore, Dr. Ramaswamy prescribed medication rather than leaving prescriptions to other providers. He also refused to defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. In the absence of medical records from Kaiser, Dr. Ramaswamy exercised his independent medical judgment in terms of directing physical therapy and the imposition of work restrictions.

33. Dr. Ramaswamy acknowledged that he wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. He specified that it did not make sense to refer Claimant to another surgeon who did not operate on Claimant. Dr. Ramaswamy summarized the situation in his December 9, 2021 note when he stated "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic." The record thus reflects that Dr. Ramaswamy did not refer Claimant to Kaiser physicians for treatment.

34. Furthermore, Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] noted he understood Claimant's position, but advised that Kaiser was not an authorized provider. He also remarked that Kaiser does not handle Workers' Compensation injuries. Although Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, the persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted], as well as the medical records, reflect that Claimant's treatment through Kaiser was not authorized. Because Kaiser was not an

authorized provider, Claimant is not entitled to reimbursement for any expenses. Accordingly, Claimant's request for reimbursement for medical costs through Kaiser is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Benefits

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Emergency Doctrine

5. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP. However, medical services provided in a *bona fide* emergency are an exception to the requirement to obtain prior authorization. *Sims v. Indus. Claim Appeals Off.,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a *bona fide* medical emergency, it is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005); *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 384 (Colo. App. 2006).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the surgery he underwent with Dr. Perloff at Kaiser on October 14, 2021 was authorized as emergency care. Initially, Claimant testified that he suffered an injury near the end of his work shift on October 6, 2021. He did not immediately report the injury and engaged in normal day-to-day activities at home on October 7-9, 2021. On October 10, 2021 Claimant extended his arm, lifted it and heard a loud pop, which necessitated medical care. Claimant did not visit an emergency room or hospital. Rather, he sought medical attention through a Kaiser urgent care facility. While Claimant reported pain and discomfort, the x-rays were negative, he displayed good grip strength, was able to fully extend his elbow, and had no physical signs of edema or deformity that suggested a need for medical care. Kaiser assessed his condition as "non-urgent."

7. As found, after being discharged by PA Benton at Kaiser, Claimant documented and reported his injury to Employer. He then scheduled follow-up appointments with Kaiser, attended an initial appointment with PA Briggs at RMMG and had a lengthy conversation with Mr. BO[Redacted]. Claimant met with Dr. Jockel at Kaiser on October 12, 2021. Contrary to Claimant's testimony, Dr. Jockel noted that he discussed operative and non-operative treatment options. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Dr. Perloff at Kaiser

8. As found, based on the issue of timeliness in repairing his biceps rupture, Claimant asserts the existence of an emergency. Claimant specifically argues that surgery needed to be performed within 10-14 days from the date of injury. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel and Dr. Perloff acquiesced to Claimant's request on February 7, 2022. Claimant contends that, because he could not have had the surgery within 10-14 days of October 6, 2021 in the Workers' Compensation system, the Kaiser surgery was authorized under the emergency doctrine.

9. As found, in contrast, Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering a distal bicep rupture repair, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant

was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 incident according to Dr. Ramaswamy.

10. As found, Dr. Ramaswamy testified that, if Claimant had followed through with authorized provider RMMG, an MRI would likely have been obtained within one week. Surgery would then likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

11. As found, on October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

12. As found, although a claimant is not required to seek authorization before obtaining medical treatment from an unauthorized medical provider in a medical emergency, the record reveals that Claimant's need for biceps rupture repair surgery did not constitute a *bona fide* emergency. The medical records and persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted] reflect that Claimant did not immediately require surgery through Kaiser rather than proceeding through the Workers' Compensation system. In reviewing the particular facts and circumstances of the present claim, Claimant could have obtained surgery within two to three weeks of his injury by proceeding through authorized provider RMGG. Accordingly, because Claimant's surgery through Kaiser was unauthorized, his request for reimbursement for the costs of emergency treatment is denied and dismissed. *See Delfosse v. Home Services Heroes, Inc.*, WC 5-075-625 (ICAO, Apr. 26, 2021) (denying the claimant's request for authorization under the emergency doctrine because there was no persuasive evidence of acute issues or that the need for surgery was emergent and there was evidence that other treatment options were available and discussed between the patient and unauthorized provider); *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004) (determining that ALJ reasonably inferred the claimant failed to prove the need for treatment was so urgent that the claimant could not notify the employer of the injury before proceeding to emergency room for treatment).

Authorization

13. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized

treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. S*ee Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

14. As found, Claimant has failed to establish by a preponderance of the evidence that the follow-up care he received with Dr. Perloff at Kaiser Permanente was authorized. Dr. Ramaswamy testified that he did not refer Claimant to Dr. Perloff or any provider at Kaiser. He specifically sent Claimant for physical therapy with a provider outside the Kaiser network. Furthermore, Dr. Ramaswamy prescribed medication rather than leaving prescriptions to other providers. He also refused to defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. In the absence of medical records from Kaiser, Dr. Ramaswamy exercised his independent medical judgment in terms of directing physical therapy and the imposition of work restrictions.

15. As found, Dr. Ramaswamy acknowledged that he wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. He specified that it did not make sense to refer Claimant to another surgeon who did not operate on Claimant. Dr. Ramaswamy summarized the situation in his December 9, 2021 note when he stated "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic." The record thus reflects that Dr. Ramaswamy did not refer Claimant to Kaiser physicians for treatment.

16. As found, furthermore, Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] noted he understood Claimant's position, but advised that Kaiser was not an authorized provider. He also remarked that Kaiser does not handle Workers' Compensation injuries. Although Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, the persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted], as well as the medical records, reflect that Claimant's treatment through Kaiser was not authorized. Because Kaiser was not an authorized provider, Claimant is not entitled to reimbursement for any expenses. Accordingly, Claimant's request for reimbursement for medical costs through Kaiser is denied and dismissed.

Disfigurement

17. Section 8-42-108 (1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view" he may receive a disfigurement award "in addition to all other compensation benefits provided in this article." As found, Claimant underwent surgery to his left upper extremity on October 14, 2021. The upper extremity surgery resulted in a single, unraised,

horizontal, thin white scar of between 2 ½ and three inches in length and approximately ¼ inch in width across the biceps. Despite much of Claimant's arm being covered in tattoos, the scar is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Claimant has met his burden of proving entitlement to a disfigurement award in the amount of $600.00.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for reimbursement for the costs of emergency surgery through Kaiser is denied and dismissed.

2. Claimant's request for reimbursement for the costs of medical treatment through Kaiser is denied and dismissed.

3. Claimant shall receive an award of $600.00 in disfigurement benefits.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: May 27, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she is entitled to receive reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (Colo. App. 1988).

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her back arising out of the course of her employment as a pre-school teacher with Employer on October 11, 2018.

2. Following her injury, Claimant underwent a variety of conservative treatments with her authorized treating physicians (ATPs) and others. Claimant's initial ATP was Bruce Cazden, M.D., at Workwell. (Ex. C). Claimant remained under his care until she transferred to UCH where James Rafferty, D.O., assumed the role of ATP in July 2019. (Ex. D). In September 2019, Dr. Rafferty referred Claimant to John Tobey, M.D., at Spine West for evaluation of her lower back pain. (Ex. E). Ultimately, Claimant was diagnosed with a lumbar strain and facet syndrome. Claimant received facet joint injections in March 2020, which gave immediate relief but without a lasting response. (Ex. E). Later, in August 2020, Dr. Tobey recommended facet joint medial branch blocks to assess candidacy for possible radiofrequency ablation (RFA) procedures. (Ex. E).

3. On September 24, 2020, Claimant underwent a radiofrequency ablation (RFA) procedure on her lower back performed by Dr. Tobey. Claimant initially did not have improvement with the RFA procedure during the first week, but reported significant improvement after approximately two months. (Ex. D).

4. On December 31, 2020, Claimant saw her ATP, Dr. Rafferty. Dr. Rafferty placed Claimant at MMI effective that date. On January 26, 2021, Dr. Rafferty performed range of motion measurements and assigned Claimant a 14% spinal impairment rating. When discussing maintenance care, Dr. Rafferty stated: "No need for scheduled maintenance care at this time although she may require repeat radiofrequency ablation in the future if her medial branches regenerate." Thus, while Dr. Rafferty did not recommend immediate and ongoing maintenance care, he did acknowledge that maintenance care would be reasonably necessary if the effects of Claimant's RFA subsequently abated.

5. Claimant testified that prior to undergoing the RFA, her back pain level was 7/10, and that she had difficulty with standing, sitting, bending, and lifting. Claimant credibly testified that after the RFA, her pain was reduced to a 3/10, and that the length of time she could stand and sit improved, that she could bend more easily and lift greater amounts. Although these activities were improved, they were not resolved. Claimant

credibly testified that the RFA relieved her symptoms as described, but that the effects were not permanent and "wore off" after approximately seven months. Claimant also believes that the RFA increased her range of motion. She testified that by the time Dr. Feldman performed the DIME, the effects of the RFA had worn off, and her back pain had increased. Claimant currently has difficulty bending, sitting, standing, which she testified are now similar to her condition prior to undergoing the RFA. Since being placed at MMI Claimant has self-referred to acupuncture, chiropractic care, and massage, to address her condition, and which she has paid for herself. Claimant testified that she would like to return to Dr. Rafferty to determine if any additional treatment or modalities could improve her condition.

6. On July 7, 2021, Claimant saw Alicia Feldman, M.D., for a DIME. Dr. Feldman placed Claimant at MMI and assigned Claimant a permanent impairment rating. Dr. Feldman agreed that Dr. Rafferty's assignment of December 31, 2020 as the date of MMI was correct. During the course of the DIME, Dr. Feldman conducted range of motion measurements. Dr. Feldman's range of motion measurements demonstrated that Claimant's lumbar flexion range of motion had decreased since her December 31, 2020 visit with Dr. Rafferty. Although her measurements resulted in a greater impairment rating, Dr. Feldman elected to use Dr. Rafferty's range of motion measurements when assigning Claimant's permanent impairment rating. Dr. Feldman indicated she believed Dr. Rafferty's rating was a true reflection of Claimant's physiologic impairment. Dr. Feldman did not indicate that the range of motion measurements she obtained were invalid, only that she felt Dr. Rafferty's measurements "more accurately reflect her impairment." She also indicated she did not believe Claimant's RFA was successful because Claimant should have experienced a decrease in symptoms within 2-3 weeks, rather than two months as she reported to Dr. Rafferty. Consequently, she indicated that she did not believe a maintenance care was needed.

7. On July 19, 2021, Respondents filed a Final Admission of Liability, in which they admitted for a 14% whole person impairment and medical. Respondents specifically denied liability for maintenance care after MMI.

8. Respondents presented the testimony of John Burris, M.D., by deposition. Dr. Burris was admitted as an expert in occupational medicine. Dr. Burris performed a Rule 8 independent medical examination of Claimant at Respondent's request on November 3, 2020. He opined that Claimant had non-specific low back pain and no objective findings on examination. He further opined that Claimant reached MMI on May 24, 2019, with no basis for an impairment rating. On March 1, 2022, Dr. Burris issued an addendum to his November 3, 2020 report addressing whether Claimant required any post-MMI care. Dr. Burris indicated in his report and testimony that he does not believe Claimant requires maintenance care. In expressing this opinion, Dr. Burris primarily relied on the fact that Dr. Feldman did not recommend maintenance care, and that Dr. Rafferty did not recommend immediate maintenance treatment. Dr. Burris' opinion regarding the need for maintenance medical care is not persuasive. He testified that after an RFA procedure, a patient's nerves may regenerate within six to twelve months after the procedure.

9. On March 15, 2022, Sander Orent, M.D., performed a record review at Claimant's request and issued a report. (Ex. 1). Dr. Orent opined that it would be reasonable for Claimant to continue chiropractic and massage treatments, and to have repeat RFA's available to her.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

MEDICAL MAINTENANCE BENEFITS

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Claimant reached MMI on December 31, 2020, approximately three months after undergoing an RFA with Dr. Tobey on September 24, 2020. When he placed Claimant at MMI, Dr. Rafferty opined that Claimant may require maintenance treatment if the effects of the RFA abated and should be permitted to consult with Dr. Tobey to determine if additional RFAs would be appropriate. Both Dr. Rafferty and Dr. Burris acknowledged that the effects of the RFA could lessen if Claimant's nerves

regenerated. Dr. Burris credibly testified that this could occur approximately six to twelve months after an RFA. Claimant credibly testified that approximately seven months after undergoing the RFA (*i.e.*, approximately April 2021), her symptoms returned to the level she experienced prior to the RFA.

When Dr. Rafferty performed range of motion measurements in January 2021, (four months after the RFA) Claimant was still experiencing the benefits of the RFA. Approximately five months later, when Dr. Feldman evaluated Claimant, her range of motion measurements were valid and reflected a greater impairment than her condition at MMI. The credible evidence thus demonstrates that Claimant's condition deteriorated after January 25, 2021, more likely than not because the effects of the RFA lessened. Claimant also credibly testified that she continues to experience symptoms and that she has received acupuncture, massage, and chiropractic to help her back issues, although her condition has not improved significantly.

The pain relief and functional improvement Claimant experienced as a result of the RFA resulted in her being placed at MMI on December 31, 2020. When the effects of the RFA abated, Claimant's condition deteriorated to the same level as before the RFA. Moreover, Claimant credibly testified that she has benefited from the additional treatment she has procured on her own (*i.e*., acupuncture, chiropractic, massage, gym exercise). The evidence demonstrates it is more likely than not that additional medical treatment will aid in returning Claimant to the same functional status she experienced when she was placed at MMI, or to prevent further deterioration. The ALJ concludes that further medical treatment is reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of her condition.

Because no specific medical treatment has been requested by Claimant's ATP, the issue of whether any specific medical treatment should be authorized as medical maintenance benefits the ALJ is without jurisdiction to authorize any specific treatment. *See Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). The ALJ makes no findings or conclusions regarding the reasonableness, necessity, or relatedness of any specific treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all authorized medical treatment that is reasonably necessary to relieve the effects of Claimant's October 11, 2018 industrial injury or to prevent further deterioration of her condition.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 27, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-005-672-002

ISSUES

The issues set for determination included:

- Did Claimant prove his condition worsened, which supported reopening his claim?
- Did Claimant prove by a preponderance of the evidence that he is entitled medical benefits, namely a L4-L5 decompression with fusion, requested by authorized treating physician Brian Reiss, M.D.

PROCEDURAL SUMMARY

A Summary Order was issued on March 16, 2022. Claimant requested a full Order on or about March 21, 2021. After an extension of time was granted, Respondents filed amended proposed Findings of Fact, Conclusions of Law and Order on April 5, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant worked as a principal for Employer, a position he has held for four years.

2. Claimant's medical history was significant in that he had extensive treatment for lumbar pain. Prior to Claimant's admitted industrial injury in 2015, he received conservative treatment for low back pain from 2009-12. On November 3, 2009 Claimant was evaluated by C. Deno Pappas, M.D. at Denver Spine and reported a long history of back pain predating 2009 by many years. Claimant reported that two weeks prior to the evaluation he woke up with low back pain radiating into his right lower extremity with pain complaints at level 8-9/10. Dr. Pappas noted that Claimant's MRI of his lumbar spine revealed a large right sided L5-S1 disc extrusion and a bulge at L4-5. Dr. Pappas' assessment was: acute right S1 radiculopathy associated with large paracentral L5-S1 disc herniation.

3. Claimant had a follow-up evaluation with at Denver Spine with Gary Ghiselli, M.D. on September 3, 2010, at which time an injection was ordered for low back pain, that was performed on September 9, 2010. Dr. Ghiselli continued to follow Claimant, who received repeat injections in December 2010. Dr. Ghiselli recommended facet injections at the L4-5 and L5-S1 levels on December 7, 2011.

4. The ALJ found that the medical records reflected objective evidence of pathology at L5-S1, along with a disc bulge at L4-5 and degenerative changes at that level. Claimant reported bilateral lower extremity symptoms and received treatment for this pain.

5. Claimant continued to experience pain and Dr. Ghiselli's note on November 8, 2012 reflected increased symptoms in the lumbar spine. Dr. Ghiselli's assessments included: worsening back and bilateral posterior thigh pain; degeneration of lumbar or lumbosacral disc; lumbago; lumbosacral spondylosis without myelopathy; radiculitis.

6. An MRI of the lumbar spine done on November 15, 2012 showed interval development of a left-sided L5-S1 extrusion which contacted the left descending never roots in the subarticular zone. Samuel Scutchfield, M.D. compared the MRI films with the previous MRI and noted the previous right-sided disc herniation had subsided. Claimant had less degenerative changes at the L4-5 level.

7. Claimant underwent a L5-S1 right-sided microdiscectomy on December 5, 2012, which was performed by Dr. Ghiselli. The pre- and post-operative diagnoses were: herniated disc at the L5-S1 level; left-sided radiculopathy with associated weakness; right sided radiculitis and weakness.

8. Following the surgery, Dr. Ghiselli noted an improvement in symptoms, including that Claimant's right-sided extremity pain was gone. He initially had radiating pain in the left buttock and thigh, which was noted to have resolved in 2013. Claimant returned to Dr. Ghiselli on May 3, 2013, at which time Claimant reported his low back had intensified and significant degeneration was noted at L5-S1. Bilateral pain into both lower extremities was noted in Dr. Ghiselli's evaluation on December 12, 2013.

9. On January 11, 2014, Claimant underwent an MRI of the lumbar spine and the films were read by Vernon Chapman, M.D. Dr. Chapman's impression was: lower lumbar spine degenerative changes, which included posterior disc bulging and mild bilateral facet degenerative changes at L4-L5, with no significant central canal narrowing. The lateral recesses were partially effaced, with mild left and moderate right foraminal narrowing. Claimant had no residual disc protrusion at L5-S1, however, posterior disc bulging was present with endplate osteophyte formation and no significant spinal canal narrowing. Dr. Chapman stated the degenerative changes were most severe at L5-S1, with moderate to severe bilateral foraminal narrowing at that level; interval L5-S1 discectomy, no residual protrusion evident.

10. Claimant was evaluated by Dr. Ghiselli on January 14, 2014 for significant lower back pain and bilateral hip pain. Dr. Ghiselli's assessments were: status post L5-S1 microdiscectomy with complete resolution of leg pain-severe spondylosis at the L5-S1 level, with disk space collapse; degeneration of lumbar or lumbosacral intervertebral disc; lumbago; lumbosacral spondylosis without myelopathy; radiculitis, thoracic or lumbar sacral neuritis and radiculitis. Dr. Ghiselli recommended an anterior lumbar interbody fusion at L5-S1.

11. On January 22, 2014, Claimant underwent the anterior lumbar fusion, which was performed by Dr. Ghiselli. The pre- and post-operative diagnoses were the same: recurrent disc herniation at L5-S1; previous L5-S1 decompression; degenerative disc disease at L5-S1.

12. After the lumbar fusion surgery, Claimant initially had some pain in his right leg and then reported bilateral pain and weakness in his legs when he was evaluated at Kaiser on June 22, 2015. The MRI done on June 25, 2015 showed disc bulging above L4-5, as well as degenerative changes at L5-S1.[1] A CT scan confirmed that the fusion was intact. On October 8, 2015, Claimant underwent a lumbar epidural steroid injection at L4-5 to treat bilateral radicular pain. The medical records reflected a reduction in Claimant's symptom after the procedure, which led the ALJ to infer there was an anatomic basis for these complaints.

13. On December 14, 2015, Claimant suffered an admitted industrial injury while working for Employer and occurred when he was removing a disruptive student with another teacher. Claimant fell to the ground and felt pain in his low back. The ALJ found this injury was an aggravation of his pre-existing back condition.[2]

14. As a result of the injury, Claimant received conservative treatment for pain in his lower back, on both the left and right side that was documented in the medical records. Claimant testified the December 14, 2015 incident caused an increase of left-sided low back and leg symptoms.

15. Claimant underwent an MRI of the lumbar spine on January 22, 2016 and the indication was left-sided sciatica. The films were read by Kim Baker, M.D., whose impression was: post-operative changes at L5-S1 without evidence of complication; left paracentral disc protrusion with inferiorly extruded fragment at L4-5 that caused significant compression of the left L5 nerve root; no pathologic enhancement following contrast material. The ALJ found this MRI provided objective evidence of injury at the L4-5 level.

16. Following the MRI, Claimant was evaluated by Dr. Reiss on January 27, 2016. At that time, he was complaining of left-sided radiculopathy and numbness in his leg. Dr. Reiss noted the most significant finding on the MRI was a herniated disc at L4-5 centrally and left with an extruded fragment behind the body of L5, which affected the L5 nerve root. Dr. Reiss recommended an L4-L5 microdiscectomy on the left.

17. In the interim, Claimant was evaluated at Kaiser Permanente on April 26, 2016, at which a lumbar ESI, was recommended.

18. Dr. Reiss performed the microdiscectomy on June 7, 2016. The level of the surgery was L4-L5.

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[1] Exhibit CC, pp. 96-97.

[2] The parties agreed the aggravation of Claimant's low back condition was compensable and entered into a Stipulation, dated June 10, 2016. The Stipulation specifically provided that the claim was limited to the herniated disc at L4-5 and Respondent agreed to authorize a microdiscectomy at this level with Dr. Reiss. [Exhibit A].

19. Claimant received rehabilitative treatment, including physical therapy ("PT") after the surgery.[3]

20. Tomm Vanderhorst, M.D., concluded Claimant reached MMI on March 13, 2017. At that time, Claimant was working his regular job, was increasing his level of activity and not taking medications. Claimant reported occasional aching in his left calf when he walked up hill. Dr. Vanderhorst's assessment was L4-5 disc rupture with L5 radiculopathy/myelopathy, status post L4-5 discectomy; prior L5-S1 discectomy with subsequent anterior interbody fusion; history of C6-7 discectomy with anterior fusion and intermittent cervicalgia; history of gout; history of exercise-induced asthma; prediabetes; hyperlipidemia.

21. Dr. Vanderhorst assigned a 23% whole person impairment for the lumbar spine, which included a Table 53 II (e) diagnosis and loss of range of motion. Dr. Vanderhorst recommended maintenance treatment, which included chiropractic manipulation and massage.

22. Although Claimant had significant improvement in his symptoms, there was no evidence in the record he was completely symptom-free from the date of MMI forward.

23. On April 13, 2017, a Final Admission of Liability ("FAL") was filed on behalf of Respondent. Respondent admitted to a 18% whole person impairment rating person pursuant to a Stipulation of the parties. Respondent admitted to post-MMI medical treatment, which was reasonable, necessary and related in accordance with Dr. Vanderhorst's report.

24. Claimant filed a response to the FAL on April 25, 2017, in which he accepted the *Grover* medical benefits admitted to in the FAL.

25. Claimant received treatment for low back pain and right sciatica at Kaiser on March 27, 2018. This note reflected increased symptoms after a motor vehicle accident in November 2017. Claimant was referred for PT. Claimant had increased right lateral hip and thigh, as well as low back pain. Neurosurgeon Christopher Kudron, M.D.'s assessment at the time of the May 21, 2018 evaluation was: lumbar spondylosis, arthropathy of lumbar facet and greater trochanteric pain syndrome. An MRI of the lumbar spine was done on June 7, 2018, which showed left hemilaminectomy post-surgical changes at L4-5, with a circumferential disc bulge with superimposed small left paracentral disk protrusion.

26. After MMI, Claimant was referred to Dr. Zimmerman for injections for low back symptoms. In the June 25, 2018 report, Dr. Zimmerman noted Claimant was allowed re-evaluation, chiropractic, epidural injections or other procedures as needed for the next

[3] Dr. Vanderhorst noted the Dr. Reiss' notes reflected that the surgery resolved Claimant's left lower extremity symptoms of pain weakness and parasthesias. Claimant had no work restrictions as of September 15, 2016. (Exhibit NN, p.127.)

five years. The ALJ inferred Dr. Zimmerman was of the belief Claimant would continue to require maintenance treatment for his low back related to the work injury.

27. Claimant received maintenance treatment in the form of massage therapy, chiropractic treatment and injections in 2018-2019. Dr. Zimmerman performed bilateral medial L4-5 medial branch block injections on July 3, 2018 and noted Claimant had a diagnostic response. Repeat bilateral L4-5 medial branch blocks of the facet joints were performed on August 1, 2018. The evaluation on August 6, 2018 noted a diagnostic response and Claimant reported no significant pain. The bilateral injections were evidence that Claimant required treatment on the right and left side. The ALJ inferred at least some of the treatment provided by Dr. Zimmerman was paid for by Respondent.

28. Dr. Zimmerman performed bilateral L4-5 radio frequency neurotomy on September 5, 2018, which resolved left-sided pain. Claimant had persistent right low back pain and radiation to the thigh and posterior calf. Dr. Zimmerman performed a right L5-S1 medial branch block of the facet joint, with no post-procedural pain and increased mobility documented in the report.

29. On or about June 14, 2019, ALJ Felter issued Findings of Fact, Conclusions of Law and Order for a hearing which took place on May 29, 2019. The issue was whether Claimant waived his right to seek medical benefits for treatment of his L5–S1 disc. ALJ Felter concluded Claimant did not waive his right to receive treatment in that area. ALJ Felter ordered Respondent to pay the cost of treatment recommended by ATP Rick Zimmerman, D.O.[4]

30. There was no evidence in the record that the June 14, 2019 Order was appealed.

31. Dr. Zimmerman performed radio frequency ablation of L4-5 and L5-S1 levels on July 29, 2019. The report said this procedure provided relief of Claimant's symptoms and was considered diagnostic.

32. On December 11, 2019, Claimant underwent a lumbar MRI. The films were read by Jeffrey Weingardt, M.D. Dr. Weingardt's impression was: multifactorial mild to moderate central canal stenosis at L4-L5, with lateral foraminal stenosis; slight retrolisthesis of L4 upon L5; moderately advanced spondylosis at L4-L5 with early changes of spondylolysis in the upper and mid lumbar spine as described; posterior paraspinous and psoas muscles atrophy; osseus interbody fusion at L5–S1.

33. Claimant returned to Dr. Reiss on February 19, 2020 at which time Claimant reported that most of his right lower extremity pain was relieved after the L4 injection (performed by Dr. Zimmerman on February 5, 2020) and with time his pain returned. Dr. Reiss stated Claimant could live with the situation or consider surgical intervention. The ALJ inferred Claimant did not have intractable pain at this point in time and did not provide

[4] Exhibit 3.

a rationale as to why the surgery was necessary at this time. The ALJ also inferred that the evaluation by Dr. Reiss was paid for by Respondent.

34. Dr. Reiss issued a report (WCM-164), dated February 20, 2020 in which he noted authorization would be sought for surgery. The ALJ found Dr. Reiss did not say surgery was required to maintain MMI or that Claimant was no longer at MMI. Dr. Reiss did not specify that how the proposed surgery would increase Claimant's level of functioning or reduce symptoms.

35. Based upon Claimant's post-MMI treatment with ATP-s Drs. Zimmerman and Reiss, the ALJ inferred at least some of the treatment was paid for by Respondent. The evidence is unclear that medical benefits were ever closed in this case.

36. Carlos Cebrian, M.D. completed a supplemental record review, dated March 13, 2020. Dr. Cebrian's diagnoses that were claim-related included: lumbar strain with new left paracentral disc protrusion at L4-5 with an inferiorly extruded fragment. The fragment extended downward 15 mm in the lateral recess and there was significant compression on the left L5 nerve root and the June 7, 2016 surgery was referenced.

37. Dr. Cebrian opined that Claimant's complaints were left-sided and secondary to a left-sided nerve root compression, which was treated surgically by Dr. Reiss. Dr. Cebrian stated Claimant had an intervening injury on November 20, 2017 in which he was rear ended and he had primarily right sided complaints, as documented in the Kaiser records. Dr. Cebrian stated that it was medically probable that Dr. Reiss' request for the L4-5 fusion, with decompression of the right sided L4 and L5 nerve roots should be denied as the right sided nerve roots were not causally related to the December 14, 2015 claim.

38. Dr. Cebrian testified as an expert at hearing. His testimony was consistent with the conclusions in his reports. Dr. Cebrian testified that the recommended surgery is an elective procedure and that it was not medically probable that the fusion will cure and relieve Claimant from his chronic back pain or to make him more functional. This particular opinion was persuasive to the ALJ. In support of his opinion that the fusion is not medically reasonable and necessary, Dr. Cebrian opined that the Claimant's pre-diabetic status and morbid obesity rendered him less likely to have a positive outcome from the fusion. He said Claimant's prior history of failed back surgeries was further evidence that the fusion is less likely to successfully relieve Claimant's pain complaints. Dr. Cebrian recommended that for the Claimant to relieve his back pain he should focus on weight loss, a directed exercise program and get his pre-diabetes under control. Dr. Cebrian testified that he would expect Claimant to experience some pain relief with weight loss.

39. On or about March 16, 2020, Respondent denied the requested authorization for surgery based upon the report of Dr. Cebrian.

40. Claimant was evaluated by Dr. Vanderhorst on June 11, 2020, at which time he reported persistent right radicular symptoms, as well as a recurrence of left radicular symptoms. At that time, Claimant sat with a good posture and moved with a normal gait. Increased pain was noted with extension and lateral flexion ROM testing. Dr. Vanderhorst's assessment was: lumbar facet joint pain; bilateral low back pain with bilateral sciatica; lumbar radiculopathy. Claimant was referred for massage/chiropractic treatments and the prescription for Gabapentin was refilled. Dr. Vanderhorst did not definitively state Claimant was no longer at MMI. Dr. Vanderhorst did not offer an opinion whether Claimant required additional treatment in the form of the proposed surgery.

41. Evidence of surveillance video taken of Claimant on August 1 and 2, 2020 was admitted into evidence. The video showed various activities in which Claimant sat at a table in a restaurant, performed various chores outside and rode an ATV. The video showed Claimant able to do the following:

- August 1, 2020 at 10:11 a.m.: kneeling, bending, working in yard.
- August 1, 2020 at 12:05 p.m.: walked around hardware store, carried box in right hand what appears to be hose or wire in left.
- August 1, 2020 at 12:40 p.m.: walking up a hill with bucket, kneeling.
- August 1, 2020 at 1:16 p.m.: working on fence, including pulling with pliers.
- August 1, 2020 at 1:32 p.m.: riding ATV, able to get off and on the ATV.
- August 2, 2020 at 8:38 a.m.: carrying a box taken out of truck bed.
- August 2, 2020 at 8:57 a.m.: casting a fishing pole with dog toy on end, throwing dog toy into pond.
- August 2, 2020 at 12:47 p.m.: walking around Costco, pushing cart.
- August 2, 2020 at 1:28 p.m.: walking around Walmart, carried plastic basket to truck.

42. The ALJ found Claimant was able to do the activities depicted in the surveillance video on August 1 and 2, 2020 without observable difficulty.

43. Claimant testified that he now uses an ATV more to get around his property because walking is more difficult due to increased pain. Claimant said he wants to undergo the fusion surgery.

44. Claimant did not prove that the proposed lumbar fusion surgery was reasonable and necessary.

45. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of whether Claimant was entitled to medical benefits turned on the opinions offered by the physicians in the case.

Reopening

Section 8-43-303(1), C.R.S. (2020), provides that an ALJ may reopen any award within six years on the grounds of error, mistake, or a change in condition. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ["change in condition" refers either to a change in condition of original compensable injury or to change in claimant's physical or mental condition which can be causally connected to original compensable injury].

As determined in Findings of Fact 2-12, Claimant had an extensive history of treatment for his lumbar spine, including treatment for pain at the L4-5 and L5-S1 levels. The treatment Claimant received included a microdiscectomy performed by Dr. Ghiselli, on December 5, 2012 for a herniated disc at L5-S1 and radiculopathy with associated weakness. (Finding of Fact 7). Claimant underwent a lumbar fusion on January 22, 2014, also at the L5-S1 level. (Finding of Fact 11). Claimant treated for bilateral radicular pain and received a lumbar epidural steroid injection in October 2015. (Finding of Fact 12). The bilateral leg pain (post-surgery) was evidence from which the ALJ could infer there was an anatomic basis for these complaints. *Id.*

The admitted injury Claimant suffered to his low back on December 14, 2015 was superimposed on this complicated medical history. (Finding of Fact 13). The ALJ determined that the 2015 injury aggravated the condition of his low back, which required treatment. *Id.* The medical records admitted at hearing documented Claimant initially

received conservative treatment for this injury. (Finding of Fact 14). Clamant then underwent a microdiscectomy, which was performed by Dr. Reiss. (Finding of Fact 18).

As found, Claimant reached MMI in 2017 and Respondent admitted for *Grover* medical benefits in the FAL. (Findings of Fact 20, 23). The medical records admitted into evidence established Claimant had increased symptoms in the lumbar spine which required treatment after MMI. (Findings of Fact 25-32). The records admitted into evidence reflected Claimant continued to receive treatment in 2018-2019, which included bilateral medial L4-5 medial branch block injections. Evidence of symptoms on both the right and left side was found in Dr. Vanderhorst's June 11, 2020 report. (Finding of Fact 40). Although the record was not completely clear, the ALJ inferred that because Claimant continued to receive treatment from ATP-s in the worker's compensation claim, including Drs. Zimmerman and Vanderhorst, Respondent most probably paid for those benefits. (Findings of Fact 27, 33). Under the evidence in the record, it is more probable than not that the medical benefits portion of the claim was never "closed".

Even assuming *arguendo* the claim was closed, Claimant's ATP-s recommended the treatment he received for increased low back symptoms. (Finding of Fact 27-28). Claimant's testimony also supported this conclusion. To the extent the claim was closed, the ALJ concluded Claimant proved by the preponderance of the evidence that his condition worsened over time and he was entitled to additional maintenance treatment.

Medical Benefits

The question presented in this case was whether Claimant satisfied his burden of proof that the proposed surgery was reasonable and necessary, as well was related to the 2015 injury. Claimant argued his condition worsened and the request for the fusion at L4-L5 was related to the natural degeneration of Claimant's admitted December 14, 2015 injury. Claimant also asserted that he has had the same treating physician since 2015, was on medical maintenance care at the direction of ATP Vanderhorst and has been receiving injections through ATP Zimmerman. Claimant pointed to the fact it was a referral from ATP Zimmerman to ATP Reiss that resulted in the request for a fusion at L4-L5. On this basis, Claimant argued the surgery should be authorized.

Respondent contended that the proposed L4-5 fusion surgery was not reasonable, necessary and/or causally related for treatment of Claimant's December 14, 2015 work injury, which aggravated his low back condition. Respondent argued the December 14, 2015 industrial accident caused Claimant's L4-5 disc to suffer a left sided herniation and Claimant did not prove the left sided herniation to the L4-5 disc caused a resulting worsening resulting in the current need for the fusion surgery. Respondent relied upon Dr. Cebrian's opinion that the need for the fusion procedure was more likely causally related to the pre-existing fusion which has caused adjacent segment disease, pre-existing degenerative disc disease, and/or the intervening MVA, than to the December 14, 2015.

Respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. (2020); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When Respondent has admitted for maintenance treatment, it is may still contest liability for particular medical benefit. *Id.* Claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *Grover v. Industrial Commission,* 759 P.2d 705, 721 (Colo. 1988).

In the case at bench, that ALJ determined Claimant did not meet his burden of proof to show the proposed fusion surgery was reasonable and necessary. (Finding of Fact 44). The ALJ's rationale was two-fold when concluding Claimant did not meet this burden. First, the medical records, including the report of Dr. Reiss did not establish that the surgery was reasonable and necessary at this time. (Findings of Fact 33-34). As found, Dr. Reiss did not provide explication or in detail as to why he believed Claimant required surgery at that point in time. *Id.* Nor was there evidence that Claimant's pain was intractable at that time. *Id.* The ALJ credited Dr. Cebrian's opinion on whether the surgery was reasonable and necessary. (Finding of Fact 38). In addition, Claimant had received injections and other treatment as part of maintenance, which provided symptom relief. In addition, there was evidence in the record that Claimant was able to perform different activities, including work around his property, which showed a level of functionality. (Findings of Fact 27, 33). On this basis, Claimant did not demonstrate the proposed surgery was reasonable and necessary.

Second, the ALJ reviewed the DOWC MTG when coming to this decision. The DOWC Medical Treatment Guidelines applicable to this procedure provide as follows:

> "G. THERAPEUTIC PROCEDURES – OPERATIVE
>
> In order to justify operative interventions, clinical findings, clinical course, and diagnostic tests must **all** be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions and in most cases a specific site of nerve root compression, spinal cord compression, or spinal instability… [Emphasis in original].[5]
>
> 4. SPINAL FUSION (USUALLY COMBINED WITH DECOMPRESSION): a.
>
> Description: Use of bone grafts, sometimes combined with instrumentation, to produce a rigid connection between two or more adjacent vertebrae.
>
> …

[5] DOWC MTG Rule 17 Exhibit 1-Low Back Pain, p. 93. [The MTG in effect were Revised: February 3, 2014, Effective: March 30, 2014].

d. Diagnostic Indications: Diagnostic indications for spinal fusion may include the following:

i. Neural Arch Defect usually with stenosis or instability: Spondylolytic spondylolisthesis, congenital unilateral neural arch hypoplasia. It should be noted that the highest level of success for spinal fusions is when spondylolisthesis grade 2 or higher is present.

ii. Segmental Instability: Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability.

iii. Primary Mechanical Back Pain/Functional Spinal Unit Failure: Multiple pain generators objectively involving two or more of the following: (a) internal disc disruption (poor success rate if more than one disc involved), (b) painful motion segment, as in annular tears, (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. Because surgical outcomes are less successful when there is neither stenosis nor instability, the requirements for pre-operative indications must be strictly adhered to for this category of patients.

iv. Revision surgery for failed previous operation(s) if significant functional gains are anticipated.

v. Other diagnoses: Infection, tumor, or deformity of the lumbosacral spine that cause intractable pain, neurological deficit, and/or functional disability."

In this regard, the ALJ found Claimant did not prove that the proposed surgery would increase his functionality and reduce symptoms. (Finding of Fact 34). Claimant did not prove that he had severe symptoms due to lumbar stenosis and spondylolisthesis, specifically at the L4-5 level. *Id.* As found, Dr. Reiss' surgery recommendation did not establish that that surgery was necessary at that point in time, rather he left it up to Claimant. (Finding of Fact 33). The treatment records admitted at hearing showed that conservative treatment such as injections, provided relief to Claimant. Accordingly, the request for authorization of the proposed lumbar fusion and decompression will be denied.

ORDER

It is therefore ordered:

1. To the extent the claim was closed, it is reopened, pursuant to Section 8-43-303(1), C.R.S. (2020).

2. Claimant’s request for authorization of the proposed lumbar fusion with decompression is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-140-466-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that his low back condition, and spinal surgery, are causally related to his admitted September 3, 2020 industrial accident.

STIPULATION

After the hearing, the parties conferred and stipulated that Claimant's average weekly wage (AWW) is $1,423.76.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 45 year-old male who worked for Employer as a Water Distribution Operator, Level 2. His job duties included maintaining and repairing municipal and fire water systems, in commercial and residential buildings. Claimant's job was physically demanding, and it required a lot of lifting and bending.

2. Claimant suffered an admitted industrial accident on September 3, 2020. He was in a crawl space under a residential property repairing a water meter. Claimant testified he had finished repairing the meter and was "army crawling" out of the space when his left leg slipped causing him to twist. Claimant testified he heard a "pop" somewhere in his body. Claimant testified he immediately felt pain in his low back shooting down his left leg.

3. Claimant was able to get out of the crawl space on his own, and he immediately reported the incident to Employer. GD[Redacted] prepared a first report of injury that same day. The mechanism of injury in the report is recorded as, "Slipped in crawl space and twisted knee." The body part affected is listed as "L Knee." (Ex. E). Claimant's back injury is not listed in the report. Claimant credibly testified, however, that he notified Ms. GD[Redacted] that the industrial accident also affected his back.

4. Claimant was first treated at Memorial Regional Hospital (Memorial) Urgent Care, on September 3, 2020. Cameron Miller, PA-C treated Claimant. According to Claimant, he had left knee pain and low back pain with "shooting" pains down his left side. Claimant reported being on his hands and knees maneuvering over materials when he twisted to his left side. He initially felt a sharp pain in his knee. He also reported some low back pain after the injury. According to the medical record, Claimant has a "history of low back pain for which he had injections and PT in the past and feels as though this exacerbated the issue." (Ex. 15).

5. Mr. Miller diagnosed Claimant with a "left patella subluxation versus an MCL sprain." He also noted that Claimant's "low back pain resembles potential disc bulge given radicular symptoms and appears to be an acute exacerbation of a chronic issue he has been treated for prior." (Ex. 15).

6. Respondents have accepted liability for Claimant's knee injury, but dispute liability for his back condition. (Ex. G).

7. Claimant testified that he had low back issues and injuries prior to September 3, 2020. In the 1990's, Claimant fell off a ladder and injured his left leg and low back. In 2003, he suffered a slip and fall at work and injured his back. Claimant received a 10% permanent partial disability rating due to this injury, and attended physical therapy for over six months. Claimant testified he has received chiropractic treatment for his back since he was a teenager.

8. Claimant testified that prior to September 3, 2020, he would have flare ups that he primarily treated with chiropractic care. Claimant also had injections into his lower back in 2016 and 2019. Claimant testified that although he had low back pain and flare ups prior to September 3, 2020, he never had trouble performing his job duties and never missed work due to back pain. He was able to work full duty and was not on any physical restrictions.

9. Claimant returned to Memorial on September 9, 2020 for a follow-up appointment and was treated by Mr. Miller. Claimant report a worsening of his back pain, now with bilateral radicular symptoms. Mr. Miller referred Claimant to a spinal surgeon, and provided pain medication and muscle relaxers for muscle spasms. (Ex. 15).

10. On September 17, 2020, Claimant went to the Orthopedic Surgery Department at Memorial, and was evaluated by Jessica Nyquist, PA-C. Ms. Nyquist noted Claimant's past history of multiple back injuries. Claimant reported that in the past, he got better after his injuries, but this time he was getting worse. Ms. Nyquist examined Claimant and took X-rays. Ms. Nyquist suspected a herniated disk and ordered an MRI given the severity of Claimant's symptoms. They discussed the possibility of injections, but Claimant was hesitant to pursue this option. Ms. Nyquist and Claimant agreed to see the results of the MRI before making any decisions going forward. (Ex. J).

11. On September 24, 2020, claimant underwent an MRI of his low back. The radiologist's report documents "at L5-S1, there is a central disc extrusion abutting the descending S1 nerve roots" and a "broad based disc bulge at L4-5." (Ex. 19).

12. Claimant underwent a prior MRI of his low back in August 2016. According to the history in the 2016 medical record, Claimant reported having "lower back pain for 1 decade. Worsening pain and bilateral lower extremity pain, left greater than right." The radiologist's impressions were: 1) Mild, multilevel degenerative disc and hypertrophic facet changes throughout the mid and lower lumbar spine without central canal narrowing; 2) L5-S1 small paracentral disc protrusion with likely contact with the descending right

S1 nerve roots; 3) L4-L5 mild bilateral neural foraminal narrowing; and 4) L3-L4 mild left neural foraminal narrowing. (Ex. B).

13. Claimant was referred to Clint Devin, M.D., at Steamboat Orthopedics. Dr. Devin, an orthopedic surgeon, evaluated Claimant on October 19, 2020. As documented in the record, Claimant described his mechanism of injury. Dr. Devin reviewed Claimant's MRI and recommended a bilateral L5-S1 microdiscectomy and decompression. (Ex. 22).

14. At Claimant's request, Dr. Devin compared Claimant's 2016 MRI with his September 24, 2020 MRI. Dr. Devin opined, "[w]e were able to obtain an MRI of the lumbar spine from August 5, 2016 at Memorial Hospital. This shows a very mild L5-S1 disc bulge with equivocal contact to the descending S1 nerve roots. This is supported in the radiology reports as well. On both of these tests, the patient has had significant progression of the L5-S1 from a disc protrusion, not really contacting any nerve roots to now, a disc herniation with extruded disc material causing moderate bilateral recess stenosis in contact to bilateral S1 traversing nerve roots. It is our opinion that this is correlative with the patient's new onset of symptoms as that this likely herniated at the time of crawling within a crawl space at work on September 3, 2020. This mechanism does support the findings on this updated MRI". (*Id.*)

15. On November 2, 2020, Dr. Devin requested authorization of spine surgery, but Insurer denied the request. (Ex. 23). On February 8, 2021, Dr. Devin appealed the decision and again provided his opinion that Claimant's need for surgery is related to claimant's occupational injury on September 3, 2020. (Ex. 24). Insurer denied the request.

16. Claimant decided to proceed with the surgery using his own insurance. On April 7, 2021, Claimant underwent a bilateral L5-S1 microdiscectomy and laminar foraminotomy with Dr. Devin. (Ex. 26).

17. Tashof Bernton, M.D. conducted an Independent Medical Evaluation (IME) of Claimant on September 9, 2021. Dr. Bernton opined that Claimant suffered an occupational injury to his low back on September 3, 2020. In reaching this opinion, Dr. Bernton took into account Claimant's pre-existing history of lumbar complaints and a prior lumbar occupational injury with permanent impairment. Dr. Bernton, however, opined that the incident on September 3, 2020, was a work-related exacerbation of a pre-existing condition. Dr. Bernton noted the marked decline in Claimant's function, the increase in pain complaints, and the evidence of structural change in comparing the pre-injury and post-injury MRIs of claimant's lumbar spine. Dr. Bernton opined that the surgery required for Claimant's condition was reasonable and medically necessary treatment for his September 3, 2020, occupational injury. (Ex. 17).

18. Respondents sent Claimant to Kathleen D'Angelo, M.D., for an IME. Dr. D'Angelo evaluated Claimant on September 21, 2021. Dr. D'Angelo opined that she was unable to render an opinion as to whether claimant suffered a work-related low back injury on September 3, 2020 until she was able to obtain other medical records. (Ex. M).

19. Dr. D'Angelo was provided with additional medical records to review, and she authored an addendum to her IME report. Based on the additional records, Dr. D'Angelo opined that Claimant's ongoing low back complaints and need for surgery were not related to his September 3, 2020 work injury. Dr. D'Angelo opined that Claimant's ongoing low back issues and need for surgery were the natural progression of his prior low back problems, and not related to his September 3, 2020 injury. (Ex. N).

20. At the hearing, Dr. D'Angelo testified consistent with her report and addendum. Dr. D'Angelo acknowledged that after Claimant's injury on September 3, 2020 he was placed on restrictions that were not in place prior to the September 3, 2020 work injury. Dr. D'Angelo testified that prior to claimant's injury on September 3, 2020, there was no surgical recommendation. Dr. D'Angelo testified that the medical treatment on September 3, 2020 for claimant's low back was reasonable, but she disagreed that the herniation on the September 24, 2020 MRI is related to the September 3, 2020 work injury.

21. Dr. Bernton was also provided with additional medical records, and a copy of Dr. D'Angelo's addendum. On March 23, 2022, Dr. Bernton issued a rebuttal report. He disagreed with Dr. D'Angelo's opinion that Claimant's disc pathology on MRI was a natural progression of his disc pathology. Dr. Bernton again asserted that the evidence indicates that Claimant suffered a low back injury on September 3, 2020 and that the fact that Claimant had prior low back complaints does not mean the current low back symptoms are unrelated to the documented injury that occurred. Dr. Bernton opines that this particular situation "essentially defines an occupational/work related exacerbation of a pre-existing condition". (Ex. 35).

22. Claimant testified at the hearing, consistent with the medical records, that he sustained an injury to his low back and left knee in a residential crawl space while working for Employer. Claimant testified that prior to his injury on September 3, 2020, he had prior low back treatment that included chiropractic care, medications, and injections. Claimant testified that although he had some prior low back issues, he never had any difficulty during his regular job. He testified that prior to his injury on September 3, 2020, he was not on any restrictions and he did not need lumbar surgery. Claimant testified after his injury on September 3, 2020, everything changed. Claimant could not perform his regular job, was put on restrictions and lumbar surgery was recommended by Dr. Devin. Claimant also testified that the surgery by Dr. Devin helped with both the back pain and the left leg symptoms.

23. Claimant testified that he was terminated by Employer because there was not a light duty position available and Employer could not accommodate his restrictions.

24. The ALJ finds that Claimant has proved by a preponderance of the evidence that he sustained a compensable injury to his back in the course of his employment on September 3, 2020.

25. The ALJ finds that the L5-S1 microdiskectomy and laminar foraminotomy performed by Dr. Devin was reasonable, necessary and related to his industrial injury on September 3, 2020.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Act, he

was performing a service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). While a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Rather, the occurrence of the symptoms may be the result of, or the natural progression of, a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Whether the claimant's condition is due to the natural progression of the pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant suffered an admitted industrial accident on September 3, 2020, injuring his left knee and lower back. (Findings of Fact ¶ 2). Claimant has a long history of lower back pain. He injured his back in the 1990s and in 2003. (*Id*. at ¶ 7). Claimant credibly testified that he was able to manage any flare ups with primarily chiropractic care. (*Id*. at ¶ 8). The ALJ credits Claimant's testimony that even with his prior back issues, he was able to fully work, and had no restrictions, but he could not perform his regular job duties after the September 3, 2020 injury.

Both experts, Dr. D'Angelo and Dr. Bernton concluded that Claimant's surgery performed by Dr. Devin was reasonable. The experts have differing viewpoints, however, regarding the relatedness of the September 3, 2020 accident. Dr. D'Angelo conducted an IME and reviewed additional records regarding Claimant's past medical issues with his lower back. Dr. D'Angelo opined that Claimant's surgery was not related to the September 3, 2020 injury because Claimant's ongoing back issues were the natural progression of his prior back problems. (*Id*. at ¶¶ 19-20). While the ALJ finds her opinion to be credible, it is not persuasive. The ALJ credits Dr. Bernton's opinion that Claimant's September 3, 2020 injury exacerbated his back issues. (*Id.* at ¶ 17). Mr. Miller agreed with this position that Claimant's injury exacerbated his previous back problems. (*Id*. at ¶ 5). Dr. Bernton noted the marked decline in Claimant's function, the increase in pain complaints, and the evidence of structural change in comparing the pre-injury and post-injury MRIs of claimant's lumbar spine. As Dr. Bernton stated, this case "essentially defines an occupational/work related exacerbation of a pre-existing injury." (*Id*. at ¶¶ 17 and 21). Claimant had pre-existing back issues, but he had no problem performing his

job prior to the September 3, 2020 work injury. (*Id*. at ¶¶ 7 and 22). Claimant has proved by a preponderance of the evidence that he sustained a compensable injury to his back in the course of his employment on September 3, 2020.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that his low back condition is causally related to his admitted September 3, 2002 work injury.

2. Claimant's April 7, 2021 spine surgery was causally related to his September 3, 2020, admitted work injury.

3. Claimant has established by a preponderance of the evidence an entitlement to medical treatment that is reasonable, necessary and causally related to treat his low back condition.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his neck beginning in May 2021 and ongoing (including a cervical spine fusion recommended by Dr. Brian Witwer) is reasonable, necessary, and related to the admitted January 21, 2020 work injury.

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

Whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant is responsible for the termination of his employment with the employer, thus ending his entitlement to TTD benefits.

FINDINGS OF FACT

1. The claimant worked for the employer as staff security at a community corrections "work release" facility in Rifle, Colorado. The claimant was paid $23.78 per hour and he worked on a full-time basis. The claimant's job duties included overseeing the delivery of food to the facility.

2. On January 21, 2020, the claimant suffered an injury[1] while on duty. Specifically, the claimant was overseeing the delivery of inmate meals. While food carts were being unloaded, one cart began to roll back off the delivery truck. The claimant reached out to grab the cart so that it would not fall three feet to the ground. As he did so, the claimant immediately felt a "snap" and pain in the right side of his neck. Subsequently, the claimant reported the incident to the employer and was provided with medical treatment for his neck.

Medical Treatment Prior to January 21, 2020

3. The claimant was involved in a motor vehicle accident (MVA) in 2007. Due to the injuries he suffered as a result of that MVA, the claimant underwent a cervical spine fusion that same year. That fusion was at the C6 and C7 levels The claimant testified that between the 2007 spine fusion and the injury in January 2021, he did not suffer any neck related symptoms.

[1] The issue of compensability was initially endorsed for the current hearing. At the hearing, the respondents stipulated that the claimant suffered an injury to his neck on January 21, 2020.

4. In the years following his fusion surgery, the claimant underwent treatment for chronic neck pain. Part of this treatment was the use of prescription narcotics.

Medical Treatment After January 21, 2020

5. On January 24, 2020, the claimant was seen in the emergency department at Grand River Medical Center. At that time, the claimant was seen by Chelsea Lawrenz, PA-C. The claimant reported dull and persistent pain, with extreme neck stiffness. PA Lawrenz recorded that the claimant "denies any distal numbness that is worse than his baseline from his prior vertebral injuries". On exam the claimant had limited range of motion in his neck, particularly to the right. The claimant was diagnosed with a cervical muscular strain. The claimant was prescribed cyclobenzaprine. In addition, the claimant was placed under work restrictions of no lifting, carrying, pushing, or pulling over five pounds; and no reaching overhead or away from the body.

6. Grand River Medical is the claimant's authorized treating provider (ATP) for this claim. On February 4, 2020, the claimant was seen at Grand River Clinic by Mark Quinn, PA-C. On exam, PA Quinn noted that the claimant's neck was tender with significant spasms on the right side. PA Quinn also noted that magnetic resonance imaging (MRI) of the claimant's cervical spine showed disc herniations at multiple levels. PA Quinn listed the claimant's diagnoses as cervical discogenic pain syndrome, cervical disc displacement, and cervical radiculopathy. PA Quinn prescribed methocarbamol in lieu of the previously prescribed cyclobenzaprine. PA Quinn also prescribed a five day course of prednisone "bursts". In addition, PA Quinn released the claimant to return to work with work restrictions of no lifting, pushing, pulling, or carrying over five pounds.

7. On February 6, 2020, the claimant was seen by his primary care provider, Natasha Ellwood, PA-C with Mountain Family Health. At that time, the claimant reported pain in his neck and shoulders following an injury at work. The claimant also reported that his chronic back pain was stable with the use of 10 milligrams of hydrocodone on a daily basis. However, due to his neck pain, he took "a couple extra pills".

8. On February 20, 2020, the claimant returned to PA Quinn. At that time, the claimant reported that the prednisone had relieved his radiating pain symptoms. PA Quinn referred the claimant to physical therapy and continued the temporary work restrictions.

9. Thereafter, the claimant attended a few physical therapy visits. However, between the appointment with PA Quinn on February 20, 2020, and July 26, 2021, he claimant did not attend any other medical appointments related to his work injury.

10. During that same period of time (February 2020 to July 2021) the claimant was seen multiple times at Grand River Medical Center. On June 13, 2020, the claimant was seen by PA Norwood, who noted a normal neck exam. Thereafter, the Grand River Medical Center medical records have no mention of neck pain or symptoms related to the work injury. However, these records do demonstrate the claimant's ongoing use of narcotics to address his chronic neck and back pain. Although the claimant's narcotic

prescription was increased following his work injury, by June 2021, his prescription/usage had returned to the claimant's baseline.

11. On July 26, 2021, the claimant was seen by PA Quinn. At that time, the claimant reported a sudden increase in his neck symptoms approximately two months prior. In addition, the claimant reported the new symptom of radiating pain down his left arm. PA Quinn noted a diagnosis of cervical radiculopathy and referred the claimant for a cervical spine MRI.

12. On August 24, 2021, the claimant underwent a cervical spine MRI. The MRI showed no issues related to the prior C6-C7 fusion, little change from the February 2, 2020 MRI, and a "slight increase" in anterolisthesis of the C5 over C6.

13. Subsequently, the claimant was referred to Dr. Giora Hahn for injections. On November 19, 2021, the claimant underwent bilateral facet injections at C4-C5 and C5-C6.

14. Following these injections, the claimant experienced numbness on the right side of his face. The claimant sought emergent care regarding this facial numbness. Thereafter, Dr. Hahn declined to administer additional injections.

15. On February 8, 2022, the claimant attended an independent medical examination (IME) with Dr. Douglas Scott. In connection with the IME, Dr. reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Scott noted that there was a gap in the medical records between March 26, 2020 and July 26, 2021. Dr. Scott opined that on January 21, 2020, the claimant probably suffered a strain of a neck muscle. In addition, Dr. Scott noted that the claimant's neck pain was addressed by prednisone burst, physical therapy, and medication. Dr. Scott opined that the claimant reached his baseline when he did not return to PA Quinn or physical therapy in March 2020. Dr. Scott opined that the onset of neck pain in May 2021 was the result of a new injury, and not causally related to the claimant's January 2020 work injury.

16. The claimant was ultimately referred for a surgical consultation. On February 23, 2022, the claimant was seen by Dr. Brian Witwer. At that time, Dr. Witwer identified the claimant's diagnoses as cervical spondylosis and radiculopathy. In addition, Dr. Witwer identified severe adjacent level disease at C5-C6 (above the prior C6-C7 fusion). Dr. Witwer recommended extending the fusion to the C5-C6 level. The respondents have denied authorization for this surgical request.

17. After receiving additional medical records, on March 27, 2022, Dr. Scott issued an addendum to his IME report. Specifically, Dr. Scott was provided with medical records during the period of March 26, 2020 and July 26, 2021. In his March 2022 IME addendum Dr. Scott noted that the claimant did not report neck related symptoms to his providers at Mountain Family Health during that time. At an appointment on June 30, 2020 at Mountain Family Health, the claimant had a normal neck exam. Then on July 1, 2021, the claimant reported to Dr. Percy that he was doing well, with no report of neck

issues. In the March 27, 2022 IME addendum, Dr. Scott opined that on January 21, 2020, the claimant suffered a temporary aggravation to his chronic neck condition, and that exacerbation was resolved by June 13, 2020. Dr. Scott further opined that the claimant's neck symptoms that he began to report in July 2021 are likely due to the natural progression of the pre-existing degenerative condition of his cervical spine. Dr. Scott reiterated his opinion that the claimant's 2021 neck symptoms are not causally related to the January 2020 work injury.

18. Dr. Scott's testimony was consistent with his written reports. Dr. Scott explained that following a spinal fusion, the levels above and below the fusion can become stressed, resulting in additional symptoms. Dr. Scott referred to this as progressive segmental dysfunction. In the claimant's case, the claimant's C5-C6 level (the level above his prior fusion) is likely the level with the most stress. Dr. Scott testified that trauma is not required to cause stress at the level above the fusion. It is Dr. Scott's opinion that the claimant's development of new symptoms in July 2021 is the result of the normal progression of progressive segmental dysfunction, and not his work injury.

19. The claimant continued working full-time between his injury in January 2020 and December 1, 2021, when his employment was terminated. The claimant asserts that following the injury he was unable to work overtime hours, resulting in lost wages. The ALJ is not persuaded by this argument. The ALJ finds that the claimant suffered no wage loss as a result of his work injury.

Employment Terminated

20. On June 19, 2021, the claimant was driving on I-70 when he was pulled over by law enforcement for speeding. During the traffic stop it was discovered that the claimant's drivers license was "under restraint" due to an unpaid traffic ticket. The claimant testified that the incident "escalated" and he was arrested and taken into custody.

21. While in police custody, the claimant agreed to undergo a blood test. The test results showed that the claimant had THC[2] and Percocet in his system. As a result, the claimant was charged with driving while ability impaired (DWAI). The claimant was released from custody the following day.

22. On Monday, June 20, 2021, the claimant was able to prove that he had paid the traffic ticket. However, the claimant was still required to go to court regarding the DWAI.

23. In approximately November 2021, the claimant pled guilty to the DWAI charge. On December 1, 2021, the claimant's employment was terminated. The claimant testified that he was terminated because he failed to report the traffic stop and related arrest to the employer within 72 hours. It is the claimant's understanding that the employer has a 72 hour "rule" or "code" that requires an employee to report any contact

[2] Tetrahydrocannabinol.

with law enforcement within that time frame. It is the claimant's understanding that his violation of that rule, resulted in the termination of his employment. The claimant testified that he was not aware of this 72 hour rule. The ALJ does not find the claimant's testimony on this issue to be credible or persuasive.

24. The ALJ credits the medical records and the opinions of Dr. Scott. The ALJ specifically credits Dr. Scott's opinion that the claimant's development of new symptoms in 2021 is the result of the normal progression of progressive segmental dysfunction, and not the work injury. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that neck symptoms that he began to report in July 2021 are causally related to the January 21, 2020 work injury.

25. The ALJ also finds that the respondents have successfully demonstrated that it is more likely than not that the claimant was responsible for the termination of his employment. The claimant knew, or reasonably should have known, that being cited for a DWAI was something to be reported to the employer. The ALJ further finds that the claimant knew, or reasonably should have known, that pleading guilty to a DWAI could result in the termination of his employment. The claimant exercised some degree and control over his decision to not disclose his arrest and charges to the employer. Therefore, the ALJ finds that the claimant was responsible for his termination of employment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his current neck symptoms and related medical treatment (including the surgical recommendation) are causally related to the January 21, 2020 work injury. As found, the medical records and the opinions of Dr. Scott are credible and persuasive.

6. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

7. As found, the claimant did not suffer a wage loss following his work injury. The claimant continued working full-time until his employment was terminated on December 1, 2021. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

8. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault"

applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

9. As found, the respondents have successfully demonstrated by a preponderance of the evidence, that the claimant is responsible for the termination of his employment.

ORDER

It is therefore ordered:

1. The claimant's request for additional medical treatment of his neck is denied and dismissed.

2. The claimant's request for a cervical spine fusion, as recommended by Dr. Witwer, is denied and dismissed.

3. The claimant's claim for TTD benefits is denied and dismissed.

4. All matters not determined here are reserved for future determination.

Dated June 1, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on November 17, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary, authorized medical benefits to cure and relieve the effects of that alleged injury that are related to the alleged work injury of November 17, 2021.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits as a consequence of the alleged work related injury.

IV. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause or is responsible for his termination.

V. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to penalties for alleged violation of W.C.R.P. Rule 8-2(A)(1) , for failure to provide a designated provider list with four medical providers as required by statute and rule, and if so if Claimant may select Dr. Brian Beatty, a level II accredited provider.

PROCEDURAL ISSUES AND STIPULATIONS

Claimant filed an Application for Hearing on December 28, 2021 on issues that include compensability, medical benefits that are authorized, reasonably necessary and related to the November 17, 2021 work related injury, average weekly wage and temporary disability benefits. Claimant also listed multiple penalties for failure to designate a list of providers and failure to timely provide a copy of the claim file.

Respondents filed a Response on and Amended Response to AFH dated January 27, 2022 with issues stating Claimant failed to specify the grounds for any penalties with specificity as required by statute, reserving the right to cure as well as statute of limitations. The responses indicated that one of the defenses included that Respondents were alleging Claimant may have been under the influence of drugs or alcohol.

Respondents agreed that they no longer were alleging any involvement with alcohol or drugs following investigation of the claim and that these allegations were simply to preserve their right to this defense if any investigation showed any such involvement.

Claimant stipulated that he was withdrawing, with prejudice, the issue of penalties for failure to provide a copy of the claim file. This stipulation is approved and this ALJ enters this stipulation as part of the order in this matter.

Respondents stipulated that the issue of independent contractor and the defense of intoxication were withdrawn, with prejudice. This stipulation is approved and this ALJ enters this stipulation as part of the order in this matter.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is primarily a Spanish speaking, 22 year old, laborer that worked in construction for Employer. His hours were varied. He build wood homes, and generally performed heavy lifting duties. Claimant attended secondary school in Guatemala.

2. Claimant worked for Employer for several months. Claimant earned $26.00 per hour.

3. Claimant alleged he was injured in the course and scope of his employment on November 17, 2021. He testified he was carrying wood that was approximately 20 foot long by twelve inches wide and two inches thick, which weighed approximately 75 lbs. Claimant was carrying the wood overhead when it shifted and pulled him backwards, causing him to fall onto some wood that was on the ground. Claimant alleged that he landed on his right side, injuring his lumbar spine.

4. On the day of the accident, Claimant advised his supervisor of the fall but was not provided with a designated provider lists. Claimant completed his work shift. The following day, Claimant again advised his supervisor of the incident. His supervisor sent him home, advised him to use some cream but failed to provide a designated provider list.

5. On Friday, November 19, 2021 Claimant sent his supervisor a text advising that he needed to see a medical provider because of the pain in his low back at the waist. He also asked whether Employer had workers' compensation insurance. Again, Employer failed to provide a designated provider list. However, he did request that Claimant go to the job site to pick up his check. Claimant did not return to work for Employer.

6. Claimant did not carry health insurance and testified that he could not afford medical care.

7. Claimant filed a Workers' Claim for Compensation on December 1, 2021 describing the mechanism of accident. Respondents filed a First Report of Injury on December 28, 2021 stating that Employer was notified of the incident on November 17, 2021. Claimant filed an Application for Hearing on December 28, 2021 on issues of compensability, medical benefits, average weekly wage and temporary disability benefits.

8. Claimant returned to heavy duty work in construction/framing on January 3, 2022 without seeking medical care or urgent care services and had no medical restrictions at that time.

9. On January 11, 2022 Respondents filed a Notice of Contest stating that they had no documentation supporting a compensable injury.

10. Claimant was first seen by Mountain View Pain Center on February 4, 2022 with complaints of lumbar spine and hip pain. This was a full month after Claimant returned to regular work in heavy construction and framing.

11. Dr. John Raschbacher evaluated Claimant for an IME on March 18, 2022 at Respondent's request. Claimant primarily reported low back pain. Dr. Raschbacher performed a physical exam, which was unremarkable. Claimant had mild tenderness which was consistent with complaints of low back pain or with someone with no back pain. Dr. Raschbacher found no objective findings on physical exam.

12. Dr. Raschbacher testified by deposition on May 6, 2022. He stated that simply because an incident occurred at work, that does not mean that Claimant suffered an injury, that looking at Claimant's alleged injury where he did not seek treatment for several months after the incident, including urgent care or an emergency department, and resuming the same type of work in January, would suggest that Claimant did not actually have an injury or that it was resolved by that time. Further, Dr. Raschbacher opined that Claimant's return to work performing essentially the same job functions indicated that Claimant is was able to have normal function. This ALJ infers by this opinion that by January 3, 2022 Claimant had normal functions, even if there was an incident.

13. Dr. Raschbacher explained that he would expect someone who had, or thought they had, serious symptomatology to seek some medical care. Dr. Raschbacher also opined that if someone had a concern about having an injury and was going to resume the same type of functions, that person would have sought care and obtained a physical exam. Dr. Raschbacher's opinion is persuasive.

14. As found, Dr. Raschbacher's opinions and findings are more persuasive that Claimant's subjective complaints and testimony.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable

cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The question of whether Claimant has met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ*. City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v.*

Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Employer. As found, Claimant returned to full duty work as a construction laborer and framer on January 3, 2022 without seeking any medical attention, even from an emergency service provider or urgent care facility. Claimant first sought medical evaluation on February 4, 2022. As found, Dr. Raschbacher credibly testified that, on exam on March 18, 2022 Claimant had no objective signs of injury. This is finding and opinion is persuasive to this ALJ. Claimant's testimony was not persuasive in this matter. Claimant's claim is not compensable. Therefore, the remaining issues are moot.

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ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for a work injury of November 17, 2021 is *denied* and *dismissed*.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 1st day of June, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 19, 2020 until terminated by statute.

2. Whether Respondent has proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as an overnight stocker. His normal hours were from 10:00 p.m. to approximately 6:00 a.m.

2. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. Claimant initially sought medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot.

3. On September 14, 2020 Claimant received medical treatment through Authorized Treating Physician (ATP) Concentra Medical Centers. He was evaluated by Glenn D. Petersen, PA. Claimant reported the left foot injury while working as an overnight stocker. He noted that he continued to work following the injury while utilizing a foot boot and knee scooter. The report documented that Claimant had been in the foot boot, using the knee scooter and non-weight-bearing on the left lower extremity for four weeks. PA Petersen diagnosed Claimant with a non-displaced fifth proximal fracture and referred him to a foot specialist. PA Petersen assigned work restrictions of sedentary work only, with the left leg elevated, and continued use of the foot boot and knee scooter. Nevertheless, Claimant was permitted to work his entire shift and authorized to return to modified duty on September 15, 2020. Claimant's next scheduled appointment with Concentra was September 28, 2020.

4. On approximately September 19, 2020 Claimant attempted to return to work for his regular shift beginning at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot.

5. Approximately three-quarters of the way through his shift on September 19, 2020 Claimant told his supervisor that he was in too much pain to complete his shift and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He remarked that he subsequently left messages for his supervisor stating that he was unable to perform his job because of pain. Claimant commented that Employer never offered him a seated position consistent with his work restrictions. He subsequently received a letter from Employer terminating his employment. Claimant specified that he was terminated because he was no longer working scheduled shifts.

6. On September 22, 2020 Claimant returned to Concentra for a walk-in, non-scheduled visit. He was evaluated by Kathryn G. Bird, DO. As noted in the Concentra record, "[p]atient comes in for a walk-in visit today to see if he could get restrictions advanced." Claimant reported that he continued to work modified duty and was awaiting the referral to the foot specialist. He reported a 4/10 pain level in his left foot. Dr. Bird restricted Claimant to seated duty only and wearing his foot boot while awake. He was permitted to work his entire shift.

7. On October 6, 2020 Claimant returned to Dr. Bird at Concentra for a follow-up appointment. He remarked that he had not yet visited Michael Zyzda, DPM, but was scheduled for the following day. Claimant also reported no longer working for Employer because no light duty was available. He noted 2/10 pain in the left foot. X-rays revealed a two millimeter gap of the first metatarsal fracture line. Claimant's restrictions remained seated duty only and wearing his boot. He was permitted to work his entire shift.

8. On October 7, 2020 Claimant visited Dr. Zyzda at Concentra for an examination. Claimant reported the mechanism of injury and remarked that the VA had placed him in the foot boot with the use of a knee scooter. He remarked that he utilized the cast boot and scooter for the first four weeks and that over the last two weeks he felt great. Dr. Zyzda recommended smoking cessation and weight-bearing on the heel, but to avoid full weight utilization. Dr. Zyzda did not alter Claimant's work restrictions.

9. Claimant testified that, following his work shifts, he would babysit and take care of his granddaughter during the day. He commented that he never spoke with any claims adjuster throughout the duration of the claim. Nevertheless, Claimant recognized the name of the claims adjuster as SD[Redacted]. He denied ever telling Ms. SD[Redacted] that he could no longer work for Employer because his post-accident work shifts during the day conflicted with his babysitting duties.

10. On October 20, 2020 Claimant returned to Dr. Bird for an evaluation. Claimant reported "[n]ot working – let go." Dr. Bird noted that Dr. Zyzda had recommended use of a bone stimulator. Claimant reported 2/10 pain in the left foot. His work restrictions remained unchanged.

11. On January 21, 2021 Claimant returned to Dr. Bird for a telemedicine evaluation. The record specifies that "[h]e was scheduled for a demand visit today" but due to a fever and sore throat the visit was done telephonically. Claimant reported

continuing left foot pain. Dr. Bird remarked that Claimant had not been evaluated by either herself or Dr. Zyzda since October. Dr. Bird did not make any changes to Claimant's work restrictions.

12. On January 28, 2021 Claimant returned to Dr. Bird for an examination. Claimant reported continuing left foot symptoms. He recalled that a few weeks earlier "he was chasing his dog and his foot twisted sideways, he felt a pop and had worse pain on the lateral side of his foot." Dr. Bird commented that Claimant had not returned to Dr. Zyzda even though he had a scheduled appointment. She also remarked that Claimant was no longer wearing or utilizing the foot boot. Claimant reported 4/10 pain in the left foot. Dr. Bird continued to restrict Claimant to seated duty.

13. On March 29, 2021 Claimant again visited Dr. Bird for an evaluation. He reported 8/10 left foot pain but that his condition had not changed. Dr. Bird commented that Insurer had denied Dr. Zyzda's February 10, 2021 surgical request. She remarked that he had not reached Maximum Medical improvement (MMI). Dr. Bird again did not change Claimant's work restrictions.

14. On May 10, 2021 Claimant returned to Dr. Bird for an examination. Claimant reported that his left foot symptoms had increased and he was experiencing edema in his left lower leg. After conducting a physical examination, Dr. Bird determined that Claimant had reached MMI. She advised Claimant that he could advance his activities as tolerated. Dr. Bird assigned a 5% left lower extremity permanent impairment rating that converted to a 2% whole person impairment.

15. On September 2, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Sharon Walker, M.D. Dr. Walker reviewed Claimant's medical records and conducted a physical examination. She concluded that Claimant had not reached MMI. Dr. Walker reasoned that Claimant was only placed at MMI because requested treatment had not been authorized. She explained that Claimant was a surgical candidate and warranted evaluation for Chronic Regional Pain Syndrome (CRPS). Dr. Walker recommended temporary work restrictions of no crawling, kneeling, squatting or climbing. She also noted no lifting, pushing, pulling or carrying in excess of 15 pounds and using a foot boot as needed.

16. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. He initially obtained medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot. Claimant then worked for several weeks utilizing the foot boot and knee scooter. On September 14, 2020 Claimant began receiving treatment through ATP Concentra. He received work restrictions of sedentary work only, with the left leg elevated and continued use of the foot boot and knee scooter. Claimant was permitted to work his entire shift and authorized to return to modified duty work on September 15, 2020.

17. Claimant has not worked for Employer since approximately September 19, 2020 because of continuing pain and left foot symptoms. He was subsequently terminated from employment. The record reflects that Drs. Bird and Zyzda have not changed Claimant's work restrictions and he has been limited to seated duty only. Claimant has thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The August 21, 2020 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

18. Respondent has failed to prove that it is more probably true than not that Claimant was responsible for his termination by abandoning his employment and is thus precluded from receiving TTD benefits. Initially, Claimant's work restrictions remained largely unchanged from when he began seeking treatment with ATP Concentra throughout the duration of the claim. Claimant was limited to seated or sedentary activities, with required use of the knee scooter starting on September 14, 2020. He was authorized to work his entire shift. However, the record reveals that Employer was unable to accommodate Claimant's work restrictions and his assigned duties caused significant pain.

19. On approximately September 19, 2020 Claimant attempted to return to work on his regular shift at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot. About three-quarters of the way through his shift Claimant told his supervisor that he was in too much pain to complete his job and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He subsequently received a letter from Employer terminating his employment.

20. Although Claimant ceased reporting to work after about September 19, 2020 the record reveals that he was unaware that he would be terminated from employment. Claimant remarked that he left messages for his supervisor after September 19, 2020 stating that he was unable to perform his job because of his pain. He commented that Employer never offered him a seated position consistent with his work restrictions. Claimant thus did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Respondent has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period October 19, 2020 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability,” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the

employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAO, July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

6. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. He initially obtained medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot. Claimant then worked for several weeks utilizing the foot boot and knee scooter. On September 14, 2020 Claimant began receiving treatment through ATP Concentra. He received work restrictions of sedentary work only, with the left leg elevated and continued use of the foot boot and knee scooter. Claimant was permitted to work his entire shift and authorized to return to modified duty work on September 15, 2020.

7. As found, Claimant has not worked for Employer since approximately September 19, 2020 because of continuing pain and left foot symptoms. He was subsequently terminated from employment. The record reflects that Drs. Bird and Zyzda have not changed Claimant's work restrictions and he has been limited to seated duty only. Claimant has thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The August 21, 2020 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI. Accordingly,

Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

8. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant was responsible for his termination by abandoning his employment and is thus precluded from receiving TTD benefits. Initially, Claimant's work restrictions remained largely unchanged from when he began seeking treatment with ATP Concentra throughout the duration of the claim. Claimant was limited to seated or sedentary activities, with required use of the knee scooter starting on September 14, 2020. He was authorized to work his entire shift. However, the record reveals that Employer was unable to accommodate Claimant's work restrictions and his assigned duties caused significant pain.

9. As found, on approximately September 19, 2020 Claimant attempted to return to work on his regular shift at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot. About three-quarters of the way through his shift Claimant told his supervisor that he was in too much pain to complete his job and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He subsequently received a letter from Employer terminating his employment.

10. As found, although Claimant ceased reporting to work after about September 19, 2020 the record reveals that he was unaware that he would be terminated from employment. Claimant remarked that he left messages for his supervisor after September 19, 2020 stating that he was unable to perform his job because of his pain. He commented that Employer never offered him a seated position consistent with his work restrictions. Claimant thus did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Respondent has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period October 19, 2020 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: June 1, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-145-713-003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to additional Permanent Partial Disability (PPD) benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was previously employed by Employer as a janitor.
2. On July 16, 2020, Claimant suffered an injury to his right leg. Claimant's right leg was struck by a metal sign. The metal sign was sitting on top of a grocery cart and hit the lateral side of his right lower leg
3. Claimant passed away on or about December 9, 2021.
4. Before passing away, Claimant treated with Concentra Medical Center under the care of Kathryn Bird, D.O. Claimant began treatment on July 27, 2020. (CHE 4, pp. 18-21). At this evaluation, it was noted that Claimant was 5 feet 6 inches, weighed 208 pounds, with a BMI of 33. Claimant reported wearing jeans at the time of incident, where an ecchymotic lesion resulted at the point of impact. Upon examination, no drainage existed, and Claimant was diagnosed with cellulitis.
5. Claimant subsequently underwent four surgeries to address the resulting wound and cellulitis. On August 14, 2020, Claimant was operated on by Dr. Craig Lehrman for surgical debridement of the right lower extremity. (RHE F, p. 22). On September 15, 2020, Claimant was operated on by Dr. Lily Daniali who performed a skin graft of Claimant's right lower extremity wound. (*Id*.) On October 2, 2020, Dr. Daniali performed a surgical preparation of the wound with application of vacuum assisted closure. (*Id*.)
6. On March 3, 2021, Dr. Bird placed Claimant at maximum medical improvement (MMI). When she placed Claimant at MMI, she noted the skin on Claimant's right lower extremity had:
    - Significant, 1/8 of an inch, pitting edema below the knee.
    - Healed skin trauma over the distal leg.
    - A large scar that is depressed on the anterolateral distal right lower leg.
    - Shiny skin from being taught,
    - Healed wound with confluent skin and "only a [single] crusted area 3 mm in diameter."

RHE F, 23.

7. Dr. Bird issued a 10% lower extremity impairment for hematoma residual impairment, similar to a peripheral vascular disease under Table 52, Class 2, p. 79, of the AMA Guides. (RHE F, pp. 20-25).

8. On March 11, 2021, Respondent filed a Final Admission of Liability admitting to temporary total disability (TTD) benefits from August 11, 2020, through November 29, 2020, totaling $5,183.88, and permanent partial disability (PPD) benefits for the 10% scheduled lower extremity rating in the amount of $7,011.89. (CHE 2). These benefits have been paid in full.

9. On June 29, 2021, Claimant at his request, attended a DIME with Robert Mack, M.D. (RHE G). At the time of the DIME, Dr. Mack concluded that Claimant is not at MMI due to pitting edema of the right edema of the right leg and foot, persistent pain, and "*recurring skin lesions"* in the skin graft area of the right leg and need for additional treatment (emphasis added). Thus, at the time of the DIME, Claimant had additional skin lesions. Dr. Mack described the lesions as:

   - Three ½ inch circular scabbed-over lesions. Two were anteromedial and one was posterior. But no drainage was noted from any of the lesions.

   RHE G, pp. 35-36.

10. Dr. Mack also determined Claimant was not at MMI because he was "concerned with the amount of edema and skin lesions noted in the area of the skin grafted wound." RHE G, pp. 36.

11. Dr. Mack concluded that there was the potential for recurring infection next to a preexisting right total knee replacement. Dr. Mack also recommended that ongoing monitoring by a wound specialist and that the leg needed additional evaluation for circulation purposes. Although Claimant was not at MMI, Dr. Mack issued a provisional lower extremity impairment rating of 35% based on Table 52 Impairment to Lower Extremity due to Peripheral Vascular Disease, under class 2. Dr. Mack also indicated in his report that "[i]t should be noted as an orthopedic surgeon, I'm not experienced performing Impairment ratings of skin and soft tissue wounds such as this."

    RHE G, p. 36.

12. Therefore, at the time of the DIME with Dr. Mack, the ALJ finds that Claimant's skin condition was worse than at the time he was originally placed at MMI by Dr. Bird and provided a 10% impairment rating.

13. The ALJ further finds that the worsening of Claimant's skin condition at the time of the DIME, in which Claimant was found to not at MMI, resulted in Dr. Mack providing a higher provisional impairment rating of 35%. Therefore, the ALJ finds that the impairment rating provided by Dr. Mack is not an accurate assessment of Claimant's resulting impairment from his work-related condition. In other words, providing an impairment rating at a time when Claimant's skin condition is worse, and which might improve with additional treatment, makes it very difficult to

determine the extent of Claimant's impairment from his work-related condition based on Dr. Mack's assessment. Because Claimant's skin condition had gotten worse, and Dr. Mack concluded Claimant should return to Dr. Daniali to assess Claimant's edema and the recurring lesions, the provisional impairment rating provided by Dr. Mack is not found to be persuasive as it relates to Claimant's ultimate impairment from his work-related injury. As a result, the ALJ finds Dr. Bird's assessment of Claimant's impairment is found to be more credible and persuasive as to Claimant's permanent impairment due to his work-related injury.

14. On January 25, 2022, an Application for Hearing was filed endorsing solely the issue of PPD benefits.

15. On February 24, 2022, Respondent filed its Response to Application for Hearing also endorsing PPD benefits and overpayment or credits applied to any PPD award due to previous payment of indemnity benefits. Respondent also endorsed that Claimant was deceased.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197

P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to additional Permanent Partial Disability (PPD) benefits.

Pursuant to C.R.S. § 8-42-116(b), "[w]here the injury proximately caused permanent partial disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived. (emphasis added).

The term "unaccrued" is not defined in the statute. In *Nilsen v. Legacy Trucking, Inc.*, (ICAO – 2009 WL 1947270), it was determined that PPD benefits had accrued for purposes of the statute since respondents had admitted to said benefits. On October 23, 2007, claimant died for reasons unrelated to his industrial injury. However, the following day, respondents had filed a Final Admission of Liability admitting to the disputed PPD benefits. ICAO reasoned that even though the claimant had passed away one day prior, entitlement to PPD benefits had accrued given the opined impairment rating and most importantly, respondents' admission to those benefits before learning of the death.

MMI status is not dispositive of determining whether PPD benefits have been accrued. In *Singleton v. Kenya Corporation*, 961 P.2d 571 (Colo. App. 1998), the Court of Appeals determined that PPD benefit may have accrued before placement at MMI "upon proof that an industrial injury caused the deceased employee to suffer a permanent disability." As such the court reasoned that "the statute does not foreclose such posthumous proof when the employee dies of unrelated causes before reaching MMI."

Claimant's widow is seeking additional PPD benefits beyond which has already paid and accrued. Claimant's widow is seeking the scheduled lower extremity impairment issued by the DIME, Dr. Mack, at 35%.

The parties agree that PPD benefits for 10% lower extremity impairment has been paid in accordance with the Final Admission of Liability. The parties agree also that no additional PPD benefits have been paid beyond the admitted 10% lower extremity. At issue is whether an additional 25% of lower extremity impairment benefits have accrued.

First, given Claimant was not at MMI at the time of the DIME and the time of his death, combined with the recommendation of additional medical care, it cannot be found that additional PPD benefits have accrued. Dr. Mack concluded that MMI had not been reached. While MMI is unnecessary to have accrued PPD benefits at death, the fact that Dr. Mack was recommending additional medical care is persuasive that that additional PPD benefits had not accrued. Dr. Mack was concerned of needing additional treatment for ongoing edema, the potential for ongoing infections, and the need for ongoing monitoring additional evaluations to address the recurrent wound lesions and circulation

concerns. As a result, Claimant's medical status per the opinions of Dr. Mack was not stable for determination of permanent partial disability status and his opinion is not found to be persuasive as it relates to Claimant's permanent impairment from his injury.

Second, this case is different from the case in *Singleton*, where no previous PPD benefit had been admitted and paid. Instead, here Respondent has already admitted and paid for PPD benefits in the amount of $7,011.89 based on an opinion that Claimant had reached MMI and was provided an impairment rating. Thus, Respondent has already compensated Claimant for PPD benefits and provided PPD benefits under the statute based on Dr. Bird's rating.

Third, given that additional treatment was being recommended by Dr. Mack, it is speculative that the advisory rating issued by the DIME should be paid under the claim. Due to Claimant's unfortunate death, it is unknown if Claimant's placement at MMI would have residual impairment of an additional 25%. It is unknown if the additional treatment would have kept Claimant's residual impairment the same as found and opined by Dr. Mack. It also is unknown if the additional treatment would have improved Claimant's condition and residual impairment. Accordingly, it is thus speculative to require payment of additional PPD benefits given the unknown nature of the future impairment had death not transpired. In other words, it is only speculative to conclude that additional PPD benefits and increased impairment exists at the time of death.

Fourth, the additional impairment issued by Dr. Mack is not reliable. Dr. Mack admits in his own report that he is not qualified to assess skin and wound impairments. Consequently, Dr. Mack's own admission makes it even more problematic to conclude that additional impairment and PPD benefits have accrued at the time of death.

Fifth, the ALJ credits Dr. Bird's opinion regarding the extent of Claimant's permanent impairment. The ALJ credits Dr. Bird's opinion because she assessed Claimant's condition at a point when Claimant was at MMI and did not have the extensive pitting edema, did not have the additional lesions, and did not need additional treatment which might improve Claimant's condition and resulting permanent impairment.

As a result, Claimant has been compensated for PPD benefits as a result of the wound injury he suffered on July 16, 2020. Based on the totality of evidence and the circumstances of this case, the Claimant's widow has failed to establish by a preponderance of the evidence that additional PPD benefits have accrued at the time of Claimant's death and that additional PPD benefits are payable based on the 35% provisional impairment rating provided by Dr. Mack. Therefore, Claimant's widow's request for additional PPD benefits is denied.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The request for additional PPD benefits based on Dr. Mack's 35% scheduled impairment rating is denied.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 2, 2022

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-125-703-002

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the lumbar spine surgery recommended by Dr. Douglas Orndorff is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her March 13, 2019 work injury?

FINDINGS OF FACT

1. Claimant is employed with Employer as a certified nursing assistant ("CNA"). Claimant job duties included performing healthcare services in Employer's assisted living facilities and in the homes of patients and individuals. Claimant testified she was a "float team" member, and would work either in homes or in facilities as needed depending on other employees' schedules.

2. Claimant sustained an admitted injury to her lower back on March 13, 2019 when she was attempting to help lift an obese patient to a toliet. Claimant testified the felt a pop and felt what she described as a warm water balloon down the small of her back.

3. Claimant reported the injury to Employer and was referred to Peak Professionals for medical treatment. Claimant was initially evaluated by Physicians' Assistant ("PA") Dockins on March 15, 2019. PA Dockins works with Dr. Adams with Peak Professionals. PA Docking noted Claimant complained of acute right-sided low back pain with right-sided sciatica. Claimant provided a consistent accident history to PA Dockins of trying to help a patient use the restroom when she sustained the back injury. PA Dockins diagnosed Claimant with a right low back strain, sciatica with radiculopathy and provided Claimant with work restrictions and medications, including Percocet. PA Dockins referred Claimant for a magnetic resonance image ("MRI") of the lumbar spine due to decreased reflexes and a positive straight leg test on the right on physical examination.

4. The MRI was performed on April 3, 2019 showed a disc protrusion at L1-L2 and disc bulges at L4-L5 and L5-S1. .

5. Claimant was evaluated by PA Dockins on May 18, 2019. PA Dockins noted Claimant had increasing pain since she had to drive from Eckert from Ridgway for work. PA Dockins noted that Claimant needed to stand every 15 minutes due to her disc bulge and the driving had delayed Claimant's healing and caused Claimant to regress some. PA Dockins noted Claimant was having worsening radicular pain down both

thighs and needed opioid painkillers at night. PA Dockins referred Claimant to Dr. Faragher for consideration of an epidural steroid injection. ("ESI").

6. Claimant returned to PA Dockins on May 23, 2019. PA Dockins noted Claimant continued to have radicular pain down both thighs. PA Dockins recommended Claimant continue using Diclofenac, cyclobenzaprine, and Percocet as medications for her symptoms. PA Dockins noted Claimant needed to take standing breaks on her commute, and recommended she stop every 15 minutes for a standing break.

7. On June 13, 2019, PA Dockins noted Claimant had continued worsening pain from her lumbar disc bulges, including radicular symptoms now occurring in the left leg. PA Dockins discussed referring Claimant to St. Mary's Hospital Neurosurgery.

8. Claimant was evaluated by Dr. Faragher for consultation on August 13, 2019. Dr. Faragher noted decreased sensation in a right L5 pattern. Dr. Faragher diagnosed Claimant with low back pain, right-sided sciatica, multiple disc bulges, right L5-S1 foraminal stenosis, and possible right sacroiliac ("SI") joint pain and dysfunction. Dr. Faragher recommended conservative treatment, including a home exercise program, physical therapy, a TENS unit, and lumbar traction, as well as medications and potential L5-S1 epidural joint injections.

9. Claimant subsequently underwent a right-sided lumbar interlaminar L5-S1 ESI on September 5, 2019 under the auspices of Dr. Faragher. On September 26, 2019, the Dr. Faragher noted Claimant did not get any benefit from the injection. Dr. Faragher opined that Claimant may be having pain associated with the SI joint and, therefore, recommended a right-sided SI joint injection. Dr. Faragher noted Claimant had been diliegent with her home exercise program which included walking most days of the week. Dr. Faragher recommended Claimant continue her walking program and home exercise program and recommended physical therapy with a focus on lower extremity stretches, core strengthening, and spinal stabilization exercises.

10. Claimant underwent the right SI joint injection on October 21, 2019 under the auspices of Dr. Faragher. Claimant reported to Dr. Faragher on November 20, 2019 that she had no improvement with the SI joint injection. Dr. Faragher noted Claimant may have facet syndrome, and recommended bilateral L4-S1 lumbar facet injections.

11. Claimant underwent the L4-S1 bilateral facet injections on January 16, 2020 under the auspices of Dr. Faragher. Claimant reported 50% improvement after the injections when she returned to Dr. Faragher on February 4, 2020. Dr. Faragher recommended Claimant undergo a new lumbar MRI.

12. Claimant underwent the MRI on May 15, 2020. The MRI showed slightly increased disc protrusion at L1-2, and significantly processed L5-S1 degenerative facet changes with more distention of the right-sided facet with new fluid and distention of the left-sided facet. Levels L2-L5 showed moderate degenerative changes.

13. Claimant returned to Dr. Faragher on May 20, 2020. Dr. Faragher noted Claimant's MRI results, and Claimant's ongoing radicular symptoms. Dr. Faragher recommended bilateral SI joint injections with fluoroscopy. The bilateral SI joint injections were eventually performed on July 9, 2020.

14. Claimant returned to Dr. Faragher on August 11, 2020. Dr. Faragher noted Claimant would like to go forward with a right L5-S1 interlaminar epidural injection after the last bilateral SI joint injection did not help as much as intended.

15. Dr. Adams subsequently referred Claimant to Spine Colorado, a neurosurgery clinic. Claimant was evaluated by PA Byers on August 25, 2020. PA Byers diagnosed Claimant with low back pain and right greater than left radiculopathy into the lower extremities, to the dorsal side of the right foot. PA Byers noted decreased sensation on the lateral leg and dorsum of the foot. PA Byers noted that some of Claimant's symptoms were consistent with nerve compression at the L5-S1 level. PA Byers recommended an electromyelogram ("EMG") to further evaluate Claimant's radicular symptoms.

16. Claimant underwent EMG testing on October 14, 2020 with Spine Colorado. The EMG testing did not show evidence of a lumbar radiculopathy, a peripheral neuropathy or a compressive neuropathy. The EMG report noted Claimant's report of radicular symptoms and decreased sensation on the lateral right leg and dorsum of the right foot on examination. The report recommended Claimant be referred to Dr. Orndorff for surgical consultation.

17. Claimant returned to Spine Colorado on December 2, 2020 where Claimant was examined by physician access supervisor ("PASUP") Hamlin. PASUP. Hamlin noted Claimant had spondylolisthesis and significant facet arthropathy at L5-S1. PASUP Hamlin noted that Claimant continued to show decreased sensation on the right leg and foot on examination. PASUP Hamlin diagnosed Claimant with anterolisthesis and herniated nucleus pulposus at L5, bilateral S1 joint dysfunction, and facet arthropathy at L5-S1.

18. Claimant consulted with Dr. Orndorff at Spine Colorado on January 20, 2021. Dr. Orndorff noted Claimant had low back pain with bilateral leg pain, right worse than left with numbness in the right toes. Dr. Orndorff noted Claimant had undergone conservative treatment including physical therapy, anti-inflammatory medications, traction, narcotics, muscle relaxers, gabapentin, meloxicam, and injections. On examination, Dr. Orndorff noted tenderness in various parts of the spine and in the SI joint, pain with flexion and extension, decreased sensation on the right leg and right foot, diminished reflex in the right patella, and positive results on SI joint compression tests.

19. Dr. Orndorff reviewed extension X-rays, which demonstrated an L5-S1 hypermobile spondylolisthesis with 4.2 mm of translation with severe facet arthropathy. Dr. Orndorff reviewed Claimant's MRI scan and noted it showed a broad-based disc

bulge at L5-S1 and severe facet arthropathy and anterolisthesis of L5 on S1 that measured 3.2 mm. Dr. Orndorff opined Claimant had exhausted all forms of conservative options and recommended an anterior approach, LF-S1 laminectomy and posterior fusion surgery.

20. Respondents obtained an independent medical examination ("IME") with Dr. Reiss on March 17, 2021. Dr. Reiss noted Claimant reported she had low back pain that was between 5-7 out of 10, along with pain down the right leg and into the right toes. Dr. Reiss noted Claimant was engaging in a home exercise program. Dr. Reiss opined Claimant had not yet completed appropriate conservative care and indicated that Claimant's pain generator had not yet been necessarily identified. Dr. Reiss recommended Claimant pursue additional conservative care including core strengthening and aerobic conditioning aided by a physical therapy program.

21. After reviewing additional imaging studies, Dr. Reiss authored a second report on May 20, 2021. Dr. Reiss noted that there was no nerve compression and therefore there was no indication for any form of decompression. Dr. Reiss opined that no surgery is indicated at this time.

22. Dr. Orndorff produced another report on October 26, 2021 in which he opined that based on Claimant's complaints of pain and radiating symptoms, he felt the L5-S1 Gill laminectomy, L5-S1 posterior interbody fusion and autograft bone was reasonable treatment that was directly addressing the pathology and symptoms that were a result of Claimant's lifting injury.

23. On January 10, 2022, Dr. Adams noted Claimant was set to begin physical therapy as recommended by Dr. Reiss, but she was delayed due to contracting COVID-19. Dr. Adams noted Claimant's medication regimen was helping her symptoms, but not solving the symptoms Dr. Adams noted Claimant would continue with her home exercise program and re-initiate physical therapy.

24. Dr. Reiss testified at hearing consistent with his IME reports. Dr. Reiss testified that Claimant's spondylolisthesis could be a surgical lesion if it caused nerve compression or instability. Dr. Reiss opined, however, that Claimant's spondylolisthesis did not cause any nerve compression or instability. Dr. Reiss further opined that Claimant's spondylolisthesis and degenerative facet joints were preexisting conditions, but noted that these conditions were not symptomatic prior to the work injury. Dr. Reiss testified that if Claimant's spondylolisthesis was unstable, surgery may be an option for Claimant. Dr. Reiss testified, however, that there was insufficient evidence that the spondylolisthesis was unstable.

25. Claimant testified at hearing that she had engaged in frequent exercise at home since 2019 using a therapy ball, rubber bands, and hand weights along with core strengthening on her own at home. Claimant testified that since re-initiating physical therapy, she had been doing extra exercises at home focusing on the pelvic area. Claimant testified that she was delayed in beginning her most recent physical therapy

due to there being a waiting list and had only engaged in six sessions. Claimant testified that she had shooting pain down the small of her back to her tailbone. Claimant testified her pain radiates to the right hip and down the outside of the right leg, wrapping around the calf, and then to the first two toes on her right foot. She testified that she had occasional shooting pain in the left leg from the hip to the knee. Claimant testified these symptoms limit her ability to sit, stand, walk, sleep, drive, and perform activities of daily living and personal care activities. Claimant testified that her condition had worsened in the year since the surgery had been recommended by Dr. Orndorff.

26. Claimant testified that she would like to have surgery in order to resolve her symptoms and be able to return to work. Claimant testified that surgery was a last option, but felt as though she had exhausted all other options in the three years since the injury and wanted to improve her function. Claimant testified that she wanted to undergo the surgery.

27. The ALJ finds Claimant's testimony to be credible and persuasive.

28. The ALJ credits the opinions and medical records of Dr. Orndorff and Dr. Faragher over the contrary medical opinions of Dr. Reiss and finds Claimant has proven it is more likely than not that the proposed lumbar spine surgery is reasonable medical treatment necessary to cure and relieve Claimant's condition resulting from the industrial injury.

29. The ALJ recognizes the contrary opinions expressed by Dr. Reiss in his report and testimony, but finds the opinions expressed in Dr. Orndorff's records along with Claimant's testimony to be more credible and persuasive with regard to the issue of whether the proposed medical procedure would be reasonable medical treatment necessary to cure and relieve the Claimant from the effects of her industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2018. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the ALJ finds the testimony of Claimant with regard to her injury and treatment along with the reports from Dr. Orndorff and Dr. Faragher and finds that Claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Orndorff, an anterior approach, L5-S1 laminectomy and posterior fusion, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her work injury of March 13, 2019.

6. Respondents' are therefore liable for the costs of the medical treatment recommended by Dr. Orndorff pursuant to the Colorado Medical Fee Schedule.

ORDER

It is therefore ordered that:

1. Respondents' shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the surgery recommended by Dr. Orndorff.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In**

addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

DATED: June 2, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-238-001

ISSUES

1. Whether Claimant timely objected to Respondents' November 10, 2021 Final Admission of Liability, and timely applied for a Division Independent Medical Examination.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of her employment with Employer on November 26, 2019. (Ex. A). Employer filed a First Report of Injury on December 4, 2019. (Ex. D).

2. On January 7, 2020, [Third Party Administrator (TPA) for Insurer redacted], sent Claimant a letter identifying itself as Insurer's representative for Claimant's claim. (Ex. E). Respondents then filed a Notice of Contest on February 10, 2020. (Ex. G).

3. On August 26, 2021, Claimant's counsel, JP[Redacted], Esq., filed an entry of appearance with the Division of Workers' Compensation and served it on [TPA Redacted] and Employer. (Ex. 12).

4. On November 1, 2021, Claimant, through Mr. JP[Redacted], filed an Application for Hearing with the Office of Administrative Courts and served it on [TPA Redacted] and Employer. (Ex. 10).

5. On November 10, 2021, Respondents filed a Final Admission of Liability (FAL) related to Claimant's November 26, 2019 injury, admitting for medical treatment, and denying that Claimant sustained any permanent partial disability. Respondents mailed the FAL to Claimant at her address of record, Employer, and Respondents' counsel, JI[Redacted], Esq. Respondents neither listed Claimant's counsel, Mr. JP[Redacted], on the certificate of mailing for the FAL nor mailed him the FAL at that time. (Ex. A).

6. The parties stipulated that Claimant timely received the FAL after Respondents mailed it on November 10, 2021.

7. On November 15, 2021, Respondents' counsel, Mr. JI[Redacted] filed an Entry of Appearance with the Office of Administrative Courts and served it on Claimant's counsel, Mr. JP[Redacted]. (Ex. 8).

8. On December 15, 2021, Claimant filed a Hearing Confirmation with the OAC for the April 8, 2022 hearing in this matter and served it on Respondents' counsel, Mr. JI[Redacted]. (Ex. 8).

9. The parties stipulated that Mr. JP[Redacted] did not receive the FAL from Respondents until December 16, 2021. The following day, December 17, 2021, Mr.

JP[Redacted] filed Claimant's Objection to Final Admission ("Objection"), and a Notice and Proposal and Application for Division Independent Medical Examination ("DIME Application"). Claimant's counsel served both the Objection and the DIME Application on Respondents and Mr. JI[Redacted]. (Exs. 3 & 5).

10. Claimant did not file her Objection and DIME Application within 30 days of the date Respondents filed the FAL. But Claimant did file both documents within 30 days of Claimant's counsel receipt of the FAL.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

TIMELINESS OF CLAIMANT'S OBJECTION AND DIME APPLICATION

The material facts of the case are not in dispute. Respondents filed the FAL on November 10, 2021, and mailed a copy to Claimant but not to Claimant's counsel.

Claimant's counsel did not receive the FAL until 36 days later, on December 16, 2021. The following day, Claimant filed the DIME Application and Objection. Respondents contend that because Claimant received the FAL, and failed to file an objection or request a DIME within thirty days, her claim automatically closed. Claimant contends Respondents' failure to provide a copy of the FAL to her counsel tolled the period for response until Claimant's counsel received the FAL. For the reasons set forth below, the ALJ concludes that Claimant's Objection and DIME Application were timely filed.

Under the Act, when an insurer files an FAL the claimant must either object to the FAL and file an application for hearing, or request the selection of a DIME physician within thirty days. § 8-43-203(2)(b)(II)(A), C.R.S. The failure to file either an objection or a DIME application within thirty days results in the closure of all issues admitted in the FAL. *Id*. When a party is represented by counsel, W.C.R.P. Rule 1-4(A), requires that "[w]henever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and the attorney(s) of record, if any." Even in the absence of a specific rule or statute requiring service on counsel of record, procedural due process requires that both the party and counsel receive actual notice of critical determinations, such as an FAL. *Hall v. Home Furniture Co.*, 724 P.2d 94, 96 (Colo. App. 1986). Where counsel is not properly served and does not have actual notice of an FAL, the time limit imposed by § 8-43-203 (2)(b)(II)(A), C.R.S., does not begin to run until counsel receives notice. *Id*. The ALJ finds the Court of Appeal's decision in *Hall* to be dispositive. Contrary to Respondents' contention, *Hall* is not factually distinguishable from the present case.

In *Hall*, a worker's compensation insurer filed a special admission of liability and mailed a copy to the claimant but did not mail or otherwise serve it on claimant's then attorney of record. 724 P.2d at 95. The claimant took no further action on his claim until he filed a petition to reopen almost six years later. *Id*. Claimant's petition to reopen was originally granted, and later reversed by the Industrial Commission that concluded the petition to reopen was untimely. Claimant appealed, arguing the insurer's failure to provide a copy of the special admission to his attorney tolled the time limit for filing a petition to reopen. *Id*. The Court of Appeals agreed with the claimant and reversed the Commission's decision, finding "[c]laimant's due process rights were violated by claimant's attorney not being furnished with a copy of the admission of liability." *Id.,* at 96. "Under these circumstances, time limitations do not commence to run until claimant's attorney first received notification…that the admission of liability had been filed." *Id*.

The *Hall* court's decision relied on and is consistent with the Colorado Supreme Court's decision in *Mountain States Tel. & Tel. Co. v. Dept. of Labor, 520 P.2d 586 (Colo. 1974).* The *Mountain States* court held that procedural due process requires notice be given to a party's attorney of record even where no statute requires such notice. "This basic requirement flows from the attorney-client relationship by which the management, discretion and control of all procedural matters connected with the litigation is invested in the attorney. By virtue of such delegation of authority, the client is bound by the actions of his attorney." *Id*. at 589. Thus, "[i]f the attorney through no fault of his own is denied notice of the critical determination in the case, and by reason thereof fails to take procedural steps necessary to preserve his client's rights, fundamental unfairness results.

Procedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests." *Id*.

The evidence establishes that Mr. JP[Redacted] was counsel of record as of August 26, 2021, and had notified Respondents of his representation by virtue of the entry of appearance, and filing the November 1, 2021 application for hearing. Respondents did not initially provide Mr. JP[Redacted] the November 10, 2021 FAL, but provided it on December 16, 2021. Consequently, under both *Hall* and *Mountain States*, the time period for Claimant to contest the FAL or request a DIME did not commence until December 16, 2021. Claimant requested a DIME and filed her Objection on December 17, 2021, within 30 days of Mr. JP[Redacted]'s receipt of the FAL. Claimant has therefore established by a preponderance of the evidence that her Objection and DIME Application were filed within the thirty-day time limit of § 8-43-203(2)(b)(II)(A), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's December 17, 2021 DIME Application and Objection to the November 10, 2021 FAL were filed within the time limit imposed by § 8-43-203(2)(b)(II)(A), C.R.S.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 2, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-971-001

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§ 8-42-105(4) and 8-142-103(1)(g), C.R.S., and thus his entitlement to temporary total disability (TTD) benefits should be terminated effective January 20, 2022.

2. Whether Respondents have established by a preponderance of the evidence that all TTD benefits paid after January 20, 2022 are an overpayment as contemplated by § 8-40-201 (15.5), C.R.S.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant initially worked as a dockworker for Employer. In January 2021, Claimant began the training program to become a truck driver. In March 2021, he received his Commercial Driver's License and became an over-the-road truck driver for Employer. (Tr. 13:25-14:8).

2. On November 13, 2021, Claimant suffered a compensable industrial injury when he missed a foothold while exiting his truck and fell backward onto the pavement. (Ex. A).

3. Respondents filed a General Admission of Liability (GAL) on December 14, 2021, and began paying TTD benefits to Claimant as of November 13, 2021, at the weekly rate of $635.17. (Ex. B).

4. On January 12, 2022, Claimant notified Employer that he was cleared to return to work with modified restrictions. (Ex. L). As of January 17, 2022, Claimant's modified restrictions included: 20 lbs. maximum lifting; 10 lbs. repetitive lifting; 20 lbs. carrying, pushing, and pulling. Claimant was to use caution with ladders and stairs, but he was cleared for commercial driving. (Ex. M).

5. TH[Redacted], Director of Safety for Employer, testified that Employer has established drug testing policies, in compliance with the Federal Motor Carrier Safety Administration (FMCSA) and Federal Motor Carrier Safety Rules (FMCSR). One such policy is that if an employee is separated from employment longer than 30 days, the employee must undergo a drug test as a prerequisite to returning to work. (Tr. 14:15-16:3).

6. Claimant had been on medical leave for more than 30 days, so as a condition of returning to work, Claimant was required to undergo drug testing.

7. Mr. TH[Redacted] and AE[Redacted], Safety Manager for Employer, are trained and certified to administer drug tests per FMCSR. (Tr. 18:13-19:5 and 37:15-38:10). Either Mr. TH[Redacted] or Mr. AE[Redacted] administered the drug tests to employees for Employer. (Tr. 18: 8-12).

8. Claimant reported to Employer for modified duty on January 17, 2022, and underwent a urine drug screen (UDS) at Employer's location. Ms. AE[Redacted] administered Claimant's UDS test. Ms. AE[Redacted] had administered two UDS tests earlier that day before she administered Claimant's test. (Tr. 39:15-23).

9. Ms. AE[Redacted] testified as to the process she was trained to utilize when administering drug tests. Ms. AE[Redacted] credibly testified that she followed that same process with Claimant on January 17, 2022. (Tr. 38:14-39:11).

10. Ms. AE[Redacted] instructed Claimant to leave the specimen cup on the back of the toilet, and to not flush the toilet. When Ms. AE[Redacted] retrieved Claimant's sample from the back of the toilet, she immediately noticed the sample did not feel warm enough on her palm. (Tr. 41:4-14).

11. The specimen cups have a temperature strip already in place when they are delivered to Employer. Ms. AE[Redacted] testified that Claimant's UDS sample did not register on the temperature strip. The temperature strip registers at 90 degrees or higher. (Tr. 41:15-42:10).

12. Ms. AE[Redacted] told Claimant that his urine sample was not registering on the temperature strip, so he needed to provide another sample within three hours under observation, or she would have to count it as a refusal, if he failed to do so. (Tr. 42:11-43:24). Ms. AE[Redacted] testified that per FMCSA requirements and the Employer's policy, Claimant was not allowed to leave and come back later, or another day to retest. (Tr. 53:4-20).

13. Claimant testified that after he left the specimen on the toilet and came out of the restroom, Ms. AE[Redacted] spent five to ten minutes talking to him about on-line classes he needed to complete before she retrieved the specimen. (Tr. 61:12-62-2). Ms. AE[Redacted] testified that this was not accurate. She testified that it takes her seconds to collect the specimen from the back of the toilet. Further, she testified that there is a requirement, per her training and certification, that there is four-minute window from the time the sample is given and when it is tested. Ms. AE[Redacted] credibly testified that there was no delay in collecting Claimant's UDS sample as he asserted. (Tr. 74:3-22). The ALJ finds Ms. AE[Redacted]'s testimony to be more credible than Claimant's testimony, and finds that there was no delay in the collection of Claimant's UDS specimen.

14. Claimant testified that Ms. AE[Redacted] told him he could not leave. He further testified that he went outside to smoke a cigarette after she told him this. According to

Claimant, Ms. AE[Redacted] followed him outside and said that he could not leave her eyesight, so he followed her back inside to her office. (Tr. 62:16-63:16).

15. Claimant requested to speak with MB[Redacted], President of Operations. Ms. AE[Redacted] attempted to call Mr. MB[Redacted], but Claimant said, "I'm not doing it, I'm out," and he left and drove away. Ms. AE[Redacted] testified that she told Claimant not to leave, and that if he left she would have to count that as a refusal to take the test. (Tr. 44:2-20).

16. Ms. AE[Redacted] credibly testified that she followed Claimant as he left the building, and again told him if he left she would have to count that as a refusal to test. She told him repeatedly not to leave. Claimant got in his car and drove off. (Tr. 44:16-46:2).

17. Claimant testified that Ms. AE[Redacted] told him he could not leave, but he left nonetheless. Claimant testified that he only lived a few blocks away and told Ms. AE[Redacted] to call him when she was ready to administer the test again. He further testified that he had no idea he could be fired for leaving. (Tr. 62:16-63:21). The ALJ does not find this testimony credible. It is uncontroverted that Ms. AE[Redacted] told Claimant he could not leave. Claimant, however, chose to disregard Ms. AE[Redacted]'s admonition.

18. Ms. AE[Redacted] completed a Federal Drug Testing Custody and Control Form indicating, "[d] id not mark on the temp strip – Refused retest – left the building." After the first out-of-temperature test, but before he left Employer's office, Claimant signed the form. (Ex. K).

19. Ms. AE[Redacted] informed Mr. TH[Redacted] as to what had occurred with Claimant's out-of-temperature testing and his refusal to do another test. (Tr. 53:21-54:4).

20. It is undisputed that Claimant did not provide a second UDS sample on January 17, 2022. Mr. TH[Redacted] testified that Claimant's refusal to submit to a second test constituted a violation of Employer's drug testing policies and was grounds for immediate termination. Employer terminated Claimant's employment as of January 17, 2022. (Tr. 25:2-22).

21. Mr. TH[Redacted] testified that had Claimant not been terminated, Employer would have accommodated Claimant's modified duty restrictions on a full-time, full wage basis until such time Claimant was medically released to full duty. (Tr. 26:23-27:11).

22. Pursuant to the Employee Handbook, "[n]o driver shall refuse to take a required test." The Employee Handbook further provides, "[a]ny violation of this policy will result in discipline up to and including termination under Denney Transport independent authority, as provided for by the DOT." (Ex. J).

23. Claimant signed confirmation of his receipt of the Employee Handbook, and his understanding that his employment with Employer "is at-will." Claimant additionally signed the New Employee Orientation Checklist, wherein he confirmed he had "READ EMPLOYEE HANDBOOK." (*Id.*).

24. Claimant's drug test was reported as out of compliance due to his refusal to submit a second sample after the first sample was out of temperature. Mr. TH[Redacted] testified that a refusal to test is classified the same as a positive drug test result. (Tr. 22:18-25).

25. Claimant's actions in refusing to submit to a second drug test after the first out-of-temperature test, and then leaving the premises after explicitly being informed he could not do so, reflect a willful and knowing violation of Employer's drug policy.

26. The ALJ finds that Claimant was responsible for the termination of his employment with employer. The ALJ further finds that Claimant's TTD benefits should be terminated.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability Benefits/Termination for Cause

To prove entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that claimant left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *Colo. Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). In order to obtain TTD benefits, §8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restrictions of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Elec.,* 971 P.2d 641, 649 (Colo. 1999).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a-d), C.R.S.

Under §§8-42-105(4) and 8-42-103(1)(g), C.R.S. ("the termination statutes"), a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

As found, Claimant acknowledged receipt of all Employer's Handbooks and written policies regarding Employer's drug testing policies. Employer's policies clearly state that

"[n]o driver shall refuse to take a required test," and "[a]ny violation of this policy will result in discipline up to and including termination." (Findings of Fact ¶ 23). Claimant's first UDS specimen did not measure on the temperature strip, so per FMCSA and Employer policies, Claimant was required to provide a second UDS, this time observed, within three hours of his first test, or it would be counted as a refusal to test. (*Id.* at ¶ 12). Ms. AE[Redacted] credibly testified that she told Claimant, after his first UDS test, that he could not leave the premises. (*Id.*). Claimant confirmed in his testimony that Ms. AE[Redacted] told him he could not leave the premises, and despite this direction, he left the premises, got in his car and drove away. (*Id.* at ¶ 14). Claimant contends he was unaware that by leaving the Employer's premises, he would be subject to termination. (*Id.* at ¶ 17). The ALJ does find not Claimant credible. The ALJ credits the testimony of Ms. AE[Redacted] that she repeatedly informed Claimant he should not leave the premises until he submitted a second sample or she would have to indicate a failure to retest. (*Id.* at ¶ 16).

Claimant willfully and knowingly violated Employer's drug testing policies which, in turn, directly resulted in his termination. (*Id.* at ¶ 25). The ALJ credits the testimony of Mr. TH[Redacted], as supported by the Employer's Handbook, that Employer was ready, willing, and able to accommodate Claimant's modified duty restrictions until he was released to full duty. (*Id.* at ¶ 21). As such, Claimant's wage loss after January 17, 2022 is directly attributable to his termination for cause and not to his industrial injury. (*Id.* at ¶ 26).

Overpayment of TTD Benefits

The Act defines an overpayment as money received by a claimant that:

1) Is the result of fraud;
2) Is the result of an error due only to miscalculation, omission, or clerical error asserted in a new admission of liability filed within 30 days of the erroneous admission of liability;
3) Is paid in error or inadvertently in excess of an admission or order that exists at the time the benefits are paid to a claimant; or
4) Results in duplicate benefits because of offsets that reduce death or disability benefits.

§8-40-201(15.5)(a), C.R.S.[1] Respondents must prove their entitlement to an overpayment by a preponderance of the evidence. *Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002).

As found, Claimant's entitlement to TTD benefits terminated as of January 17, 2022 due to Claimant's termination for cause. Respondents argue that Claimant, received money he "was not entitled to receive" and this constitutes an "overpayment." Respondents, however, rely upon the prior statutory definition of "overpayment." As set forth in the Act, the current version of the statute is effective as of January 1, 2022.

[1] The definition is effective January 1, 2022.

Consequently, Respondents have not proven that TTD benefits paid to Claimant after January 17, 2022 are an overpayment pursuant to §8-40-201(15.5)(a), C.R.S. The TTD benefits paid to Claimant from January 17, 2022 to date were not paid in error, nor were they the result of fraud. Thus, the TTD benefits that Claimant received from January 17, 2022 forward are not an overpayment, and Respondents are not entitled to recover this money.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant's entitlement to TTD benefits terminated as of January 17, 2022 due to Claimant's termination for cause.

2. Respondents have failed to prove by a preponderance of the evidence that they are entitled to claim an overpayment of all TTD benefits paid on or after January 17, 2022.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Brian J. Beatty, D.O. that Claimant's left hip condition is causally related to her December 17, 2018 motor vehicle accident (MVA).

2. Whether Claimant has demonstrated by a preponderance of the evidence that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA.

STIPULATION

The parties agreed that Claimant is not currently at Maximum Medical Improvement (MMI) based on active treatment for her right lower extremity. Accordingly, the issue of permanent impairment as it relates to the left hip is not ripe for adjudication and is reserved for future determination.

FINDINGS OF FACT

1. Claimant is a 70 year-old female who suffered admitted industrial injuries on December 17, 2018 during a MVA. She was immediately transported to a hospital following the accident. Claimant was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture. She ultimately underwent right ankle surgery.

2. Claimant has a significant history of pelvic and SI joint injuries related to a 2016 non-work related fall off a ladder in which she shattered her pelvis. She was out of work for almost one year because of the injury. Specifically, on October 12, 2016 Claimant underwent an open reduction and internal fixation symphysis (ORIF), closed reduction percutaneous iliosacral screw fixation and right sacral fracture. A second ORIF surgery was performed on January 12, 2017 due to pelvic nonunion with hardware failure and Claimant underwent an external fixation to the anterior pelvis. Despite the injuries, Claimant eventually made a full recovery and was released to work full duty.

3. On January 28, 2019 Claimant began medical care with Authorized Treating Physician (ATP) Cathy Smith, M.D. for her December 17, 2018 MVA. Dr. Smith took a detailed history of the mechanism of injury and noted that Claimant had undergone surgery. Claimant was then discharged to Fairacres Manor on January 24, 2019 for continued rehabilitative care. A physical examination revealed no pain with direct palpation or manipulation of the lower back, SI joints, buttocks or bilaterally at the hips. Claimant had equal bilateral hip range of motion. Her work-related diagnoses included

fracture of the right calcaneus and right tibia, fracture of the mid-sternum, abdominal hematoma and chest wall hematoma.

4. On May 29, 2019 Claimant returned to Dr. Smith at UC Health. Since becoming more active, Claimant noticed increased lower back pain that she attributed to her gait because of walking in a bent forward position. A physical examination revealed an extremely antalgic gait while walking without the use of a cane. Dr. Smith addressed proper cane usage with Claimant. They discussed that the onset of lower back pain in all medical probability was due to Claimant's significant gait disturbance. Dr. Smith thus recommended therapy for Claimant's lumbar discomfort while also receiving treatment for right ankle stiffness and pain.

5. On August 7, 2019 Claimant reported to Dr. Smith a sudden escalation in lower back discomfort that began four to five days earlier. Claimant was unsure what caused the increased pain, but noted that she had a physical therapy appointment the day before the pain escalated. Claimant reported no pain with direct palpation or manipulation bilaterally at the hips.

6. On September 3, 2019 Claimant returned to Dr. Smith at UC Health for an examination. Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." Dr. Smith remarked that range of motion in the lumbar spine was extremely tender. Moreover, Claimant reported pain with palpation "in the posterior lateral left hip" and pain with external rotation of the left hip.

7. On September 13, 2019 Claimant underwent a CT scan of the abdomen and pelvis. The impression included chronic healed fractures of the pubic rami and lower sacrum with internal fixation hardware across the superior pubic rami and right SI joint as well as bilateral SI joint osteoarthritis. A lumbar CT scan revealed extensive degenerative changes throughout the thoracic and lumbar spine. There was no evidence of any acute trauma or failure of Claimant's hardware.

8. Dr. Smith determined that the escalation of Claimant's symptoms was likely multifactorial in nature. She attributed the increase to a change in exercises and physical therapy combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Gregory Reichhardt, M.D. for a physiatric consultation.

9. On September 18, 2019 Claimant visited Dr. Reichhardt and reported significant pain over the left SI and gluteal area while doing prone hip extensions in physical therapy. Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower

leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. After discussion, Dr. Reichhardt administered trochanteric bursa and trigger point injections.

10. By September 27, 2019 Claimant reported that she was doing 40% to 50% better following the trochanteric bursa and trigger point injections. However, because she continued to report SI gluteal area pain, Dr. Reichhardt recommended a hip MRI arthrogram.

11. Claimant subsequently underwent repeat trochanteric bursa and trigger point injections over time and generally obtained relief of her symptoms. She also received an SI joint injection and experienced pain relief.

12. On October 17, 2019 Claimant underwent a left hip MRI arthrogram. The impressions were: (a) limited arthrogram images of the left hip due to extensive metal susceptibility artifact from prior acetabulum fixation; (b) left greater than right trochanteric bursitis; (c) asymmetric atrophy of the left gluteus medius and gluteus minimus muscles when compared to the right side, likely sequela of a prior muscle injury or denervation change; and (d) degenerative disc disease of the lower lumbar spine.

13. Claimant returned to Dr. Reichhardt on October 18, 2019. He commented that the hip MRI confirmed Claimant had hip bursitis along with other pain generators. Dr. Reichhardt noted that it was difficult to determine whether Claimant had intra-articular hip involvement or SI involvement, but her examination was more prominent for the SI area.

14. Claimant subsequently underwent a left SI joint injection on January 3, 2020. On February 17, 2020 Claimant received a trochanteric bursa injection and trigger point injections to the gluteal area.

15. On October 21, 2020 Dr. Reichhardt placed Claimant at Maximum Medical Improvement (MMI). He diagnosed Claimant with a work-related MVA resulting in a sternal fracture, right calcaneal fracture and abdominal hematoma, status post ORIF for calcaneal fracture and lower back/left hip/SI area pain that included a "possible component of trochanteric bursitis, myofascial pain and possible non-work related L4 lumbar radiculopathy. With regard to the left hip, Dr. Reichhardt assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits. He recommended maintenance treatment for the left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years.

16. On March 25, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Brian J. Beatty, D.O. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal

fracture and left hip greater trochanteric bursitis. He agreed that Claimant reached MMI on October 21, 2020. With regard to the left hip, Dr. Beatty assigned a 33% extremity impairment rating that converted to a 13% whole person rating due to range of motion deficits. Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

17. Respondents filed an Application for Hearing to challenge Dr. Beatty's DIME determination. Specifically, Respondents asserted that Claimant had not sustained a ratable left hip condition related to her work injury.

18. On January 4, 2022 John Raschbacher, M.D. performed an independent medical examination of Claimant and testified at the hearing in this matter. Dr. Raschbacher reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant sustained a sternum fracture, abdominal wall hematoma, right fibula fracture and a comminuted right calcaneus fracture as a result of her December 17, 2018 MVA. Claimant reported that she developed left bursa symptoms due to limping so badly that she had pain in her hip and left buttock during physical therapy in August 2019. However, Dr. Raschbacher reasoned that Claimant's left hip condition and symptomatology was not related to her MVA and inconsistent with the mechanism of injury.

19. Dr. Raschbacher remarked that left hip trochanteric bursitis is located outside of and lateral to the hip joint. He explained that the bursa is well outside the hip joint and bursitis is inflammation of the bursa. Even if related to the injury, bursitis would not produce a permanent impairment. Further, bursitis is a fairly common problem that can become symptomatic without trauma and is frequently idiopathic. Here, imaging revealed that bursitis was present in both hips. Dr. Raschbacher testified that it was unusual that bursitis was present radiologically on both sides, but only symptomatic on one side. He noted that bursitis typically involves point tenderness, not dysfunction at the hip joint causing loss of motion.

20. Assuming Claimant suffers symptomatic bursitis, Dr. Raschbacher reasoned that it would not likely produce permanent impairment or limitations of hip motion. Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for the left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Dr. Raschbacher also noted it was unlikely that a physical therapist would recommend exercises that cause hip bursitis, and hip joint motion does not cause trochanteric bursitis.

21. Dr. Raschbacher testified that there were no medical records reflecting that Claimant sustained an acute hip or lower back injury as a result of her December 17, 2018 MVA. He noted that the left hip MRI clearly showed old muscle changes from the 2016 ladder injury. Further, trochanteric bursitis is not usually caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common

and typically patients have no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

22. Dr. Raschbacher also disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior pathology on the MRI related to the 2016 fall, and trigger point injections are not used to treat trochanteric bursitis.

23. On May 5, 2022 the parties conducted the post-hearing evidentiary deposition of ATP Dr. Reichhardt. Dr. Reichhardt disagreed with Dr. Raschbacher's causation assessment. He reasoned that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

24. Dr. Reichhardt explained that, based on his physical examinations, Claimant had very prominent tenderness over the trochanteric bursa. Even though she had generalized tenderness over other areas including the SI joint and some of the muscles around the hip girdle region, she was particularly tender over the bursa. After performing various examinations and injections, Dr. Reichhardt was able to obtain a better understanding of Claimant's probable pain generators. Notably, he ruled out labral tears based on the hip MRI.

25. Dr. Reichhardt detailed that, although Claimant obtained some improvement after SI joint injections, she continued to experience symptoms over the lateral aspect of the hip. He thus wanted to repeat the trochanteric bursa injection. Dr. Reichhardt explained that Claimant's source of pain was emanating from the bursa and caused reactive changes in the muscles around the hip joint under the hip girdle.

26. Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that, when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)*

(AMA Guides) Claimant warranted an impairment rating for the left hip based on range of motion limitations. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

27. Dr. Reichhardt recommended maintenance treatment for the left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He suggested treatment to the hip for a four-year period because injections either lose their benefit or people do not require them for functioning even if they still have symptoms. He summarized that Claimant's symptoms from the trochanteric bursa are affecting the myofascial girdle of the left hip. Moreover, because the altered gait could be contributing to Claimant's myofascial pain, Dr. Reichhardt recommended additional trigger point injections. Dr. Reichhardt thus reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA.

28. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that Claimant's left hip condition is causally related to her December 17, 2018 MVA. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Beatty's causation determination was incorrect. Initially, Claimant suffered admitted industrial injuries on December 17, 2018 during a MVA. She was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture.

29. Claimant received treatment for her injuries from ATP Dr. Smith. In a September 3, 2019 visit with Dr. Smith Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." After a CT scan of the abdomen and pelvis, Dr. Smith attributed the increase in pain to a change in physical therapy exercises combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Dr. Reichhardt for a physiatric consultation.

30. On September 18, 2019 Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. He then administered trochanteric bursa and trigger point injections. On October 17, 2019 Claimant underwent a left hip MRI arthrogram that revealed left greater than right trochanteric bursitis. After additional diagnostic testing and injections, Dr. Reichhardt determined that Claimant reached MMI on October 21, 2020 and assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits.

31. On March 25, 2021 Claimant underwent a DIME with Dr. Beatty. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal fracture and left hip greater trochanteric bursitis. Dr. Beatty agreed that Claimant reached MMI on October 21, 2020 and assigned a 33% extremity impairment rating for Claimant's left hip that converted to a 13% whole person rating due to range of motion deficits.

32. After conducting an independent medical examination, Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for Claimant's left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of left hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Furthermore, trochanteric bursitis is not frequently caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common and typically patients present no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

33. Dr. Beatty did not engage in a detailed causation analysis connecting Claimant's left hip condition to her MVA. However, the persuasive opinion of Dr. Reichhardt supports Dr. Beatty's DIME determination that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

34. Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that, when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides,* Claimant warranted an impairment rating for the left hip because of

range of motion deficits. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

35. Based on the medical records and persuasive opinion of Dr. Reichhardt, Dr. Beatty correctly assigned an impairment rating for Claimant's left hip condition. The contrary determination of Dr. Raschbacher is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Beatty's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

36. Claimant has demonstrated that it is more probably true than not that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA. Dr. Reichhardt determined that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

37. ATP Dr. Reichhardt recommended maintenance treatment for Claimant's left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He summarized that Claimant's symptoms from the trochanteric bursa affect the myofascial girdle of her left hip. Moreover, because the altered gait could be contributing to Claimant's myofascial pain, Dr. Reichhardt reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA. Similarly, DIME Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

38. In contrast, Dr. Raschbacher disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior MRI pathology related to the 2016 fall and trigger point injections are not used to treat trochanteric bursitis. Despite Dr. Raschbacher's determination, the medical records and persuasive opinion of ATP Dr. Reichhardt reflect that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to Claimant's December 17, 2018 MVA. Accordingly, Claimant is entitled to receive two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers

at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether

the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that Claimant's left hip condition is causally related to her December 17, 2018 MVA. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Beatty's causation determination was incorrect. Initially, Claimant suffered admitted industrial injuries on December 17, 2018 during a MVA. She was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture.

9. As found, Claimant received treatment for her injuries from ATP Dr. Smith. In a September 3, 2019 visit with Dr. Smith Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." After a CT scan of the abdomen and pelvis, Dr. Smith attributed the increase in pain to a change in physical therapy exercises combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Dr. Reichhardt for a physiatric consultation.

10. As found, on September 18, 2019 Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. He then administered trochanteric bursa and trigger point injections. On October 17, 2019 Claimant underwent a left hip MRI arthrogram that revealed left greater than right trochanteric bursitis. After additional diagnostic testing and injections, Dr. Reichhardt determined that Claimant reached MMI on October 21, 2020

and assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits.

11. As found, on March 25, 2021 Claimant underwent a DIME with Dr. Beatty. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal fracture and left hip greater trochanteric bursitis. Dr. Beatty agreed that Claimant reached MMI on October 21, 2020 and assigned a 33% extremity impairment rating for Claimant's left hip that converted to a 13% whole person rating due to range of motion deficits.

12. As found, after conducting an independent medical examination, Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for Claimant's left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of left hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Furthermore, trochanteric bursitis is not frequently caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common and typically patients present no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

13. As found, Dr. Beatty did not engage in a detailed causation analysis connecting Claimant's left hip condition to her MVA. However, the persuasive opinion of Dr. Reichhardt supports Dr. Beatty's DIME determination that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

14. As found, Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that,

when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides,* Claimant warranted an impairment rating for the left hip because of range of motion deficits. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

15. As found, based on the medical records and persuasive opinion of Dr. Reichhardt, Dr. Beatty correctly assigned an impairment rating for Claimant's left hip condition. The contrary determination of Dr. Raschbacher is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Beatty's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

Medical Benefits

16. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

17. As found, Claimant has demonstrated by a preponderance of the evidence that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA. Dr. Reichhardt determined that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

18. As found, ATP Dr. Reichhardt recommended maintenance treatment for Claimant's left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He summarized that Claimant's symptoms from the trochanteric bursa affect the myofascial girdle of her left hip. Moreover, because the altered gait could be contributing

to Claimant's myofascial pain, Dr. Reichhardt reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA. Similarly, DIME Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

19. As found, in contrast, Dr. Raschbacher disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior MRI pathology related to the 2016 fall and trigger point injections are not used to treat trochanteric bursitis. Despite Dr. Raschbacher's determination, the medical records and persuasive opinion of ATP Dr. Reichhardt reflect that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to Claimant's December 17, 2018 MVA. Accordingly, Claimant is entitled to receive two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

2. Claimant is entitled to receive reasonable and necessary additional medical benefits, including left hip trigger point injections and left hip bursa injections, for her December 17, 2018 MVA.

3. The issue of permanent impairment as it relates to Claimant's left hip is not ripe for adjudication and is reserved for future determination.

4. Any other issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: June 8, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[Redacted]** Claimant, v. **[Redacted]** Employer, and **[Redacted],** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-091-771-005**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge ("ALJ"), Richard M. Lamphere on March 2, 2022 and April 25, 2022. The March 2, 2022 hearing was convened in Courtroom 1 of the Office of Administrative Courts (OAC) in Colorado Springs and was digitally recorded between 1:00 and 2:40 p.m. The April 25, 2022 hearing was conducted via video teleconference and digitally recorded on the Google Meets platform between 9:00 and 9:36 a.m.

Claimant was present for both hearings and testified on her behalf. She is proceeding *pro se*, i.e. without counsel. Respondents were represented at both hearings by [Redacted], Esq. In addition to Claimant's testimony, the parties took the evidentiary deposition of Dr. Wallace Larson on April 5, 2022. The written transcript of Dr. Larson's deposition testimony has been lodged with the OAC and is admitted into evidence. The ALJ has also received and listened to the audio recording of Dr. Larson's April 5, 2022 deposition. The audio recording of Dr. Larson's deposition is also admitted into evidence. In addition to the aforemtnioned testimony, the ALJ admitted the following exhibits into evidence: Claimant's Hearing Exhibits 1-7 and Respondents' Hearing Exhibits A-E. Finally, the ALJ takes administrative notice of the contents of files identified as W.C. No. 5-091-771-004 and W.C. 5-091-771-004 maintained by the OAC.

The parties presented, closing arguments at the April 25, 2022 hearing. Because Claimant raised concerns regarding the accuracy of the written transcript of Dr. Larson's deposition testimony, the ALJ ordered any video of Dr. Larson's deposition be produced to Claimant and the OAC within ten days of the April 25, 2022 hearing. As part of his order, the undersigned gave Claimant ten days after receipt of the video of Dr. Larson's deposition to submit supplemental argument to the ALJ. Respondents were given five days after receipt of Claimant's supplemental argument to file a written response. After fifteen days from the production of the video, the ALJ indicated that the case would be

at issue and ready for an order.[1] The ALJ was subsequently notified that while Dr. Larson's deposition was conducted by Zoom Teleconference, no video was captured and preserved. Nonetheless, audio of Dr. Larson's deposition was available and sent to Claimant, Respondent's counsel and the ALJ for review.

On May 2, 2022, Claimant filed, what the ALJ considers, a Motion to Add an Issue for Hearing. In her motion, Claimant alleges that there were "Discrepancies" between the audio of Dr. Larson's deposition and the written transcript prepared by Mile High Court Reporting & Video. On May 11, 2022, Claimant submitted additional documentation to the OAC for consideration by the ALJ. This documentation included a May 3, 2022 statement from DJ[Redacted] outlining her personal perceptions concerning the testimony of Dr. Larson. On May 13, 2022, Respondent's counsel filed a motion to strike Ms. DJ[Redacted]' statement on relevancy and hearsay grounds. By order dated May 17, 2022, the undersigned struck Ms.DJ[Redacted]'s statement. In the May 17, 2022 Order, the ALJ advised the parties that the issue of the alleged inconsistencies between the written transcript and the audio recording of Dr. Larson's deposition would be addressed, along with the other issues before the ALJ, in a full order containing specific findings of fact and conclusions of law. Neither party submitted supplemental argument based upon the May 17, 2022 order. Consequently, the matter is ready for an order.

In this order, [Redacted] will be referred to as "Claimant." [Redacted] will be referred to as "Employer" and [Redacted] will be referred to as "Insurer." Employer and Insurer may be referred to collectively as Respondents. All others shall be referred to by name.

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2018); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her claim should be reopened based on an alleged worsening of condition related to her October 12, 2018 industrial injury.

II. If Claimant established that she is entitled to a reopening of her claim, whether she also established, by a preponderance of the evidence, that she is entitled to additional medical treatment, temporary total disability (TTD) benefits and a disfigurement award.

FINDINGS OF FACT

[1] See the April 26, 2022 order of ALJ Lamphere.

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's October 12, 2018 Industrial Injury and Treatment for the Same

1. Employer operates as a long term care facility housing residents who require various levels of help with activities of daily living (ADL) and management of chronic health conditions.

2. Claimant worked for Employer as the night shift nursing supervisor. She is a registered nurse (RN). In the early morning hours of October 12, 2018, Claimant was summons to a patient room by the nursing staff to assist in moving a resident to her bed for the night.

3. Claimant testified that the resident in question weighed 425 pounds and that when she arrived to the patient's room she found her dangling precariously from a Hoyer lift. Concerned that the resident was slipping out of the sling, Claimant ordered the staff to lower the patient to the floor so the sling could be repositioned and the resident safely lifted to her bed. According to Claimant, she placed pillows and blankets on the floor and cradled the patients head and neck from a kneeling position while the staff eased the resident to the floor. As Claimant stood back up, she experienced pulling and pain in her neck, shoulders and upper back. She completed an incident report and returned to work. Claimant tendered the incident report to her supervisor when she reported to work around 5:00 a.m. and went home after her shift, hoping that her pain would subside.

4. Once home, Claimant retired to bed but awoke around 2:00 p.m. with severe pain in her shoulders, upper back and lower back. She called her supervisor informing her she was going to take the evening off and went to the emergency department at Penrose Hospital where she was assessed with a strain of the left trapezius muscle.

5. Liability for Claimant's injuries was admitted and she began a course of conservative care[2], including physical therapy (PT) on October 21, 2018.

6. On November 26, 2018, Claimant returned to the emergency room at Penrose Hospital where she reported that she had been attending PT as part of her treatment plan for her work injury. Upon presentation to the ER, Claimant advised that her physical therapist had "felt something" concerning in her low back and that additional PT would be held until Claimant underwent an MRI. (Respondents' Exhibit (RE) C, p. 73). Claimant reported that she asked her authorized treating provider (ATP) under her workers' compensation claim for an MRI but none was ordered. (Id.). Claimant was in pain and tearful. (Id.). Accordingly, she was admitted to the hospital for observation and completion of an MRI of the thoracic and lumbar spine. (Id.). Imaging of the thoracic spine revealed "mild thoracic dextroscoliosis" and "mild

[2] Under the direction of Dr. Charles Patrick Higgins.

degenerative disc and facet joint changes but "[n]o significant spinal canal or neural foraminal compromise in the thoracic spine. (Id.) The C6-7 level of the cervical spine was also partially visible on the thoracic MRI and demonstrated "more advanced degenerative disc disease" along with a disc bulge or herniation was "partially demonstrated." (Id.). No MRI of the cervical spine appears to have been completed during Claimant's November 26, 2018 hospital admission.

7. On November 28, 2018, Claimant returned to Dr. Higgins for reevaluation. Claimant reported "ongoing and worsening pain in her neck that radiates down through her shoulders." Dr. Higgins erroneously documented that Claimant had an MRI of the cervical spine, which demonstrated a disc herniation at the C6-7 level. (RE C, p. 73). Claimant requested a neurosurgical referral and Dr. Higgins acquiesced to the same. (Id.).

8. On December 5th and 26th, 2018, Dr. Higgins again recommended that Claimant undergo both an orthopedic and neurology evaluation for her persistent symptoms and reported MRI findings. (RE C, p. 74).

9. Claimant sought additional care through the emergency room at Penrose Hospital on January 16, 2019. She reported that she was waiting for a workup with a spinal surgeon and was returning to the ER for continued pain. Spinal examination was entirely normal and non-tender to palpation. (Id.). Claimant requested a "steroid" injection, which was administered. She was also provided with valium and tramadol for use at home and discharged.

10. On February 4, 2019, Dr. Eric Ridings completed an Independent Medical Examination (IME) of Claimant at the request of Respondents. After completing a physical examination directed to the cervical spine, Dr. Ridings opined:

> My current impression is that the patient does not have a work-related cervical diagnosis, in that I do not see any examination evidence of abnormality that I would relate to the cervical spine. She does have at least a disc bulge at C6-7 seen on the thoracic MRI scan, but disc bulges are often asymptomatic as I suspect this one is at least currently, given the lack of findings or complaints in the cervical spine today.

(RE B, p. 67).

11. While Dr. Ridings did not believe Claimant had a work-related cervical diagnosis, he did conclude that Claimant had suffered a left greater than right shoulder strain that had become chronic causing myofascial pain and tightness. Nonetheless, Claimant's history of bilateral upper extremity paresthesia combined with the "poorly-visualized cervical disc abnormality on the thoracic MRI prompted Dr. Ridings to recommend that Claimant actually obtain a cervical MRI. (RE B, p. 67). He noted specifically that Claimant "did not have examination findings consistent with rotator cuff

injury or any other intra-articular pathology of either shoulder." (Id. at p. 66). Dr. Ridings completed an additional records review on March 26, 2019. (RE B, p. 56-59). Dr. Ridings concluded that the additional records contained "little" information and failed to change any of the opinions expressed in his February 4, 2019 IME report.

12. Claimant was referred to Dr. Kenneth Finn to assume/direct the care related to her October 12, 2018 industrial injury. (Re A, p. 18). Dr. Finn evaluated Claimant on April 11, 2019. (Id.). He noted mild positive impingement signs concerning the left shoulder along with decreased cervical range of motion. (Id.). He recommended MRI of the neck, additional PT and consideration of an MR/arthrogram of the left shoulder. (Id.).

13. On April 21, 2019, Claimant experienced an episode of syncope while grocery shopping. She was taken to the emergency room where an MRI of the cervical spine was performed. (RE A, p. 19). The MRI reportedly demonstrated a C4-5 right paracentral disc extrusion without significant cord compression or nerve root impingement. (Id.).

14. Claimant returned to Dr. Finn on May 3, 2019 in follow-up. (RE A, p. 19). Dr. Finn performed an electrodiagnostic study of the left upper extremity that he interpreted as falling within normal limits. (Id.). Because the left upper extremity was more affected than the right, testing of the right arm was deferred. (Id.). Dr. Finn noted that the recent cervical spine MRI demonstrated "multilevel spondylosis and disc extrusions which may be contributing to her symptoms . . ." (Id.). Consequently, he recommended a cervical epidural steroid injection (ESI).

15. Claimant underwent an IME with Dr. Lawrence Lesnak on May 24, 2019. (RE C). Following his medical records review and physical examination, Dr. Lesnak opined that Claimant might possibly have sustained a "mild soft tissue strain/sprain injury to her left suprascapular/scapular/upper trapezius musculature as a result of the 10/12/2018 reported occupational incident." (RE C, p. 79). He felt that Claimant's "expanding symptomatology" raised the specter for an underlying anxiety/personality disorder based on his conclusion that Claimant had no reproducible objective findings to support any of her ongoing complaints. (Id.). According to Dr. Lesnak, if Claimant had suffered a sprain/stain injury to her left suprascapular/scapular/upper trapezius musculature, this injury would have completed resolved within several weeks/months. (Id.). Consequently, he opined that Claimant had "no current diagnoses . . . that would correlate with her current subjective complaints that would be related in any way to the occupational incident of 10/12/2018." (Id.).

16. Claimant's symptoms continued unabated throughout the balance of 2019 and into 2020. She continued to treat with Dr. Finn and additional diagnostic testing to include repeat electrodiagnositc studies and an MR arthrogram of the left shoulder were performed. The potential for multiple sclerosis was raised and neurology consults were completed.

17. On May 27, 2020, Claimant was evaluated by Dr. Wallace Larson in an IME setting at Respondents request. (RE D). Dr. Larson was asked to provide opinions regarding Claimant's current diagnosis and what, if any, diagnosis were causally related to the October 12, 2018 work incident involving lowering the heavy resident in question to the floor. After taking a history, completing a records review and physical examination, Dr. Larson opined as follows:

> The patient does not have any objectively identified diagnosis or injury related to her reported incident at work 10/12/2018. Whether the claimed injury occurred from supporting the patient's head while she was in a kneeling position, or, as reported to me, as she was arising from a kneeling position, it is highly unlikely she sustained any injury at all. Her symptoms are not consistent with any anatomic injury. Clearly, arising from a kneeling position would not have caused injury that she describes as involving nearly her entire body.
>
> * * *
>
> Radiographic and MRI findings are clearly those of a pre-existing [condition]. There is no reasonable indication those conditions were aggravated by her occupational exposure.

(RE D, p. 100).

18. The ALJ finds the opinions of Drs. Ridings, Lesnak and Larson regarding the relatedness of Claimant's persistent shoulder and neck symptoms to the October 12, 2018 work incident involving the lowering a heavy resident to the floor are strikingly similar to one another.

19. On October 29, 2020, Claimant sought a neurosurgical evaluation with Dr. Paul Boone. (Claimant's Exhibit (CE) 2; see also RE A, p. 40). Dr. Boone noted that Claimant reported experiencing constant back pain with sensory disturbance and subjective weakness in her lower extremities. (Id. at p. 41). She also complained of intermittent neck pain and constant pain involving her upper extremities bilaterally which began after the October 12, 2018 work incident. (Id.). Dr. Boone reviewed the images of a cervical MRI obtained September 13, 2020. According to Dr. Boone, Claimant's September 13, 2020 cervical MRI demonstrated the "presence of mild diffuse spondylitic changes as manifested by the presence of some signal change within all cervical disc space segments." (RE A, p. 44). He also noted the presence of a disc bulge/osteophyte complex at C6-7, which resulted in "moderate right and moderate to severe left bilateral foraminal stenosis." (Id.). No other focal areas of significant cervical disc herniation or cervical spinal stenosis were identified on radiographic imaging. (Id.). Dr. Boone opined that Claimant's symptoms and associated findings on imaging did not warrant neurosurgical intervention. (RE A, p. 45). Instead, Claimant

was encouraged to pursue additional injection therapies and an evaluation by a pain management specialist to address her ongoing symptoms. (Id.).

20. On November 25, 2020, Claimant underwent an evaluation by Dr. David Weinstein with respect to her complaints of bilateral shoulder pain. During this encounter, Claimant reported, "diffuse pain throughout the shoulder girdles and arms." (RE A, p. 46). She reported having EMGs and suggested that she had carpal tunnel syndrome. (Id.). Following a comprehensive physical examination, Dr. Weinstein opined that Claimant's imaging (MRI scans) did not demonstrate any high-grade full or partial thickness rotator cuff or labral tears and that her persistent symptoms were consistent with "severe myofascial inflammation." (Id. at p. 49). He recommended additional physical therapy and suggested that Claimant was approaching MMI. (Id.).

21. Claimant was placed at maximum medical improvement (MMI) on November 25, 2020, by Dr. Thomas Higginbotham as part of a Division Independent Medical Examination (DIME) performed January 5, 2021. (RE A). In his DIME report dated January 10, 2021 and amended February 2nd and 4th, 2021, Dr. Higginbotham assessed Claimant with a strain injury involving the neck and shoulders along with "moderate cervical spondylosis without radiculopathy" and "bilateral shoulder impingement syndrome." (Id. at p. 32). Dr. Higginbotham assigned a 25% combined whole person impairment rating and indicated that surgery had not been "recommended for [Claimant's] neck or shoulders. (Id. at pp. 33-35). He noted further that additional injection therapy was not likely to improve her condition. He recommended a self-directed care program consisting of breathing techniques stretching, automassage, postural righting maneuvers, improved nutrition and a general strengthening and aerobic exercise program. (Id. at p. 35). Finally, Dr. Higginbotham recommended that Claimant avoid any further litigation associated with the workers' compensation system. (Id.).

22. Claimant testified that she experienced a worsening of her neck/upper extremity symptoms on February 1, 2021.

23. Respondents filed a Final Admission of Liability (FAL) on February 26, 2021 admitting to Dr. Higginbotham's assigned impairment rating. (RE A, p. 1) The FAL did not admit liability for maintenance care after MMI.

24. Claimant through her then attorney, [Redacted], Esq. filed an objection to Respondent's February 26, 2021 FAL. As part of her objection to the February 26, 2021 FAL, Claimant also filed an Application for Hearing (W.C. No. 5-091-711-004) endorsing Permanent Partial Disability and Overcoming the DIME opinions of Dr. Higginbotham as to impairment. The March 17, 2021 Application for Hearing did not endorse ongoing maintenance care as an issue for determination at hearing.

25. On March 11, 2021, Claimant returned to Dr. Boone for follow-up regarding her persistent neck pain. (CE 3). During this encounter, Claimant reported experiencing constant neck pain, which was exacerbated by head movement. (Id.).

With the exception of left greater than right upper extremity radicular type pain, Dr. Boone's diagnostic impression remained unchanged. (Id.). Non-operative and operative treatment options were discussed and after consultation, Claimant elected to proceed with surgical intervention directed to the C6-7 osteophyte complex causing severe bilateral foraminal stenosis. (Id.). Accordingly, Claimant was scheduled for C6-7 total disc replacement surgery. (Id.).

26. Although she did not include the C6-7 operative note in her exhibit packet, Claimant testified that she underwent a total disc replacement surgery for severe spinal stenosis. A follow-up IME report authored by Dr. Larson on April 29, 2021 indicates that Claimant presented with a well-healed left anterior cervical incision and reported that she underwent cervical disc replacement surgery on April 7, 2021. (RE D, p. 102).

27. In his April 29, 2021 IME report, Dr. Larson documents that Claimant was "uniquely" uncooperative with the IME by refusing to provide any meaningful history or allow any meaningful examination. (RE D, p. 108). He reiterated his opinion that Claimant had "no occupationally related diagnosis. (Id.). He opined further that Claimant need for a C6-7 disc replacement surgery was not related to her claimed October 12, 2018 industrial injury.

28. On June 4, 2021, Dr. Larson issued a brief report outlining a medical record authored by Dr. Richard Meinig following an April 20, 20921 visit with Claimant. (RE B, p. 101). Dr. Larson's June 4, 2021 report indicates simply that Claimant was evaluated by Dr. Meinig for bilateral shoulder impingement and that a left subacromial shoulder injection with Kenalog was administered. (Id.). The report also indicates that a recent MRI arthrogram demonstrated "some tendinosis changes and some type II acromion changes but no evidence of full-thickness cuff tearing." (Id.). Dr. Larson's summery of the content of Dr. Meinig's April 20, 2021 report is devoid of any mention concerning the need for shoulder surgery.

29. Claimant did not supply a copy of the April 20, 2021 report of Dr. Meinig or any other report opining that Claimant needs shoulder surgery and that the need for this surgery is causally related to Claimant's October 12, 2018 industrial injury.

30. On July 19, 2021, Claimant filed an Unopposed Motion with Withdraw her March 17, 2021 Application for Hearing with a request that she be permitted to file a successor application within 30 days of the order granting her motion. Claimant acknowledged that should she not refile an Application for Hearing within 30 days, her claim would close subject to the reopening provisions of the Workers Compensation Act. Claimant's motion was granted by order of ALJ William Edie on July 21, 2021. Claimant's counsel then moved to withdraw from the claim and the claim was closed by the Office of Administrative Courts.

31. As Claimant did not file an Application for Hearing within the 30 days prescribed by the July 19, 2021 Motion and the July 21, 2021 Order of ALJ Edie, the claim closed subject to reopening.

32. On November 16, 2021, Claimant filed an Application for Hearing endorsing among other issues, petition to reopen. This Application was designated as W.C. No. 5-091-711-005. Attached to her Application was a type written statement from Claimant indicating that she underwent spinal surgery as a consequence of her October 12, 2018 industrial injury and that she had been diagnosed with bilateral damage caused by her work injury which was worsening for which surgical intervention had been recommended.

Dr. Larson's April 5, 2022 Deposition Testimony

33. As noted, Dr. Larson testified by deposition on April 5, 2022. Claimant contends that the written transcript of Dr. Larson's deposition testimony is incomplete as the court reporter omitted material testimony from the record. In order to assess the accuracy of the written transcript, the ALJ ordered that the video tape of Dr. Larson's deposition be produced and forwarded to the Claimant and the ALJ for review. As referenced above, no video of the deposition was captured. Nonetheless, an audio recording of Dr. Larson's deposition had been preserved and the same was forwarded to Claimant and the ALJ for review.

34. The ALJ has listened carefully to the audio recording of Dr. Larson's deposition testimony. After thorough review of the audio recording, the ALJ is not convinced that any significant omissions in Dr. Larson's testimony were made by the court reporter. Rather, review of the audio recording reveals that on a couple of occasions a small error was made when transcribing the audio to text when preparing the written transcript of Dr. Larson's testimony. For example, during the audio recording Respondents counsel asked Dr. Larson whether there was "any objective medical evidence that these symptoms which Ms. Fieldgrove testified to had their onset on February 1 of 2021 *were due to* a natural progression and worsening of the work-related incident and its sequelae." (Audio Recording of Dr. Larson's April 5, 2022 deposition, Time Stamp, 8:49–9:09). This question was transcribed incorrectly as: "Is there any objective medical evidence that these symptoms which Ms. Fieldgrove testified to had their onset on February 1 of 2021 *would lead to* a natural progression and worsening of the work-related incident and its sequelae?" (Deposition Transcript of Dr. Larson, p. 8, lines 9-13)(emphasis added). While small errors in the transcription appear to have occurred during Dr. Larson's deposition, the ALJ finds Claimant's contention that wholesale omissions occurred in reducing Dr. Larson's testimony to written text unfounded.

35. Dr. Larson testified that Claimant's October 12, 2018 work incident did not cause or substantially and permanently aggravate Claimant's C6-7 spinal stenosis. (Deposition Transcript of Dr. Larson, hereinafter Depo. Trans., p. 7, ll. 18-25). He testified that spinal stenosis most commonly arises from the progression of the aging process which overtime results in bone spur formation, which causes impingement, and narrowing of the spinal contents around the neck, including the spinal nerves. (Depo. Trans., p. 10, ll. 8-12). According to Dr. Larson, Claimant's C6-7 spinal stenosis was

most probably caused by the natural age-related changes in her neck. (Id. at p. 10, ll. 20-23). He opined further that Claimant's need for surgical intervention at C6-7, as performed by Dr. Boone on April 7, 2021, was not related to worsening, as a natural progression of Claimant's work-related incident, but rather due to progression of the age-related changes in her neck. (Depo. Trans., p. 8, ll. 20-25 and pp. 9-10).

36. In support of his opinions, Dr. Larson testified that the evidence presented supported a conclusion that Claimant did not suffer an acute injury to the neck on October 12, 2018. (Depo. Trans., p. 11, ll. 1-7). Indeed, he suggested that the presence of "spondylitic changes" and the reference to an osteophyte complex and retrolisthesis in the medical record supports a conclusion that Claimant's spinal stenosis and need for surgery were caused by progressive age-related related degenerative forces rather than the incident of October 12, 2018. (Depo. Trans. Pp. 11-13).

37. Claimant challenged the opinions of Dr. Larson on the basis that he did not have her MRI report or the March 11 or April 7, 2021 reports of Dr. Boone at the time he completed his April 29, 2021 IME. Claimant's questions to Dr. Larson imply her belief that his opinions should be rejected because he was insufficiently educated as to the condition of her neck or the surgery performed. The ALJ is not persuaded. Dr. Larson testified that subsequent to his April 29, 2021 IME, he had an opportunity to review Dr. Boone's March 11, 2021 report. (Depo. Trans. P. 38, ll. 3-7). According to Dr. Larson, there was nothing in Dr. Boone's March 11, 2021 report that indicated that the Claimant's neck condition was occupationally related or related to trauma. (Id. at p. 39, ll. 3-8). Indeed, everything in the March 11, 2021 report of Dr. Boone supported his conclusion that the condition of Claimant's neck was "consistent" with degenerative change in the cervical spine and the recommendation for disc replacement surgery was to treat those degenerative changes. (Id.).

38. The totality of the evidence presented persuades the ALJ that Claimant has failed to establish that her bilateral shoulder condition has worsened since the October 12, 2018 work incident. Although Claimant asserted in her Application for Hearing and Petition to Reopen that the condition of her shoulders was worsening and she had received a recommendation for surgery, she failed to present evidence of the same. Indeed, the evidence presented supports a finding that since the October 12, 2018 work incident, Claimant has and continues to suffer from bilateral shoulder pain and paresthesia, which Dr. Weinstein concluded was consistent with "severe myofascial inflammation" and could not be treated surgically.[3] Based upon the evidence presented, it appears that the Claimant last treated for her shoulders on April 20, 2021, when she was seen by Dr. Meinig.[4] Similar to the opinions of Dr. Finn and Higginbotham, Dr. Meinig concluded that Claimant's primary diagnosis was impingement of both shoulders. Thus, it does not appear that Claimant's working diagnosis has changed by April 20, 2021. The ALJ is aware that Dr. Meinig's report was summarized by Dr. Larson. Nonetheless, that summery does not indicate that Claimant needs surgery and Claimant failed to present corroborating evidence that her

[3] See Dr. Weinstein's November 25, 2020 report, RE A, p. 49.
[4] See RE D, p. 101.

diagnosis, had changed, her symptoms were worse or that shoulder surgery was reasonable, necessary and related to the October 12, 2018 work incident.

39. Based upon the evidence presented, Claimant has failed to present sufficient evidence of a worsening shoulder condition that would warrant removing her from MMI and reopening the case for additional medical benefits. Rather, the evidence presented persuades the ALJ that Claimant's current subjective complaints of worsening shoulder pain are unreliable and that her current pain and paresthesia likely represent symptoms similar to those she was experiencing when he was placed at MMI.

40. Concerning her cervical spine complaints, the ALJ credits the opinions of Drs. Ridings, Lesnak and Larson to find that Claimant has failed to establish a causal connection between her C6-7 spinal stenosis and her need for disc replacement surgery to the October 12, 2018 work incident in question. While Claimant's belief that the October 12, 2018 incident lead to her neck symptoms and need for spinal surgery is sincere, the objective medical evidence, i.e. the MRI[5] and the deposition testimony of Dr. Larson support a finding that Claimant's C6-7 spinal stenosis was probably caused by the natural progression of age-related degenerative disc disease and the development of an osteophyte complex at this spinal level. The ALJ is convinced that the Claimant's degenerative disc disease and osteophyte complex caused associated stenosis at C6-7 by narrowing the tunnel for and pressing upon the spinal nerves exiting the facet joints which subsequently gave rise to Claimant's neck pain and subsequent need for surgery.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the

[5] As commented upon by Dr. Boone on October 29, 2020 and March 11, 2021.

record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. As found above, Claimant's subjective reports of worsening shoulder pain and need for shoulder surgery are not supported by the evidence presented. Moreover, the evidence presented fails to support Claimant's contention that there is a causal connection between her neck pain and her need for surgery to the October 12, 2021 work incident. While the ALJ is convinced that Claimant's reports of neck pain were/are credible and that her disc replacement surgery was reasonable and necessary, the medical evidence persuades the ALJ that the need for such treatment was not causally related to the October 12, 2018 incident involving the lowing of a heavy resident to the floor as Claimant described.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from progressive age-related degenerative disc and spine disease, the natural progression of which probably resulted in her neck symptoms and need for treatment, including surgery at C-6-7.

Claimant's Request to Reopen Her Claim Based on a Change Condition

E. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). In seeking to reopen a claim, the claimant shoulders the burden of proving his/her condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62

P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000).

F. The question of whether a claimant has proven a change in condition of the original physical or mental condition, which can be causally connected to the original compensable injury, is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). In this case, Claimant contends that the evidence supports a conclusion that she has proven that her shoulder condition, an injury traceable to the original compensable injury has worsened since being placed at MMI by Dr. Higginbotham. As found, the ALJ is not convinced. Here, Claimant failed to present persuasive evidence that her shoulder symptoms have worsened with the passage of time or that she needs surgery to address that worsening. Rather, the credible evidence presented supports a conclusion that Claimant's principal diagnosis has not changed and she continues to experience symptoms similar to those she had when she was placed at MMI. As presented, the evidence supports a conclusion that Claimant likely suffers from persistent severe myofascial inflammation of the shoulders girdles, which is not amenable to surgery. Because Claimant has failed to present sufficient evidence of a worsening condition and because an authorized provider has not indicated that she requires additional treatment for her shoulders[6], Claimant's request to reopen her claim based upon a change in the condition of her shoulders must be denied and dismissed.

G. Claimant also contends that she is entitled to reopen her case based upon a change in the condition of her neck, which worsening ultimately caused her to undergo a C6-7 disc replacement and fusion procedure with Dr. Boone on April 7, 2021. Respondents contend that Claimant's neck pathology and her need for spinal surgery are unrelated to the October 12, 2018 incident wherein Claimant assisted in lowing a heavy resident to the floor. Indeed, Respondents contend that Claimant's persistent cervical symptoms and need for spinal surgery related to the natural progression of an underlying preexisting degenerative condition at C6-7. On this point, the ALJ agrees with Respondents. Here, the evidence presented supports a conclusion that Claimant failed to establish the requisite causal connection between her cervical condition and her need for surgery to the October 12, 2018 work incident in question.

H. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the

[6] The ALJ is without authority to order an authorized treating physician to provide a particular form of treatment, which has been recommended only by a physician unauthorized to treat. *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAO May 4, 1995); *see also Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO May 15, 2018).

ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As found, the ALJ credits the opinions of Dr. Larson to conclude that Claimant's C6-7 spinal stenosis and ultimately her surgery was probably caused by the natural progression of age-related degenerative disc disease and the development of an osteophyte complex at this spinal level. Moreover, the is not convinced that the described mechanism of injury (MOI), i.e. Claimant's employment related duties aggravated, accelerated or combined with this pre-existing condition to give rise to Claimant's disability or need for treatment. Rather, the evidence presented supports a conclusion that Claimant's neck pain and need for treatment, including surgery was, more probably than not, related to the natural age-related progression of her chronic pre-existing degenerative disc and spine disease.

I. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

J. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted by Respondents, the occurrence of symptoms at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment or the incident occurring January 2, 2021. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found, the ALJ credits the opinions of Dr. Larson to find and conclude that Claimant's neck pain/dysfunction is probably related to and emanating from the natural progression of a pre-existing condition rather than the duties of her employment on October 12, 2018. While the ALJ commends Claimant's work ethic and devotion to her position, there simply is a dearth of forensic evidence to connect her current symptoms and neck pathology to the incident occurring on October 12, 2018. Accordingly, Claimant has failed to establish the requisite causal connection between her neck condition and need for surgery to her work activities on October 12, 2018. Because Claimant has failed to establish she suffered a compensable neck injury as defined by the aforementioned legal opinions, her request to re-open her claim based upon a worsening of this condition must be denied and dismissed. As Claimant has failed to carry her burden of proof to reopen her claim, the additional claims for

benefits, including her request for additional medical treatment, temporary disability benefits and disfigurement need not be addressed.

ORDER

It is therefore ordered:

1. Claimant's request to reopen her claim is denied and dismissed.

DATED: June 8, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND** ORDER by U.S. Mail, or by e-mail addressed as follows:

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Date: June 8, 2022

/s/ Matthew Chavez
Court Clerk

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on April 8, 2021 within the course and scope of his employment with Employer.

IF CLAIM IS DEEMED COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized and reasonably necessary to cure and relieve him of the effects of the injury.

III. Whether Claimant has proven by a preponderance of the evidence what was Claimant's average weekly wage.

IV. Whether Claimant has proven by preponderance of the evidence that he is entitled to temporary disability benefits from April 9, 2021 through the present.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a penalty for Employer's failure to have workers' compensation insurance.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on issues of compensability, medical benefits, reasonably necessary and related, average weekly wage, and other compensation, including indemnity benefits for lost wages. The Office of Administrative Courts logged the AFH on January 24, 2022.

Attached to the AFH was an Employers' First Report of Injury dated December 18, 2021 purportedly completed by David Gallivan, Manager of Legislation on behalf of Corvel Corporation and Colorado Uninsured Employer's Board. Also attached were multiple forms completed by Claimant for Corvel.

Respondent Employer did not file a Response to the Application for Hearing.

A hearing was previously scheduled before ALJ Kara R. Cayce on April 14, 2022. Upon receiving the pro se (self-represented) advisement from the ALJ, Claimant indicated he wished to proceed. Employer moved for an extension of time to retain counsel. Claimant objected to the extension as he did not wish further delays. The ALJ found good cause for the extension and issued an order granting the extension of time to commence the hearing for up to 45 days. ALJ Cayce advised in the April 14, 2022 order that the

parties proceeding pro se were responsible for being familiar with and complying with the OAC policy, applicable rules and statutes.

At the rescheduled May 24, 2022 hearing both parties again appeared pro se. This ALJ also advised the parties that they were responsible to know the OAC policy and rules of procedure as well as the Rules of Evidence, the statutory and case law authority. Both Claimant and Employer indicated that they had made attempts to obtain counsel without success and that they wished to proceed with the hearing at this time.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Claimant's testimony of alleged injury

1. At the time of the hearing Claimant was sixty years old. Claimant worked for Employer as of January 2021 as a mechanic.

2. On April 8, 2021 Claimant was assigned the task of dismantling a Nissan pathfinder. Claimant stated that was using a socket wrench, attempting to loosen the screws that attached the motor to the chassis of the vehicle. One of the screws was not coming lose. He applied a lot of force to get it to loosen up. Claimant testified that, while he was exerting all the force he could, the screw broke and the right arm over extended in a jerky movement. He stated that it caught him by surprise and the posture change caused a wrenching of the right shoulder, and pop. He immediately felt an unbearable pain in the right shoulder. Claimant was in such extreme pain that all he could do in the moment was sit down on an adjacent tire.

3. Claimant testified that multiple individuals were in the shop when the accident happened and came over quickly. Claimant had to rest for a while before he went to report the injury to the shop manager. His coworkers advised him to seek medical attention right away. The owner of the shop was in Mexico at the time, but Claimant advised him of the accident when he returned.

4. Claimant stated he made an appointment at Denver Health Medical Center and was evaluated. He was provided with some care and he returned to work but not at the same level of activity or at full capacity. He was performing easy work. His shoulder problems did not improve and, following diagnostic testing, he was advised by the providers that he required surgery for the shoulder.

5. Claimant testified that his employer continued to pay him half of his wages for a while, but that it did not fully compensate him for his loss of earnings. He continued to work light duty, being paid his full salary until his August 24, 2021 surgery date and following the surgery he was not able to return to work as his physician did not authorize his return to work. His Employer stopped payments at that time. Employer called Claimant to advise him that he would no longer continue payments until he returned to work.

6. Claimant indicated that he has not returned to normal and does not have full strength or range of motion in the injured shoulder. He was not capable of returning to work at the time of the hearing as he believed the nerves and tendons were affected. This caused him significant depression and financial stress. He was forced to sell his vehicle to meet his essential expenses. He noted that he was unable to pay rent or meet his other needs for the last several months. He is scared that he will be evicted and he and his disabled wife will have nowhere to live. He also became depressed because of this situation where he was unable to work due to the injury.

7. Claimant's weekly wage was $1,200. He was paid $600.00 per week from August 25, 2021 until October 24, 2021. His employer asked that he convey to his physician he be allowed to return to his regular job but Claimant was unwilling to do so as he continued to have right shoulder problems.

8. His surgery took place on August 25, 2021 and he continues to have problems with his right shoulder. He showed this ALJ the five arthroscopic port scars on his right shoulder. Four were small incisions scars no larger than a dime. The fifth scar was approximately two inches long close to the armpit.

B. Employer's testimony

9. Employer, (owner) stated he had no workers' compensation insurance. He stated that he noted that he had a certain responsibility to Claimant but that other of his workers were complaining that he was paying Claimant and Claimant was not working. He also stated that Claimant failed to provide any medical reports or receipts. He stated that he paid Claimant for a while but then could no longer continue to do so as he saw no sign that Claimant could return to work.

10. Owner stated that he had been travelling on the date of the alleged injury but denied that the accident could happen in the manner Claimant stated. He was not provided with any broken bolts or any evidence that the accident happened. Owner believed Claimant for a while but then determined that he no longer did. He stated that he had been running his business for 14 years without any incidents or problems like this. Owner stated that Claimant should have been able to gage the amount of force to exert to remove the screw without any accidents.

C. Medical Records

11. Claimant was seen on April 9, 2021 at the Lowry Family Health Center for Denver Health by Daniel R. Wells-Prado, M.D. The records are unclear as to the diagnosis or history in this record as multiple of the records were in Spanish. However, the records show that Claimant was administered the Moderna COVID-19 vaccine at that time intramuscularly into the left deltoid muscle. The records also show that he had a screening for colorectal cancer, prediabetes and was noted to be at risk for heart disease.

12. On April 28, 2021 Claimant was seen by Raenna P. Simcoe, M.D. regarding acute onset of pain after fall the previous day onto the right shoulder. The history of present illness states “Yesterday slipped on water and fell onto R shoulder. Felt sharp pain from front to back, feels clicking, pain now 6/10, worse with lifting overhead, tried ibuprofen but did not last long, heat also helped, has some tenderness, no numbness or tingling.” Dr. Simcoe ordered x-rays.

13. On July 7, 20221 Nurse Stacy Morsch documented that Claimant was seen for a right shoulder trauma from “a fall a couple of months ago.” It also noted that x-rays showed no fracture and was positive for degenerative changes. On exam Claimant showed weakness with empty can test. He also showed tenderness of the anterior and bicep tendon, and decreased range of motion. Nurse Morsch order a right shoulder MRI to rule out ligament injury based on physical findings.

14. Claimant was seen at the Outpatient Medical Center Radiology/MRI Department on July 20, 2021. The MRI findings as read by Dr. Scott Tomsick showed a massive rotator cuff tear involving the supraspinatus, infraspinatus and subscapularis tendons, including muscle atrophy of the supraspinatus, glenohumeral joint synovitis and biceps tendinosis.

15. Claimant was initially evaluated by Jarrod T. King, M.D., an orthopedic surgery specialist, on August 19, 2021. They obtained a history of injury at work while working on removing an engine out of a vehicle, when he sustained a right shoulder injury. His impression was that Claimant was “right-hand-dominant 59-year-old auto mechanic with an acute traumatic large rotator cuff tear with pseudoparalysis of the right shoulder.” They assessed that Claimant was “indicated for early surgical intervention to prevent severe disability associated with the severe rotator cuff tear to the patient's dominant extremity.” He stated that there was no role for conservative care and Claimant was booked for surgery for an acute rotator cuff repair. He reviewed the diagnostic testing and found that the x-rays of the right shoulder revealed impingement related anatomy and the MRI arthrogram scan demonstrated full-thickness supraspinatus and a partial infraspinatus tear, which is retracted back to the glenohumeral joint line, with no significant atrophy of the supraspinatus or infraspinatus, they suspected some damage to the subscapularis. Claimant was immediately scheduled for surgery for the following Wednesday.

16. Claimant was seen on August 25, 2021 for a traumatic rotator cuff tear as an outpatient surgery patient by Dr. King and his PA Jamie Stambaugh. On exam they found Claimant’s right shoulder had loss of range of motion and that Claimant was catastrophically weak with external rotation and supraspinatus testing.

17. The operative report showed Dr. King performing arthroscopic double row rotator cuff repair of the subscapularis, and double row repair of the supraspinatus and infraspinatus tendons, as well as open subpectoral biceps tenodisis, arthroscopic subacromial and subcoracoid decompression with acromioplasty and coracoplasty, arthroscopic extensive glenohumeral debridement, and coplaning of AC joint.

18. Immediately following the surgery, Dr. Benjamin Lippert, at the surgeon's request, administered an upper extremity block with Marcaine.

19. Following surgery, Claimant was restricted from any lifting, sent home in a sling. Claimant was instructed to return to see Dr. King two weeks post-surgery and to start physical therapy within one to two weeks. The initial physical therapy visit was scheduled for September 1, 2021 wit the Outpatient Rehabilitation Services PT. The follow up with orthopedics was scheduled for September 9, 2021 with PA Jamie Stambough of the Orthopedic Department at DHMC.

20. There is a record by PA Stambaugh on December 1, 2021 for recheck and follow up of the right shoulder.

21. As found, Claimant has failed to show by a preponderance of the evidence that he was injured in the course and scope of his employment. While Claimant testified about an event on April 8, 2021, the medical records tendered at hearing fail to show that is the case. In fact, the medical records support that he was seen on April 9, 2021 for conditions unrelated to a right shoulder injury. The records persuasively note that Claimant had a slip due to water and fell onto his right shoulder causing injury on or about April 27, 2021. This is documented by Dr. Simcoe on April 28, 2021. It was at this time when the provider ordered an x-ray. The history is also documented by Nurse Morsch on July 7, 2021. As found, the Denver Health medical records are more persuasive than Claimant's account of events and testimony in this matter. Claimant is specifically found not credible.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is

not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

Here, as found, Claimant has failed to prove that he was injured in the course and scope of his employment with Employer. As found, the medical records are more persuasive than Claimant's testimony in this matter. On April 9, 2021 Claimant was seen

at Denver Health and there is no indication that Claimant complained of right shoulder injury. However, on April 28, 2021 Dr. Simcoe documented that Claimant had had a fall the previous day when he slipped on water and fell on his right shoulder. This is further documented on July 7, 2021 by Nurse Morsch. The documentation in the medical records do not support a determination of compensability in this matter. Therefore, Claimant's claim for compensation is denied and dismissed. The remaining issues are moot in light of this determination.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim with regard to an alleged injury on April 8, 2021 is *denied* and *dismissed*.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 10th day of June, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he was Respondent's "employee" performing services under an express or implied contract of hire when he suffered injuries on July 2, 2020?
- If Claimant proved a compensable injury, the ALJ will address these additional issues:
- What is Claimant's average weekly wage?
- Is Claimant entitled to TTD benefits commencing July 2, 2020?
- Is Claimant entitled to reasonably necessary medical benefits to cure and relieve the effects of his injury?
- Is Respondent liable for penalties for failure to carry workers' compensation insurance at the time of Claimant's accident?

FINDINGS OF FACT

1. Respondent is an automotive repair shop in Manassa, Colorado. The company has been operated by [Redacted, hereinafter LH and DH respectively] as a sole proprietorship for over 40 years. Mr. LH performs all repair work, while Ms. DH primarily tends the books and other administrative tasks. The automotive repair work is performed out of a garage on a property immediately adjacent to Mr. and Ms. H's home. Respondent never had any employees other than Mr. and Ms. H prior to June 30, 2020.

2. On July 2, 2020, Claimant suffered severe injuries on Respondents' property when a trailer tongue accidentally dropped on his feet. Mr. H was backing up a pickup truck to connect the trailer and Claimant was standing next to the tongue. The trailer tongue was resting on a jack. The tongue dislodged from the jack and fell on Claimant's feet.

3. Claimant suffered multiple severe fractures from of the accident. Ms. DH drove him to the emergency department in Manassa. Claimant was airlifted to Memorial Hospital in Colorado Springs, where he was hospitalized for six days. He was discharged from the hospital on July 8, 2020.

4. Claimant had surgery on August 6, 2020 to fuse multiple joints in his left foot. Although the surgery was successful from a technical standpoint, Claimant continued to experience severe pain in his feet. He was subsequently diagnosed with complex regional pain syndrome (CRPS).

5. Claimant applied for Medicaid during his hospital stay. Medicaid has covered treatment related to the injury.

6. The medical records contain no persuasive evidence regarding whether Claimant was Respondent's employee at the time of the accident.

7. Claimant first met the LH and DH at their home on June 30 or July 1, 2022. The introduction was made by Chief Roman Marrufo of the Manassa Police Department. Chief Marrufo had brought Claimant to the H's home to inquire whether Respondent had any work available for Claimant. Chief Marrufo has known the Hs for many years because Respondent provides automotive repair services for the Town of Manassa.

8. Chief Marrufo could not recall the specific date on which he and Claimant went to the H's home.

9. Claimant testified Respondent hired him to work as a laborer and "shop hand" for $8 per hour. Claimant assumed he would be working 40 hours a week, "Monday through Friday," because he understood that to be Mr. H's work schedule. Claimant testified the initial meeting took place on "the last day of June 2020." He testified Mr. LH offered him a job and he was told to start work the next day. Claimant testified the offer and acceptance were purely verbal, and conceded there is no written documentation of an employment relationship. Claimant testified he worked for Respondent on July 1, 2020, helping to remove a transmission and other repair tasks.

10. There is no persuasive evidence Claimant ever sought or received pay for any work he allegedly performed before the July 2, 2020 accident.

11. Regarding the injury, Claimant testified he was helping Mr. LH hook up a trailer to a pickup truck when the accident occurred. Claimant was standing next to the trailer, "guiding" Mr. LH as he backed up the truck. The trailer dislodged from the jack and landed on Claimant's feet.

12. Ms. DH confirmed that Claimant and Chief Marrufo came to the house and ate lunch, although she could not recall the exact date. Claimant asked whether Respondent had any work. Claimant stated he had no experience as an automotive mechanic. Ms.DH testified that even if Respondent had offered Claimant a job, it would not have been "Monday through Friday" because the shop is closed on Friday. She recalled that Claimant had returned "the next morning and just kind of hung around out in the garage." It is unclear whether the "next day" to which she referred was the day of Claimant's injury, or the day before the injury. Ms. DH testified the trailer was parked at a different location than Claimant described in his testimony. She knew Mr. LH had backed the truck to hook up the trailer, but did not witness the accident itself. Ms. DH took Claimant to the hospital, but could not go in with him "because of COVID." Ms. DH testified she "didn't hear a whole lot about" Claimant's injuries after taking him to the hospital. Claimant later contacted Ms. DH and requested "gas money," and she gave him some cash. She disagreed that Respondent ever hired Claimant. She testified Respondent's

financial records contain no indication that Claimant was hired or paid any wages. Ms. DH confirmed Respondent had no workers' compensation insurance.

13. Mr. LH recalled meeting Claimant over lunch at his home. He agreed that Claimant asked whether Respondent had any work available. They briefly discussed Claimant's work experience, and Claimant indicated he had never done automotive repair work before. Mr. LH was unsure if or how Claimant could help, but he told Claimant to come back "tomorrow" and they could talk more about it. Mr. LH testified he told Claimant, "**if** I hired him, I could only pay $8 an hour." Mr. LH testified Claimant was injured "the day after" their initial conversation. He testified Claimant had been at the shop for less than an hour before the accident occurred. Mr. LH disputed Claimant's testimony he was working at the shop the day before the accident. He was adamant that the accident occurred "the next day" after Claimant and Chief Marrufo came to the house. Mr. LH testified he had merely discussed a possibility of employment with Claimant but never offered him a job.

14. Claimant's testimony is no more persuasive than Mr. and Ms. H's testimony.

15. Claimant failed to prove he was performing services for Respondent under a "contact of hire" at the time of his accident.

CONCLUSIONS OF LAW

It is undisputed that Claimant suffered severe injuries on July 2, 2020 when the trailer fell on his feet. However, to receive workers' compensation benefits, Claimant must prove he was an "employee" performing services under a "contract of hire" when the accident occurred. Section 8-40-202(1)(b). Even if Claimant was on Respondent's property to discuss a possible job, injuries suffered before a contract of hire comes into existence are not compensable. *E.g., Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991) (job applicant injured during a pre-employment physical was not entitled to compensation where employment was not guaranteed even if she had passed the test).

An "employee" is defined as an individual "who performs services for pay" under an express or implied "contract of hire." Sections 8-40-202(1)(b) and (2)(a). Contracts of hire are subject to the same rules as other contracts. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994). A contract of hire may be found even though not every formality attending commercial contracts has been observed as long as the fundamental elements of contract formation are present. *Id*. at 1387. Claimant must prove he was Respondents' employee by a preponderance of the evidence. *Hall v. State Compensation Insurance Fund*, 387 P.2d 899 (Colo. 1963). No particular form of evidence is required, and the existence of a contract of hire must be determined based on the totality of evidence in the particular case. *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861, 864 (Colo. App. 1996).

As found, Claimant failed to prove he was an "employee" performing services under a "contract of hire" at the time of his accident. Because there is no documentary proof that Claimant was Respondent's employee, the evidence on this point consists

solely of testimony. Chief Marrufo confirmed that Claimant had asked about work at the initial meeting, but offered no testimony regarding any agreement to hire Claimant or whether Claimant actually performed any work for Respondent. The case thus comes down to conflicting testimony of interested witnesses. Claimant appeared a credible witness. But Mr. and Ms. H appeared credible too. Claimant's testimony was no more persuasive than the testimony offered by Respondent. It is possible that Claimant was "hired" by Respondent to work in the repair shop. It is at least equally likely that Claimant and Respondent were merely exploring the possibility of an employment relationship, but no offer or acceptance had actually occurred. Based on the evidence presented, the ALJ cannot say that one scenario is more likely than the other. Claimant has the burden of proof in this matter, and this evidentiary equipoise prevents Claimant from proving a contract of hire as "more likely than not."

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 10, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-733-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that an L5-S1 laminectomy and transforaminal lumbar interbody fusion (TLIF) surgery recommended by Clint Devin M.D., is related to her admitted work injury.

FINDINGS OF FACT

1. Claimant is 49 years old, and has worked for employer for approximately five and one-half years as a dietary assistant and dietary manager. Employer operates a hospital and an assisted living facility, and Claimant's job duties have included meal preparation, general kitchen work, stocking products, and delivering meals.

2. Claimant has a history of chronic lower back issues dating to 2004 when she sustained an injury while working for a different employer. Since that time, Claimant has experienced intermittent issues with her lower back, including radicular symptoms in her right leg and foot. (Ex. C, D, E, F, and G). In May 2016, Claimant underwent a discectomy at the L5-S1 level, after which her symptoms improved. (Ex. F). In January 2018, Claimant underwent a second lumbar discectomy at the L5-S1 level for a recurrent disc herniation. (Ex. I). Claimant testified that following the 2018 surgery, she felt good and did not have any further radiating symptoms. Claimant testified that after her 2018 surgery, her back issues did not affect her ability to perform her job duties for employer.

3. On October 28, 2020, Claimant was transporting meals from the hospital to the assisted living facility. The meals were contained in two plastic totes with handles on each side of the tote. Claimant was carrying two totes in front of her torso when she slipped on an icy sidewalk. Although Claimant did not fall to the ground, her legs split apart, resulting in admitted injuries.

4. Later on October 28, 2020, Claimant saw Frank Tong, D.O., at the Middle Park Medical Center emergency department, reporting pain in her left shoulder and hip pain. Dr. Tong diagnosed Claimant with a left trapezius strain with radiculopathy, and a left hip strain. Claimant reported minimal hip pain, mild hip tenderness, and normal hip range of motion. Claimant did not report any issues with her lower back, and Dr. Tong found no lumbar spinal tenderness. (Ex. 4).

5. On November 3, 2020, Mark Wisner, D.O., at Middle Park Medical Center, saw Claimant for cervical pain, including radicular symptoms. Dr. Wisner diagnosed her with cervicalgia, cervical radiculopathy, and trapezius strain, with concerns for a possible cervical disc herniation. (Ex. 4). Claimant underwent a cervical MRI on November 31, 2020, which confirmed cervical disc issues at C5-6 and C6-7. (Ex. 10). Over the following nine months, Claimant received various evaluations and treatment for her cervical spine

symptoms, including physical therapy, massage, medications, and cervical epidural steroid injections. (Ex. 4, 5, 7, and 8).

6. Between October 28, 2020, and July 29, 2021, Claimant intermittently reported non-specific lower back pain. For example, on December 17, 2020, Claimant reported that she felt the positioning of her neck and arm bothered her lower back. (Ex. 4). Claimant also reported to physical therapy that she had chronic lower back pain that had worsened. (Ex. 5). When Claimant saw nurse anesthetist Kellie Marie Logue, CRNA, she reported "chronic low back pain" with an onset "years ago" and constant duration. (Ex. 8). Claimant's medical records do not document reports of lower back radicular symptoms, or specific treatment for lower back pain between the October 28, 2020 injury and July 29, 2021.

7. Claimant's first documented complaint of acute back pain following her work injury was on July 29, 2021, nine months after her injury. On July 29, 2021, Claimant reported to Dr. Wisner "new onset" back pain, with pain across the lower back including radiation and a rare stabbing sensation in the right buttock. On examination, Dr. Wisner noted lumbar spasms and tenderness, with decreased range of motion. Straight leg raise tests were negative on both the left and right. Dr. Wisner assessed that Claimant had a "new onset lumbar strain, likely related to compensation in movements due to neck pain and radiculopathy." (Ex. 4). Dr. Wisner offered no further explanation as to how compensation for Claimant's neck pain caused or contributed to a lumbar strain.

8. On August 2, 2021, Claimant saw Clint Devin, M.D., at Steamboat Orthopaedic & Spine Institute. Dr. Devin noted Claimant's two prior lumbar discectomies had left her with "saddle anesthesia and paresthesias in her right buttock and leg area," and these symptoms were "obviously concerning to her, but the neck is the more pressing issue at this point." Dr. Devin's record from August 2, 2021, does not note any specific examination of Claimant's lumbar spine or diagnosis related to her lumbar symptoms. (Ex. 7).

9. On August 31, 2021, Claimant underwent surgery on her cervical spine. (Ex. 7).

10. On September 30, 2021, Claimant reported to Dr. Wisner that she was experiencing post-surgical numbness in her right foot and lower back pain. Dr. Wisner indicated Claimant's right foot numbness was of uncertain etiology, stating: "question compressive neuropathy from surgical positions v spinal nerve compression from original [injury]." He ordered a lumbar x-ray to investigate Claimant's right foot numbness. (Ex. 4). The lumbar x-ray was interpreted as showing "increased moderate degenerative changes," compared to an October 9, 2017 MRI of Claimant's lumbar spine. (Ex. R).

11. On October 25, 2021, Claimant saw Dr. Devin and reported she had struggled with back pain for years, and that her back tended to be sore with activity, and could worsen with coughing or sneezing. Dr. Devin noted Claimant had symptoms consistent with nerve tension and radicular pain on the right and recommended an MRI and lumbar x-rays. (Ex. 7). The lumbar x-ray was interpreted as showing questionable static grade 1 anterolisthesis of L4 and L5 versus rotational artifact, and lower spine predominant disc

degeneration and facet arthropathy. (Ex. 10). Dr. Devin increased Claimant's previous prescription for gabapentin to address her lumbar symptoms. (Ex. 7).

12. On November 1, 2021, Claimant woke at approximately 3:00 a.m. with severe right-sided lower back pain with shooting pain down her right leg, and increased right foot numbness. Claimant was evaluated at the emergency department by Jason Stuerman, M.D., and provided medication for pain. She was advised to follow up with Dr. Wisner the following day. (Ex. 9).

13. The following day, November 2, 2021, Claimant saw Dr. Wisner, reporting pain across the right low back and down the back of her leg to her mid-posterior thigh, with new whole-foot numbness. (Claimant's foot numbness was previously limited to the outside of her foot.) Dr. Wisner indicated he suspected Claimant's condition was "related to original fall given complaint of hip pain at the time." (Ex. 4).

14. Claimant's lumbar MRI was completed on November 9, 2021, and showed a large (10 mm) right-sided disc herniation at L5-S1. (Ex. 10). Dr. Wisner then referred Claimant for s spine surgery consultation. (Ex. 4).

15. Claimant returned to Dr. Devin on November 15, 2021, for evaluation of her lumbar spine. Dr. Devin reviewed Claimant's MRI, and diagnosed Claimant with a recurrent L5-S1 lumbar disk herniation. He recommended a right L5-S1 laminectomy and TLIF (transforaminal lumbar interbody fusion) (Ex. 7).

16. Claimant continued to report right foot numbness and lower back pain in visits with Dr. Wisner on November 18, 2021, December 21, 2021, January 25, 2022, and February 25, 2022. At the December 21, 2021 visit, Dr. Wisner noted that Dr. Devin had unexpectedly passed away, and that Claimant required a new neurosurgical consultation. (Ex. 4).

17. On March 14, 2022, Claimant saw Alex Sielatycki, M.D., at Steamboat Orthopaedics. Dr. Sielatycki noted that Dr. Devin's proposed surgery was denied by workers compensation. Dr. Sielatycki noted that Claimant continued to have pain in the low back radiating down the right leg with right foot numbness and Claimant "reports the onset [of] this was the fall at work." He further noted that Claimant "had a history of discectomy prior to that number of years prior [sic], but it has not been a problem until the fall as she reports." Dr. Sielatycki diagnosed Claimant with lumbar recurrent disk herniation at L5-S1. In addressing causation, he wrote: "By her history and report of symptom onset at the time of her fall, I think it is reasonable to conclude that the fall contributed in part 50% or more to the recurrence of symptoms. I think it is also reasonable to pursue fusion as Dr. Devin had recommended right-sided approach L5-S1, facetectomy with fusion of L5-S1." (Ex. 7). Dr. Sielatycki's record from Mach 14, 2022 does not indicate that he reviewed Claimant's medical records in reaching his causation opinion. Given that Claimant's medical records do not indicate that Claimant experienced low back pain or radicular symptoms on or near October 28, 2020, the ALJ finds Dr. Sielatycki's causation opinion unpersuasive.

18. On January 11, 2022, Robert Messenbaugh, M.D., performed a record review at Respondents' request. Dr. Messenbaugh was admitted as an expert in occupational medicine and orthopedics, and testified at hearing. He opined that Claimant's lumbar disc herniation and S1 nerve root compression shown on the November 9, 2021 were not causally related to her October 28, 2020 work injury. Consequently, he opined that the recommended lumbar surgery, although reasonable and necessary, was not causally related to her work injury.

19. Dr. Messenbaugh credibly testified Claimant's L5-S1 spinal level was compromised prior to October 28, 2020, due to her prior surgeries. He further opined it would not take a significant amount of force to result in a disc herniation due to her compromised state. He credibly testified that if Claimant had sustained a lumbar disc injury on October 28, 2020, one would expect symptoms to appear at that time. However, Claimant did not report significant low back symptoms or symptoms of lumbar radiculopathy until months after the initial injury. He also opined that the negative straight leg raise tests Dr. Wisner performed on July 29, 2021 indicated that "though [Claimant] might have been experiencing some low back pain, she was not showing physical examination evidence of having lumbar nerve root compression." (Ex. T). Dr. Messenbaugh credibly testified that the symptoms attributable to an L5-S1 disc protrusion would primarily affect the L5-S1 dermatome, and would result in radicular symptoms in the Claimant's foot and lower leg, and an absent ankle reflex.

20. Claimant credibly testified that prior to October 28, 2020, she was able to perform her job functions and did not have any radicular symptoms. She testified that from January 2021 through August 2021, she was experiencing a deep ache in her lower back, and occasional tingling sensations in her right leg. No credible evidence was admitted indicating that Claimant experienced radicular symptoms related to her lower back between October 28, 2020 and July 29, 2021.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has failed to establish by a preponderance of the evidence that the need for the surgery proposed by Dr. Devin (and later Dr. Sielatycki) is causally related to Claimant's industrial injury. The proposed surgery is intended to address the lumbar disc hernia shown on Claimant's November 9, 2021 MRI and the resulting symptoms. The evidence does not establish that either the lumbar disc hernia or the associated symptoms are causally related to Claimant's October 28, 2020 work injury. The ALJ finds credible Dr. Messenbaugh's opinion that if Claimant sustained a lumbar disc injury at the

time of her October 28, 2020 injury, symptoms would have begun shortly thereafter. The symptoms attributable to an L5-S1 disc protrusion would primarily affect the L5-S1 dermatome, and would manifest as radicular symptoms in the Claimant's foot and lower leg, and an absent ankle reflex. Claimant did not report any radicular symptoms until July 29, 2021, when she reported brief stabbing sensation into the right buttocks. Dr. Wisner performed straight leg raise tests at that time, which were negative for lumbar nerve root compression, suggesting that no disc herniation was present at that time. Claimant later reported radicular symptoms consistent with a disc herniation on leg on September 30, 2021, when she reported symptoms in her foot and leg, which became severe on November 1 2021.

Although Dr. Wisner and Dr. Sielatycki opined that Claimant's lumbar symptoms were causally related to her October 28, 2020 injury, neither persuasively explained how the emergence of radicular symptoms in either July 2021 or September 2021 was caused by or related to Claimant's injury nine to eleven months earlier. Moreover, neither physician credibly opined as to how Claimant's L5-S1 disc herniation was caused by or related to her work injury, other than the fact that Claimant's symptoms emerged after the injury. Dr. Sielatycki's opinion is based on the incorrect assumption that Claimant's lower back symptoms began at the time of her fall, and is thus not persuasive.

Given Claimant's history of lumbar surgery, the significant time gap between her injury and the first report of symptoms, and the fact that no physician has credibly opined that Claimant's lumbar disc herniation was caused by or aggravated by the October 28, 2020 injury, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence a causal connection between her October 28, 2020 injury and the symptoms and anatomical pathology for which surgery is recommended.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the L5-S1 laminectomy and transforaminal lumbar interbody fusion (TLIF) surgery recommended by Dr. Devin and Dr. Sielatycki is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that his low back condition is causally related to his October 7, 2020 work injury.

II. Whether Claimant proved by a preponderance of the evidence that his left knee anterior horn medial meniscus tear and need for surgery for that tear are causally related to his October 7, 2020 work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 32 years old at the time of the hearing in this matter. He worked for Employer as a painter.

2. Medical history was significant for preexisting complaints of lumbar spine pain. On December 10, 2019 Claimant was seen at Clinica Family Health by Britt Severson, M.D., who documented that Claimant was seen for shooting low back pain and gluteal pain that radiated to the dermatome anteriorly. On physical exam, Dr. Severson noted normal low back ROM[1] flexion, extension, lateral bending and rotation; no paraspinal muscle TTP[2], normal strength, sensation, normal gait and no edema in LE[3] bilaterally; negative straight leg raise bilaterally with visual overview of all four extremities as normal. Dr. Severson also noted normal inspection and range of motion of the cervical and thoracic spine. On review of systems he documented negative for back pain, joint pain, joint swelling and neck pain though he noted some muscle weakness. However, Claimant was assessed with acute left sided low back pain with left sided sciatica despite the normal exam. Dr. Severson suspected only a mild strain of the low back muscles.

3. Claimant was attended by Dr. Severson on April 16, 2020 and June 1, 2020 but without mention of a lumbar spine or sciatica condition, only hypertension as well as complaints of anxiety and dizziness.

4. Claimant was working for Employer on October 7, 2020. His supervisor requested that he paint the railings of the balconies of the apartments they were working on. He was using a boom or lift in order to reach to paint them. The boom would only go down to about four feet above the ground and Claimant would jump off to the ground. On October 7, 2020 he jumped off of the boom and felt immediate onset of pain in his left

[1] Range of Motion
[2] Tender to palpation
[3] :Lower extremities

knee. Claimant resumed painting but he had to lean to the right because of the left knee pain. Claimant then called his supervisor to advise that he could no longer continue painting due to the pain. His coworkers had to help him get off the lift. After consulting with his supervisor, they took him home, where he stayed for two days. Claimant stated that his knee swelled up and that he had swelling also in the thigh and lower leg. Claimant testified he remembered having problems with the left hip and low back from the date of the injury but they were not as severe as the left knee pain.

5. On October 9, 2020 PA-C Kelli Eisenbrown of AFC Urgent Care evaluated Claimant for left leg injury after Claimant jumped off of a lift on October 7, 2020 and reported left knee pain and an odd feeling in his left knee since the injury, including pain and instability. She documented that Claimant had an abnormal left knee, tender to palpation at the superomedial joint line and overlying the medial meniscus. She ordered x-rays and medication for pain. She also referred Claimant for an MRI, due to instability of the left knee and concerns with possible ACL tear, as well as to an orthopedic specialist. She stated that the objective findings were consistent with history and mechanism of injury and was to return to clinic following the orthopedic evaluation. Claimant was limited to sedentary work and no lifting.

6. Employer filed an Employer's First Report of Injury (FROI) on October 14, 2020 noting a left knee sprain at approximately 4:00 p.m. on October 7, 2020. The FROI notes that Claimant reported the injury on the date of incident.

7. On October 19, 2020 PA-C Chelsea Rasis of Concentra documented that the sprain to the left knee was a result of Claimant jumping down from a lift boom. He stated that the left knee worsened during the remainder of the day in the medial aspect of the left knee and that he had swelling in the medial joint for the first three days, which improved with a RICE regimen.[4] PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee that was dull and associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. Claimant had abnormal range of motion of the left knee. He stated that the objective findings were consistent with history and mechanism of injury. PA Rasis instructed Claimant on gait, and the proper use of crutches while walking, sitting and navigating stairs safely. PA Rasis ordered physical therapy, an MRI and an interpreter as well as a brace for the left knee. Claimant was limited to modified work. The October 21, 2020 evaluation with PA Rasis appears to be a duplicate of the prior visit. In follow up visits he continues to mention that Claimant continues to have pain in the medial aspect of his left knee.

8. Claimant was attended by PA Rasis again on October 28, 2020. Rasis noted Claimant had a heavy poking pain that was constant in the left medial knee with tenderness over the anteromedial aspect of the left knee and over the medial collateral ligament as well as abnormal range of motion. Claimant was worse with bending of the left knee, squatting and walking. Claimant was using the brace and crutches and reported

[4] RICE stands for rest, ice, compression and elevation.

that he had swelling sometimes. Rasis documented that Employer had no light duty available so Claimant was not working.

9. On October 28, 2020 Respondents filed a General Admission of Liability admitting to medical benefits and temporary disability benefits, specifically noting that they were admitting liability for only the left knee injury.

10. An October 31, 2020 left knee MRI showed a small bone contusion of the anterior peripheral medial femoral condyle, a borderline shallow trochlear groove and edema within Hoffa's fat pad. The report was issued by Dr. Robert Leibold of Health Images. It did not document any problems with the menisci.

11. On November 18, 2020 Claimant continued to complain of pain in the medial aspect of the left knee. The symptoms of moderate pain occur constantly. Autumn Schwed, D.O. documented instability, stiffness, tenderness and painful walking with exacerbating factors of kneeling, squatting and walking. Dr. Schwed stated that the objective findings were consistent with history and mechanism of injury. Claimant continued with follow-up appointments at Concentra with multiple providers that documented the pain in the medial aspect of the left knee with anterior and lateral pain.

12. On January 6, 2021, Dr. Theodore Villavicencio took over as Claimant's primary treating physician at Concentra (the ATP), and he has remained in that role.

13. On February 1, 2021 Claimant started seeing Stephanie Best, P.T. She documented Claimant with pain in the left knee with medial side pain that feels swollen, and grabbing when trying to put weight through the leg, up/down stairs, squatting and kneeling. She stated that Claimant had mild limitation in hip rotation, was able to achieve full depth squat with notable effort and had multiple areas of myofascial trigger points present throughout the quadriceps, gastric and hamstring. She laid out a treatment plan for the following four weeks.

14. On February 9, 2021 Ms. Best noted that Claimant's lower extremity pain resolved with the prior trigger point dry needling and only had the familiar medial knee pain remaining.

15. Michael Hewitt, M.D. attended Claimant on February 15 2021 and found mild medial joint line tenderness of the left knee. He reviewed the MRI findings with Claimant and recommended and injected lidocaine into the anterolateral knee to decreased inflammation.

16. On February 16, 2021 Ms. Best stated that Claimant's pain had resolved with the injection the prior day though had some returning pain with squats but applied ice pack at the end of the PT session. Claimant continued to attend PT for strengthening and TDN with pain most notable along the medial aspect of the left knee. By March 25, 2021 Claimant reported he was riding a bike and treadmill to improve endurance and by April 12, 2021 he was able to try intermittent jogging with some soreness but doing well. However, by April 27, 2021 Claimant returned to work and started having leg pain again.

17. On April 16, 2021 Claimant was reporting some popping on his left knee to Dr. Villavicencio, who continued to document the pain in the medial aspect of the left knee with anterior and lateral pain with tenderness diffusely over the anterolateral aspect and

diffusely over the anteromedial aspect. Dr. Villavicencio also continued to state that objective findings were consistent with history and work-related mechanism of injury, providing Claimant work restriction.

18. On April 30, 2021 Claimant complained to Dr. Villavicencio that he had some stabbing pains that started in the left foot, going up to lower back that comes and goes. This is the first time that Dr. Villavicencio provided a diagnosis of lumbar spine strain and made a referral to physical therapy to start treating Claimant's lumbar spine. There is no apparent causation analysis or even examination of the spine in this document nor is there any mention of objective findings other than joint pain generally.

19. On May 4, 2021 Claimant complained to Ms. Best that he had occasional back pain since the injury but that the knee symptoms had been more prominent. He reported that the pain started in his foot up to his left low back and into his hip and buttocks, along the left side of his ribcage area, especially when using the foam roller. Claimant reported pain between the shoulder blades on May 10, 2021 that had been present for the last couple of days, as well as pain in the foot and calf while walking.

20. On May 14, 2021 Claimant reported that he had tried to carry a bucket at work, that was about 50 lbs., and had left sided back pain.

21. Claimant described feeling overall better on May 17, 2021, the pain in the back and leg was minimal, his knee was still sore and he was getting "sore" between the shoulder blades and spine, but not pain. However, following body weight squatting Claimant reported pain that initially felt like cramping in the left flank area, intensified to feel "like my nerve" was "angry" and shooting pain from the foot up into the left buttock, up the back and into the shoulder blade.

22. On May 18, 2021 Dr. Villavicencio noted that Claimant had a setback the prior day in physical therapy, noting leg and back complaints but also noted that Claimant was worse in the left medial aspect of the left knee with anterior and lateral pain in the left knee, noting that Claimant was in moderate distress. He specifically noted that the chief complaint was that "[T]he patient presents today with follow up LT knee pain/ discomfort, tightness medially after PT." Dr. Villavicencio ordered an MRI of the lumbar spine, referred Claimant to a physiatrist for evaluation of the lumbar spine and provided a "[W]ork status-modified -not able to return today due to increased pain."

23. On May 18, 2021 Dr Albert Hattem performed a medical records review and responded to Insurer's inquiry whether further physical therapy was justified as medically reasonable and necessary. He responded in the negative as he considered the knee injury to be minor and that Claimant had made sufficient gains to be able to proceed with a self-directed exercise program. Dr. Hattem also opined that Claimant's lumbar spine condition was not related to the claim.

24. On May 25, 2021, Claimant was evaluated by Dr. Chan anyway, who noted that Claimant was able to ambulate around the room without difficulty, but he displayed very visible pain symptoms and complaints on examination. Dr. Chan indicated Claimant was neurologically intact, and the majority of his issues with regard to his lumbar spine were likely due to an underlying deconditioning. Dr. Chan's assessment was that Claimant's lumbar, thoracic and cervical issues were diffuse myofascial complaints, most

consistent with a myelogenic complaint, and not related to his claim. Dr. Chan opined that further work-up was indicated, but it should be pursued outside of the workers' compensation system.

25. On the morning of June 9, 2021, Claimant returned to Dr. Villavicencio, reporting positional vertigo, and increased cervical pain with bilateral upper extremity paresthesias. Dr. Villavicencio reviewed Dr. Chan's opinion with Claimant concerning his spinal issues. He noted that Claimant understood he was to go to Denver Health to rule out other causes of his vertigo, bilateral upper extremity issues, cervical issues, and lumbar issues.

26. On the same day, Claimant went to Denver Health for an evaluation of his vertigo and other issues, but before he entered the facility the Denver Health staff found him on the sidewalk outside, suspecting Claimant had a syncopal episode. He was then treated at Denver Health ED for syncope, increased neck pain, and bilateral upper extremity paresthesias.

27. Claimant returned to Dr. Villavicencio on June 17, 2021. Claimant continued to complain of left knee pain. On exam Dr. Villavicencio noted that Claimant continued to have a similar exam as on previous exams including tenderness diffusely over the anterolateral aspect of the left knee and diffusely over the anteromedial aspect with minimal decrease from last visit including limited end range abnormal range of motion. Dr. Villavicencio referred him for a left knee MRI.

28. Claimant returned to Dr. Hewitt on June 21, 2021. Claimant reported that he had good benefit from the cortisone injection but the symptoms restarted while participating in therapy on May 17, 2021. On exam there was mild medial joint line tenderness. Following discussion of care options, Dr. Hewitt recommended a new MRI to confirm healing of the bone bruise.

29. The MRI on June 30, 2021, read by Dr. Frank Crnkovich, noted a probable anterior horn medial meniscus tear toward the midline. The lateral meniscus was intact. He also noted that the bony contusion had resolved.

30. On July 19, 2021 Claimant was again seen by Dr. Hewitt to review the MRI findings of minimal knee effusion, resolved medial femoral condyle bone bruise, and fraying of the anterior horn of the medial meniscus with a medial plica.[5] Claimant had persistent medial-sided knee pain and Dr. Hewitt recommended proceeding with arthroscopy of the left knee.

31. On July 29, 2021 Dr. Hattem issued another medical record review report opining that any further left knee complaints were not related to the work injury and that there was no documentation of increased left knee problems in physical therapy on May 17, 2021 that would justify approving the recommended arthroscopy.

32. On August 16, 2021, Dr. Villavicencio responded to a letter from Insurer requesting updated opinions on causation and MMI. Dr. Villavicencio indicated Claimant's low back condition was "due to compensating for gait", but claimant's low back condition should be at MMI. Dr. Villavicencio related Claimant's left knee meniscal tear to squatting

[5] Thin, intraarticular fold of the joint lining, or synovial tissue, over the medial aspect of the knee.

during therapy on May 17th, and he further indicated Claimant was not at MMI for his knee, as he needed surgery.

33. On September 23, 2021, Claimant received medical care for his low back at Denver Health. Claimant was complaining of multiple issues including his left upper back, shoulder, chest, and occasional numbness in his forearms and lower extremities. On October 1, 2021, a lumbar MRI obtained at Denver Health was read as showing a L4-5 left foraminal disc protrusion and annular tear impinging on the exiting left L4 nerve root, and moderate left neural foraminal narrowing secondary to the protrusion. On October 19, 2021, Claimant's Denver Health provider reviewed the lumbar MRI, and diagnosed the lumbar condition as chronic bilateral low back pain with left sided sciatica.

34. On December 7, 2021, Claimant was seen for an IME by Dr. F. Mark Paz at Respondents' request. Dr. Paz took a history from Claimant, reviewed Claimant's available medical records, examined Claimant, and then opined that Claimant's work related injury was a left knee femoral condyle contusion with bone bruise, and that Claimant's other issues (cervical, thoracic, lumbar spine, upper and lower extremity paresthesias) were not related to this claim.

35. On April 8, 2022, Stephanie Best, P.T., testified concerning Claimant's allegation that his low back condition and left knee anterior horn medical meniscus tear were causally related to squatting exercises he performed that occurred during physical therapy she provided. Ms. Best testified that it is not uncommon for physical therapy patients to experience soreness in areas other than those being treated, and that soreness does not equate to injury. She stated that she would not be surprised if a patient with a prior history of left sided low back pain with left-sided sciatica experienced soreness in those areas following a therapy session. During the course of the therapy she provided from February 1, 2021 through May 17, 2021, Claimant often complained of issues that would go beyond his left knee and she was aware that at times Claimant complained of pain traveling from his left foot up his leg, through his hip and buttock, up his low back and into his upper back and shoulder blade areas, which she associated to the common after effects of therapy. She opined that she did not believe that Claimant sustained a new injury to his low back, mid-back or neck as a direct result of therapy she provided.

36. Dr. Paz testified as an expert in general medicine, occupational medicine, and as a Level II physician. He indicated that after issuing his report, he was provided with Claimant's prior medical records from Clinica Family Health, additional records from Denver Health, and he reviewed Ms. Best's deposition testimony. He was also present during the hearing for claimant's testimony. Dr. Paz indicated that based upon his review, Claimant did not sustain a low back injury as part of this claim, whether during the initial injury, during therapy using a foam roller prior to May 17th, or during the May 17th therapy session. He also disagreed with Dr. Villavicencio's opinion Claimant's low back condition was related to compensating for gait, noting that claimant was able to return to walking, and to work, and records document a non-antalgic gait.

37. As found, Claimant has failed to prove that the lumbar spine (or any other spine condition) injury was related to the October 7, 2020 workplace injury or in any way related to the May 17, 2021 physical therapy exercises he performed. Dr. Chan, Dr.

Hattem and Dr. Paz are persuasive in this matter that Claimant was suffering from deconditioning.

38. As found Claimant has proven by a preponderance of the evidence that he sustained a work-related injury to the medial aspect of his left knee. Claimant was complaining of joint line tenderness and pain to the medial aspect of his left knee from the first visit with PA Eisenbrown on October 9, 2020. PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. On November 18, 2020 Claimant continued to complain of pain in the medial aspect of the left knee. Dr. Schwed documented instability, stiffness, tenderness and painful walking with exacerbating factors of kneeling, squatting and walking. Claimant continued with follow-up appointments at Concentra with multiple providers that documented the pain in the medial aspect of the left knee, including Dr. Villavicencio on February 10, 2021 and April 16, 2021. However, after the May 17, 2021 physical therapy visit, on May 18, 2021 Dr. Villavicencio noted that Claimant had a setback the prior day in physical therapy, complaining of worsened symptoms in the left medial aspect of the left knee with anterior and lateral pain in the left knee, noting that Claimant was in moderate distress. Dr. Villavicencio and Dr. Hewitt are persuasive in the matter of a worsening of the medial aspect of Claimant's left knee and the consequent medial meniscus injury. Claimant has proven that the surgery recommended by Dr. Hewitt is reasonable, necessary and related to the October 7, 2020 workplace injury.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is

not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296.

All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this October 7, 2020 work related injury to his left knee. This was actually admitted to by Respondents in their General Admission of Liability dated October 28, 2020 and is not in dispute. However, the question remains whether Claimant injured his lumbar spine and if the medial meniscus arthroscopy is related to the October 7, 2020 admitted work related injury.

C. Causation of alleged lumbar spine injury

Claimant had two different theories with regard to his lumbar spine, thoracic spine and cervical spine complaints. First, that he had low back pain from the inception of the October 7, 2020 work injury but did not complain of them because his left knee complaints were so overwhelming. The medical records first documented lumbar spine pain on April 30, 2021, over six months following his original injury date. This is not persuasive. The second theory was that he aggravated both his left knee and his lumbar spine, thoracic spine and cervical spine, with attendant radicular symptoms into his upper and lower extremities, on May 17, 2021 during physical therapy.

Claimant had to prove by a preponderance of the evidence that the lumbar spine condition he was alleging as part of the work related claim was caused in the course and scope of his employment. Under the quasi-course of employment doctrine, injuries sustained during treatment of the industrial injury have been held compensable as a consequence of the industrial injury*. Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo.App. 1993). The doctrine is not restricted to injuries arising out of "authorized" treatment. *Schrieber v. Brown & Root, Inc*., 888 P.2d 274, 278(Colo.App. 1993). For instance, in *Excel Corp.,* the Colorado Court of Appeals held that injuries sustained while leaving a physical therapy session for treatment of the industrial injury were compensable. The Court reasoned that this is so because the employer is required to provide medical treatment, and the claimant is required to submit to medical treatment. Additionally, a claimant is obligated to cooperate with reasonable medical treatment designed to cure and relieve the effects of the industrial injury. See §8-43-404(3), C.R.S. In *Miller v. Progressive Driver Services, Inc.,* W.C. No. 4-318-241 (April 22, 1998), aff'd 98CA0902 (Nov. 27, 1998)(NSOP), the panel explained that "[a]s pointed out by Professor Larson, this includes treatment in the form of exercise. 1 Larson, Workers' Compensation Law § 13.22 & § 13.22(d)." Accordingly, the failure to compensate a claimant for the natural and proximate results of his rehabilitation efforts which are consistent with the "prescribed" treatment for the industrial injury could undermine a claimant's prompt and complete recovery. The question of whether a particular injury falls within the quasi-course of employment doctrine is essentially one of fact for determination by the ALJ. See *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997).

However, the lumbar spine was neither caused nor aggravated during physical therapy on May 17, 2021 while under the care of therapist Best. Medical records showed that Claimant had back pain approximately six months after the inception of the work injury on October 7, 2020 and as early as April 30, 2021, around the time when he complained of back pain to Dr. Villavicencio and his physical therapist. Claimant failed to show that the lumbar spine condition was aggravated or caused during physical therapy in the quasi course of employment.

D. Causation of alleged left knee condition and authorization for surgery

As found, PA Rasis of Concentra documented that the injury to the left knee was a result of Claimant jumping down from a lift boom on October 7, 2020. He stated that the left knee worsened during the remainder of the day in the medial aspect of the left knee and that he had swelling in the medial joint for the first three days, which improved with a RICE regimen. PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee that was dull and was associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. As found, the problems with pain in the medial aspect of Claimant's left knee occurred from the very inception of the claim and the fact that the initial MRI did not show the fraying of the medial meniscus is not persuasive that there was no injury to the left medial meniscus.

As found, the persuasive medical evidence is that Claimant continued to have medial meniscus pain that continued from the date of the injury through the day in which Claimant had a worsening of his condition during physical therapy on May 17, 2021. As found, Claimant was performing squats that day, put pressure on the left meniscus and caused further injury and symptoms in the left medial meniscus. This is supported by the persuasive report of May 18, 2021 where Dr. Villavicencio documented the worsened left knee complaints in the medial aspect of the left knee, when he recommended an MRI of the left knee. Claimant followed up with Dr. Hewitt, the orthopedic specialist, who also recommended the MRI of the left knee. The MRI of June 30, 2021 radiologist suspected a medial meniscus tear and this was confirmed by Dr. Hewitt, who recommended the surgical repair. As found, Dr. Hewitt and Dr. Villavicencio are more persuasive in this matter, over the contrary opinions of other examining or evaluating medical providers. As found, Claimant has shown that it is more likely than not that the left knee medial meniscus tear was as a consequence of the aggravation sustained in the quasi course of employment, while receiving medical care related to the workplace injury of October 7, 2020. As found, Claimant has shown that the surgery proposed by Dr. Hewitt to treat the left medial meniscal tear was proximately caused by the injury arising out of and in the course of the employment. As found, Claimant has further shown that the surgery is authorized, reasonably necessary and related to the admitted workplace injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for authorization of treatment of the lumbar spine or other conditions is denied and dismissed as the lumbar spine or any other spine conditions are not proximately caused by the October 7, 2020 work related injury.

2. Respondents shall pay for the reasonable, necessary and related medical treatment for the left meniscal tear injury of October 7, 2020 including the authorized treatment proposed by both Dr. Villavicencio and Dr. Hewitt.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 13th day of June, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Deceased Claimant's average weekly wage.

II. Identification of any dependents.

III. If Older and Younger Minor Children are dependents pursuant to Sec. 8-42-501, et.al., what is the allocation of dependent benefits among the dependents.

IV. Are there any offsets.

PRELIMINARY MATTERS

None of the Claimants were represented by counsel. A *pro se* advisement was given before the commencement of testimony and parties agreed they wished to proceed as self-represented through their respective guardians and the Estate Representative.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer is a concrete contractor, contractor, excavator, demotion and trucking business. On September 23, 2021 Deceased Claimant was involved in a fatal accident while unloading a skid loader off a trailer. Claimant's coworker was in the skid steer moving the bucket upwards when he lost control of the bucket mechanism and Claimant was crushed by the bucket/plow, which fell on him while he was unchaining the skid steer. Deceased Claimant was working for Employer at the time of the accident.

2. Deceased Claimant suffered blunt force injuries to his chest, pelvis, and right lower leg. An autopsy report from John Carver, MD at the Jefferson County Coroner's Office identifies the cause of death as crush injuries of the right upper chest and pelvis. Deceased Claimant was 29 years old at the time of his death. His date of birth was February 28, 1992.

3. On September 28, 2021, the Division of Workers' Compensation sent a letter addressed to The Estate of Jonathan Martinez in an effort to ascertain whether the decedent left dependents who may be entitled to workers' compensation benefits. Copies

of Dependent's Notice & Claim for Compensation blank forms were enclosed. The letter was sent to 11471 Paris Court, Henderson, CO 80640.

4. Respondents filed a Fatal Case – General Admission of Liability on December 14, 2021 admitting to compensability due the work related accident. Respondents stated that dependent benefits were still to be determined.

5. A representative of the Division of Workers' Compensation and the claims representative from the Insurer communicated by email regarding the status of possible dependent benefits. For example, on December 28, 2021 the claims representative provided the following update to DOWC: "Hi William, The status of the dependent benefits is still pending. We are still awaiting the completed dependent claim forms from the respective parties, along with other ID documentation. I was in contact with the family representative recently and they were close to getting us the necessary paperwork. At least at last report. Please let me know if you need anything else."

6. In a subsequent email on January 10, 2021, the claims representative provided the following additional update: "Hi William, Of course, the main issue that based on information gathered thus far we believe the decedent had two minor children from different mothers and was not legally married to either. Under C.R.S. 8-41-505: 'A minor child of a deceased putative father is entitled to compensation when it is proved to the satisfaction of the director that the father, during his lifetime, has acknowledged the child as his and has regularly contributed to his or her support or maintenance for a reasonable period of time prior to his death.' Neither of the minor children or their respective mothers are currently represented, so we have been attempting to gather information as best we can from decedent's mother – whom he was living with on the date of the fatal accident. We need further information to confirm the decedent was actually contributing to the illegitimate children's support and maintenance – which is the missing link so far. I hope that helps but please let me know if you need any further information."

7. Decedent's mother testified at the time of the hearing as a representative of the Deceased Claimant's Estate. Deceased Claimant lived with her and her husband for the last several years, prior to his passing. Deceased Claimant was not married at the time of the accident. The Deceased would frequently leave the home for stretches at a time and would sometimes be visiting his Oldest Minor Child. Sometimes the Oldest Minor would visit him at his mothers' home and stay overnight. She was unaware of when and how often the Deceased Claimant would visit his children.

8. Deceased Claimant's mother's husband had hired Deceased Claimant to work for Employer in 2020, originally. He had been working for Employer at the time of the accident. Her husband was a minor partner in the Employer's business. She testified that her husband's cousin was the majority owner and the cousin was the one to provide her with the wage information, which she included on the Dependent's Notice and Claim for Compensation filed by each of the mothers of the two minor children in the amount of $580.00 per week. She prepared the initial claims, met with both of the mothers of the minor children to have them sign the claim forms before a notary public.

9. Deceased's mother stated that he was earning $17.00 per hour and worked approximately 34 hours a week based on what she knew of his coming and going from

the home and her consultation with the majority owner of Employer. Deceased's mother was asked about these wage records, including gaps in the wage history – such as a 4 month gap between mid-January 2021 and late May 2021. She explained that the business involves both excavation and cement work. The company was busier in the summer months. In addition to the seasonal nature of the work, she indicated that her son also had some significant personal difficulties in life including depression. Wage records showed the net earnings and multiple time periods that were blank or unreported on the Employee Quick Report, which was provided by Employer.

10. Deceased Claimant was unmarried at the time of his death.

11. Deceased Claimant was survived by two acknowledge children.

12. The Oldest Minor Child was born on March 17, 2010 and was twelve years and two months old at the time of the hearing. The birth certificate of the Oldest Minor Child showed that the father's name was that of the Deceased Claimant. Deceased Claimant's mother stated that he was 18 years old when the Oldest Minor Child was born. She confirmed that the Deceased was never married to the Oldest Minor Child's mother. She explained that the Child's mother does have four other children, but that only the Oldest Minor Child was Claimant's biological child. The Child would come to their house fairly often to spend time with Claimant and her grandparents.

13. The Oldest Minor Child was being paid for child support through the Colorado Family Support Registry and the Complete Disbursement Record showed payments made. However, the mother testified that the Deceased also contributed by paying for back to school supplies and clothing or other necessities that the Oldest Minor Child required and assisted her mother when necessary with additional funds occasionally.

14. The Youngest Minor Child was born on July 7, 2017 and was four years and 10 months old at the time of the hearing. The birth certificate of the Youngest Minor Child showed that the father's name was the Deceased Claimant. Deceased Claimant's mother testified that Claimant and the Youngest Minor Child's mother were never married, that the Deceased spent very limited time with the Younger Child and that she, herself, had not seen the Younger Child since she was a baby. When asked if Decedent paid child support for the Younger Minor Child, she explained that there was no formal child support order like with the Older Minor Child. However, if the Child's mother contacted the Decedent and said she could use help with something then Decedent would try to provide some funds.

15. Deceased's mother clarified for this ALJ that she was not alleging to have been financially dependent on her son at the time of his death.

16. Respondents filed an Application for Hearing on February 14, 2022 on the issues of AWW and Death Benefits. The Remarks section of the Application reflects: "Decedent was involved in a fatal accident on 9/23/21 within the course and scope of his employment. A GAL (Fatal Claim) was filed on 12/17/21. GAL noted that medical benefits and funeral expenses had been paid but that 'Dependent benefits are still to be determined.' Respondents believe that there may be two dependents. Decedent was not married, but did have two minor children" They further stated that "Respondents are

applying for hearing to obtain an order identifying any dependents and the status of those dependents (whole or partial); and allocation/apportionment of benefits among any dependents. AWW; Offsets (if applicable)…"

17. Decedent's mother was asked about the Dependent's Notice and Claim for Compensation forms filed on behalf of both minor children. When the claims representative from Pinnacol reached out to her and explained that he was trying to identify any potential dependents, Decedent's mother helped complete those forms with information regarding the two minor children and in assisting the children's mothers to sign each of the forms for their respective children.

18. The Youngest Minor Child's mother testified by phone at hearing. She stated that she had a child with Claimant in 2017 and confirmed that she and Claimant were never married. They did not live together. They did not file joint income tax returns together. The Youngest Child's mother indicated that there was no child support order or arrangement. She testified that Claimant did pay $100.00 on occasion and for other expenses such as for preschool supplies. She testified that she had primary custody of the Youngest Minor Child and that she is the one that supported her daughter. When asked how often she would talk with Claimant, she explained that it was very sporadic. There were times that they would talk for a couple of months and then Claimant would go "MIA" and she would hear nothing. She stated that she only recalled taking the Youngest Minor Child to her grandparents' house in Henderson to visit, where Claimant was also living, 1 or 2 times in 2018 or 2019 when she was a baby.

19. The Youngest Minor Child's mother confirmed that she had been provided with a set of the hearing exhibits from Respondents prior to hearing. She was asked about documents captioned "Parenting Plan" and "an Allocation of Parental Responsibilities" Order. The Youngest Minor Child's mother confirmed that she had provided those documents to Respondents' counsel. She explained that these documents were issued in 2018, when the Youngest Minor Child was only 1 year old. These documents represented her proposal at the time with respect to custody time and division of parental responsibilities. She explained, however, that Clamant did not end up showing up for any of the court dates so the judge ended up awarding her primary custody. The Youngest Minor Child's mother testified that she and Claimant did not ever end up actually sharing custody or dividing parental responsibilities as originally suggested in the documents.

20. The Youngest Minor Child's mother testified that the Youngest Minor Child had not yet received any benefits from the Social Security Administration since Claimant's death, such as social security survivor benefits. She explained that, since she did not have a copy of Claimant's death certificate, she had not been able to pursue anything with the Social Security Administration. However, it was her intention to apply for benefits for the Youngest Minor Child.

21. The Youngest Minor Child's mother confirmed for the ALJ that she does have a bank account and was the Youngest Minor Child's guardian.

22. The Oldest Minor Child's mother also testified at hearing confirming that she had had a child with Claimant in 2010, that they had never married and had never lived together. They did not file joint income tax returns together. She stated that there was a child support order in place, and that when Claimant was working then child support would

be paid to the Family Support Registry. She explained that she had provided the document, which is a disbursement record from the Family Support Registry with Child Support Services. The Oldest Minor Child's mother confirmed that this document reflected child support payments that Claimant had made for the Oldest Minor Child from 2017 through 2021. She testified that if he was working, he would generally pay around $200 per month. In addition to the child support payments, she confirmed he would also make other financial contributions such as helping pay for school supplies. She acknowledged that the Oldest Minor Child did refer to Claimant as her "dad." Decedent would sometimes visit the Oldest Minor Child at their house and that the Oldest Minor Child would also go to visit Claimant and her grandparents in their own home in Henderson.

23. The Oldest Minor Child's mother testified that she had not received benefits from the Social Security Administration, such as social security survivor benefits, on her daughter's behalf since Claimant's death. She said that this is something that she is still trying to figure out, and confirmed for the ALJ that it is her intention to apply for such benefits.

24. The Oldest Minor Child's mother confirmed for the ALJ that she does have a bank account and that she was the Oldest Minor Child's guardian.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the

industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

A. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning

capacity. *Ebersbach v.United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

There is, admittedly, limited documentation upon which to calculate an AWW. The Employer's First Report indicates that Claimant was paid $17.00 an hour and this was also supported by the testimony of Decedent's mother, the Estate Representative. Her husband and his cousin operate Employer's business. She testified that she included an AWW figure of $580.00 on the two Dependents' Notices & Claim for Compensation. She indicated that this was based upon information that she received directly from the cousin. She did testify that the company's work with excavation and cement was somewhat seasonal. Claimant had lapses in his wage records due in part to the seasonal work, and in part due to some personal difficulties that Claimant had experienced over the years. Based on the totality of the evidence, the fair approximation of Decedent's average weekly wage, as found, is $580.00.

B. Dependents for Purposes of Death Benefits

Respondents seek a determination of any dependents in this matter. Pursuant to Sec. 8-41-501(1), C.R.S. the following persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence):

(a) Widow or widower, un less it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support…

(b) Minor children of the deceased under the age of eighteen years of age, including posthumous or legally adopted children;

(c) Minor children of the deceased who are eighteen years or over and under the age of twenty-one years if it is shown that:

(I) At the time of the decedent's death they were actually dependent upon the deceased for support; and

(II) Either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited school. The period of the presumed dependency shall continue until they attain the age of twenty-one years or until they cease to be engaged in courses of study as full-time students at an accredited school, whichever occurs first."

In this case, Claimant was not legally married to either of the mothers of his two biological children. Claimant did not live with either of the children's mothers either, at the time of his death, nor is there any evidence that either of the mothers were alleging to have been common law spouses of Claimant. Further, neither took Claimant's last name nor did they file joint income tax returns with the Decedent.

Despite the lack of a marital relationship, Claimant's biological minor children may still potentially be deemed dependents for purposes of entitlement to death benefits. Section 8-41-505 provides: "***A minor child of a deceased putative father is entitled to compensation when it is provided to the satisfaction of the director that the father, during his lifetime, has acknowledged the child as his and had regularly contributed to his or her support and maintenance for a reasonable period of time prior to his death***."

Under the facts of this case, there are birth certificates supporting that Claimant was the biological father of the Older and Younger Minor Children. The question that then needs to be addressed is whether Claimant acknowledged the minor children as his **and** regularly contributed to his or her support for a reasonable period of time prior to his death.

The evidence and testimony supports that a child support order was in place for the Older Minor Child, and that child support payments were made to the Family Support Registry from 2017-2021. Claimant also contributed financially for school supplies for the Older Minor Child.

While the evidence for the Younger Minor Child is not as clear since there was no formal child support order in place, the Younger Minor Child's mother testified that Clamant would contribute $100 on occasion and that Claimant would help with her school supplies-such as for preschool. Further, she did file documents with the court with the intention of sharing custody with the Decedent but, since he failed to show to the proceedings, the judge awarded her custody, though not because he was not the father, as demonstrated by the Birth Certificate, as Decedent clearly was. This was acknowledged by Decedent's mother, who testified that both daughters were Decedent's biological daughters.

In response to queries by this ALJ, both of the Minor's mothers indicated that they hold accounts and are their daughters' guardians.

The Decedent's mother testified that she was not dependent on the Decedent and denied seeking any such dependent benefits.

As found, from the totality of the evidence, both the Older Minor Child and the Younger Minor Child are entitled to claim death benefits in this matter as dependent minor children of the deceased pursuant to Sec. 8-41-505(b), C.R.S. As found, there are no other dependents in this case.

C. Allocation

Respondents suggest that, if there was a determination that both minor children, qualify for benefits under § 8-41-505, the most equitable outcome would be an equal

50/50 allocation between the two minor children. This ALJ agrees with this assessment. Neither of the minor Children made any request for a division that was any different in this case. Therefore, as found, the equitable allocation of the dependent benefits is fifty percent (50%) to the Oldest Minor Child and fifty percent (50%) to the Youngest Minor Child.

Upon the Oldest Minor Child reaching the age of majority benefits shall continue only if the Oldest Minor Child shows that she continues schooling with an accredited school and only to the age of twenty-one. At the time the Oldest Minor Child's benefits terminate, the Youngest Minor Child shall be allocated one hundred percent (100%) of the death benefits until the Youngest Minor Child reaches the age of majority or shows she continues to be entitled to dependent benefits pursuant to Sec. 8-41-505(c)(II), C.R.S.

D. Offsets

Section 8-42-114, C.R.S. lays out what death benefits dependents may receive and states designates what reductions may be asserted against those death benefits as follows:

> In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

In this matter, it is clear that, based on the testimony of both minor children's mothers, neither of the dependents have received social security death benefits at this point in time. At least the Youngest Minor Child's mother stated that she could not apply for benefits as they did not have the death certificate. In response to queries by this ALJ, both of the Minor's mothers indicated that they do intend to pursue the possibility of social security survivor benefits for their respective minor daughters. Should either or both minor dependents obtain social security dependent death benefits, their guardian shall provide the information to Respondents and Respondents shall be entitled to take an offset pursuant to statute. As found, at this time, no offset is appropriate.

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ORDER

IT IS THEREFORE ORDERED:

1. Decedent's average weekly wage is $580.00 and dependent benefits shall be paid out at the maximum rate of $386.66 per week.

2. The Oldest Minor Child is entitled to 50% of the dependent death benefits in the amount of $193.33 per week until terminated by law.

3. The Youngest Minor Child is entitled to 50% of the dependent death benefits in the amount of $193.33 per week until terminated by law.

4. Respondents shall pay benefits as stated above, including interest at the rate of eight percent (8%) on all benefits that were not paid when due.

5. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 16th day of June, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL BACKGROUND

W.C. No. 5-143-435 involves an admitted injury claim with Employer and its insurance carrier at the time, Pinnacol Assurance ("the Pinnacol injury"). Employer subsequently changed workers' compensation carriers to Zurich American Insurance. W.C. No. 5-164-953 involves a contested claim filed with Employer during Zurich's policy period ("the Zurich injury"). The claims were consolidated for hearing in an order dated September 14, 2021.

ISSUES

- Did Claimant prove the Pinnacol claim should be reopened effective February 17, 2021 based on a change of condition?
- In the alternative, did Claimant suffer a new compensable injury on February 17, 2021 during Zurich's policy period?
- Did Claimant prove entitlement to medical benefits and TTD benefits commencing February 18, 2021?
- The parties to the Zurich claim stipulated to an AWW of $1,854.52.
- The parties to the Zurich claim stipulated that Dr. Emily Burns is the ATP, if the claim is compensable.

FINDINGS OF FACT

1. Claimant works for Employer as a Shop and Field Technician, repairing heavy equipment such as excavators, bulldozers, haul trucks, skid loaders, and crusher machines. The job requires long shifts with frequent heavy lifting, prolonged standing and walking, squatting, climbing, and crawling while working on and around equipment.

2. Claimant suffered an admitted injury to his left knee on July 6, 2020 when he jumped from the exit ladder of a bulldozer approximately four feet off the ground.

3. Claimant had had problems with his left knee since approximately 2011. He underwent arthroscopic surgery in September 2018 consisting of debridement, removal of loose bodies, and chondroplasties in the medial, femoral, and patellar compartments. Claimant recovered from the surgery and sought no treatment for his left knee from March 2019 until the July 2020 work accident. Claimant started working for Employer in February 2020, and performed the heavy work without difficulty or limitation. He also regularly participated in fitness activities such as running and weightlifting.

4. After the July 6, 2020 work accident, Employer referred Claimant to the UCHealth Occupational Medicine Clinic for authorized treatment. Claimant saw PA-C Zoe Call at his initial appointment on July 8, 2020. He disclosed the prior knee surgery but could not recall if the current injury felt similar to the prior injury. Ms. Call diagnosed a knee sprain, suprapatellar effusion, and osteoarthritis. She referred Claimant to Dr. Jordan Schaeffer, an orthopedic surgeon.

5. A left knee MRI on July 15, 2020 showed a medial meniscus tear and multi-compartmental degenerative changes.

6. On August 4, 2020, Dr. Schaeffer performed a left knee arthroscopy with partial medial meniscectomy, chondroplasty, and removal of loose bodies.

7. Dr. Kathryn Murray took over as Claimant's primary ATP on September 9, 2020. Claimant was still having significant swelling in his knee, and was using a crutch to assist with ambulation. He was awaiting clearance from Dr. Schaeffer to start therapy.

8. On September 17, 2020, Dr. Schaeffer noted Claimant's mechanical symptoms had improved but he was still having pain and swelling, "likely secondary to underlying degenerative changes." Dr. Schaeffer hoped to avoid a total knee arthroplasty, given Claimant's young age. He administered a cortisone injection and aspirated the knee.

9. Claimant's knee slowly improved over the next two months, but he continued to have some symptoms, particularly with activity. On November 23, 2020, Dr. Murray documented his knee would swell "if he is doing a lot of standing or walking." The physical therapist had recommended gradually increasing his walking rather than trying to progress too quickly. Claimant was worried about tolerating the physical demands of his regular work. Objectively, the examination findings were improved, with "minimal" swelling and discomfort with palpation along the medial joint line. Dr. Murray thought Claimant was approaching MMI, pending his next appointment with Dr. Schaeffer.

10. Claimant followed up with Dr. Schaeffer on December 16, 2020. Dr. Schaeffer noted, "surgery was done for acute medial meniscal tear in the setting of advanced medial and patellofemoral compartmental chondromalacia. He has had a slow recovery, but at this time he feels he is doing well with no recurrent swelling and controlled pain." Claimant felt ready to return to work. Physical examination showed no abnormalities other than reduced range of motion. Dr. Schaeffer opined Claimant was "doing well" and had reached MMI. He released Claimant to work without restrictions. Given his significant degenerative changes, Dr. Schaeffer opined Claimant might require a total knee arthroplasty in the future. He recommended follow-up as needed depending on the progression of knee pain as Claimant returned to normal work duties and activity.

11. Claimant saw Dr. Emily Burns for an MMI and impairment evaluation on January 7, 2021. She noted he was only performing seated tasks at work because Employer had not let him return to full duty. He still had some pain when walking up stairs, but was improving. The knee was not locking, catching, or giving out. He was back at the

gym doing his normal activities except for less lifting with the lower extremities. He was working up to his pre-injury 30-minute sessions on the stair mill. Claimant was wearing a knee brace occasionally but only for heavier activities "such as at the gym," and using ibuprofen on a "very occasional" basis. On examination, the knee was mildly tender to palpation along the medial joint line but otherwise nontender. There was no instability and meniscal testing was negative. Dr. Burns observed Claimant's gait to be "essentially normal." Dr. Burns assigned a 26% lower extremity rating based on the meniscal diagnosis and range of motion deficits. She released Claimant to full duty work. She opined no specific maintenance care was needed, although recommended Claimant be allowed to follow-up with orthopedics for any recurrent symptoms over the next year.

12. Claimant credibly testified that the surgery performed by Dr. Schaeffer was helpful and his knee was "good" when he was placed at MMI. He was getting around fine at home, going up and down the stairs multiple times per day, helping to care for his children, using a treadmill and elliptical machine, and exercising on his home gym.

13. Claimant returned to full duty work in the "shop" on the first workday after his impairment evaluation.

14. The work in the shop is physically demanding, although not as strenuous as working in the field, particularly regarding walking long distances on uneven terrain and climbing stairs.

15. [Adjuster redacted, hereinafter Ms. G] is a senior claim representative at Pinnacol who handled Claimant's claim. On January 14, 2021, Ms. G emailed and spoke with Claimant regarding her intent to file a Final Admission of Liability (FAL). Ms. G also advised Claimant of his right to contest the FAL, and encouraged him to advise Employer if he had further problems with his knee.

16. Pinnacol filed an FAL on January 15, 2021 admitting for Dr. Burns' rating. The FAL also admitted for medical benefits after MMI.

17. Claimant applied for a full lump sum on January 17, 2021. The Division issued an Order on January 20 approving the lump sum.

18. Claimant spoke with Ms. G by phone on January 20. He explained his knee felt sore after by the end of his shift and wondered, "what I should do? Should I go see a doctor?" Claimant understood soreness was normal after several months of sedentary activity and assumed it would resolve, but wanted to "make sure I was covering all the bases . . . and being straightforward about what was going on." Ms. G offered to schedule a maintenance care visit but Claimant wanted to wait "a week or so" and see how his knee progressed.

19. Claimant improved steadily over the next several weeks. The improvement was "especially" notable at work, but also at home. He was performing his physical therapy exercises daily, jogging on a treadmill, walking fast, and "doing it faster, longer."

20. By mid-February 2021, Claimant felt he had improved enough that he could return to the field. He was eager to resume the overtime that routinely comes with being out in the field, and felt "ready to rock."

21. Claimant was assigned to work at the mine in Cripple Creek on February 17, 2021. The facility is very large, which required extensive walking and climbing stairs while carrying heavy items. Claimant's primary task that day was to work on a large material press, which required him to crawl through a labyrinth of pipes and tubing to get inside the machine. At one point, his leg slipped and he felt a sharp, significant pain in his knee. A supervisor on site noticed him limping shortly thereafter and Claimant stated he had "tweaked" his knee. Claimant he limped for the remainder of the day while performing his duties, and the limping was noticeable enough that coworkers offered to help him with his work.

22. After his shift, Claimant texted his supervisor to report that his knee was "messed up" and he could not work the next day. The text messages were not introduced into evidence and Claimant could not recall exactly what he said. However, he agreed he mentioned "climbing up and down stairs all day" but did not describe specific incident climbing through the pipes.

23. When Claimant arrived home that evening, he removed his heavy work clothes and observed his knee was significantly swollen. He credibly testified, "there was fluid in places there wasn't before." He elevated and iced his knee that evening and took ibuprofen.

24. Claimant called Ms. G the next day. Claimant told Ms. G his knee pain increased after working 13 hours in the mine the day before going up and down the stairs. Claimant mentioned no specific incident, although Ms. G conceded she did not ask him if there was a specific event. Ms. G reminded Claimant he would probably need a total knee replacement in the future and advised that Pinnacol would probably not cover that under his claim. Nevertheless, Ms. Gills authorized Claimant to see Dr. Burns about his worsened symptoms.

25. Claimant saw Dr. Burns on February 25, 2021. Dr. Burns had a detailed discussion with Claimant regarding the condition of his knee since her last evaluation and the trigger for his increased symptoms. Dr. Burns documented,

> [H]e went back to work after he was closed and placed at MMI after his last visit here. He was feeling stronger—he was crawling, climbing, lifting, hopping without any pain at all but just soreness at the end of the day consistent with remaining re-strengthening. Last Thursday (2/18/2021) he went to the mine in Cripple Creek for his job duties that day—duties that they included lots of stairs, carrying buckets of bolts weighing 80-90 lbs, climbing in and out of machine. He had a specific incident while climbing out of material press – it is a little above his waist height with pipes and safety lines and he pulled his left leg up and over some of the pipes with his leg out behind him and he did have to push off of one of the pipes with his

> left leg and he felt immediate pain where the bubble of swelling was before and it got more swollen. After that later in the day he couldn't put full weight on the knee anymore. He has continued to have more swelling since then. He feels like he is "kind of" having more locking and catching especially with going down stairs when it actually feels a little unstable. He reports medial pain when he puts weight on it. He has iced and elevated, no work – it has improved a little but still significantly painful when he steps on.
>
> The day this injury happened, it then took him 3 hours to drive home – riding in a service truck and when he climbed out it was really stiff. When he got home it was more swollen. He had compression sleeves on at the time and when he took that off it was swollen on both the medial spot and lateral. He has been using his knee brace and that is not helping a whole lot.
>
> Before this event, he had almost no swelling and felt strong again and fully confident in the knee, no functional limitations over the past month. He was going to the gym and doing his normal athletic routine.

Inspection of the knee showed a focal area of swelling proximal to the medial joint line, and a smaller pocket of swelling over the lateral knee. The knee was significantly tender to palpation over the medial meniscus and the swollen area proximal to the medial meniscus. Claimant could "barely" get to full extension and had about 90° of flexion. His gait was "extremely antalgic" and he was using a cane. Dr. Burns opined,

> It does sound like he has had full functional recovery with maintaining that over about a month after being placed at MMI and then had the specific event. However, his pain and swelling and symptoms are very similar to what he had before. . . . At this point, I am inclined to consider this part of his previous injury unless we discover with an MRI later that a new significant injury has occurred.

26. Dr. Burns restricted Claimant to sedentary work only with the ability to elevate his knee "as needed." She referred him back to Dr. Schaeffer for reevaluation.

27. Ms. G credibly testified she initially did not think Claimant sustained a new injury based on their conversation of February 18, 2021. But she subsequently received Dr. Burns' report dated February 25, 2021, with the detailed description of the accident on February 17, 2021. The report changed Ms. G' opinion regarding the cause of Claimant's ongoing symptoms. Had Employer had still been a Pinnacol policyholder, she would have instructed Employer to file a new claim.

28. Claimant saw PA-C Jayme Eatough for an unscheduled appointment on March 1, 2021. Ms. Eatough noted that "since injury he has been icing and resting." Claimant had gone to work that morning, but simply going up and down stairs, driving his truck, and walking across the parking lot had severely aggravated his pain. He tried to elevate his leg while sitting in the chair at work "but it wouldn't stop throbbing." He could only stay at work a few hours before he left and came in for evaluation. A physical

examination confirmed swelling and “very limited” range of motion. Ms. Eatough observed an antalgic gait and recommended crutches if weight bearing was too painful. She amended Claimant’s restrictions to include “needs to be able to elevate knee with support above his heart at all times” and “use crutches at all times.”

29. Employer could not accommodate Claimant’s restrictions. Other than the aborted work attempt on March 1, 2021, he been off work since February 18, 2021.

30. On March 16, 2021, Zurich filed a notice of contest in W.C. No. 5-164-953.

31. A left knee MRI on March 18, 2021 showed moderate joint effusion, normal postoperative appearance of the prior partial meniscectomy, and high-grade cartilage loss with reactive marrow edema.

32. On March 19, 2021, Dr. Burns reviewed the new MRI and opined Claimant’s “symptoms are stemming from his underlying osteoarthritis within effusion that would suggest irritation.” She further opined, “he does not have a mechanism with this injury to cause significant new cartilage damage.” She stated she would “circle back on causality” after the orthopedic evaluation.

33. On April 16, 2021, Claimant was evaluated by Michael Sciortino, an orthopedic PA-C, who opined Claimant’s symptoms were due to “advanced degenerative changes within his medial femoral compartment.” Claimant and Mr. Sciortino discussed the possibility of a TKA, but Claimant opted against pursuing a TKA. Mr. Sciortino gave Claimant a corticosteroid injection.

34. Dr. Mark Failinger performed an IME for Pinnacol on September 2, 2021. Claimant told Dr. Failinger “he sustained a left knee injury in February 2021” while “pulling and pushing with the left leg off a pipe, [when] he felt pain in the left knee.” Claimant described limping after that accident and reporting the injury to a manager before the end of his shift. Claimant described texting his supervisor that same evening to express concern about his ability to work the following day. Upon returning home, he observed swelling, lumps, and bulges of fluid, which his spouse commented looked like “hamburger.” He also reported difficulty sleeping after the accident despite ice, elevation, and ibuprofen.

35. Dr. Failinger opined Claimant remains at MMI for the Pinnacol injury. Dr. Failinger did not think the Pinnacol injury accelerated the underlying degenerative joint disease, "although it might have caused further tearing of a preexisting meniscus tear.” Dr. Failinger opined the pathology caused by the Pinnacol injury was treated reasonably and Claimant was appropriately put at MMI in January 2021. He noted Claimant had no difficulties before the specific accident in February 2021, which created new symptoms. Dr. Failinger attributed Claimant’s recent increase in symptoms to the Zurich injury. For the new injury, Dr. Failinger recommended rest, a cortisone injection, and possibly viscosupplementation injections. He opined another arthroscopy is unlikely to improve Claimant’s symptoms. He believes a TKA or osteotomy will eventually be needed,

although “it would be difficult for an orthopedic surgeon to recommend a [TKA] at this time given his young age.”

36. On September 16, 2021, Dr. Burns responded to an inquiry from Zurich’s counsel regarding the cause of Claimant’s recurrent symptoms. Dr. Burns confirmed Claimant had no restrictions after being put at MMI. She noted he reported some soreness over the few weeks after returning to work, “but denied actual pain including with his work carrying bolts up and down stairs and crawling prior to the day he started experiencing significant symptoms again.” She indicated he “reported to [her] that it was the crawling that seem[ed] to trigger his recurrence of symptoms,” and had described his current symptoms as being “more severe than in the past.” Dr. Burns did not think the 2021 MRI showed any “significant change,” although she would “certainly defer to orthopedics for confirmation of this statement from the images.” She commented that causation “could certainly be argued either way,” but she was “inclined to connect” the recurrence to “his previous injury rather than attribute it to a new injury.”

37. Claimant saw Dr. Burns again on October 13, 2021, who opined that he should remain on sedentary work restrictions.

38. Dr. Failinger testified at hearing consistent with his report. Dr. Failinger opined any pathology caused by the Pinnacol injury was “cleaned up” during the 2020 surgery, and Claimant was appropriately placed at MMI for the Pinnacol injury. He saw no evidence to suggest Claimant’s recurrent symptoms are related to that injury. Dr. Failinger opined Claimant suffered a new knee injury in February 2021, when he “torqued” or twisted it while pushing off a pipe with his leg. Dr. Failinger testified that such a torqueing mechanism heightens the risk of a cartilage injury and Claimant’s description of the accident is consistent with a new injury. He explained that that Claimant’s post-accident dysfunction, swelling, symptoms, and new effusion (as demonstrated by the 2021 MRI) are also suggestive of a new injury: “[T]he reason we get swelling in arthritic situations like this is that cartilage gets knocked off . . . the body says, ‘I can’t have fragments in here,’ . . . In the fluid that’s made after these events, there are . . . enzymes that will break down to dissolve and disintegrate the floating cartilage, so that’s why we have swelling . . . In an arthritic knee when there’s cartilage that’s falling off . . . if it’s a . . . slow rate of falling off it doesn’t happen, but a sudden knocking off of cartilage will create this debris and then the knee swells . . .” Dr. Failinger testified there is a 99.9% chance that articular cartilage damage caused the new effusion. He considered Claimant a reliable historian and opined one would have to “completely discount” Claimant’s statements and testimony to conclude the Zurich injury was not responsible for the current symptoms.

39. Dr. Failinger’s opinions are credible and persuasive.

40. Claimant’s testimony was credible, including his description of the incident while climbing in the material press.

41. Claimant failed to prove entitlement to additional medical or indemnity benefits under the Pinnacol claim.

42. Claimant and Pinnacol collectively proved Claimant suffered a new injury at work on February 17, 2021. The new injury directly and proximately caused the worsening of Claimants' condition, leading to increased disability and a need for medical treatment.

43. Claimant proved he was disabled and suffered an injury-related wage loss from February 18, 2021 through February 28, 2021, and from March 2, 2021 ongoing.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen[1] any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Pre-existing disability from a prior industrial injury does not preclude recovery of workers' compensation benefits for a second compensable injury to the same body part. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986).

A claimant suffers a compensable injury if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove a compensable aggravation. A purely symptomatic aggravation is sufficient for an award of benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment or causes a disability, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). However, the mere fact that a claimant experiences symptoms during or after work activities does not necessarily establish a compensable injury. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Where, as here, the pre-existing condition results from a prior industrial injury, the ALJ must determine whether the recurrent pain is "a logical and recurrent consequence

[1]The indemnity portion of the Pinnacol claim is closed, and additional TTD benefits can only be awarded if the claim is reopened. The medical portion of the claim remains open pursuant to the January 15, 2021 FAL. Therefore, reopening is not a prerequisite to an award of additional medical benefits. Nevertheless, Claimant still must prove a causal nexus between the requested treatment and the original injury.

of the original injury," or a compensable "aggravation" giving rise to a new claim. *F.R. Orr Construction, supra,* at 968.

As found, Claimant and Pinnacol collectively proved Claimant suffered a new compensable injury to his left knee on February 17, 2021. The new injury proximately caused additional disability, a wage loss, and a need for medical treatment. Claimant's knee substantially worsened on February 17, 2021, as evidenced by his credible testimony and the contemporaneous medical records. The aggravation was caused by climbing and crawling in the material press. Before the new accident, Claimant was active, caring for his children at home, exercising, and successfully performing physically demanding work. After the accident, he could not bend the knee, had significantly more pain, and had a new "giant bubble" of fluid in the knee. Dr. Burns' documented new clinical findings on February 25, including multiple areas of swelling, range of motion loss, and an "extremely antalgic" gait. Dr. Failinger's causation analysis is credible and persuasive that Claimant's worsened condition on and after February 17, 2021 represents a new injury rather than a continuation of the Pinnacol injury.

Admittedly, Claimant's failure to mention a specific incident in his text message to his supervisor or his conversation with Ms. G conflicts with his later descriptions to Dr. Burns, Dr. Failinger, and at hearing. But the balance of persuasive evidence convinces the ALJ that Claimant's account of the incident with the material press is truthful. The probative value of the text message is diminished because it was not offered into evidence. Regardless, Claimant's primary intent was probably to advise his supervisor he aggravated the knee and would not be able to work the next day, rather than trying to provided a detailed description of the day's events. Similarly, when Claimant spoke with Ms. G, his main concerns were to let her know his knee was worse and inquire about seeing a doctor. Although Claimant volunteered no information about the incident with the material press, Ms. G did not ask him about any incident either. Dr. Failinger persuasively explained why the detailed discussion with Dr. Burns on February 25 is the most reliable source of information regarding the precipitating event. Claimant most likely gave Dr. Burns additional details because she specifically asked about it, and because he wanted her to understand what precipitated the sudden worsening of his condition to decide the best course of treatment. Moreover, reporting a new injury to Dr. Burns ran counter to Claimant's compensation-related self-interest by complicating his ability to obtain further benefits from his already-established Pinnacol claim. The ALJ is not persuaded by the argument Claimant fabricated the specific incident.

B. TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Once commenced, TTD benefits continue until the occurrence of one of the events listed in § 8-42-105(3)(a)-(d). One enumerated terminating event is a return to regular or modified employment. Claimant was off work because of the injury from February 18 through February 28, 2021. His entitlement to TTD terminated on March 1, 2021 when he returned to modified duty. He then left work again because of the injury, and commenced a new period of disability on March 2, 2021. As of the hearing date, Claimant had not been placed at MMI, released to full duty work, or returned to work.

The parties stipulated to an AWW of $1,854.52. Two-thirds of the stipulated AWW exceeds the maximum compensation rate of $1,074.22 applicable to Claimant's date of injury. Accordingly, all TTD benefits are payable at the rate of $1,074.22.

C. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant proved evaluations and treatment recommended by Dr. Burns are reasonably necessary and causally related to the February 17, 2021 accident covered under the Zurich claim.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen W.C. No. 5-143-435 for additional temporary disability benefits is denied and dismissed.

2. Claimant's request for medical benefits in W.C. No. 5-143-435 is denied and dismissed.

3. Claimant's claim in W.C. No. 5-164-953 for a February 17, 2021 injury is compensable.

4. Zurich shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

5. Claimant's AWW is $1,854.52.

6. Zurich shall pay Claimant TTD benefits at the maximum weekly rate of $1,074.22, from February 18, 2021 through February 28, 2021, and from March 2, 2021 until terminated by law.

7. Zurich shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

8. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: January 19, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to additional permanent partial disability (PPD) benefits.

FINDINGS OF FACT

1. On October 14, 2019, the claimant suffered an injury to his right shoulder while working for the employer. On October 25, 2019, the respondents filed a General Admission of Liability (GAL) regarding the October 14, 2019 work injury.

2. During this claim, the claimant has treated with providers a Roaring Fork Family practice.

3. On January 20, 2020, a magnetic resonance image (MRI) of the claimant's right shoulder showed, *inter alia*, a moderately sided acromial spur, mild infraspinatus tendinosis, a bursal tear of the mid distal fibers, an articular tear of the distal anterior fibers, moderate acromioclavicular joint osteoarthritis, and mild atrophy of the teres minor muscle.

4. On June 1, 2020, the claimant was seen by Dr. Ferdinand Liotta for a surgical consultation. Dr. Liotta noted that the claimant was a candidate for shoulder surgery. Thereafter, surgery was scheduled for July 7, 2020.

5. The claimant has Type 2 diabetes. On July 3, 2020, the claimant was seen by Ivy Chalmers, PA-C for a pre-operative appointment. On that date, it was noted that the claimant's hemoglobin A1c level was at 12.8. As a result, the recommended rotator cuff repair surgery was not performed. Dr. Liotta communicated to PA Chalmers that he will not perform the surgery until the claimant's A1c level is less than 8.

6. The claimant's primary care physician is Dr. Christopher Tonozzi. The medical records entered into evidence demonstrate that Dr. Tonozzi attempted to work with the claimant to lower his A1c levels. On July 20, 2020, the claimant's A1c level was 13.9. On December 8, 2020, it was 10.8. On January 19, 2021, the A1c level was 10.9. On March 31, 2021, it was at 9.3. On July 27, 2021, the claimant's A1c level was at 12.5.

7. These same medical records demonstrate that the claimant was not compliant with Dr. Tonozzi's instructions regarding insulin use. For example, on March 31, 2021, Dr. Tonozzi instructed the claimant to increase his insulin to 80 units in the morning and 50 units in the evening. However, on July 27, 2021, the claimant informed Dr. Tonozzi that he had not increased his insulin, and continued at 60 units in the morning, and 45 units in the evening. The claimant also reported that he "had heard lots

of insulin might do damage, so he actually decreased. Hoped tea he was taking would help." As noted above, the claimant's A1c level was 12.5 on that date.

8. On April 4, 2021, the claimant was seen by Dr. Andrew Gisleson. On that date, Dr. Gisleson noted that the claimant's diabetes was poorly controlled and he could not undergo surgery. Dr. Gisleson recommended that the claimant be placed at maximum medical improvement (MMI).

9. On June 14, 2021, Dr. David Lorah determined that the claimant reached MMI as of April 6, 2021. Dr. Lorah noted that although the claimant is a potential surgical candidate, he cannot undergo surgery until he is able to lower his hemoglobin A1c levels. Specifically, Dr. Lorah noted that the claimant's A1c would need to be less than 7 prior to undergoing surgery. Dr. Lorah rated the claimant's permanent impairment for his right upper extremity as nine percent (which converts to five percent whole person).

10. On September 10, 2021, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Lorah's June 14, 2021 report.

11. Following the FAL, the claimant requested a Division sponsored independent medical examination (DIME). On November 16, 2021, the claimant attended a DIME with Dr. Frank Polanco. In connection with the DIME, Dr. Polanco reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Polanco identified the claimant's diagnoses as a right shoulder strain, tendinosis with biceps tearing, and "subacute on chronic" quadrilateral space syndrome. Dr. Polanco opined that the claimant was not at MMI and needed additional treatment including physical therapy and surgery.

12. During his deposition testimony, Dr. Polanco stated that the claimant has adhesive capsulitis (also called "frozen shoulder"). Dr. Polanco recommends the claimant undergo manipulation under anesthesia. It is Dr. Polanco's opinion that this procedure would improve the claimant's function.

13. On January 26, 2022, the claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Primack opined that the claimant was at MMI. Dr. Primack noted that the claimant has adhesive capsulitis, secondary to diabetes. In addition, Dr. Primack opined that the treatment recommendation by Dr. Polanco would not address the claimant's condition. Dr. Primack assessed permanent impairment of 11 percent for the claimant's right upper extremity (which converts to whole person impairment of seven percent).

14. Dr. Primack's deposition testimony was consistent with his report. Dr. Primack explained that due to the claimant's diabetes, he has developed a diabetic shoulder. Specifically, the tendons and soft tissue in the claimant's shoulder have

thickened and created adhesions. Therefore, manipulation under anesthesia (as recommended by Dr. Polanco) would not work to improve the claimant's shoulder function. In fact, that procedure would likely worsen the rotator cuff tear.

15. The claimant testified that he would like to undergo the treatment recommended by Dr. Polanco. The claimant also testified that he has tried to reduce his blood sugar levels.

16. In the April 27, 2022 Findings of Fact, Conclusions of Law, and Order, the ALJ credited the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack over the contrary opinions of Dr. Polanco. The ALJ found that the respondents had overcome the opinions of the DIME physician. The ALJ also found that the claimant was at MMI.

17. At the hearing, the claimant argued that if the ALJ found that the respondents had overcome the DIME physician's opinion on MMI, then the ALJ should order the claimant to return to the DIME physician for an impairment rating. The respondents argued that if the ALJ found that the respondents had overcome the DIME physician's opinion on MMI, then the issue of PPD benefits would become ripe for an order based on the evidence presented at the hearing. The ALJ has considered these arguments and finds that she has jurisdiction to determine the issue of PPD benefits, and that issue is ripe of an order at this time.

18. In this matter, there are two impairment ratings assessed for the claimant's right upper extremity Dr. Lorah's assessment of 9 percent and Dr. Primack's assessment 11 percent. The DIME physician, Dr. Polanco did not assess an impairment rating at the DIME. The ALJ credited Dr. Primack's opinions on the issue of MMI. The ALJ likewise credits Dr. Primack's assessment of an 11 percent impairment rating for the claimant's right upper extremity. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that he is entitled to an impairment rating of 11 percent for his right upper extremity.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

5. As found, the impairment rating assessed by Dr. Primack is credible and persuasive. As found, the claimant is entitled to an impairment rating of 11 percent for his right upper extremity.

ORDER

It is therefore ordered the claimant is entitled to an impairment rating of 11 percent for his right upper extremity.

Dated this 21st day of June 2022.

Cassandra M. Sidanycz
Administrative Law Judge

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and

OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Whether Respondents have overcome the opinions expressed by Dr. Mayer in her Division-Sponsored Independent Medical Examination ("DIME") report by clear and convincing evidence that the Claimant is not at maximum medical improvement ("MMI")?

- Has Claimant established by a preponderance of the evidence that the additional medical treatment recommended by Dr. Mayer is reasonable treatment necessary to cure and relieve Claimant from the effects of the industrial injury?

- If Respondents have overcome the DIME physician's opinion regarding MMI by clear and convincing evidence, what is Claimant's proper permanent impairment rating?

- Has Claimant proven by a preponderance of the evidence that she is entitled to additional temporary partial disability ("TPD") benefits for the period of June 1, 2020 through ongoing?

- Have Respondents proven by a preponderance of the evidence that Claimant was overpaid temporary disability benefits for which they are entitled to an offset against permanent partial disability ("PPD") benefits?

FINDINGS OF FACT

1. Claimant was employed by Employer as an Activity Assistant. Claimant contracted COVID-19 while employed with Employer in April 2020. Claimant reported to the emergency room on April 13, 2020 and was diagnosed with acute hypoxemic respiratory failure and was admitted to the hospital and put on oxygen.

2. Respondents filed a General Admission of Liability on October 8, 2020 admitting for temporary total disability ("TTD") benefits from April 5, 2020 through May 31, 2020 and temporary partial disability ("TPD") from June 1, 2020 through ongoing. Respondents admitted to an AWW of $717.58.

3. Following her release from the hospital, Claimant was referred to family nurse practitioner ("FNP") Caitlin Lawshe for medical treatment. FNP Lawshe evaluated Claimant on April 24, 2020. FNP Lawshe noted Claimant complained of low energy levels and low oxygen levels that required supplemental oxygen. Claimant returned to FNP Lawshe on May 11, 2020 and noted that she had tried to wean down the supplemental oxygen, but her saturation levels dropped below 90%. Claimant reported

being able to walk to her mailbox and do light duties around the house a 1-2L of oxygen.

4. FNP Lawshe eventually allowed Claimant to return to work up to four hours per day after her May 26, 2020 examination. FNP Lawshe noted Claimant required 2L of oxygen with activity and recommended Claimant get an O2 backpack to go to work with.

5. FNP Lawshe subsequently referred Claimant to Dr. Knutson, a pulmonologist, for medical treatment. Dr. Knutson initially examined Claimant on July 13, 2020. Dr. Knutson noted Claimant had been a smoker for 30 years. Dr. Knutson diagnosed Claimant with significant exertional hypoxemia. Dr. Knutson referred Claimant for a computed tomography ("CT") angiogram of the chest.

6. The CT angiogram of the chest was performed on July 16, 2020. The CT angiogram showed no definite pulmonary embolus, but it was noted that the evaluation of some of the pulmonary arterial branches was limited by suboptimal contrast bolus timing and some motion artifact. Atherosclerotic changes of the aorta and scattered atelectasis was also noted along with interlobular septal thickening and emphysematous changes.

7. Claimant underwent an echocardiogram on August 7, 2020 that revealed no significant abnormalities.

8. Claimant continued to treat with Dr. Knutson. Dr. Knutson noted on September 14, 2020 that Claimant was continuing to need supplemental oxygen at 2.5L with activity and up to 3L while at work.

9. Claimant returned to Dr. Knutson on March 22, 2021. Dr. Knutson noted Claimant reported using more oxygen recently, with 3L being needed while at work. Dr. Knutson noted Claimant likely has COPD and mild post COVID fibrosis which would explain her increased need for supplemental oxygen. Dr. Knutson recommended Claimant continue with pulmonary rehab and recommended no change in her work restrictions.

10. Claimant underwent a repeat chest CT scan on April 12, 2021. The CT scan showed no interval change in mild emphysema and mild interlobular septal thickening and chronic subpleural ground-glass changes in the lung base. Calcification in the tail of the pancreas were noted to probably reflect chronic pancreatitis.

11. Claimant was next evaluated by Dr. Knutson on April 26, 2021. Dr. Knutson noted Claimant had some benefit with her pulmonary rehab with treadmill activity at 3-4 L per minute of supplemental oxygen. Dr. Knutson opined that Claimant has reached maximum medical improvement from a standpoint of her pulmonary status. Dr. Knutson opined that Claimant would greatly benefit from a portable oxygen concentrator in order to maintain her mobility, activity tolerance, and conditioning as well

as her ability to work, albeit in shorter shirts. Dr. Knutson noted that Claimant's exercise oxygen needs would be chronic.

12. FNP Lawshe examined Claimant on June 2, 2021. FNP Lawshe noted Claimant reported having good days and bad days with oxygen requirements of 3L with rest and 4L with activity. Claimant reported she was working from 10:00 – 2:00 three days a week and 10:00 – 4:30 two days per week and would leave work exhausted. FNP Lawshe placed Claimant at MMI as of June 2, 2021 and continued her work restrictions for her current schedule. FNP Lawshe recommended an additional 24 weeks of pulmonary rehab along with the use of inhalers as maintenance medical treatment.

13. Claimant was referred to Dr. Adragna for the impairment rating by FNP Lawshe. Dr. Adragna performed testing on Claimant in association with her impairment rating and provided Claimant with an impairment rating of 25% whole person, placing Claimant in Class II Of Table 8, Classes of Respiratory Impairment, of the AMA Guides 3rd Edition, Revised.

14. Claimant underwent a Division-sponsored Independent Medical Examination ("DIME") with Dr. Mayer on October 13, 2021. Dr. Mayer reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with the DIME. Dr. Mayer noted Claimant reported not being on supplemental oxygen or medications prior to contracting COVID-19. Dr. Mayer noted Claimant's was discharged from pulmonary rehab on June 23, 2021, despite the recommendation from FNP Lawshe that she continue with the rehab for another 24 weeks as of June 2, 2021.

15. Dr. Mayer summarized Claimant's medical records in her DIME report, including the diagnostic testing performed by the physicians providing Claimant medical care. Dr. Mayer noted it was her medical opinion that Claimant's oxygen requirements for 6-minute walk have not been established. Dr. Mayer further noted that she was concerned that Claimant's supplemental oxygen requirements are out of proportion to her pulmonary physiology, which suggested there may be an additional cause of her hypoxemia that may be amenable to treatment reasonably expected to improve her condition. Therefore, Dr. Mayer opined that Claimant was not at MMI for her work injury.

16. Dr. Mayer opined that Claimant should undergo additional testing to determine if there was treatment that would reasonably be expected to improve Claimant's condition and functional status, and if identified and treated, decrease her oxygen requirements and allow her to resume more of her former work activities. Dr. Mayer recommended a V/Q scan of perfusion scan to evaluate possible chronic thromboembolic disease. Dr. Mayer also recommended an echocardiogram with agitated saline to evaluate possible pulmonary hypertension and right to left shunt. Lastly, Dr. Mayer recommended an oxygen desaturation test with arterial line, to establish 6-minut walking oxygen requirements and possible component of obesity

hypoventilation. Dr. Mayer recommended the oxygen desaturation test as soon as possible.

17. Dr. Mayer further opined that Claimant qualified for an impairment rating under Class IV of Table 8, Classes of Respiratory Impairment, of the AMA Guides 3rd Edition, Revised, and provided Claimant with an impairment rating of 65% whole person.

18. Respondents filed an Application for Hearing on November 22, 2021 to contest the finding of not at MMI by Dr. Mayer.

19. Respondents referred Claimant for an Independent Medical Examination ("IME") with Dr. Bernton on January 11, 2022. Dr. Bernton reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with the IME. Dr. Bernton diagnosed Claimant with persistent hypoxemia and noted Claimant would require ongoing oxygen following her COVID-19 infection. Dr. Bernton opined in his report that he agreed with Dr. Knutson that Claimant was at MMI.

20. Dr. Bernton opined that the fact that there are diagnostic evaluations which can be performed and could potentially determine that other conditions maintenance treatment may be required does not alter the fact that Claimant is at MMI at this point in time.

21. Dr. Bernton noted that he agreed with Dr. Mayer that performing a repeat echocardiogram would be appropriate as it has been over a year from Claimant's prior echocardiogram. Dr. Bernton noted that a finding of the presence of pulmonary hypertension is, unfortunately, not unlikely given Claimant's deasutration off of oxygen in the presence of pulmonary fibrosis. Dr. Bernton opined that if pulmonary hypertension were present, that might alter treatment but that would not the fact that Claimant is at MMI.

22. Dr. Bernton further opined in his report that a V/Q scan would be appropriate, but again opined that this could be done as maintenance care. Dr. Bernton opined that a congenital right-to left shunt was a low probability and would not be an issue unless Claimant did have pulmonary hypertension, which had not yet been established. Dr. Bernton further opined that there was little evidence for the presence of obesity hypoventilation. Dr. Bernton opined that testing exercise with an arterial line was not a necessary test.

23. Dr. Bernton agreed with Dr. Mayer that Claimant's prognosis was unfortunately for continued decline in pulmonary function due, at a minimum, to aging and possibly to progression of the past-COVID pulmonary fibrosis. Dr. Bernton noted other treatments may be required based upon the Claimant's condition in the future. Dr. Bernton further opined that Claimant's proper PPD rating was the 25% whole person rating provided by Dr. Adragna.

24. Dr. Bernton testified at hearing consistent with his IME report. Dr. Bernton testified that Claimant had been clinically stable for quite some time when she was placed at MMI. Dr. Bernton testified that while he agreed that additional testing may be reasonable, the recommended additional testing could be considered maintenance treatment.

25. Respondents referred Claimant for an additional IME with Dr. Schwartz on February 18, 2022. Dr. Schwartz reviewed Claimant's medical records, obtained a medical history and performed a physical examination with testing in association with his IME. Dr. Schwartz issued a report on March 2, 2022 and diagnosed Claimant with work related post-COVID pulmonary fibrosis, and non-work related COPD/emphysema lung conditions along with another non-work related, non-pulmonary condition, morbid obesity, that may contribute to her hypoxemia but more certainly contributes to her shortness of breath with exertion.

26. Dr. Schwartz opined in his report that the recommended V/Q scan was reasonable to evaluate Claimant for a pulmonary emboli. Dr. Schwartz opined that if this evaluation is performed and negative, an echocardiogram would be unnecessary as the previous echocardiogram in August 2020 showed no heart abnormality of any etiology.

27. Dr. Schwartz opined in his report that Claimant likely had COPD/ emphysema prior to her COVID pneumonia that was secondary to her 30 years of daily exposure to the toxic effects of cigarette smoke. Dr. Schwartz opined that Claimant's long-term need for inhaled bronchodilators is treatment for her pre-exiting COPD and patients with post-COVID pulmonary fibrosis do not have COVID-induced COPD for which they would benefits from chronic bronchodilator therapy. Dr. Schwartz opined in his report that Claimant likely developed COVID pneumonia in April 2020 secondarty to a workplace exposure, which left Claimant with longstanding, no-smoking-related pulmonary abnormalities, possibly fibrosis, and an impairment of oxygenation for which Claimant now requires, and likely will continue to require, long-term need for supplemental oxygen.

28. Dr. Schwartz opined that based on Claimant's stability over the past year and there being no treatment available to treat her post-COVID pulmonary condition other than maintenance therapy with supplemental oxygen, Dr. Schwartz concurred with the opinion that Claimant was at MMI.

29. Dr. Schwartz testified consistent with his report at hearing. Dr. Schwartz opined in his testimony that Claimant was at MMI as of April 26, 2021. Dr. Schwartz testified that Claimant may have other conditions that could affect her respiratory condition. Dr. Schwartz testified that the COVID-pneumonia was not actively being treated. Dr. Schwartz opined that Claimant having blood clots was unlikely, but the V/Q scan would be appropriate for determination of long term clots in Claimant's legs.

30. Dr. Knutson testified by deposition in this matter. Dr. Knutson testified that she had reviewed the DIME report from Dr. Mayer. Dr. Knutson testified she did not believe any addition testing was necessary. Dr. Knutson testified the chest CT angiogram was performed in July, 2020 and "was adequate to exclude the so-called diagnosis of chronic thromboembolic disease." Dr. Knutson testified that the ventilation perfusion scan (V/Q scan) does not generally contribute any additional information, so she felt that test would not be useful.

31. With regard to the echocardiogram, Dr. Knutson testified that this would be a test for a pre-existing problem which was not reflected based on Claimant's history, and would only be suggested when there is presence of pulmonary hypertension, which Dr. Knutson felt was not warranted.

32. The ALJ notes that Dr. Knutson's opinion that no further diagnostic treatment is necessary in this case is contradicted by Dr. Mayer, Dr. Schwartz and Dr. Bernton who all testified that at least some additional testing would be reasonable in this case. The opinions did not agree as to whether this testing would be considered maintenance care or was pre-MMI care, but they did agree that at least some of the testing was reasonable.

33. Dr. Mayer testified by deposition in this matter. Dr. Mayer testified that one of the most notable things about Claimant's condition that remains unresolved is how much oxygen she needs when she walks. Dr. Mayer noted that the CT scan report was relatively mild and less that what she would expect Claimant to have with the severe degree of problems with oxygenation.

34. Dr. Mayer testified that one of the problems with COVID infections is that it can predispose people to developing chronic thromboembolic disease. Dr. Mayer noted that the physicians in this case had very appropriately performed a CT angiogram of the chest to look for acute pulmonary embolism, which was negative, although there was some limitation in seeing some of the outer branches, but to not identify a major clot. Dr. Mayer explained that her concern was not that a blood clot had been missed, but that hypercoagulability, the tendency to clot, would remain an ongoing problem in the long COVID syndrome.

35. Dr. Mayer testified that Claimant's condition included having her oxygen going too low during the day and/or night. Dr. Mayer testified that this can lead to pulmonary hypertension. Dr. Mayer noted that according the physical therapy reports, when they were trying to have Claimant do pulmonary rehabilitation, and especially on the treadmill, Claimant's oxygen kept going low, even though the activities they were having her do were consistent with activities of daily living. Dr. Mayer testified she was concerned with the fact that if Claimant were spending a fair amount of time moving around at an oxygen saturation below 88 percent, it would increase her risk for pulmonary hypertension. Dr. Mayer opined that a repeat echocardiogram could evaluate for right ventricular systolic pressure, which shows an elevated pressure in the right ventricle, which is an estimate of the pressuring in the pulmonary arteries, i.e.

pulmonary hypertension. Dr. Mayer testified that the physical therapy records document that Claimant's oxygen saturation had not been adequate when doing things like walking at a relatively slow pace on the treadmill.

36. Dr. Mayer testified that the existence of a right-to-left shunt was unlikely, but as an alternative explanation for why Claimant's oxygen is dropping when they exercise is a right-to-left shunt. Dr. Mayer explained in her testimony that the basis for her recommendations was the fact that Claimant's degree of oxygenation problems she has is out of proportion both to the mildly reduced diffusing capacity and the relatively mild fibrosis in the lung. Dr. Mayer explained that the reason she suggested this test is that if Claimant was getting an echocardiogram, the right-to-left shunt is a very simple addition to add the agitated saline and would allow for a more complete exam.

37. With regard to the six-minute walk test, Dr. Mayer testified the test would be to determine how much oxygen Claimant would need to maintain adequate oxygen saturation during activity. Dr. Mayer explained that this would help determine how much oxygen Claimant would need to maintain adequate oxygen saturation and have an adequate level of oxygen for her to safely do her activities of daily living.

38. The ALJ finds the DIME report and testimony of Dr. Mayer to be credible and persuasive with regard to Claimant's current medical condition and recommendations for further testing and treatment.

39. Claimant testified at hearing in this matter. Claimant testified she would like to undergo the testing recommended by Dr. Mayer. Claimant testified she continues to try to work for Employer, but her shifts have had to be shorter. Claimant testified that while she used to work 40 hours per week, she is now working 22-24 hours per week. Claimant testified she started back at work in June 2020 working four hours per day. Claimant testified she is not earning the same amount of money now than she was before she contracted COVID. Claimant testified that since she returned to work in June 2020 she has received TPD every two weeks in the amount of $25.

40. The ALJ finds the testimony of Claimant to be credible and persuasive.

41. With regard to the issue of MMI, the ALJ finds that Respondents have failed to overcome the DIME physician's opinion that Claimant is not at MMI by clear and convincing evidence. The ALJ credits the opinions expressed by Dr. Mayer in her report and testimony and finds that the evidence establishes that additional testing is appropriate to determine if there is an additional condition, such as chronic thromboembolic disease or pulmonary hypertension, which could be improved with additional treatment.

42. Notably, if Claimant is found to have blood clots, or pulmonary hypertension, additional treatment could be necessary to treat those conditions. The ALJ notes that the opinions expressed by Dr. Bernton and Dr. Schwartz indicate that the testing is reasonable, but their opinion is that it should be considered maintenance

treatment as opposed to medical treatment designed to cure and relieve the Claimant from the effects of the industrial injury. The ALJ finds that this represents a difference of medical opinion regarding the issue of MMI and does not overcome the opinion of Dr. Mayer by clear and convincing evidence.

43. In this case, the ALJ credits the opinion expressed by Dr. Mayer that the additional testing, including the V/Q scan, the echocardiogram and exercise test are reasonable medical treatment necessary prior to Claimant being placed at MMI and finds that Respondents have failed to establish that the opinion of Dr. Mayer regarding MMI has been overcome by clear and convincing evidence.

44. Based on the finding that Respondents have not overcome the DIME opinion on MMI by clear and convincing evidence, the ALJ need not make a finding on permanent impairment as this issue is not yet ripe.

45. With regard to the issue of temporary partial disability ("TPD") benefits, the ALJ finds Claimant's testimony that she received only $25 every two weeks from Insurer to be credible and persuasive. This testimony is consistent with the indemnity logs from Insurer that were entered into evidence at hearing.

46. Additionally, Claimant's wage records that were entered into evidence at hearing in this matter. The wage records demonstrate that Claimant was only capable of working part time after she returned to work on or about June 10, 2020. Claimant was provided with temporary disability benefits from Insurer in the amount of $1,708.50 for the period of April 5 through April 29, 2020. Claimant was then provided with temporary disability benefits in the amount of $956.76 every two weeks for the period of April 30, 2020 through September 30, 2020. After Claimant was placed at MMI, Respondents provided Claimant with indemnity benefits in the amount of $25 every two weeks, despite the fact that no admission of liability had been filed reducing the amount of temporary disability benefits paid to Claimant until the October 8, 2020 general admission of liability which admitted for TTD benefits for the period of April 5, 2020 through May 31, 2020 at a rate of $478.38 per week. The GAL noted the full amount of TTD benefits amounted to $3,895.38.

47. According to the indemnity logs entered into evidence by Respondents, Claimant was paid $25 every two weeks for the period of October 1, 2020 through February 28, 2022 for a total of $9500.00 (the indemnity logs show two payments on March 14 and March 28, but the ALJ is only calculating TPD benefits through March 1, 2022 only go that far). The indemnity logs further establish that temporary disability benefits in the amount of $12,232.86 were paid for the period of April 5, 2020 through September 30, 2020.

48. The ALJ notes that Claimant's testimony with regard to her receipt of TPD benefits is consistent with the Claim Indemnity Payment Log from Insurer entered into evidence by both parties at hearing. Insofar as the testimony may be considered inconsistent with the indemnity log entered into evidence at hearing, the ALJ credits the

indemnity log and wage records entered into evidence at hearing. The ALJ notes that Claimant's wage records entered into evidence at hearing demonstrate that Claimant's earnings after she returned to work were consistently several hundreds of dollars less per week than her admitted average weekly wage and were not rectified by the bi-weekly $25 payments from Respondents.

49. However, the indemnity logs indicate that Claimant was paid temporary disability benefits in the amount of $956.76 every two weeks up through September 30, 2020. Claimant's disability benefits were then reduced to $25 per week through the date of hearing.

50. Section 8-42-106, C.R.S. provides that in cases of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. The ALJ credits Claimant's testimony that she was unable to continue to work full time as a result of her work injury and had to reduce her hours to be credible and persuasive. The ALJ finds that this testimony is consistent with the medical records entered into evidence in this case.

51. Claimant set forth in exhibit 15 documentation showing the amount of temporary disability benefits owed to Claimant and the amounts of temporary disability benefits paid to Claimant. According to exhibit 15, Claimant was entitled to temporary partial disability benefits in the amount $19,007.69 for the period of May 28, 2020 through the date of hearing. This is in addition to the $3,895.38 in TTD benefits Claimant was entitled to for the period of April 5, 2020 through May 31, 2020, for a total of $22,903.07. The indemnity logs establish that through the date of the hearing, Claimant was paid $13,182.86 which establishes an underpayment of $9,720.21 through March 1, 2022 ($22,903.07 - $13,182.86 = $9,720.21).

52. The ALJ credits exhibit 15 and finds that Claimant has established by a preponderance of the evidence that she is entitled to additional temporary disability benefits in the amount of $9,720.21 for the period of June 1, 2020 through March 1, 2022. Based on the finding that Claimant is entitled to ongoing TPD benefits, the ALJ finds that Respondents have failed to establish that there was an overpayment of temporary disability benefits in this case. Respondents request for an Order finding an overpayment of benefits is therefore denied.

53. Respondents shall pay Claimant TPD benefits for the period of June 1, 2020 and continuing until terminated by law based on the stipulated average weekly wage ("AWW") of $717.58. As found, Claimant's calculation of underpaid TPD benefits in the amount of $9,720.21 through March 1, 2022 is found to be credible and persuasive.

54. Respondents shall also pay statutory interest on the unpaid amount of temporary benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2018. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

5. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

6. As found, the ALJ finds the testimony of Dr. Mayer more credible and persuasive than the conflicting testimony of Dr. Knutson, Dr. Bernton and Dr. Schwartz. As found, Dr. Bernton and Dr. Schwartz both opined that the testing recommended by

Dr. Mayer was reasonable, but maintained that this was maintenance treatment. As found, the opinions by Dr. Bernton and Dr. Schwartz represent a difference of opinion regarding the nature of the treatment and do not rise to the level of clear and convincing evidence that Claimant is not at MMI.

7. The ALJ recognizes the opinions of Dr. Bernton and Dr. Schwartz that while some of the additional testing is reasonable, it would be more appropriately categorized as maintenance medical treatment. However, diagnostic procedures constitute a compensable medical benefit that must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. *Jacobson v. American Industrial Service/Steiner Corp.*, W.C. No. 4-487-349 (ICAO, April 24, 2007). In this regard, the ALJ credits the opinions expressed by Dr. Mayer to be more credible and persuasive than the contrary opinions expressed by Dr. Bernton and Dr. Schwartz.

8. Respondents' are therefore liable for the costs of the medical treatment recommended by Dr. Mayer pursuant to the Colorado Medical Fee Schedule.

9. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to an award of temporary partial disability benefits for the period of May 31, 2020 through ongoing. As found, Claimant's testimony that she was unable to continue to work full time as a result of her work injury is found to be credible.

11. As found, the ALJ credits the indemnity logs entered into evidence along with Claimant's exhibit 15 and finds that Claimant was underpaid temporary disability benefits in the amount of $9,702.21 through March 1, 2022. As found, Claimant is entitled to ongoing TPD benefits until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents' shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the testing recommended by Dr. Mayer.

2. Respondents shall pay Claimant TPD benefits in the amount of $9,720.21 for TPD benefits through March 1, 2022.

3. Respondents shall pay ongoing TPD benefits to Claimant until terminated by law or statute.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: June 21, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-039-027-003

ISSUES

The issues set for determination included:

- Is Respondent precluded from litigating the issue of causation concerning Claimant's low back injury based upon the prior Order issued by ALJ Peter Cannici?

- Did Respondent overcome the opinions of the physician who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") [David Yamamoto, M.D.] regarding permanent medical impairment by clear and convincing evidence?

PROCEDURAL STATUS

The undersigned ALJ issued a Summary Order on December 27, 2021, which was mailed on December 27, 2021. Respondents requested a full Order on January 5, 2022. This Order follows.

FINDINGS OF FACT

1. There was no evidence in the record that prior to February 2017, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

2 On February 2, 2017, Claimant was injured when he slipped and fell on black ice while in the course and scope of his employment. Claimant injured his low back and right hip as a result of the fall. Claimant was transported by ambulance to the Emergency Department of Good Samaritan Hospital.

3. Claimant was hospitalized at Good Samaritan Hospital where x-rays showed he had a comminuted intertrochanteric and subtrochanteric fractures of the right hip with displacement and varus angulation.

4. On February 3, 2017, Claimant underwent surgery for the intertrochanteric and subtrochanteric fractures, which was performed by George Chaus, M.D. The surgery included open reduction internal fixation of the fractures with an intramedullary implant. Dr. Chaus noted the characterized the fracture was "significantly more difficult for fixation and reduction than a standard intertrochanteric or subtrochanteric hip fracture with significant deforming forces requiring an open reduction, cerclage cable wiring and advanced trauma techniques.

5. Claimant was hospitalized at Good Samaritan through February 6, 2017. Claimant was evaluated by ATP Dean Prok, M.D. at SCL Broomfield on March 10, 2017.

Claimant, who was using a wheelchair and cane, reported right upper/lateral leg pain. Dr. Prok diagnosed Claimant with right hip pain, right knee pain and acute intractable tension-type headaches.

6. Claimant was at a skilled nursing facility (Advanced Health Care) for approximately one month before he returned home.

7. The medical records admitted at hearing showed Claimant continued to use a wheelchair and a cane. On March 17, 2017, Claimant returned to Dr. Chaus. Claimant described weight bearing status as "toe touch weight bearing". Claimant did not report lumbar pain. Dr. Chaus also evaluated Claimant on April 18, 2017, who noted he was still using a wheelchair. Dr. Chaus said Claimant was to transition to weight bearing.

8. On April 11, 2017, Claimant returned to light duty work with Employer. He had restrictions of no lifting or carrying more than two (2) pounds, and no walking, crawling, kneeling, squatting, climbing, or driving. Claimant was directed to use the wheelchair for movement a maximum of 2-4 minutes per hour. X-rays taken on April 28, 2017 documented the fact that the hip fracture was healing well.

9. On May 19, 2017 Claimant returned to Dr. Prok for an examination. Claimant did not report any lower back pain. He utilized a walker instead of a wheelchair. Claimant advised Dr. Prok that he would be leaving soon for a one month-long vacation in the Philippians. Dr. Prok referred Claimant to Nicholas K. Olsen, D.O. for an examination.

10. On June 29, 2017 Claimant was evaluated by Dr. Olsen. Claimant mentioned the recent trip to the Philippines with his family. While in the water he was able to walk with a normal gait and significantly reduced pain. Claimant noted a marked increase of pain with a single-legged stance on the right lower extremity, difficulty walking upstairs and relief when sitting in a recliner or propping his leg up with pillows in bed. Dr. Olsen noted mild forward flexed posture and moderate range of motion deficits in both flexion and extension. He prescribed land-based physical therapy and pool therapy because of Claimant's good experience with water walking while in the Philippines.

11. Over the next four months, Claimant received treatment including physical therapy ("PT") and his treatment was overseen by Dr. Prok. Claimant's initial visit at CACC Physical Therapy was on July 10, 2017. He advised the therapist that his greatest difficulty was with walking; that dressing himself was a challenge, especially putting on his right sock and shoe; that sitting and driving for long periods aggravated his pain; and that he utilized a chair lift at home. The initial PT exam revealed deficits in strength, flexibility, and walking tolerance, which limitations restricted his ability to perform usual work and activities of daily living (ADL-s). Claimant received PT at CACC until August 31, 2017.

12. On August 24, 2017 Claimant visited Dr. Olsen for an examination. Claimant was using a straight cane mostly at work but less at home. He reported anterior

right groin pain when weight-bearing as well as pain in his right knee and hip. Claimant did not mention pain in his lumbar spine or SI joint. Dr. Olsen noted "neutral mechanics" in the lumbar spine and full range of motion ("ROM").

13. Dr. Prok saw Claim at regular intervals from September 22, 2017 through March 5, 2018. Claimant reported right knee pain and Dr. Prok included "acute pain of right knee" in his diagnoses. These records reflected Claimant's continued use of a cane.

14. On February 5, 2018 Dr. Olsen added, "acute deep vein thrombosis (DVT) of the distal vein of right lower extremity" to his diagnoses. He noted that Claimant's personal physician was managing the DVT with blood thinners.

15. Dr. Prok concluded Claimant reached MMI on March 5, 2018. At that time, Claimant was reporting right hip, right knee and right thigh pain. Claimant was using a cane to ambulate. Dr. Prok assigned Claimant a 21% lower extremity impairment and 20% for the implant arthroplasty, pursuant to Table 45 of the *AMA Guides*.

16. Respondent filed a Final Admission of Liability ("FAL") on March 22, 2018, admitting to Dr. Prok's impairment rating.

17. On September 7, 2018 Claimant underwent a DIME that was conducted by David Yamamoto, M.D. Claimant reported pain in the right hip, right leg, right knee and low back. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination, Dr. Yamamoto diagnosed Claimant with the following: (1) right hip intertrochanteric fracture/subtrochanteric fracture with extension to the proximal right femur requiring an intramedullary implant; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) DVT following the right hip fracture, lengthy immobilization and inactivity post-injury.

18. Dr. Yamamoto stated Claimant's continuing antalgic gait was secondary to his work injury, which resulted in persistent lower back pain and dysfunction that had not been formally treated. This conclusion regarding causation was persuasive to the ALJ. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond to treatment, Dr. Yamamoto suggested he be referred to a physiatrist for further evaluation and treatment.

19. After a hearing was conducted on February 7, 2019, ALJ Cannici issued Findings of Fact, Conclusions of Law and Order, dated March 19, 2019, which was mailed March 20, 2019.[1] More particularly, on the causation question, ALJ Cannici found: "[B]ased upon the medical evidence in the record, the ALJ determined Claimant suffered an injury to his lumbar spine as a result of his February 2, 2017 work injury". Judge Cannici found Respondent did not meet its burden of proof to overcome Dr. Yamamoto's opinion on MMI:

[1] This Order was admitted into evidence as part of Exhibit KK, pp. 350-360.

"Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports".[2]

20. The ALJ determined the issues adjudicated at the February 7, 2019 hearing were different than those at the instant hearing. In particular, the first hearing involved the issue of MMI, while the latter concerned the question of Claimant's permanent medical impairment.

21. Respondent filed a General Admission of Liability ("GAL") on May 3, 2019, referencing Dr. Yamamoto's determination that Claimant was not at MMI, as well as ALJ Cannici's Order.

22. Claimant returned to Dr. Prok on May 24, 2019. It was noted he was working with permanent restrictions and used a cane for support. He reported low back pain above the hip, along with aching/burning in that area, as well as the right hip area. On examination, Dr. Prok noted Claimant reported pain in the hip, lower leg and knee areas diffusely. Pain was also present in the right low back, with tenderness to palpation in the right lumbosacral and thoracic region and SI area. Dr. Prok referred Claimant to Scott Primack, D.O. and for PT.

23. Claimant underwent seven treatment sessions at CACC Physical Therapy beginning on June 21, 2019, with modalities including deep tissue massage and neuromuscular treatments. The massage therapist who assessed Claimant found he had hypertonicity or tension in his quadratus lumborum, glutes, and lumbar paraspinals at each of the seven (7) visits. By the end of therapy on August 16, 2019, Claimant's left and right quadratus lumborum muscles were still hypertonic. The ALJ noted these treatments were in connection with low back pain and the physical therapist's findings of hypertonicity.

24. On July 12, 2019, Claimant was evaluated by Dr. Prok. His pain complaints were similar to the previous evaluation, including right low back, gluteal and hip pain. On examination, Dr. Prok noted mild decreased ROM at the hip, with minimal soreness in the knee and hip area. Right and left low back pain was present on movement at end range.

[2] Exhibit KK, p 356.

Dr. Prok's assessment was: S/P ORIF fracture; acute pain of right knee; pain and swelling of left lower leg; fall; closed fracture of the right hip with routine healing; chronic right-sided low back pain without sciatica; acute DVT of the distal vein of right lower extremity.

25. On July 19, 2019, Claimant was evaluated by Dr. Primack. He reported a 20% improvement in connection with his lumbar spine, with increased pain with sitting and improvement with walking. Dr. Primack noted on examination that Claimant had a Trendelenburg gait pattern without the cane, which was an issue of hip mechanics as compared to spine mechanics. The Trendelenburg gait pattern was still present with the cane, but less so. Dropping of the right pelvis was present, which was consistent with a gluteus medius level weakness. Lumbar flexion was 40°, extension was 20°, with some discomfort with extension noted. (The ALJ found these measurements showed restrictions in ROM). Right and left lateral side bending or within normal limits.

26. Dr. Primack's diagnoses were: pelvis and hip intertrochanteric and subtrochanteric hip fracture, which resulted in an intra-medullary implant, with a significant breaking the right proximal femur; Claimant had extensive PT and was followed by Dr. Prok, with no report of back pain. Claimant was referred to Dr. Olsen, who managed Claimant's recovery, with neutral mechanics were demonstrated at follow-up appointments; MMI by Dr. Prok on March 5, 2018; DIME on September 7, 2018; subjective symptoms as described. Dr. Primack did not foresee any permanent residual impairment at the level of the lumbar spine, but ordered a lumbar MRI.

27. Claimant underwent a lumbar MRI on July 26, 2019. The films were read by Eduardo Seda, M.D. Dr. Seda's impression was: L1-2 left paracentral extruded free disc fragment, with moderate dural sac narrowing and mild crowding of the cauda equina; degenerative disc joint changes at the other level without dural sac or root sleeve deformity. The ALJ found the MRI provided evidence of objective conditions within Claimant's lumbar spine.

28. Claimant returned to Dr. Primack on August 16, 2019, at which time the MRI was reviewed. On examination, Claimant had 18° of hip extension, 28° abduction, adduction was 20°, internal rotation was 26° and external rotation was 44°. Dr. Primack concluded Claimant was at MMI. He opined there was no specific work-related lumbar spine injury, but lumbar spondylosis was present. Dr. Primack concluded Claimant had a 16% impairment of the lower extremity.

29. On October 4, 2019, Dr. Prok placed Claimant at MMI and noted an impairment rating was previously assigned. Dr. Prok's diagnoses were: closed fracture of right hip with routine healing; chronic right-sided low back pain without sciatica; right hip pain; acute pain of right knee; S/P ORIF fracture; fall subsequent encounter. Dr. Prok stated Claimant had permanent restrictions of no running and use of cane, as needed. The record did not contain ROM testing worksheets for Claimant's hip or lumbar spine performed by Dr. Prok.

30. On November 15, 2019, Claimant returned to Dr. Yamamoto for the follow-up DIME. At that time, Claimant reported right hip, right lower back and right leg pain. Dr. Yamamoto noted decreased ROM in all planes and the left iliac crest was slightly lower than the right. Dr. Yamamoto observed that after the first DIME, the lower back was then marked on all the subsequent pain diagrams and the lower back pain was noted in the physical therapy that was done after the first DIME report.

31. Tenderness was found over the right paraspinal musculature. Decreased ROM of the right hip was found with the following measurements: flexion 90°, extension 20° degrees, abduction 40°, abduction 40°, internal rotation 24°, external rotation 36°. Dr. Yamamoto's diagnoses were: right hip inter-trochanteric fracture, sub trochanteric fracture with extension at right proximal right femur requiring an intramedullary implant; healthy gait requiring frequent use of cane; mechanical low back pain secondary to the antalgic gait; history of DVT following the right hip fracture, causation unclear.

32. Dr. Yamamoto concluded Claimant had a permanent medical impairment for the lumbar spine of 15%, which included 5% from Table 53, IIB of the *AMA Guides*, with 10% assigned for loss of ROM. For the right hip, he was assigned an ROM impairment of 14%, which converted to a 6% whole person impairment. Dr. Yamamoto included worksheets for the impairment rating and reviewed the reports of Dr. Olsen and Dr. Primack. Dr. Yamamoto disagreed that Claimant's low back was not related to the work injury and specifically commented on Dr. Cebrian's conclusions, as follows:

> "He (Dr. Cebrian) opined that through a large portion of the medical care, there was not documentation of any lumbar spine complaints. (*Comment: Mr. Heine states that he did mention the lower back pain on several occasions but it was not documented. The low back pain was not documented at all until after I performed the Division IME and when he returned to treatment the lower back pain was then documented and addressed.)*
>
> "He (Dr. Cebrian) opined on page 22 of his report that the lumbar spine complaints were not causally related to the claim. He noted that I indicated that Mr. Heine used a cane 80% of the time because of his gait abnormality. He stated that the purpose of a cane was to redistribute the weight from the lower leg that is weaker (or) painful and to improve stability by increasing the base of support and by utilizing a cane it takes additional for(ce) (off of) the spine and should lessen any muscular related soreness secondary to a gait abnormality. (*Comment: I certainly am aware of this but Dr. Cebrian also did not take into account the fact that the ongoing use (of) the cane clearly showed that his gait was not stable this would strongly indicate that he was having difficulty with pelvic stability which could in my opinion clearly was the cause of ongoing significant mechanical low back pain.)*
>
> "He (Dr. Cebrian) also stated that even if Mr. Heine had some lumbar muscular soreness as a result of the gait abnormality, the muscular soreness did not rise

to the level of permanent impairment. (*Comment: If this was muscular soreness, I would not expect it to persist for a period of over 2 years.)*[3]

Dr. Yamamoto articulated his rationale for including the lumbar spine as follows:

"With all due respect, I am not in agreement with the findings from Dr. Cebrian. Dr. Cebrian that the hip injury should be a scheduled impairment even though he noted that Mr. Heine required the use of a cane and that a Trendelenburg gait was documented clearly by Dr. Primack. This is clear evidence that the impairment extends above the right hip joint. Dr. Primack also noted back pain even though he did not a pine that this was readable and thought it was more muscular. I would argue that this is more than a muscular problem and rises to the level of a spine impairment. It is clear that the lumbar dysfunction is a chronic condition and is expected to improve. In regard to the DVT, I find it more than a coincidence that this happened on the same side that he had the severe hip fracture. There was a long period of time between the fracture and the DVT and it appeared that this was at least eight months although Mr. Heine reported that it was six months when I first saw him. He does have increased risk because of his age and obesity as Dr. Cebrian pointed out but in my opinion, this is more than coincidence. However, I did not have some of the records from Dr. Olsen, when I did the initial DIME. I will concede that there is not convincing evidence regarding the work relatedness of the DVT although I certainly am of the opinion that the right femur injury played a significant role. I have elected not to rate the DVT. I am strongly of the opinion that the mechanical low back pain is a result of the ongoing altered gait and again have included the lower back as part of the impairment. It is noted that there was a small herniated disc in a one-two which I believe to be an incidental finding".[4]

33. The ALJ credited Dr. Yamamoto's opinion and found it more persuasive than those offered by Dr. Cebrian and Dr. Primack.

34. There was no evidence in the record that Dr. Yamamoto's rating was invalid. The ALJ found that Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment was supported by the medical evidence in the record.

35. On March 20, 2020, Carlos Cebrian, M.D. conducted a follow-up evaluation of Claimant, at the request of Respondent.[5] At that time, Claimant's complaints included:

[3] Ex. II, pp. 323-325.

[4] Ex. II, pp. 327-328.

[5] Dr. Cebrian's prior evaluation was November 29, 2018. In that report, he stated Claimant was at MMI. The ALJ noted Dr. Cebrian's subsequent report reiterated other opinions from the prior report, including his disagreement with Dr. Yamamoto concerning Claimant's date of MMI and whether his low back condition was causally related to the work injury.

limping while walking; swelling, right leg; pain, right hip; pain, lower back. On examination, Claimant's lumbar spine had no spasms, trigger points or atrophy. Straight leg raise was to 60°, with a negative FABER and Patrick signs. ROM with dual inclinometers was: 62° in flexion, 25° in extension, 25° in right lateral flexion and 25° and left lateral flexion. Dr. Cebrian's diagnosis that were claim-related included: right hip fracture, with surgery performed by Dr. Chaus.

36. Dr. Cebrian concluded Claimant's lumbar spine complaints were not causally related to the February 2, 2017 injury, reasoning that there was no documentation of lumbar spine complaints for an extended period of time after the injury. Dr. Cebrian also opined that Claimant's lower extremity DVT was not causally related to the February 2, 2017 injury. He disagreed with Dr. Yamamoto and opined Claimant had a medical impairment rating of his right hip totaling 18% lower extremity impairment, which converted to a 7% whole person impairment.

37. Dr. Cebrian testified at hearing and said his examination of Claimant revealed that when using a cane, Claimant's gait normalized. (The ALJ noted this differed from the opinion offered by Dr. Primack). Without the cane, Claimant had a Trendelenburg gait, which Dr. Cebrian explained occurred due to hip dysfunction, with one hip dropping lower than the other. When using a cane, Claimant's hips stabilized and this was why his impairment was limited to the hip. Dr. Cebrian testified that Claimant did not sustain an injury to the lumbar spine and had no permanent impairment to that area of his body.

38. The ALJ found Respondent failed to overcome the opinions of DIME physician, Dr. Yamamoto. The opinions expressed by Dr. Cebrian differed from Dr. Yamamoto, but did not establish an error.

39. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,*

5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Issue preclusion

Claimant argued that the doctrine of issue preclusion barred Respondent from contesting the issue of causation or relatedness, as this issue was previously litigated. Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien,* 990 P.2d 78, 84-85 (Colo. 1999). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id*. Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). All elements of issue preclusion were not met in the case at bench.

As found, there were not identical issues litigated at the February 7, 2019 and August 20, 2020 hearings, as the former hearing involved the question of MMI and the latter, medical impairment. (Finding of Fact 20). Even though the issue of causation was an intrinsic part of both hearings, the ultimate issues were different. Therefore, the doctrine of issue preclusion does not apply in the case at bar.

Overcoming the DIME

In resolving this issue concerning Claimant's impairment, the ALJ noted the question of whether Respondent overcame Dr. Yamamoto's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263

(Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In this case, Respondent disputed whether Claimant was entitled to a permanent medical impairment for his lumbar spine and contended the scheduled hip rating (14%) should be converted to the whole person impairment (6%) as an impairment not on the schedule. Respondents cited the opinions of Dr. Cebrian and Dr. Primack to support their argument. Claimant argued that insufficient evidence was introduced to overcome Dr. Yamamoto's opinions and that the clear and convincing evidentiary standard was not met.

There was no dispute about the underlying facts in the case. As determined in Findings of Fact 2-9, Claimant was injured at work on February 2, 2017 when he slipped and fell on icy concrete surface while checking fire extinguishers. He sustained comminuted intertrochanteric and subtrochanteric fractures of the right hip, with displacement and varus angulation. Claimant underwent surgery on February 3, 2017 and underwent an open reduction internal fixation procedure, with an intra-medullary implant performed by Dr. Chaus. Dr. Chaus noted Claimant had a significant break in the right proximal femur. *Id.*

Claimant was released from Good Samaritan Hospital and spent approximately one month in a skilled nursing facility. (Findings of Fact 5-6). Claimant was using a wheelchair and cane, as reflected in the medical records admitted at hearing. *Id.* When Claimant returned to light duty on April 11, 2017, he was using a wheelchair and then also using a walker. The evidence in the record reflected that Claimant continued to use the cane throughout this period of time. (Findings of Fact 9-13). As found, the medical records reflected Claimant did not report low back pain in the period of time after his surgery, but reported hip and groin pain. *Id.* Claimant's ATP Dr. Prok determined Claimant reached MMI on March 5, 2018. (Finding of Fact 15).

In the first DOWC-sponsored IME, Dr. Yamamoto concluded Claimant was not an MMI. (Finding of Fact 17). Claimant reported low back pain and Dr. Yamamoto opined that as a result of the work injury and resulting altered gait, Claimant had low back symptoms. (Finding of Fact 18). The ALJ credited this opinion. A hearing was held on the question of whether Claimant was at MMI and ALJ Cannici concluded Respondent had not overcome Dr. Yamamoto's conclusions by clear and convincing evidence. (Finding of Fact 19).

As determined in Findings of Fact 22-23, Claimant was evaluated by Dr. Prok and received additional treatment, including PT to address low back complaints. As found, in the subsequent evaluations by Dr. Prok and Dr. Primack, Claimant reported low back pain in pain diagrams following the first DIME and low back pain was included in the assessment by those physicians. *Id.* Dr. Prok then placed him at MMI on October 4, 2019. (Finding of Fact 29).

In the case at bar, the ALJ determined Respondent did not meet its burden of proof. The ALJ's rationale was twofold; first, there was no evidence that Dr. Yamamoto's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. The ALJ found that Dr. Yamamoto's ROM measurements were valid at the time he performed the evaluation and the evidence submitted Respondent did not refute this fact. (Finding of Fact 34). In this regard, Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment in his lumbar spine was supported by the fact that the records showed he had pain and qualified for such an impairment under the *AMA Guides*. (Findings of Fact 33-34).

In addition, Dr. Yamamoto concluded Claimant's mechanical back pain was related to his altered gait. (Findings of Fact 18, 32). As part of his reports for both evaluations, Dr. Yamamoto provided a detailed explanation as to the basis of this opinion. *Id.* In the second DIME report, Dr. Yamamoto specifically addressed the conclusions of Dr. Cebrian and expressed his disagreement. (Finding of Fact 32). Dr. Yamamoto explained his reasoning with regard to the etiology of Claimant's low back pain. *Id.* The ALJ found Dr. Yamamoto's opinion to be persuasive. (Finding of Fact 33).

Second, the evidence adduced by Respondents to contravene Dr. Yamamoto's opinion simply constituted a difference of opinion. Dr. Cebrian disagreed that Claimant had a medical impairment to his lumbar spine, however, the ALJ found Dr. Cebrian did not refute that Claimant's low back condition was causally related to the work injury or that Dr. Yamamoto's rating was valid. (Findings of Fact 36-38). The ALJ determined this did not constitute sufficient evidence to meet the clear and convincing evidentiary standard and Respondent is required to pay PPD benefits based upon Dr. Yamamoto's rating.

ORDER

It is therefore ordered:

1. Respondent did not meet its burden to overcome the DIME physician's findings with regard to Claimant's medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 20% whole person impairment of his lumbar spine and a 14% scheduled impairment of his right hip as a result of his industrial injury.

3. Respondent shall pay PPD benefits based upon Dr. Yamamoto's medical impairment rating. Respondent is entitled to a credit for PPD benefits previously paid.

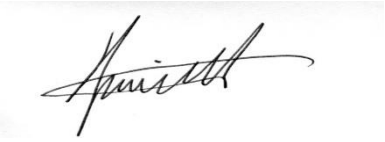
4. Respondent shall pay 8% statutory interest on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-915-969-006

ISSUES

- Whether Claimant may proceed to hearing on her Application for Hearing when she refuses to allow the court to record the hearing via Google Meets?

FINDINGS OF FACT

1. Claimant filed an Application for Expedited Hearing on January 25, 2022 seeking a hearing on prior authorization for medical benefits. The matter was set for hearing on April 21, 2022 at 8:30 a.m. to proceed to hearing via Google Meets or in person in Glenwood Springs, Colorado. All parties appeared at the April 21, 2022 hearing via Google Meets.

2. Respondent submitted hearing exhibits to the court in advance of the April 21, 2022 hearing. The hearing exhibits were received by the court on April 12, 2022.

3. Prior to going on the record for the April 21, 2022 hearing, the ALJ inquired from Claimant whether she had received Respondent's hearing exhibits. Claimant maintained that she had not received the exhibits. Respondent confirmed that the hearing exhibits had been sent to Claimant's P.O. Box which was noted on the January 25, 2022 Application for Hearing to be Claimant's address. Respondent also noted that the hearing exhibits had been emailed to Claimant the morning of April 21, 2022. Claimant advised that she had not checked her P.O. Box since the previous Friday (April 15) and did not want to proceed to hearing without having an opportunity to have time to review Respondent's hearing exhibits.

4. The ALJ inquired at the April 21, 2022 hearing if Claimant would like an extension of time to commence the hearing and inquired as to how long Claimant would need in order to review the exhibits for the extension of time. The ALJ granted the request for the extension of time and the parties agreed to recommence the hearing on April 28, 2022 at 1:00 p.m. Discussion was had as to how the new hearing would proceed, specifically whether the parties were to use the same Google Meets link, and the ALJ advised the parties that a new Google Meets link would be sent by the court for the April 28, 2022 hearing.

5. No evidence was accepted into the record at the April 21, 2022 hearing and the only discussions involved whether Claimant had a chance to review the Respondent's exhibits that had been sent to her and whether she wished to have additional time prior to review the exhibits before going on the record and taking any evidence in the case. Additional discussion was had off the record as to whether

Respondent was required to provide the hearing exhibits to Claimant three business days prior to the hearing and if the hearing exhibits would not be allowed into evidence if the exhibits were not exchanged. The ALJ explained to Claimant that there was no statutory rule that required the exchange of exhibits three business days prior to hearing and that particular rule was used by the OAC office in Grand Junction to ensure that the court and all parties had the exhibits in advance of the hearing.

6. The court did not issue a new Notice of Hearing for the April 28, 2022 hearing as the hearing was continued at the prior hearing to a date agreed up by all parties. The court clerk did issue a new Google Meets link to the parties for the April 28, 2022 hearing to be used by the parties.

7. Shortly before the April 28, 2022 hearing, Claimant emailed the clerk of the Court and indicated that she wanted to show up at the hearing in person. The clerk advised Claimant that she could appear in person, but the hearing was to be held in the Grand Junction Office of Administrative Courts and not the Glenwood Springs location.

8. Prior to the April 28, 2022 hearing, Claimant filed two written motions with the OAC. The first motion sought a protective order pursuant to C.R.C.P. 26(c) and the second motion requested an extension of time for the hearing which indicated that Claimant wished to attend the hearing in person and wanted the hearing to be in Glenwood Springs.

9. The April 28, 2022 hearing was recorded via Google Meets and using the recording equipment in the courtroom in Grand Junction. At the outset of the hearing, the ALJ dealt with the outstanding motions from Claimant and allowed Respondent to verbally advise as to their position on both motions. Counsel for Respondent noted that Respondent objected to both motions.

10. With regard to the Motion for Protective Order pursuant to Colorado Rules of Civil Procedure ("CRCP) 26(c), Respondent's counsel advised the ALJ that no discovery was outstanding in this case. Claimant argued at the hearing that a protective order was necessary in this case in order to protect Claimant from the dissemination of her medical records to the public.

11. The ALJ orally denied the Motion for Protective Order at the hearing and noted that he would put reduce the denial of the Order to a written Order prior to the next hearing. The ALJ noted that CRCP 26(c) deals with a protective order that limits discovery. As no discovery was outstanding in this case, there was no basis for a protective order limiting discovery.

12. With regard to Claimant's request for a continuance in order to proceed to hearing in person in Glenwood Springs, the ALJ eventually granted this motion over Respondent's objection, and the parties were able to eventually agree to proceed to hearing in Glenwood Springs on June 9, 2022 at 10:30 a.m. Counsel for Respondent noted that he had another hearing set later in the afternoon on June 9, 2022 and

requested that he be allowed to appear virtually at the hearing in Glenwood Springs. The ALJ agreed to this request by Respondent.

13. An Order granting Claimant's Motion for Extension of Time and Request for In Person Hearing and Denying Claimant's Motion for Protective Order was issued on April 29, 2022. The April 29, 2022 written order set forth the ALJ's reasoning for granting the motion for extension of time and denying the request for protective order and is contained in the file, so it will not be rehashed in this Order. The Order noted that Respondent would be allowed to appear at the June 9, 2022 hearing virtually if they decided to do so, which was consistent with the discussion on the record at the April 28, 2022 hearing.

14. A new Notice of Hearing for the June 9, 2022 hearing was issued on April 29, 2022. The paralegal for Respondent's counsel confirmed on the same day that Respondent's counsel would be attending the hearing via Google Meets.

15. Respondent also filed a request for a copy of the April 28, 2022 Google Meets recording on April 29, 2022. Claimant objected to the Google Meets recording being disseminated and noted in her April 29, 2022 email that she did not consent to the recording and did not want the Respondent to have a video copy of the recording that they could spread around to the public.

16. On May 25, 2022, Claimant filed a Motion to Suppress Claimant's Medical Information and Records, Recall and Destroy the Unauthorized "Google Meets" Video Recordings of Hearings and for Change of Administrative Law Judge. Claimant argued in her Motion that the initial hearing was set for April 21, 2022 and provided the parties with the option of appearing either via Google Meets on in person, but did not state that the hearing would be recorded using Google Meets.

17. Claimant stated in paragraph 4 of her motion "Pursuant to the court's rules, hearing exhibits were required to be delivered at least 3 business days in advance of the hearing for video conference hearings. Respondent's hearing exhibits were not delivered in time. According to the Vail post office, they were sent via Certified Mail and did not arrive at the post office until sometime on April 18, 2022. Claimant did not receive notice of the mailing until several days after the April 28, 2022 hearing because she was out of town." Claimant stated in Paragraph 6 of her motion, "Because of the untimely delivery of the hearing exhibits, the court continued the Hearing to April 28, 2022. The court did not issue a Notice of Hearing for the hearing. The court did not state during the April 21, 2022 hearing that the reset hearing would only be via Google Meets...."

18. The ALJ would note that these statements made by Claimant in her motion are, at best, a misstatement of the procedural matters in this case. The April 21, 2022 hearing was not continued based on Respondents' untimely exchange of exhibits. In fact, by Claimant's own admission, the exhibits were timely exchanged as the post office delivered the exhibits via certified mail on April 18, 2022, three business days

prior to the April 21, 2022 hearing. Moreover, when the parties inquired whether they should use the same link for the April 21, 2022 hearing, the ALJ advised the parties that a new link would be sent to the parties. Claimant at no point prior to the eve of the April 28, 2022 hearing expressed a desire to appear in person. When Claimant did indicate that she wanted to attend the hearing in person, Claimant was provided with the appropriate information regarding attending the hearing in person in Grand Junction. It was Claimant who then objected to having to travel to Grand Junction for the hearing, even though that option was provided to Claimant prior to the hearing.

19. With regard to the Google Meets recording, Claimant argued in her motion that nothing in the rules provides for recording via Google Meets or any video recording of proceedings. Claimant therefore requested relief in the form of having any Google Meets recordings be destroyed and not provided to any of the parties.

20. Claimant also requested that the ALJ recuse himself from the case based on the argument that the ALJ decided the Motion for Protective Order against Claimant without requiring Respondent to respond to the motion. Claimant also argued the ALJ blamed Claimant for the first continuance of the hearing even though Respondent failed to provide hearings exhibits in a timely fashion, did not provide a Notice of Hearing for the April 28, 2022, did not record the procedural hearing on April 21, 2022 and recorded Claimant in an unauthorized manner at the April 28, 2022 hearing via Google Meets. Claimant argued that these actions showed bias and prejudice against Claimant and violated Claimant's substantive and procedural due process and privacy.

21. Respondent filed an objection to Claimant's motion on May 31, 2022. Respondent noted in the objection to Claimant's request that the Google Meets recording be destroyed that the OAC Rules and Polices use various terms to describe the recordings and the Workers' Compensation Act notes that the hearing be "electronically recorded". The objection further noted that the OAC Rules contemplate the use of video format in discussing having witnesses testify video videoconference.

22. Respondent further noted that the OAC issued emergency rules permitting video hearings on July 31, 2020 in response to the COVID-19 pandemic. In this notice, the OAC advised that all hearings would be conducted by telephone of video conference and advised that the OAC would utilize Google Hangouts for the recording of the telephone and video conference hearings. Respondent argued in their objection that Claimant's argument that the OAC's utilization of Google Meets is unlawful and prejudicial was not supported by law or fact, nor did it deny Claimant due process with regard to her right to proceed to hearing.

23. Notably, the July 31, 2022 notice involving the use of Google Meets in light of the COVID-19 pandemic, signed by Director and Chief Administrative Law Judge Matthew Azer, states in pertinent part:

> In light of the COVID-19 pandemic state of emergency and the existing Executive Orders from the Governor, as well as local municipalities, all at

the Office of Administrative Courts (Denver, Colorado Springs and Grand Junction) **shall be conducted by telephone or video conference** for the near future.

The OAC will consider allowing in person hearings but only in limited circumstances in late October 2020.

The OAC utilizes Google Hangouts[1] for the recording of the telephone and video conference hearings. Parties will received a Google Hangout calendar invite on the afternoon prior to the scheduled hearing, with the telephone conference number, as well as a pin number to join the scheduled hearing. Parties are responsible for telephoning that telephone number at the time and date of the hearing. The parties should also have available the telephone numbers of any witnesses participating in the hearing. The ALJ will conference in the witnesses to the Google Hangout hearing. The parties shall ensure that all witnesses have copies of any exhibits that will be referenced during the telephonic hearing. (emphasis in original)

24. With regard to Claimant's request for disqualification of the ALJ, Respondent properly noted that CRCP 97 provides that "any party may for such disqualification and a motion by a party shall be supported by affidavit." Respondent noted that this rules has been interpreted to require a verified affidavit setting forth factual allegations which, if true, would show bias or the appearance of bias and prejudice. Respondent further argued that lack of a verified affidavit is sufficient basis to deny a motion for recusal. *See Austin v. City and County of Denver*, 462 P.2d 600 (1980). Respondent argued that Claimant's failure to provide a verified affidavit in support of her motion should result in the denial of her motion.

25. Respondent further argued that mere opinions or conclusions that the judge is biased are insufficient for a judge to be recused from a case. Respondents also noted that adverse rulings alone do not support a conclusion of bias.

26. ALJ Sidanycz issued an Order on June 1, 2022 summarily denying Claimant's Motion to Suppress Claimant's Medical Information and Records, Recall and Destroy the Unauthorized Google Meets Video Recordings of Hearings and for Change of Administrative Law Judge.

27. Claimant then filed a "Forthwith Request for Clarification of Court's Order Dated June 1, 2022" on June 2, 2022. Because this motion was filed within 10 days of the June 9, 2022 hearing, and Respondent has 10 days to respond to the motion, Claimant was advised by the OAC clerk that this motion would be taken up at the June 9, 2022 hearing.

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[1] The ALJ will use the terms Google Hangouts and Google Meets interchangeably in this Order as these reference the same technology utilized that the OAC to conduct hearings since at least July 31, 2020.

28. On June 3, 2022 Claimant filed "Claimant's Objection to Court's Order re: Delivery of Confidential Exhibits to Respondent in Advance". In this motion, Claimant maintained that because Respondent opposed her request for an order suppressing her confidential information from the public record, and the Court denied the motion, she could not provide advance copies of the hearing exhibits before the hearing. Claimant also argued in the motion that "Respondent should also be required to appear at the hearing in advance." At the conclusion of this motion, in bold type, Claimant stated, **"Finally, I object to and do not consent to any recording of the hearing or proceedings by any means other than the courtroom's official audio recording system."** (emphasis in original).

29. At the June 9, 2022 hearing, Claimant appeared in person in Glenwood Springs, Colorado along with the ALJ. Respondent's counsel appeared via Google Meets. The courtroom audio recording was started and the ALJ indicated to the parties that he would address Claimant's objection to recording the proceedings via Google Meets before starting the Google Meets recording.

30. Claimant noted that she could not hear or see Respondent's counsel on the video screen of the tablet at the bench. Claimant indicated that without being able to see Respondent's counsel, she would be unaware if Respondent's counsel were making faces or attempted non-verbal ex-parte communication with the ALJ.

31. Claimant had with her at counsel table a tablet and the ALJ invited Claimant to join the Google Meets hearing in order to be able to see Respondent's counsel. Claimant indicated that she was unable to join the WiFi network without providing additional information. The ALJ then turned up the volume on the tablet at the bench and turned the screen so it pointed away from the judge and towards Claimant.

32. The ALJ advised Claimant that Respondent was not required to appear live at the hearing based on our prior discussion at the April 28, 2022 hearing where the parties were attempting to find an agreeable date and Respondent's counsel had indicated that they had an afternoon hearing, but could appear in the morning if they were allowed to appear virtually. The ALJ reminded Claimant that the start time for the June 9, 2022 hearing had been set for 10:30 a.m. pursuant to her request that the hearing not start at 8:30 a.m. the ALJ further noted that the hearing confirmation for the June 9, 2022 hearing set forth that the matter was to proceed via Google Meets. Claimant maintained her objection to recording the hearing via Google Meets.

33. Upon inquiry from Claimant, the ALJ advised Claimant that the official recording for the hearing would be the Google Meets recording. The ALJ advised Claimant that the hearing had been noticed as a Google Meets hearing and Respondent had made arrangements to proceed to hearing virtually which was specifically allowed by the ALJ at the April 28, 2022 hearing in an effort to get this matter to hearing on a date and time agreeable to all parties.

34. Claimant continued to object to the Court proceeding with the hearing

being recorded via Google Meets. Claimant maintained that having a video of her at hearing was improper without her consent. The ALJ then offered to turn off the camera on the tablet which would effectively preclude any video of the Claimant at the hearing from appearing on the recording. Claimant would still not agree to this as a reasonable accommodation to allow for the court to record the proceedings via Google Meets.

35. The ALJ noted that if Claimant did not agree to have the matter recorded electronically in a manner in which the court had determined the hearing should be recorded, the ALJ would have no choice but to dismiss her application for hearing. Nonetheless, Claimant would not agree to allow the court to record the matter via Google Meets.

36. Claimant appeared to argue that the use of Google Meets to record the hearing, even with the camera turned off, violated her right to privacy and she should not be forced to proceed to hearing in this manner. Claimant offered no legal or factual basis for the claim that the recording of the hearing via Google Meets violated her right to privacy, and offered no rational explanation as to how her right to privacy would be infringed by having an electronic recording of the hearing take place via Google Meets.

37. The ALJ finds and determines that Claimant's objection to proceeding to hearing and having the matter recorded in the manner best determined by the ALJ, Claimant puts the court in a precarious position. Either the ALJ records the hearing over Claimant's objection to being recorded or the court must acquiesce to Claimant's demands for how the hearings should proceed. The court finds that such action is improper on the part of Claimant.

38. Claimant was issued multiple warnings by the ALJ at the June 9, 2022 hearing that if she did not consent to the recording, the ALJ would be forced to strike her application for hearing. The other option would be to have the ALJ record the Claimant without her consent in an administrative hearing in which she is seeking a benefit, or allow Claimant to dictate the terms of the recording of the hearing and the presentation of evidence. The court offered multiple accommodations to Claimant including having her join the Google Meets through her electronic device, turning the ALJ's tablet to face Claimant and/or turning off the camera so Claimant would not be recorded. Claimant summarily rejected having the matter recorded through Google Meets even with all of the accommodations offered to her and provided no reasonable basis for her continued objection to having the hearing recorded via Google Meets other than she did not want it to occur in that way because it violated her right to privacy. The ALJ finds that the Claimant's refusal to consent to the recording of the hearing via Google Meets is unreasonable under the circumstances of this case.

39. Notably, Claimant bears the burden of proof with regard to the issues endorsed on her Application for Hearing (medical benefits). Based on Claimant's refusal to allow the court to electronically record the hybrid hearing using Google Meets as set forth in the Hearing Notice for the April 21, 2022 and June 9, 2022 hearing, Claimant effectively blocked the court from initiating the hearing and taking evidence on

the matter. Because Claimant has the burden of proof on these issues, Claimant has failed, by her own actions in frustrating the process of getting the case to hearing, to present any evidence that she is entitled to medical benefits in this case. No evidence was entered at hearing and no testimony was taken. Therefore, Claimant has failed to meet her burden of proof to establish the right to any benefit under the Colorado Workers' Compensation Act.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2018. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-43-207(1) states in pertinent part:

> Hearings shall be held to determine any controversy concerning any issue arising under articles 40 to 47 of this title. In connection with hearings, the director and administrative law judges are empowered to:
>
> (h) Control the course of the hearing and the conduct of persons in the hearing room.

5. Section 8-43-213(1), C.R.S., provides: "All testimony and argument of all hearings held pursuant to Section 8-43-207 concerning any issue arising under article

40 to 47 of this title shall either be taken verbatim by a hearing reporter or shall be electronically recorded by the division."

6. In response to the COVID-19, the Office of Administrative Courts set forth Google Hangouts to allow for the recording of hearings held before the OAC. This was memorialized in a July 31, 2020 statement from Director and Chief Administrative Law Judge Matthew Azer. The July 31, 2020 statement specifically addresses that the video conference hearings will be recorded via Google Hangouts.

7. As found, in this case, the matter was noticed up for a Google Meets hearing on April 21, 2022. All parties appeared at the hearing via Google Meets. As found, the ALJ granted Claimant's request for a continuance at the hearing on April 21, 2022 in order to allow Claimant additional time to review the exhibits Respondents intended to present at hearing. As found, the parties agreed to reconvene the case for hearing on April 28, 2022 at 1:00 p.m. As found, the court advised the parties that a new Google Meets link would be sent to the parties for the April 28, 2022 hearing.

8. As found, prior to the April 28, 2022 hearing, Claimant advised the court that she would like to appear in person at the April 28, 2022 hearing. As found, Claimant was advised that if she wished to appear live, she would need to appear at the OAC office in Grand Junction, Colorado. As found, Claimant then filed a written motion for a protective order and a motion for an extension of time and request for an in person hearing.

9. At the April 28, 2022 hearing, the ALJ denied Claimant's motion for protective order under CRCP 26(c) as no discovery was outstanding. Over Respondent's objection, the ALJ granted Claimant's motion for a continuance and request for an in person hearing and set the case for hearing on June 9, 2022 at 10:30 a.m. in Glenwood Springs, Colorado. The ALJ further allowed Respondents to appear virtually at the June 9, 2022 hearing.

10. Claimant subsequently objected to any video recordings of the hearings in this case via Google Meets. Claimant argued that allowing the matter to be recorded using Google Meets violated her right to privacy. However, Claimant offered no legal or factual basis for this contention that electronically recording the proceedings via Google Meets violated her right to privacy.

11. Claimant's actions in this case in refusing to allow for an electronic recording of the hearing through Google Meets serves to frustrate the court's attempts to get the matter to hearing in an attempt to allow for the presentation of evidence.

12. As found, Claimant bears the burden of proof in this case by a preponderance of the evidence. Claimant's actions in this case in refusing to consent to the recording of the proceedings via Google Meets precludes the ALJ from taking evidence in this case and Claimant is unable to meet her burden of proof without

submitting evidence. Therefore, Claimant's request for benefits must be denied and dismissed.

13. As found, based on Claimant's refusal to consent to having the hearing in this matter recorded in the manner in which the court had determined was the most appropriate means of recording, specifically using the recording function through Google Meets which was being utilized by Respondent's to appear at the hearing, Claimant has frustrated the court's attempts to have this matter proceed to hearing. The ALJ finds that the appropriate remedy in this case based on Claimant's actions is that Claimant's Application for Hearing should be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's application for hearing is hereby dismissed. Claimant's request for benefits is denied and dismissed.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: June 22, 2022

Keith E. Mottram

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Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant prove she suffered a compensable injury on July 5, 2021?
- Is Claimant entitled to TTD benefits from July 19, 2021 through September 7, 2021?
- Is Claimant entitled to ongoing TTD benefits commencing January 3, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment on January 3, 2022, thereby precluding an award of TTD?
- The parties stipulated to an average weekly wage (AWW) of $282.79, with a corresponding weekly TTD rate of $188.53.
- If the claim is compensable, the parties stipulated that treatment provided by Concentra, Dr. Kenneth Finn, and UCHealth Urgent Care was reasonably necessary and authorized. Respondents also agreed to pay for the July 21, 2021 office visit to Peak Vista Community Health Center.
- If the claim is compensable, the parties stipulated to a general award of TPD benefits from September 8, 2021 through January 3, 2021. The parties agreed to reserve the exact amount of TPD owed to Claimant.

FINDINGS OF FACT

1. Claimant worked for Employer as a kitchen crewmember. Claimant had previously worked for Employer in the mid-2010s. She left for other employment but stayed in regular contact with her former manager, Jorge G[Redacted]. She was re-hired in November 2020.

2. When she was re-hired in 2020, Claimant made clear that she could only work Monday through Thursday because of child-care obligations. Claimant's husband shares custody of three young children with his ex-wife. The children stay with Claimant and her husband on Friday, Saturday, and Sunday. Claimant also has full custody of three children from a previous marriage. As a result, she cares for six children on Friday, Saturday, and Sunday. The children's ages range from 18 months to 13 years. Employer acknowledged Claimant's family obligations and only scheduled her to work on Monday through Thursday.

3. On July 5, 2021, Claimant noticed a pungent odor coming from one of the refrigerators. On further investigation, she discovered three boxes of spoiled chicken. Claimant contacted her supervisor, [Redacted, hereinafter Mr. G], and they agreed the bad chicken should be discarded.

4. Each box of chicken weighed approximately 40-50 pounds.

5. Claimant carried all three boxes (one at a time) approximately 50 feet to a rear door that exits to the alley. She then carried two boxes outside to the dumpster. She lifted the boxes above her shoulder and threw them into the dumpster. After lifting the second box into the dumpster, Claimant experienced pain in her low back.

6. Claimant did not report the injury to anyone that day, because she initially "didn't think it was something bad . . . I thought I was just tired [from] working a lot of hours." Claimant finished her shift and went home. She showered and took Tylenol for the pain.

7. Claimant testified that a few days after the accident, she told the shift leader, "[Redacted, hereinafter J," (sp?) that her back had been hurting "ever since I threw the chicken away." She also told co-workers [Redacted, hereinafter Ms. N] and "[Redacted, hereinafter Ms. S]" about her back pain. Ms. N[Redacted] confirmed that Claimant told her about the injury the day after the accident. Claimant also mentioned her back pain to Ms. N[Redacted] at other times over approximately the next 10 days. Neither J[Redacted] nor S[Redacted] were called as witnesses to dispute Claimant's testimony.

8. Claimant continued to work her regular shifts for ten day after the accident. Her back pain became progressively worse, particularly with lifting and bending at work. She did not report the injury to Employer or seek treatment because she hoped her back would get better on its own.

9. On Friday, July 16, 2021, Claimant's back pain become worse and "wouldn't go away." She struggled to participate in routine family activities over the weekend, and primarily rested. Claimant credibly testified she performed no activities outside of work during that time that could have caused a back injury.

10. Claimant sought treatment on July 19, 2021, at the urging of her parents. She texted her supervisor, Mr. G[Redacted], at 6:30 A.M. to advise that she could not make it into work and would have someone bring him a doctor's note later that day.

11. Claimant was seen at the UCHealth Urgent Care clinic on July 19. She complained of low back pain "x 2 weeks and recently worsening." The triage EMT documented, "she lifted a heavy box at work and has had progressive back pain since." Claimant told the treating ER provider that, "prior to onset of sxs she was throwing away a big thing of chicken at work and as she did she felt a bit of a twinge of pain but nothing unbearable. Pain became more constant afterward and was steady until 2 days ago when it began to significantly worsen." The pain was in her low back and radiated down both legs. She was having difficulty sitting, bending, and walking. Physical examination showed significant muscle spasm over the lumbar paraspinals and decreased lumbar range of motion. Claimant was diagnosed with acute low back pain and "sciatica." She was given a Toradol injection and prescriptions for a muscle relaxer and prednisone. The provider gave Claimant note stating could return to work on July 22 "as long as her symptoms have improved."

12. Claimant texted Mr. G[Redacted] later that evening that she could not come to work for several days. She said she would send him a copy of the off-work note as soon as she could.

13. Claimant saw her PCP at Peak Vista Community Health Centers on July 21, 2021. Claimant reported "low back pain starting x 2 weeks ago after throwing a heavy object into a trash can at work. States pain initially was not that bad, but has progressively worsened with time." The provider encouraged Claimant "to notify [her] supervisor of this injury at work."

14. Claimant texted Mr. G[Redacted] while she was at the Peak Vista clinic and asked if someone could report the injury "to the insurance to see if they can take care of this since it happened at work." Mr. G[Redacted] stated he would speak to his supervisor. Mr. G[Redacted] later texted Claimant that he needed "the date of when you carried the box of chicken outside." Claimant replied that the injury occurred on July 5 "when the chicken went bad." She said she was working with Margarita and Sarahi at the time.

15. Claimant and Mr. G[Redacted] exchanged text messages over the next several days regarding Claimant's injury and the procedures she needed to follow.

16. On July 29, 2021, Claimant texted the following to Mr. G[Redacted]:

> I am sorry. I just can't move because of my back. I went to the hospital and they told me I could not move for at least 3 days and could be more. It is because the day the chicken went bad, I went to go dump it at the dumpster and I got hurt. I didn't think it was that bad but with time it did start hurting more and more. This week it did get worsened since Friday, I was not able to move for nothing. I knew that I should have reported it, but I didn't think it was something serious. I do apologize.

17. Claimant saw Dr. Daniel Peterson at Concentra, Employer's designated provider, on August 2, 2021. She stated she "strained her low back on 7/5 throwing boxes of chicken wings that had gone bad into a dumpster. She felt mild pain that day and worked for 2 more weeks." Examination showed tenderness to palpation muscle spasms around the lumbar spine. Dr. Peterson diagnosed a lumbosacral strain and opined that Claimant's objective findings were consistent with the history and a work-related injury. Dr. Peterson prescribed muscle relaxers, ibuprofen, and referred Claimant to physical therapy. He imposed work restrictions including lifting no over 10 pounds and alternate sitting, standing, and walking. The work restrictions were incompatible with Claimant's regular job.

18. Employer sent Claimant a written modified job offer on September 2, 2021. The planned schedule was Monday through Thursday, from 5 P.M. to 10 P.M. Claimant accepted the job offer and returned to work on September 8, 2021.

19. Claimant underwent a lumbar MRI on November 4, 2021. It showed a right-sided disc herniation at L5-S1.

20. Claimant received conservative treatment through November 30, 2021. She stopped receiving treatment because Insurer had notified Concentra that the claim was denied and no additional treatment would be covered. Claimant's condition had partially improved but not fully recovered when she stopped treatment.

21. Claimant's description of the accident and the progression of her low back problems is credible and persuasive. Claimant's testimony is supported by the history of injury documented by multiple medical providers.

22. Claimant proved she suffered a compensable back injury on July 5, 2021.

23. Claimant proved she was disabled from her regular work and suffered an injury-related wage loss from July 19, 2021 through September 7, 2021.

24. Claimant worked modified duty from September 8, 2021 through January 2, 2022. She was terminated on January 3, 2022, and has not worked since that date.

25. Employer asserts Claimant was terminated for excessive "no call no shows" and unexcused call offs.

26. Employer's attendance policy requires all employees to provide "reasonable advance notice" of any absences, which is defined as three hours before the scheduled start of a shift. Employees are allowed only five "call-offs" in a rolling 12-month period. Absences exceeding that limit may result in disciplinary action "up to and including termination."

27. Employer identified the following days of missed work as the basis for the termination: "11/22/2021, 11/24/2021, 12/9/2021, 12/17/2021, 12/24/2021, 12/27/2021, 12/28/2021, 12/29/2021, and 12/31/2021."

28. Claimant was absent on November 22 and November 24 with approved PTO. The leave was verbally approved by Mr. G[Redacted] and approved in writing by the VP of operations on November 19, 2021.

29. Claimant missed work on December 9, 2021 because of illness. She notified Mr. G[Redacted] in the morning (more than three hours before the start of her shift) that she was vomiting and had a fever. Mr. G[Redacted] immediately replied "OK." She texted Mr. G[Redacted] again in the afternoon that she was feeling worse and still vomiting. Mr. G[Redacted] replied, "Okay, stay safe."

30. Also on December 9, unknown members of management completed a "Time Off Request Form" stating that Claimant missed work that day because of "No Day Care." Claimant later refused to sign the form because it was inaccurate.

31. In mid-December 2020, Employer changed Claimant's work schedule to include Fridays without discussing it with her. On December 13, 2021, Claimant noticed that she had been put on the schedule for Friday, December 17. Claimant was confused

because it had always been understood that she could not work on Fridays. Claimant had the following text exchange with Mr. G[Redacted] regarding the schedule:

> Claimant: Sir, I have a question. That schedule, did you schedule it just in case I come in or did they tell you I had to come in?
>
> G[Redacted]: That's what James asked me to do. Now that you can work 5 days and 25 hours.
>
> Claimant: But I cannot work on the weekends.
>
> G[Redacted]: I know, but that's what he said.
>
> Claimant: It is because I cannot do that, not because I don't want to. I lose more money in paying for a babysitter than what I make.
>
> G[Redacted]: I understand.

32. Claimant revisited the issue with Mr. G[Redacted] at work on December 13 or 14. Claimant reiterated her longstanding inability to work on Friday, Saturday, or Sunday. Mr. G[Redacted] acknowledged awareness of that limitation but said he had been instructed to put her on the schedule. Claimant testified Mr. G[Redacted] told her Employer was trying to get her to quit or create a basis for her termination.

33. Claimant did not work on Friday, December 17.

34. Claimant texted Mr. G[Redacted] on Monday, December 20 and asked if she was still on the schedule. She was concerned she might have been terminated because she could not work the previous Friday. Mr. G[Redacted] replied, "Yes, of course." Mr. G[Redacted] asked Claimant if she knew of anyone else looking for work. Claimant told Mr. G[Redacted] she might be able to work more hours, but reiterated she could only work Monday through Thursday.

35. Claimant did not work on Friday, December 24.

36. Claimant was absent from work on December 27, 28, 29, and 31. She had previously requested the week off because they were going to have her husband's children for the entire week. Claimant made this request at the same time she requested the time off in November. Claimant understood Mr. G[Redacted] to have approved the time off because he said there were enough people to cover her hours that week. Employer has a wall calendar in the kitchen to track at a glance when various employees will be off work. Claimant had marked herself out on the wall calendar after receiving approval from Mr. Go[Redacted].

37. Claimant reported to work on January 3, 2022, for what she believed to be her next scheduled shift. She was informed that she had been terminated.

38. Mr. G[Redacted] testified he first learned about Claimant's injury on July 19, 2021. He corroborated that Claimant had been approved for time off from November 19 to November 28. Mr. G[Redacted] agreed that Claimant's schedule before December 17 had always been Monday through Thursday, and he knew she could not work on Friday, Saturday, or Sunday. He conceded Claimant's absence on December 9 was excused because of illness. Mr. G[Redacted] disputed Claimant's testimony that he approved leave the week of December 27 through December 31. He did not recall Claimant asking for that week off, but testified he would have denied the request because that is typically a busy week at the restaurant. Mr. G[Redacted] denied telling Claimant that Employer was looking for an excuse to fire her.

39. Claimant's testimony regarding her missed work is credible and more persuasive than the contrary evidence offered by Respondents.

40. Claimant genuinely believed her request for time off the last week of December 2021 had been approved.

41. Claimant was still disabled and medically restricted from her regular job when she was terminated on January 3, 2022.

42. Respondents failed to prove Claimant was responsible for termination of her employment.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

As found, Claimant proved she suffered a compensable back injury on July 5, 2021. Claimant's testimony is credible and persuasive. She reported the injury and resulting back pain to co-workers within days of the accident. Any discrepancies regarding the exact timing of her conversations with co-workers in the 10 days after the accident are minor and do not appreciably detract from the persuasiveness of Claimant's testimony. Although Claimant agreed in hindsight she should have reported the injury to management immediately, her reasons for not doing so are plausible and reasonable under the circumstances. Claimant described the accident and progression of symptoms to multiple medical providers in a manner consistent with her testimony. Physical examinations at the urgent care and at Concentra showed muscle spasms in her low back, which objectively corroborates an injury. There is no persuasive evidence that Claimant had any low back problems before the work accident, nor persuasive evidence to suggest an alternate cause of the symptoms that started on July 5.

B. Claimant is entitled to TTD benefits from July 19, 2021 through September 7, 2021

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3).

As found, Claimant proved she was disabled from her regular job and suffered an injury-related wage loss from July 19, 2021 through September 7, 2021. Although she kept working for approximately 10 days after the accident, her condition worsened and she could no tolerate the standing, walking, and lifting associated with her job. Claimant is entitled to TTD benefits commencing July 19, 2021, first shift she missed because of the injury. Claimant remained off work until starting modified duty on September 8, 2021.

C. Claimant was not responsible for her termination

Claimant was disabled from her regular pre-injury work and Respondents stopped offering modified duty on January 3, 2022. Ordinarily, she would be entitled to TTD benefits under those circumstances. But Respondents argue they are not liable for TTD commencing January 3, 2022 because Claimant was responsible for termination of her employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The “termination statutes” are an affirmative defense to liability for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that the claimant performed a “volitional act” or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents failed to prove Claimant was responsible for termination of her employment on January 3, 2022. The ostensible basis for her termination—"excessive" absenteeism—is not supported by persuasive evidence. Her absence on December 9, 2021 was because she had a fever and was vomiting. Missing work because of illness is not a "volitional act" to justify termination, particularly in a food service position. Her absences on November 22 and 24, 2021 were covered by her pre-approved PTO leave. Regardless of whether it is within an employer's prerogative to terminate an "at will" employee for *excused* absences, the employee cannot reasonably be held "responsible" for their termination in such a circumstance. Claimant was a good worker with a longstanding positive relationship with her manager. No employee in similar circumstances would reasonably expect to be terminated for absences that were pre-approved and excused by their supervisor.

Admittedly, Claimant's absences on Friday, December 17, 24, and 31 were not excused. However, those absences are excluded from consideration as a basis for termination by § 8-42-105(4)(b). A claimant's refusal to work modified duty does not constitute responsibility for termination if the refusal was reasonable under the circumstances. Section 8-42-105(4)(b) references factors such as long-distance travel, unreasonable expense or financial hardship, or "any other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer." Claimant had advised Employer from the start of her employment that she could not work on Fridays, Saturdays, or Sundays. She cares for six young children on those days, and it would have been impractical and cost-prohibitive to secure daycare so she could work one shift at her relatively low-wage job. Employer was fully aware of her family situation, and never scheduled her to work on those days until after her injury. And when Employer changed Claimant's longstanding work schedule, it did so without discussion or reasonable advance notice.

The final question is whether Claimant's absences on December 27, 28, 29 were excused. Claimant's testimony that Mr. G[Redacted] told her she could take the week of December 27 is credible. But even if she misunderstood Mr. G[Redacted], the ALJ is persuaded she genuinely believed the leave was approved, and she otherwise would not have skipped work without calling in.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries on July 5, 2021 is compensable.

2. Insurer shall cover authorized medical treatment reasonably needed to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, treatment provided by Concentra, Dr. Kenneth Finn, the emergent visit to UCHealth Urgent Care on July 19, 2021, and treatment at Peak Vista Community Health Center on July 21, 2021.

3. Claimant's average weekly wage is $282.79, with a corresponding TTD rate of $188.53 per week.

4. Insurer shall pay Claimant TTD benefits from July 19, 2021 through September 7, 2021.

5. Claimant is entitled to a general award of TPD benefits from September 8, 2021 through January 2, 2022. The parties may request an additional hearing if they cannot agree on the specific amount of benefits due.

6. Respondents' defense that Claimant was responsible for termination of her employment on January 3, 2022 is denied and dismissed.

7. Insurer shall pay Claimant TTD benefits commencing January 3, 2022 and continuing until terminated according to law.

8. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

9. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 23, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on August 6, 2021, he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received for his back is reasonable and necessary to cure and relieve him from the effects of the work injury.

FINDINGS OF FACT

1. The employer operates a roofing company. The claimant worked as a roofer.

2. The claimant testified regarding three different incidents that occurred during his employment. The first incident occurred in June or July 2021. The claimant testified that at that time he was picking up trash and debris around a job site. When he lifted a trash container he felt a slight pain in his back.

3. The second incident occurred in August 2021. The claimant testified that he was cutting TPO plastic from rolls and needed to move one of the rolls. While attempting to lift the roll, the claimant felt a "hard pain" in the right side and center of his back.

4. The third incident occurred approximately one month after the August incident. At that time, the claimant was on a roof and carrying hoses for the nail guns. The roof was icy, and the claimant slipped and felt more pain in his back.

5. The incident at issue before the ALJ is the one involving moving rolls of plastic. This incident has been identified as occurring on August 6, 2021.

6. TS[Redacted] is the company president for the employer. On September 1, 2021, Mr. TS[Redacted] created the First Report of Injury or Illness form regarding the August 6, 2021 incident. In that document, the injury was reported to the employer on August 20, 2021 and is described as "While working in Aspen, employee picked up a roll of material. Straining Mid Back."

7. Mr. TS[Redacted] testified that TPO is a membrane used in the roofing process. Each roll weighs approximately 400 pounds. It is Mr. TS[Redacted]'s understanding that the claimant and some coworkers were competing to see who could pick up the roll of TPO. Upon learning of the August 6, 2021 incident, Mr. TS[Redacted] sent the claimant for medical

treatment. The claimant did not report injuries related to picking up trash or slipping on a roof to Mr. TS[Redacted].

8. Ater the August 6, 2021 incident, the claimant continued working for the employer. In addition, after reporting the incident on August 20, 2021, the claimant continued performing his normal job duties.

9. Mr. TS[Redacted] testified that the claimant's last day of work for the employer was in early or mid-September. After that time, Mr. TS[Redacted] contacted the claimant regarding returning to work. However, the claimant declined any work offered to him by Mr. TS[Redacted].

10. The claimant was first seen for the August 6, 2021 incident on September 2, 2021. At that time, the claimant was seen by Andrew Henrichs, PA-C at Roaring Fork Family Practice. The claimant described all three incidents mentioned above. The claimant also reported low back pain radiating up his back to the base of his neck. PA Henrichs opined that the claimant's pain was likely muscular and referred the claimant to physical therapy.

11. On September 15, 2021, the claimant returned to PA Henrichs and reported increased pain. PA Henrichs continued to recommend physical therapy. In addition, he prescribed hydrocodone/acetaminophen.

12. The claimant began physical therapy on September 16, 2021. At that time, the claimant reported that his worst pain[1] was 10, best pain was 2, and his current pain **was 4.**

13. The claimant was again seen by PA Henrichs on September 30, 2021. The claimant reported worsening symptoms, with the addition of pain radiating down his right leg. PA Henrichs ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

14. On October 6, 2021, the claimant underwent an MRI of his lumbar spine. Dr. David Breland reviewed the MRI and on October 7, 2021 and noted normal alignment, no fracture, with normal discs and no canal stenosis at all levels. Dr. Breland identified the MRI as a "negative exam".

15. On October 14, 2021, the claimant returned to PA Henrichs. At that time, the MRI results were reviewed and PA Henrichs reiterated that the claimant's pain was likely muscular. The claimant was placed on light duty with work restrictions that included a lifting restriction of 10 pounds, and no kneeling, squatting, crawling, or climbing.

[1] Based upon a 10 point pain scale.

16. Subsequently, the claimant was referred for a surgical consultation. On October 20, 2021, the claimant was seen by Dr. Michael Campian at The Spine Center. Dr. Campian noted that the claimant's MRI was unremarkable and opined that the claimant's pain was myofascial. Dr. Campian recommended the claimant continue with physical therapy.

17. At a physical therapy appointment on October 26, 2021, the claimant reported his worst pain as 9, best pain as 6, and current pain as 9.

18. On February 11, 2022, the claimant attended an independent medical examination (IME) with Dr. J. Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In a questionnaire for the IME, the claimant reported that his current pain as 9, worst pain 10, and least pain 9. In his IME report, Dr. Raschbacher opined that the claimant did not suffer an injury at work. In support of his opinion, Dr. Raschbacher noted that the claimant's reported mechanisms of injury and subjective complaints are not supported by objective findings. Dr. Raschbacher also noted that the claimant's presentation at the IME was "remarkable for the nonphysiologic examination". Dr. Raschbacher further opined that the claimant does not need any permanent work restrictions.

19. On February 15, 2022, PA Henrichs determined that the claimant was at maximum medical improvement **(MMI)** and referred him for a functional capacity evaluation and an impairment rating.

20. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the medical records, the opinions of Ors. Campian and Raschbacher, and the testimony of Mr. TS[Redacted]. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury to his back at work on August 6, 2021.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on August 6, 2021, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, he medical records, the opinions of Ors. Campian and Raschbacher, and the testimony of Mr. TS[Redacted] are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an August 6, 2021 injury is denied and dismissed.

Dated June 24, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty {20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https:1/oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, It Is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-478-001

ISSUES

1. Whether Respondents have established by a preponderance of the evidence sufficient grounds for withdrawal of their General Admission of Liability.

2. Whether Claimant has established by a preponderance of the evidence that physical therapy recommended by Dr. Rizza is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that a referral to Dr. Shoemaker is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is a 52-year-old man who worked for employer as a delivery driver. Claimant's job duties included driving a delivery truck and delivering products to retail and grocery stores, stocking shelves, and loading and unloading the delivery truck.

2. On September 7, 2021, Claimant reported an injury to Employer arising out of the course of his employment with Employer. Specifically, Claimant indicated to that he has sustained an injury to his lower back while delivering product to a grocery store in Estes Park, Colorado while working his delivery route. Claimant testified that he was pushing a cart full of product into a grocery store when the cart abruptly stopped because one of the cart's wheels dropped into a gap in the pavement. Claimant testified the cart weighed approximately 300 pounds when loaded with product. Claimant weighed 180 pounds at the time. Claimant testified that he felt a pop in his left hamstring. Claimant completed his remaining two stops in Estes Park that morning, and the pain in his leg increased. Claimant did not complete the remaining stops on his route drove his truck back to Employer's warehouse in Fort Collins, Colorado.

3. Later that day, Claimant had a telehealth visit with physical therapist, Tonya Davis, at Sozo Physical Therapy. Claimant reported feeling a discomfort in his left hamstring while pushing a cart, continuing to work and then noticing discomfort in his left buttock while driving. Claimant continued to receive physical therapy at Sozo through September 29, 2021. (Ex. G).

4. Employer prepared a First Report of Injury on September 7, 2021. (Ex. A). On September 30, 2021, Employer filed a General Admission of Liability (GAL) with the Division of Workers' Compensation, admitting for medical benefits, and temporary total disability benefits. (Ex. B). On September 21, 2021, Employer provided Claimant with a Designated Provider List which included Workwell Occupational Clinic in Fort Collins, Colorado, among others. (Ex. D).

5. On September 22, 2021, Claimant saw Pamela Rizza, M.D., at Workwell in Fort Collins. Claimant reported pain and tightness in his left hamstring and irritation of the left sciatic nerve radiating to his calf. Claimant denied lower back pain. On examination, Dr. Rizza noted moderately limited extension of the lower back, with positive straight leg raising on the left, with an absent reflex in the left Achilles. Dr. Rizza also noted decreased sensation over the lateral and posterior thigh and lateral foot, with difficulty toe walking on the left with giveaway weakness. Dr. Rizza noted that Claimant's examination was consistent with an L5-S1 radiculopathy and referred Claimant for a lumbar MRI. (Ex. F).

6. The MRI, performed on September 28, 2021, showed a prominent left paracentral disc extrusion at L5-S1 causing significant left lateral recess stenosis, and likely posterior displacement and impingement on the descending left S1 nerve root. (Ex. 5).

7. On September 29, 2021, Claimant saw Dr. Rizza who reviewed Claimant's MRI, and indicated that the disc extrusion "appears acute on the MRI, and is consistent with his mechanism of injury and current symptomatology." Dr. Rizza referred Claimant for an evaluation with a physiatrist, Dr. Shoemaker, for the performance of a lumbar epidural steroid injection (LESI) for a diagnosis of intervertebral disc disorder with radiculopathy, and referred Claimant for six sessions of physical therapy. (Ex. F).

8. On September 30, 2021, Respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability benefits. (Ex. B).

9. On October 13, 2021, Claimant again saw Dr. Rizza, who recommended that Claimant continue physical therapy. She also noted that Claimant's LESI was awaiting approval, and she would like it to be done urgently once authorized. Dr. Rizza also indicated that she anticipated Claimant would need ongoing physical therapy once the LES was completed. (Ex. F).

10. On October 14, 2021, Respondents sent a letter to Dr. Rizza (copying Claimant) recommending authorization ongoing physical therapy and physiatrist referral to Dr. Shoemaker for a left L5-S1 LESI. The letter indicated: "The medical provider, injured worker and workers' compensation claims adjuster have been notified that this specific service meets established criteria for medical necessity ONLY based on the information presented by the medical provider." The letter was authored by Jennifer Smith-Newsome, a case specialist for Sedgwick, which the ALJ infers was Insurer's third-party administrator for Claimant's claim. (Ex. F).

11. Claimant attended six sessions of physical therapy through Workwell from October 1, 2021 through October 18, 2021. (Ex. J).

12. Claimant returned to Dr. Rizza on October 27, 2021, noting there had been a slight improvement in range of motion, but Claimant still had "classic S1 radiculopathy findings on exam with an absent Achilles reflex and paresthesias in the L5-S1 dermatome." Ex. F. Dr. Rizza noted that "it continues to be my medical opinion that [it] is medically probable that the current injury is work related." Dr. Rizza also noted that "rehab care and LESI

referral pending case review by Sedgwick." (Ex. F). The ALJ infers that by "rehab care" Dr. Rizza was referring to physical therapy.

13. On November 30, 2021, Claimant was seen by John Burris, M.D., for a WCRP Rule 16 IME at Respondents' request. On examination, Dr. Burris noted that Claimant had numbness in the left leg S1 dermatome and an absent left ankle DTR (deep tendon reflex), which was consistent with a left S1 radiculopathy. He indicated that Claimant's diagnosis was a L5-S1 intervertebral disc disorder with left S1 radiculopathy. He indicated that Claimant's original "'hamstring injury' was likely the early manifestation of the S1 radiculopathy and not an actual hamstring injury, which is a common presentation for this condition." (Ex. E). Dr. Burris concluded that Claimant's mechanism of injury was inconsistent with his condition, therefore "from a medical causation standpoint, [Claimant's] low back condition cannot be causally related to the reported 9/7/2021 workplace event." In reaching this conclusion, Dr. Burris referenced the "AMA Guides to the Evaluation of Disease and Injury Causation," which indicated "there is insufficient scientific evidence to attribute the cause of lumbar disc herniation to any minor trauma or ergonomic risk factor. The cases in which there is just a temporal association between an event and the onset of sciatica from a disc herniation logically represent when the herniation occurs, but not why it occurs." The AMA Guides to the Evaluation of Disease and Injury Causation, cited by Dr. Burris were not offered or admitted into evidence. Dr. Burris testified that he believed Claimant sustained "minor trauma" which was insufficient to cause an injury. (Ex. E).

14. Dr. Burris was admitted as an expert in occupational medicine, and testified at hearing. He testified that Claimant's presentation, timing of reported symptoms, progression of symptoms and pain distribution were all consistent with an L5-S1 disc protrusion. Dr. Burris testified that he did not believe Claimant's injury was causally related to his work, because the is "insufficient evidence to associate disc herniations with minor trauma or ergonomic risk factors." Dr. Burris further testified that "up to 80 percent of the studies that have been done show that up to 80 percent of people have degenerative findings and are asymptomatic in [Claimant's] age group." Dr. Burris did not identify any specific study or studies upon which this testimony was based, and no such studies were offered or admitted into evidence.

15. Dr. Burris further testified that "Physical trauma is associated with approximately 1 percent of the appearance of disc herniations. It is much more likely that it's from a spontaneous event or from a natural progression of degenerative changes." Dr. Burris offered no cogent explanation for this opinion. He testified that over the past 25 years, that he has seen many injured workers who have had spinal herniations caused by exertional activity. Dr. Burris opinion that Claimant's disc injury is unrelated to the September 7, 2021 work incident is neither credible nor persuasive.

16. Claimant was not evaluated by a physiatrist, did not receive an LESI injection, and did not receive "rehab care" or physical therapy after November 30, 2021. Claimant testified that Insurer denied authorization for those treatments.

17. On January 18, 2022, Respondent's counsel sent a letter to Dr. Rizza asking if she agreed with Dr. Burris' opinion that Claimant's condition was unrelated to his September 7, 2021 workplace event. On February 18, 2022, Dr. Rizza responded "No," explaining "It is 75% medially probable that the mechanism described and a forceful push resulting in [illegible] lumbar hyperextension caused an acute disc herniation. The course of symptoms, onset, physical exam findings, and MRI imaging are all consistent w/acute S1 radiculopathy." (Ex. F).

18. At hearing, Respondents presented the testimony of KF[Redacted], one of Claimant's co-workers. Mr. KF[Redacted] is a relief driver employed by Employer who assisted Claimant with his route in Estes Park on September 7, 2021. Mr. KF[Redacted] did not ride in the same vehicle with Claimant and only assisted with Claimant's three stops in Estes Park that morning. Mr. KF[Redacted] testified he did not witness the incident Claimant asserts caused his injury, that Claimant did not complain of any injury to him, and he did not notice the Claimant exhibiting any signs of injury that day. After completing the Estes Park stops, Mr. KF[Redacted] did not see Claimant again that day. Mr. KF[Redacted] testified that he was the only person who transported product from the truck into the grocery store that morning, but that he was not constantly in Claimant's presence that morning.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a

matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

WITHDRAWAL OF ADMISSION OF LIABILITY - COMPENSABILITY

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. § 8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). There must be a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics,* W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment

aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Respondents have failed to establish by a preponderance of the evidence grounds for withdrawal of their General Admission of Liability. Claimant credibly testified that while performing his job duties, he felt a pop in his hamstring on September 7, 2021. Mr. KF[Redacted]'s testimony that he did not see the event occur or that he did not observe Claimant pushing a cart into the store does not contradict Claimant's testimony. Respondents have failed to establish by a preponderance of the evidence that the September 7, 2021 work incident did not occur as Claimant described.

Respondents have also failed to establish by a preponderance of the evidence that Claimant's lumbar disc herniation was not caused by the September 7, 2021 work incident. Both Dr. Rizza and Dr. Burris agree that Claimant's presentation, timing of reported symptoms, progression of symptoms, and pain distribution are consistent with an L5 disc protrusion. The ALJ credit's Dr. Rizza's opinion that Claimant's reported mechanism of injury is consistent with the injury sustained.

Dr. Burris' opinion that Claimant's injury was unrelated to the September 7, 2021 work incident, and more likely related to a "spontaneous event" or degenerative condition is neither credible nor persuasive. Dr. Burris relied primarily on unsupported statistics and an excerpt from an AMA text from which the context of the full statement could not be ascertained. No credible evidence was admitted from which the ALJ can assess the source from which Dr. Burris concluded that 80% of disc herniations are degenerative in nature or that only 1% of disc herniations are caused by "minor trauma." No credible evidence was admitted defining "minor trauma," or whether Claimant's injury fits into that purported category, beyond Dr. Burris' conclusory statements. Dr. Burris' admission that he has seen many patients with spinal herniations caused by exertional activities also contradicts his testimony. Nothing in Dr. Burris' testimony or written opinions or the other evidence presented established that it is more likely than not that Claimant's lumbar disc condition was not causally related to Claimant's September 7, 2021 work incident.

SPECIFIC MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that Dr. Rizza's referral to Dr. Shoemaker for a lumbar epidural steroid injection is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Rizza referred Claimant for a lumbar epidural steroid injection on September 29, 2021. The request was reviewed by Insurer's representatives and it was indicated that the treatment was approved as medically necessary. The evidence at hearing was insufficient to establish the reasons for which authorization was apparently denied. However, the basis for denial appears to be Dr. Burris' opinion that Claimant's injury was not work-related. The ALJ infers from Dr. Rizza's referral and the fact that it is undisputed that Claimant has a herniated lumbar disc, that the treatment is reasonably necessary to cure or relieve the effects of the injury. Claimant's request for approval of a referral to a physiatrist for the performance of a lumbar steroid injection is approved.

With respect to physical therapy, Dr. Rizza initially referred Claimant for six sessions of physical therapy on September 29, 2021. Claimant attended six sessions of physical therapy through Workwell from October 1, 2021 through October 18, 2021. Although Dr. Rizza indicated that additional physical therapy would be anticipated following performance of an LESI, the records do not indicate that a referral for additional physical therapy has been placed. Because no current request for authorization of physical therapy has been made, the ALJ lacks jurisdiction to authorize physical therapy at this time. *Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAO May 4, 1995).

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their General Admission of Liability is denied.

2. Claimant's request for authorization of a referral to a physiatrist for an L5-S1 LESI is granted.

3. Claimant's request for authorization of physical therapy is not ripe for decision, and is therefore denied without prejudice.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 24, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on December 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received for her back is reasonable and necessary to cure her from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits.

4. If the claimant is eligible for TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for the termination of her employment.

PROCEDURAL HISTORY

The current matter involves an alleged acute injury occurring on December 6, 2021. In October 2021, the claimant reported an occupational disease/cumulative trauma injury to the same employer. At hearing, the claimant agreed that the occupational disease/cumulative trauma claim is barred by the statute of limitations and she is not pursuing that claim. Therefore, the December 6, 2021 injury is the only injury at issue at this time.

FINDINGS OF FACT

1. The claimant was employed with the employer on a full time basis as a paraprofessional. The claimant's job duties included providing support needs for special education students.

2. The claimant testified that on December 6, 2021, she was assigned a special needs student "J". While walking with this student, the student tried to climb into her stroller. The claimant attempted to assist J into the stroller and felt spasms on the left side of her back. Following that incident, the claimant completed her work tasks for the day. The claimant also worked on December 7, 2021. However, the claimant was experiencing intense back pain and did not work December 8, 2021.

3. On December 8, 2021, the claimant sent an email to AB[Redacted], Principal at the school where the claimant worked. In that email, the claimant stated that her back was "out" and she planned to see a chiropractor the following day. The claimant also stated that it was possible that her back issues were due to her work with student J. When she was asked to clarify why the claimant believed her time with J was related to her back pain, the claimant replied that J's "needs were different" than her normally assigned student.

Back symptoms and treatment prior to December 6, 2021

4. The claimant has undergone chiropractic treatment for her back with chiropractor Eileen Macfarlane. In a medical record dated January 2, 2020, the claimant reported to Dr. Macfarlane that she felt stabbing pain in her ribs and back while lifting boxes. On January 27, 2020, the claimant reported neck pain, headaches, and a flu-like feeling. On February 8, 2020, the claimant reported to Dr. Macfarlane symptoms of neck pain. On February 15, 2020, the claimant reported neck pain, and pain in her upper thoracic spine. On February 22, 2020, the claimant reported low back pain. The claimant continued her treatment with Dr. Macfarlane throughout 2020 and 2021. At these visits the claimant reported waxing and waning neck and neck pain.

5. On April April 26, 2021, the claimant was seen via "telehealth" at Mountain Family Health Centers by Emily Borkovec, PA-C. On that date, the claimant reported that she had experienced low back pain "off and on for the past couple of years", however it has worsened over the last year. The claimant requested a letter from PA Borkovec regarding a "position change" at work. PA Borkovec identified the claimant's diagnosis as chronic bilateral low back pain without sciatica.

6. On August 23, 2020, the claimant reported to PA Borkovec that she had fluctuating, but persistent, low back pain. The claimant reported that she was picking up 50 pound toddlers at her workplace. PA Borkovec ordered lumbosacral x-rays and physical therapy.

7. On October 14, 2020, the claimant returned to PA Borkovec and reported worsening low back pain. At that time, PA Borkovec placed the claimant under work restrictions of "no lifting". The claimant testified that she understood that she was not to lift more than 10 pounds.

8. On October 18, 2021, x-rays of the claimant's lumbar spine showed multilevel degenerative facet arthrosis at the L3-L4 and L4-L5 levels, and most severe at the lumbosacral junction.

Treatment after December 6, 2021

9. On December 9, 2021, the claimant was seen by Dr. Macfarlane. At that time, the claimant reported a flare-up after she picked up a child at work. In a letter dated December 9, 2021, Dr. Macfarlane opined that the claimant reinjured her lumbar

sacral spine on December 6 and 7, 2021. Dr. Macfarlane recommended no lifting over 10 pounds.

10. On December 17, 2021, the claimant informed the employer that she was resigning from her position. The claimant testified that she resigned at that time because was not getting support from the employer.

11. On December 30, 2021, PA Borkovec took the claimant off of all work. In a letter of that same date, PA Borkovec opined that the claimant's pre-existing back condition was complicated by an injury on December 6, 2021.

12. In early January 2022, the claimant attempted to rescind her resignation. The employer declined to do so.

13. On January 19, 2022, the claimant was seen by Dr. Macfarlane. At that time, the claimant reported that her low back pain was seven out of ten after picking up boxes. On January 27, 2022, Dr. Macfarlane recorded that claimant alleged increased low back pain after driving and sitting at a computer for longer than an hour. On February 2, 2022 and February 15, 2022, the claimant reported to Dr. Macfarlane that her back pain was better. However, on February 21, 2022, the claimant reported to Dr. Macfarlane that her low back pain was five out of ten, after driving for several hours over the weekend.

14. The claimant testified that after the event of December 6, 2021, her pain was elevated from her baseline for roughly one month. The claimant also testified that she felt that she had returned to her baseline pain after 12 weeks of not lifting anything. The claimant denied reporting to Dr. Macfarlane that she had increased pain after driving or sitting at the computer.

15. On April 18, 2022, Dr. Albert Hattem performed a medical records review in this case. In his report, Dr. Hattem opined that the claimant has pre-existing lumbar spondylosis, which is not work related. Dr. Hattem explained that spondylosis is "a degenerative age related and genetically predisposed condition that typically causes waxing and waning low back pain that will worsen over time regardless of one's activities." Dr. Hattem noted that the claimant had regular treatment of her low back pain prior to December 6, 2021. Dr. Hattem further opined that the claimant's ongoing symptoms were a continuation of the ongoing waxing and waning back pain that she had been having for years.

16. The ALJ credits the medical records and the opinions of Dr. Hattem. The ALJ specifically credits Dr. Hattem's opinion that the claimant's ongoing symptoms were a continuation of the ongoing waxing and waning back pain that she had been having for years. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an acute injury to her low back on December 6, 2021. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not

that her pre-existing low back condition was aggravated or accelerated by her work activities on December 6, 2021.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. The occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the

employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, August 18, 2005). An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta, supra; Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988); *Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on December 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her pre-existing low back condition was aggravated or accelerated by her work activities on December 6, 2021. As found, the medical records and the opinions of Dr. Hattem are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's claim for workers' compensation benefits related to a December 6, 2021 incident is denied and dismissed.

2. All remaining endorsed issues are dismissed as moot.

Dated June 24, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after

mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable left knee injury on June 24, 2021.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and causally related medical benefits, including the left knee surgery he underwent on September 1, 2021.

III. Whether Claimant proved he is entitled to temporary total disability ("TTD") benefits from July 4, 2021, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant has worked for Employer as a delivery driver for over six years. Claimant's job duties require unloading cases from a semi-truck and delivering the cases to various locations, which involves ascending and descending ramps and stairs.

2. Claimant's August 2017 medical records document a history of blood clots with left leg pain and swelling, as well as a lump and bruising behind his left knee. Claimant testified he was not experiencing any left knee issues or limitations leading up to the work incident.

3. Claimant sustained a work injury while making a delivery for Employer on June 24, 2021. Claimant testified at hearing that this particular delivery required making approximately four to five trips up and down 20 stairs carrying 200-300 pounds each trip. Claimant used a dolly to carry the product up the stairs. Claimant testified that on the last trip up the stairs he felt immense pressure on his left knee in the area of his knee cap. He testified it felt as though the muscle in that area was gone. Claimant testified he developed a bump in that same area. He further testified he had not previously felt a similar sensation in his knee nor did he previously have a bump on his knee in that area.

4. Claimant finished his delivery route for the day. Claimant testified the sensation in his knee worsened that evening. He reported the incident to Employer the following day and was referred to Concentra.

5. Claimant presented to David Kleberger, APN at Concentra on June 25, 2021. APN Kleberger documented, "…pt says yesterday his LT knee started to have a lot of pressure, no pain but a new bump right on the knee cap." (Cl. Ex. 4, p. 8). Claimant did not report experiencing a popping sensation at the time of the incident. APN Kleberger noted,

"[Claimant] denies any known workplace mechanism of injury including a trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow to his left knee. Says he thinks it might be from climbing stairs. Today says he has no left knee pain, but notice bump right over the patella." (Id.) Claimant reported a current pain level of 0/10 with pressure and stiffness. On examination of the left knee, APN Kleberger noted a callous over the patella. There was full range of motion with no tenderness, no crepitus, no clicking, no ecchymosis, and no instability. McMurray's test was negative. Claimant's gait was normal. X-rays of the left knee revealed no acute pathology or trauma. The radiologist noted findings of no joint effusion. APN Kleberger diagnosed Claimant with left knee pressure with no known work injury. He stated, "[b]ased on a careful exam of the patient, as well as the information obtained about their job duties and mechanism of injury, it does not appear that the presenting complaints arose out of their job duties in the course of the patient performing those duties." (Cl. Ex. 4, p. 11). APN Kleberger released Claimant to work full duty and discharged him from workers' compensation care. He advised Claimant to follow-up with his primary care physician.

6. Claimant testified he met with APN Kleberger for about five minutes. Claimant testified he advised APN Kleberger that he was moving a few hundred pounds of product up stairs and that he felt immense pressure on his knee when he got to the top of the stairs on his last trip. Claimant testified he had a bump on his left knee and that APN Kleberger felt the bump.

7. Claimant subsequently purchased a knee brace and returned to work. Claimant testified he attempted to work for four days but was unable to perform the work. Claimant testified he then contacted Insurer to attempt to schedule another evaluation with a workers' compensation provider but was denied. Claimant then made an appointment with his primary care physician.

8. On July 7, 2021 Claimant sought treatment with his primary care physician, Sara Buros, NP at West Physicians. Claimant reported that on June 24, 2021 he experienced an injury at work where he noticed pressure of the medial side of his knee and decreased strength. He reported experiencing some clicking and instability. On examination, NP Buros noted a positive medial McMurray test, cystic lesion over the anterior portion of the patellar tendon, mild tenderness to palpation over the medial patellar tendon and medial joint line, and decreased range of motion. NP Buros assessed Claimant with left knee pain. She referred Claimant for a left knee MRI.

9. Claimant underwent a left knee MRI on July 12, 2021. Frank Crnkovich, M.D. gave the following impression: "1. Menisci, cruciate ligaments, collateral ligaments, and chondral surfaces preserved. 2. Medial plica and some edematous change medial retinacular interface. Correlation with the patient's clinical exam for any signs and symptoms of medial plica syndrome suggested." (Cl. Ex. 6, pp. 28-29).

10. On July 15, 2021 Respondents filed a Notice of Contest.

11. On July 20, 2021 Claimant presented to Todd Wente, M.D. at Panorama Orthopedics & Spine Center for an orthopedic evaluation upon the referral of NP Buros. Claimant reported that his left knee symptoms began while lifting boxes up stairs and, at that time, he experienced immense pressure. Claimant reported that his left knee had since been clicking and locking with instability. On examination, Dr. Wente noted trace effusion and moderate to severe tenderness of the medial patella with rolling of medial infrapatellar plica. McMurray's test was negative. Dr. Wente reviewed Claimant's left knee x-rays and MRI, noting that the MRI revealed some edematous changes around a medial infrapatellar plica with no other significant internal derangement. He diagnosed Claimant with symptomatic left knee, medial infrapatellar plica.

12. Regarding treatment, Dr. Wente remarked,

> I had a long discussion with the patient today regarding his options. We discussed various non-operative treatment strategies ranging from various injections to physical therapy, to medications, etc. The patient at this point is a little unclear as to whether this represents a work-related injury or not. The pain certainly was brought about by work activities. I think we will leave that to him in terms of how he wants to manage it. I also did discuss arthroscopic intervention for a plica resection.
>
> I do believe that he is probably mostly symptomatic based on his exam today from the plica. We discussed that it is still possible to get this to calm down non-operatively. He is fairly confident he wants to move forward with the more definitive treatment, particularly in light of his very rigorous job demands. He is really unable at this point to do his job effectively and safely. We discussed arthroscopic intervention with a limited synovectomy. We discussed further assessment of the rest of the joint as well to confirm the MRI findings.
>
> (Cl. Ex. 6, p. 30).

13. Claimant elected to proceed with surgery for the synovial plica of his left knee. On September 1, 2021, Dr. Wente performed a left knee arthroscopy with limited synovectomy.[1]

14. Claimant developed calf pain and swelling post-operatively and was diagnosed with acute deep vein thrombosis, for which he underwent treatment.

15. Claimant continued to see Dr. Wente for follow-up visits and reported left knee stiffness and limited range of motion. On November 9, 2021, Dr. Wente noted Claimant's assessment as status post left knee patella chondromalacia, plica resection. He noted, "The more I am treating him, I think this is probably more of a patellofemoral problem particularly in light of the patella chondromalacia noted on his arthroscopy." (Cl. Ex. 7, p. 52). He recommended Claimant continue to undergo physical therapy.

[1] Dr. Wente's September 1, 2021 operative report was not offered as evidence.

16. On December 10, 2021, Mark S. Failinger, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. Failinger noted,

> He states he had a specific work event that occurred in late June 2021 while he was going up stairs using a two-wheeled dolly and was moving product. He was 12 to 15 steps up the stairs, and had already taken four or five loads up the stairs. On the last load, he states he was on the very last step at the top of the stairs, when he felt a 'pressure' and a popping that occurred on the inside of the knee. He states there was 'immense pressure,' and his muscle felt like it was 'deteriorating.'

(R. Ex. P, p. 1.)

17. Claimant reported to Dr. Failinger that he did not experience pain at the time of the incident. Claimant denied a prior history of left knee pain, injury, or treatment. Claimant reported he was not currently experiencing knee pain, but that the pain could reach 6/7-10 when going up and down stairs or hills. Dr. Failinger performed a physical examination and reviewed Claimant's medical records dating back to February 16, 2009. He did not have Dr. Wente's medical reports to review.

18. Dr. Failinger remarked that the mechanism of injury Claimant reported to him was different than that noted in APN Kleberger's report. Dr. Failinger concluded that, with no mechanism of injury, it was not medically probable a work injury occurred. Dr. Failinger noted that APN Kleberger specifically asked Claimant multiple questions to determine if any work injury did, or could have, occurred which would cause Claimant's symptoms, and that all questions were met with negative answers. He further noted that APN Kleberger found no positive findings on examination, with full knee range of motion and no tenderness. Dr. Failinger noted that, although Claimant reported pressure in his knee, no significant effusion was noted on APN Kleberger's examination, as would be expected if any actual pathology existed. Dr. Failinger opined there is no reasonable medical probability that the bump on Claimant's knee was work-related. He opined that the bump was likely due to a callus or pre-patellar bursitis, which does not occur unless there is repetitive kneeling onto the knee, or a direct blow to the knee. Dr. Failinger concluded that the imaging reports did not evidence any abnormalities except for possible evidence of medial plica. He opined there was "extremely low medical probability" any pathology was created in the June 24, 2021 work incident. Dr. Failinger explained that a plica is a developmental anatomical structure and not, by itself, a symptomatic nor pathological structure. He noted that, although it is rare and uncommon, plicas can became irritated, but that Claimant would have experienced immediate pain in such situation.

19. Regarding Claimant's left knee surgery, Dr. Failinger remarked,

> I do not have any follow-up clinic notes by the treating orthopedic surgeon, Dr. Wente. It is not known if Dr. Wente noted a specific and localized pain

> in the medial plica for which he determined that there was an inflamed plica as a reasonable diagnosis. It is unknown if the patient underwent any physical therapy or injections. Very few patients would require surgery for a medial plica syndrome, with the mainstay of treatment being first, relative rest, and physical therapy, as well as performing a possible cortisone injection. There are occasions when a plica syndrome exists, if diagnosed and corroborated by the physician examination, and the patient has ongoing pain for which surgery is performed. However, it would be uncommon for a plica syndrome to require surgery.

(R. Ex. P, p. 20).

20. Dr. Failinger ultimately opined that with no abnormalities found on June 25, 2021, and with no mechanism that would reasonably explain the possible occurrence of a work injury, it is not with reasonable medical probability that any work-related injury occurred on June 24, 2021.

21. Dr. Failinger testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Failinger testified consistent with his IME report and continued to opine that Claimant did not sustain a work injury on June 24, 2021. Dr. Failinger explained that Claimant's MRI demonstrated a plica, which is a common vestigular remnant. He noted that there was no effusion indicating an acute injury. Dr. Failinger reiterated that the typical treatment for plica is conservative. However, he testified that if the pain is localized to the plica, per examination and injection, surgery may be reasonable. He testified that if Claimant underwent conservative treatment for six months and continued to experience issues, surgery might be considered. He explained that if the plica was indeed causing Claimant's issue, Claimant's condition would have quickly improved after surgery, which it did not. Dr. Failinger again opined that Claimant's plica was not work-related.

22. Claimant testified he remains on work restrictions as a result of the work injury and has not returned to work since on or about July 4, 2021.

23. Claimant earned $30.86/hour and was paid on a weekly basis. Claimant's wage records reflect that the number of hours Claimant worked per week varied. Claimant earned $2,213.90 for the pay period ending The pay period ending June 19, 2021. In the three months preceding the pay period ending June 19, 2021 (21 weeks – from pay period ending 1/30/2021 to 6/19/2021), Claimant earned a total of $47,343.94. Based on the wage records, a fair approximation of Claimant's AWW is $2,254.47.

24. Claimant's testimony is credible.

25. The ALJ finds the opinion of Dr. Wente, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Failinger.

26. Claimant proved it is more probable than not he sustained a work injury that aggravated, accelerated or combined with a pre-existing condition, causing disability and the need for treatment.

27. Claimant proved it is more probable than not the left knee surgery performed by Dr. Wente was reasonable, necessary and causally related to his work injury, and that he is entitled to reasonable, necessary and causally related medical treatment for his left knee.

28. Claimant proved his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is entitled to TTD benefits from July 4, 2021, ongoing.

29. Claimant's AWW is $2,271.84. This represents a fair approximation of Claimant's wage loss and diminished earning capacity based on his wage records.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Comm’n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (ICAO, September 9, 2016). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved it is more probable than not he sustained a compensable work injury. While performing his job duties, Claimant experienced a sensation of immense pressure in his knee while moving a 200-300 pound load up multiple stairs, after doing so repeatedly. Dr. Wente opined that Claimant’s pain was caused by his work activities. Claimant’s work duties require going up and down multiple

stairs a day, handling hundreds of pounds of items. Claimant's left knee MRI demonstrated a medial plica with edematous changes. Symptomatic plica was found on Dr. Wente's physical examination. Dr. Wente subsequently also noted symptomatic patellofemoral chondromalacia. While August 2017 medical records indicate Claimant has a history of blood clots and a lump behind his left knee, there is no evidence Claimant was undergoing left knee treatment leading up to the work injury, or that he was experiencing similar symptoms he had subsequent to the work injury. Claimant credibly testified that leading up to the work injury he was not experiencing any left knee symptoms or limitations. Claimant was capable of performing physical work until the work injury. Subsequent to the work injury, Claimant was unable to perform his regular job duties and required medical treatment.

Dr. Failinger heavily relied on NP Kleberger's initial medical record in reaching his opinion that there was no mechanism of injury. NP Kleberger specifically noted Claimant denied any trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow, but did note that Claimant attributed his injury to climbing stairs at work. Claimant credibly testified he told NP Kleberger that he was moving a few hundred pounds of product up the stairs when the onset of symptoms occurred. Additionally, Dr. Failinger's analysis was limited as he did not review Dr. Wente's medical records. He specifically stated it was unknown to him if Dr. Wente noted specific and localized pain in the medial plica and if Claimant underwent any physical therapy or injections. The ALJ is persuaded Claimant's injury arose out of an employment risk and was precipitated by moving hundreds of pounds up and down multiple stairs. The onset of Claimant's symptoms was causally related to the performance of his work duties. The preponderant evidence establishes Claimant's work duties aggravated, accelerated or combined with his underlying asymptomatic condition, causing Claimant to become symptomatic, require medical treatment, and be placed on restrictions preventing Claimant from performing his regular job duties.

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probable than not he is entitled to reasonable, necessary and causally related treatment, including the left knee surgery performed by Dr. Wente. Dr. Wente initially opined that Claimant was likely mostly symptomatic from the plica based on his examination and MRI findings. Dr. Wente attempted conservative treatment in the form of injections prior to proceeding with surgery to relieve Claimant's symptoms. Dr. Wente subsequently also identified patellofemoral chondromalacia as a cause of Claimant's symptoms. While Dr. Failinger opined that it is uncommon to require surgery for medial plica syndrome, he acknowledged that surgery may be reasonable when the plica was identified as the source of pain and when conservative treatment failed. Here, Dr. Wente initially identified the plica as Claimant's source of pain, attempted

conservative treatment, and subsequently found it reasonable to proceed with surgery. The treatment Claimant received for the left knee, including the left knee surgery performed by Dr. Wente, was causally related to his work injury and reasonably necessary to cure or relieve the effects of the injury.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved he is entitled to TTD benefits from July 4, 2021, ongoing. As a result of Claimant's June 24, 2021 work injury, he was placed on work restrictions and was unable to perform his regular job duties. Claimant has not worked since July 4, 2021 as a result of the disability, resulting in actual wage loss to Claimant. As Claimant's industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss, Claimant has proven entitlement to TTD benefits.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, an AWW of $2,254.47 represents a fair approximation of Claimant's wage loss and diminished earning capacity, based on his wage records.

ORDER

1. Claimant proved by a preponderance of the evidence that on June 24, 2021, he injured his left knee arising out of and in the course and scope of his employment with the Employer.

2. Claimant proved by a preponderance of the evidence that he is entitled to medical benefits, including the September 1, 2021 left knee surgery performed by Dr. Wente, that are reasonably necessary and causally related to his compensable, June 24, 2021 left knee injury.

3. Claimant is entitled to TTD from July 4, 2021, ongoing, until terminated by operation of law, subject to any applicable statutory offsets.

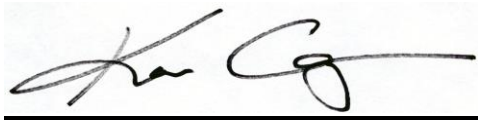
4. Claimant's AWW is $2,254.47.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable left knee injury on June 24, 2021.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and causally related medical benefits, including the left knee surgery he underwent on September 1, 2021.

III. Whether Claimant proved he is entitled to temporary total disability ("TTD") benefits from July 4, 2021, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant has worked for Employer as a delivery driver for over six years. Claimant's job duties require unloading cases from a semi-truck and delivering the cases to various locations, which involves ascending and descending ramps and stairs.

2. Claimant's August 2017 medical records document a history of blood clots with left leg pain and swelling, as well as a lump and bruising behind his left knee. Claimant testified he was not experiencing any left knee issues or limitations leading up to the work incident.

3. Claimant sustained a work injury while making a delivery for Employer on June 24, 2021. Claimant testified at hearing that this particular delivery required making approximately four to five trips up and down 20 stairs carrying 200-300 pounds each trip. Claimant used a dolly to carry the product up the stairs. Claimant testified that on the last trip up the stairs he felt immense pressure on his left knee in the area of his knee cap. He testified it felt as though the muscle in that area was gone. Claimant testified he developed a bump in that same area. He further testified he had not previously felt a similar sensation in his knee nor did he previously have a bump on his knee in that area.

4. Claimant finished his delivery route for the day. Claimant testified the sensation in his knee worsened that evening. He reported the incident to Employer the following day and was referred to Concentra.

5. Claimant presented to David Kleberger, APN at Concentra on June 25, 2021. APN Kleberger documented, "…pt says yesterday his LT knee started to have a lot of pressure, no pain but a new bump right on the knee cap." (Cl. Ex. 4, p. 8). Claimant did not report experiencing a popping sensation at the time of the incident. APN Kleberger noted,

"[Claimant] denies any known workplace mechanism of injury including a trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow to his left knee. Says he thinks it might be from climbing stairs. Today says he has no left knee pain, but notice bump right over the patella." (Id.) Claimant reported a current pain level of 0/10 with pressure and stiffness. On examination of the left knee, APN Kleberger noted a callous over the patella. There was full range of motion with no tenderness, no crepitus, no clicking, no ecchymosis, and no instability. McMurray's test was negative. Claimant's gait was normal. X-rays of the left knee revealed no acute pathology or trauma. The radiologist noted findings of no joint effusion. APN Kleberger diagnosed Claimant with left knee pressure with no known work injury. He stated, "[b]ased on a careful exam of the patient, as well as the information obtained about their job duties and mechanism of injury, it does not appear that the presenting complaints arose out of their job duties in the course of the patient performing those duties." (Cl. Ex. 4, p. 11). APN Kleberger released Claimant to work full duty and discharged him from workers' compensation care. He advised Claimant to follow-up with his primary care physician.

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9. Claimant underwent a left knee MRI on July 12, 2021. Frank Crnkovich, M.D. gave the following impression: "1. Menisci, cruciate ligaments, collateral ligaments, and chondral surfaces preserved. 2. Medial plica and some edematous change medial retinacular interface. Correlation with the patient's clinical exam for any signs and symptoms of medial plica syndrome suggested." (Cl. Ex. 6, pp. 28-29).

10. On July 15, 2021 Respondents filed a Notice of Contest.

11. On July 20, 2021 Claimant presented to Todd Wente, M.D. at Panorama Orthopedics & Spine Center for an orthopedic evaluation upon the referral of NP Buros. Claimant reported that his left knee symptoms began while lifting boxes up stairs and, at that time, he experienced immense pressure. Claimant reported that his left knee had since been clicking and locking with instability. On examination, Dr. Wente noted trace effusion and moderate to severe tenderness of the medial patella with rolling of medial infrapatellar plica. McMurray's test was negative. Dr. Wente reviewed Claimant's left knee x-rays and MRI, noting that the MRI revealed some edematous changes around a medial infrapatellar plica with no other significant internal derangement. He diagnosed Claimant with symptomatic left knee, medial infrapatellar plica.

12. Regarding treatment, Dr. Wente remarked,

> I had a long discussion with the patient today regarding his options. We discussed various non-operative treatment strategies ranging from various injections to physical therapy, to medications, etc. The patient at this point is a little unclear as to whether this represents a work-related injury or not. The pain certainly was brought about by work activities. I think we will leave that to him in terms of how he wants to manage it. I also did discuss arthroscopic intervention for a plica resection.
>
> I do believe that he is probably mostly symptomatic based on his exam today from the plica. We discussed that it is still possible to get this to calm down non-operatively. He is fairly confident he wants to move forward with the more definitive treatment, particularly in light of his very rigorous job demands. He is really unable at this point to do his job effectively and safely. We discussed arthroscopic intervention with a limited synovectomy. We discussed further assessment of the rest of the joint as well to confirm the MRI findings.
>
> (Cl. Ex. 6, p. 30).

13. Claimant elected to proceed with surgery for the synovial plica of his left knee. On September 1, 2021, Dr. Wente performed a left knee arthroscopy with limited synovectomy.[1]

14. Claimant developed calf pain and swelling post-operatively and was diagnosed with acute deep vein thrombosis, for which he underwent treatment.

15. Claimant continued to see Dr. Wente for follow-up visits and reported left knee stiffness and limited range of motion. On November 9, 2021, Dr. Wente noted Claimant's assessment as status post left knee patella chondromalacia, plica resection. He noted, "The more I am treating him, I think this is probably more of a patellofemoral problem particularly in light of the patella chondromalacia noted on his arthroscopy." (Cl. Ex. 7, p. 52). He recommended Claimant continue to undergo physical therapy.

[1] Dr. Wente's September 1, 2021 operative report was not offered as evidence.

16. On December 10, 2021, Mark S. Failinger, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. Failinger noted,

> He states he had a specific work event that occurred in late June 2021 while he was going up stairs using a two-wheeled dolly and was moving product. He was 12 to 15 steps up the stairs, and had already taken four or five loads up the stairs. On the last load, he states he was on the very last step at the top of the stairs, when he felt a 'pressure' and a popping that occurred on the inside of the knee. He states there was 'immense pressure,' and his muscle felt like it was 'deteriorating.'

(R. Ex. P, p. 1.)

17. Claimant reported to Dr. Failinger that he did not experience pain at the time of the incident. Claimant denied a prior history of left knee pain, injury, or treatment. Claimant reported he was not currently experiencing knee pain, but that the pain could reach 6/7-10 when going up and down stairs or hills. Dr. Failinger performed a physical examination and reviewed Claimant's medical records dating back to February 16, 2009. He did not have Dr. Wente's medical reports to review.

18. Dr. Failinger remarked that the mechanism of injury Claimant reported to him was different than that noted in APN Kleberger's report. Dr. Failinger concluded that, with no mechanism of injury, it was not medically probable a work injury occurred. Dr. Failinger noted that APN Kleberger specifically asked Claimant multiple questions to determine if any work injury did, or could have, occurred which would cause Claimant's symptoms, and that all questions were met with negative answers. He further noted that APN Kleberger found no positive findings on examination, with full knee range of motion and no tenderness. Dr. Failinger noted that, although Claimant reported pressure in his knee, no significant effusion was noted on APN Kleberger's examination, as would be expected if any actual pathology existed. Dr. Failinger opined there is no reasonable medical probability that the bump on Claimant's knee was work-related. He opined that the bump was likely due to a callus or pre-patellar bursitis, which does not occur unless there is repetitive kneeling onto the knee, or a direct blow to the knee. Dr. Failinger concluded that the imaging reports did not evidence any abnormalities except for possible evidence of medial plica. He opined there was "extremely low medical probability" any pathology was created in the June 24, 2021 work incident. Dr. Failinger explained that a plica is a developmental anatomical structure and not, by itself, a symptomatic nor pathological structure. He noted that, although it is rare and uncommon, plicas can became irritated, but that Claimant would have experienced immediate pain in such situation.

19. Regarding Claimant's left knee surgery, Dr. Failinger remarked,

> I do not have any follow-up clinic notes by the treating orthopedic surgeon, Dr. Wente. It is not known if Dr. Wente noted a specific and localized pain

> in the medial plica for which he determined that there was an inflamed plica as a reasonable diagnosis. It is unknown if the patient underwent any physical therapy or injections. Very few patients would require surgery for a medial plica syndrome, with the mainstay of treatment being first, relative rest, and physical therapy, as well as performing a possible cortisone injection. There are occasions when a plica syndrome exists, if diagnosed and corroborated by the physician examination, and the patient has ongoing pain for which surgery is performed. However, it would be uncommon for a plica syndrome to require surgery.

(R. Ex. P, p. 20).

20. Dr. Failinger ultimately opined that with no abnormalities found on June 25, 2021, and with no mechanism that would reasonably explain the possible occurrence of a work injury, it is not with reasonable medical probability that any work-related injury occurred on June 24, 2021.

21. Dr. Failinger testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Failinger testified consistent with his IME report and continued to opine that Claimant did not sustain a work injury on June 24, 2021. Dr. Failinger explained that Claimant's MRI demonstrated a plica, which is a common vestigular remnant. He noted that there was no effusion indicating an acute injury. Dr. Failinger reiterated that the typical treatment for plica is conservative. However, he testified that if the pain is localized to the plica, per examination and injection, surgery may be reasonable. He testified that if Claimant underwent conservative treatment for six months and continued to experience issues, surgery might be considered. He explained that if the plica was indeed causing Claimant's issue, Claimant's condition would have quickly improved after surgery, which it did not. Dr. Failinger again opined that Claimant's plica was not work-related.

22. Claimant testified he remains on work restrictions as a result of the work injury and has not returned to work since on or about July 4, 2021.

23. Claimant earned $30.86/hour and was paid on a weekly basis. Claimant's wage records reflect that the number of hours Claimant worked per week varied. Claimant earned $2,213.90 for the pay period ending The pay period ending June 19, 2021. In the three months preceding the pay period ending June 19, 2021 (21 weeks – from pay period ending 1/30/2021 to 6/19/2021), Claimant earned a total of $47,343.94. Based on the wage records, a fair approximation of Claimant's AWW is $2,254.47.

24. Claimant's testimony is credible.

25. The ALJ finds the opinion of Dr. Wente, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Failinger.

26. Claimant proved it is more probable than not he sustained a work injury that aggravated, accelerated or combined with a pre-existing condition, causing disability and the need for treatment.

27. Claimant proved it is more probable than not the left knee surgery performed by Dr. Wente was reasonable, necessary and causally related to his work injury, and that he is entitled to reasonable, necessary and causally related medical treatment for his left knee.

28. Claimant proved his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is entitled to TTD benefits from July 4, 2021, ongoing.

29. Claimant's AWW is $2,271.84. This represents a fair approximation of Claimant's wage loss and diminished earning capacity based on his wage records.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Comm’n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (ICAO, September 9, 2016). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved it is more probable than not he sustained a compensable work injury. While performing his job duties, Claimant experienced a sensation of immense pressure in his knee while moving a 200-300 pound load up multiple stairs, after doing so repeatedly. Dr. Wente opined that Claimant’s pain was caused by his work activities. Claimant’s work duties require going up and down multiple

stairs a day, handling hundreds of pounds of items. Claimant's left knee MRI demonstrated a medial plica with edematous changes. Symptomatic plica was found on Dr. Wente's physical examination. Dr. Wente subsequently also noted symptomatic patellofemoral chondromalacia. While August 2017 medical records indicate Claimant has a history of blood clots and a lump behind his left knee, there is no evidence Claimant was undergoing left knee treatment leading up to the work injury, or that he was experiencing similar symptoms he had subsequent to the work injury. Claimant credibly testified that leading up to the work injury he was not experiencing any left knee symptoms or limitations. Claimant was capable of performing physical work until the work injury. Subsequent to the work injury, Claimant was unable to perform his regular job duties and required medical treatment.

Dr. Failinger heavily relied on NP Kleberger's initial medical record in reaching his opinion that there was no mechanism of injury. NP Kleberger specifically noted Claimant denied any trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow, but did note that Claimant attributed his injury to climbing stairs at work. Claimant credibly testified he told NP Kleberger that he was moving a few hundred pounds of product up the stairs when the onset of symptoms occurred. Additionally, Dr. Failinger's analysis was limited as he did not review Dr. Wente's medical records. He specifically stated it was unknown to him if Dr. Wente noted specific and localized pain in the medial plica and if Claimant underwent any physical therapy or injections. The ALJ is persuaded Claimant's injury arose out of an employment risk and was precipitated by moving hundreds of pounds up and down multiple stairs. The onset of Claimant's symptoms was causally related to the performance of his work duties. The preponderant evidence establishes Claimant's work duties aggravated, accelerated or combined with his underlying asymptomatic condition, causing Claimant to become symptomatic, require medical treatment, and be placed on restrictions preventing Claimant from performing his regular job duties.

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probable than not he is entitled to reasonable, necessary and causally related treatment, including the left knee surgery performed by Dr. Wente. Dr. Wente initially opined that Claimant was likely mostly symptomatic from the plica based on his examination and MRI findings. Dr. Wente attempted conservative treatment in the form of injections prior to proceeding with surgery to relieve Claimant's symptoms. Dr. Wente subsequently also identified patellofemoral chondromalacia as a cause of Claimant's symptoms. While Dr. Failinger opined that it is uncommon to require surgery for medial plica syndrome, he acknowledged that surgery may be reasonable when the plica was identified as the source of pain and when conservative treatment failed. Here, Dr. Wente initially identified the plica as Claimant's source of pain, attempted

conservative treatment, and subsequently found it reasonable to proceed with surgery. The treatment Claimant received for the left knee, including the left knee surgery performed by Dr. Wente, was causally related to his work injury and reasonably necessary to cure or relieve the effects of the injury.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved he is entitled to TTD benefits from July 4, 2021, ongoing. As a result of Claimant's June 24, 2021 work injury, he was placed on work restrictions and was unable to perform his regular job duties. Claimant has not worked since July 4, 2021 as a result of the disability, resulting in actual wage loss to Claimant. As Claimant's industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss, Claimant has proven entitlement to TTD benefits.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, an AWW of $2,254.47 represents a fair approximation of Claimant's wage loss and diminished earning capacity, based on his wage records.

ORDER

1. Claimant proved by a preponderance of the evidence that on June 24, 2021, he injured his left knee arising out of and in the course and scope of his employment with the Employer.

2. Claimant proved by a preponderance of the evidence that he is entitled to medical benefits, including the September 1, 2021 left knee surgery performed by Dr. Wente, that are reasonably necessary and causally related to his compensable, June 24, 2021 left knee injury.

3. Claimant is entitled to TTD from July 4, 2021, ongoing, until terminated by operation of law, subject to any applicable statutory offsets.

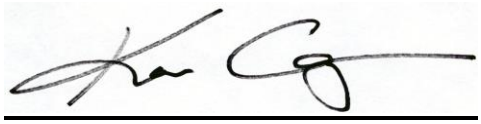
4. Claimant's AWW is $2,254.47.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-181-109-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],
Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 9, 2022 and April 25, 2022, in Denver, Colorado. Both sessions of the hearing were recorded by Google Meets (reference: 3/9/22, Google Meets, beginning at 8:30 AM and ending at 12:10 PM. 4/25/22, beginning at 8:30 AM, and ending at 1:00 PM)

The Claimant was present in person, virtually, and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted],shall be referred to as the "Claimant." [Redacted], shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's post hearing brief (erroneously designated as "proposed findings of fact, conclusions of law and order) was filed on May 2, 2022. Respondents' answer brief was filed on May 9,

2022. No timely reply brief was filed and the matter was deemed submitted for decision on May 12, 2022.

ISSUES

The paramount issue to be decided concerns whether a work-related event of August 17, 2021 caused a compensable injury to the Claimant's right shoulder. If so, is the Claimant entitled to medical benefits and temporary total disability (TTD) benefits from August 18, 2022 through January 2, 2022?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The stipulations of the parties were approved and accepted by the ALJ, however, in light of the fact that the paramount issue of compensability is hereby being decided against compensability, resolution of these issues is moot.

2. The Claimant was employed by the Employer, a construction/home improvement company, as an installer/foreman. He began working for the Employer in February 2021. In his free time, the Claimant plays Frisbee golf, professionally. On March 19, 2021, the Claimant received his second waring of violation of company policy from his Employer. It was noted that he had arrived late and left early for assignments and that Claimant had stated that the job had been completed when it was not. The Claimant acknowledged these infractions when he signed the write-up on March 25, 2021 (Respondents'. Exhibit H, 1-5).

The Event

3. On August 17, 2021, the Claimant was assigned to complete a project at a home in Parker, Colorado. Tile needed to be reinstalled on a bath/shower unit. The day before, other crew members had prepped the tub to install the tiles and brought the Claimant the equipment he needed to perform the job. Installation of the tiles should have taken 20 minutes to half an hour. The tiles had to be retrieved from another site as a full box of tiles was not needed. Sufficient tiles were there for the Claimant.

4. The Claimant alleges that at around 10:30 AM, he was straddling a tub when he saw a tile fall out of the corner of his eye. He states that he reached backwards and caught the tile and then fell in the tub as he was facing the water well at the time that he saw the tile fall. There were no witnesses to this event, and the Claimant did not inform the homeowner that he had an injury. The Claimant picked up his tools, installed the tiles and left the job site shortly after 11:00 AM.

5. The Claimant contacted his Employer at 12:47 PM to report the injury. He was instructed to seek medical attention at the local urgent care. The Claimant was not seen at the first facility and drove six miles to the next facility off Parker Road in Aurora. The Claimant reported to TT[Redacted that he had tried to catch a falling tile and extend his right arm externally and that the tile weighed 20 pounds. On physically exam there was swelling, and deformities noted on the right shoulder. The following were listed as normal, that the neck was supple with good range of motion (ROM); there was no tenderness across the clavicle or the shoulder joint, the trapezius and deltoid were normal, the **biceps tendon and rotator cuff were normal, and that the arm, forearm, elbow hand and wrist were normal.** The radiologist noted on X-ray that there was no sign of fracture, but that there were degenerative changes and osteophytes and there was no acute abnormality. There is no mention in this report that the Claimant had been referred there by another facility or that he had fallen backwards. (Respondents' Exhibit D 2-6).

6. On August 19, 2021, the Claimant gave a recorded statement with TL[Redacted], of the insurance carrier. Claimant's height was recorded at 6 feet. Claimant informed TL[Redacted] that he had arrived at the job site at 9:00 AM and that the incident occurred at 10:30 AM. The Claimant described the job. He told TL[Redacted] that he was sitting on the edge of the tub near the water well when he noticed out of the corner of his eye a tile tipping over. He stated his arm was straight out a when he reached to catch the tile. TL[Redacted] clarified that he reached straight out. The Claimant informed TL[Redacted] that he caught the tile in a parallel manner. The Claimant confirmed that he reached out the length of the tub. The Claimant did not mention that he reached backwards or fell backwards into the tub but that he caught the tile (Respondents' Exhibit I 4-5). Later in the statement TL[Redacted] clarified that the Claimant was sitting on the edge of the tub towards the water well and that the tile weighed 13 pounds. Claimant confirmed this. TL[Redacted] specifically asked that while the Claimant was sitting on the edge of the tub out of his right (eye) that he noticed a tile tipping over and that he "reached out to catch it" and the Claimant stated "yes." The recorded statement continued:

> Q: And it was, you're sitting on the edge of the tile, so it's straight out from your body, you, you weren't reaching up or down, or anything?
>
> A: No, I reached straight out, straight, you know what I mean? And that, that's where I was, kind of, in an awkward position, that's where it...
> (Respondents' Exhibit I pg. 13-14).

7. Later that afternoon VO[Redacted] of the Employer went to the home to inspect. All the equipment was there including the wet saw. She took photographs of the tub. She noted that the tile was on the first level of the tub and had not fallen from a higher level. There was no damage to the tub. This inspection contradicts the Claimant's version of the event and calls his credibility into question.

Medical

8. The MRI (magnetic resonance imaging) showed that the A.C. joint was hypertrophic and had fluid. There was a septated cyst present. The rotator cuff had severe tendinopathy, but no sign of tear. There was grade 2 atrophy present in the subscapularis. The glenohumeral joint was normal but had mild synovitis. The right bicep was torn with tenosynovitis. The final diagnosis was bicep tear, severe rotator cuff tendinopathy, acromioclavicular joint tendinopathy with a septated cyst. (Respondents' Exhibit D. 31-32).

9. On August 25, 2021, the Claimant was seen by David Frank, M.D. On physical exam it was noted that the right bicep had a "Popeye sign". The Plan was a referral to Ortho One at Swedish Hospital and the Claimant was set for a return appointment on September 8, 2021. The Claimant failed to attend the appointment. (Respondents' Exhibit D-25-29).

10. The Claimant was seen by Steven Horan, M.D., an orthopedic physician on September 3, 2021. Under chief complaints, it was noted that the Claimant informed Dr. Horan that he had previously had a separated shoulder, but that this present pain was different than that. Dr. Horan noted the Claimant's medications and examined the patient. Dr. Horan's diagnosis was rotator cuff tendonitis, and bicep ruptured. Dr. Horan performed an injection and recommended that the Claimant return in six weeks if the Claimant needed another injection. Dr. Horan noted that the Claimant did not wish to proceed with a bicep repair surgery. The Claimant failed to keep the follow-up appointment (Claimant's Exhibit 1-2).

11. The Claimant applied for Unemployment benefits on November 1, 2021, and was awarded a weekly benefit of $600.00. He returned to employment with a new employer on January 3, 2022.

Appaji Panchangam, Ph.D., Biomechanical Engineering

12. The Respondents retained Dr. Panchangam of Rimkus Consulting to perform a biomechanical analysis of the incident. An exemplar tub was inspected by Scott J. Simmons, P.E., of Rimkus, on November 22, 2021. The tub was 59 inches long, 29 inches wide, and 20 inches high (**Photograph 3**). The inner dimensions of the tub were 43 inches in length, 24 inches in width, and 13 inches deep. An identical exemplar tile was inspected by Dr. Panchangam, on December 20, 2021. The tile was 12 inches by 24 inches and approximately 1/2 inch thick (**Photograph 4**). It was made of porcelain, and the weight of the exemplar tile was approximately 9 pounds.

13. Dr Panchangam reviewed the medical records in order to obtain the vital statistics and diagnosis of the injury and review the history. He reviewed the anatomy

of the shoulder and biceps and the reported mechanism of injury. He noted that the tears present would have to be caused by forced external rotation of the right arm and elbow. The force needed was a 90-degree flexion of the elbow. He concluded that the injury sustained by the Claimant is not consistent with the mechanism of injury taking into consideration the Claimant's height, the width of the tub, the weight of the tile, and the described mechanism of injury. He further elaborated on the issue of the bicep tendon tear and that given the Claimant's base strength and weight of the tile, the load on the arm. He noted the photos of the tub in question and generated several diagrams depicting the injury. His conclusion was that the Claimant's reported injury did not correlate with the medical findings and that the Claimant did not incur an injury on the date in question. (Respondent Exhibit E).

Claimant's Independent Medical Exam (IME) BY Jack Rook, M.D.

14. The Claimant underwent an IME with Dr. Rook on February 10, 2021. Dr. Rook noted that the Claimant incurred an acute injury on August 17, 2021. Dr. Rook's review did not include a review the Claimant's recorded statements. Such a review would have been critical for Dr. Rook to appreciate the mechanism of injury. Dr. Rook noted that the tile weighed 18-20 pounds. This contradicts the Claimant's estimate of 13 pounds and Dr. Panchangam's verified weight of nine pounds. Dr. Rook noted that the Claimant caught the tile while straddling the tub and that the weight of the tile forced him to fall backwards and that the Claimant landed on his back, and stayed on his back for several minutes due to the shoulder pain. Dr. Rook then repeated the histories in the medical records. In reviewing Dr. Horan's report, he noted that the Claimant denied having had prior shoulder separations. He took note that the claim was presently denied. He did not note that the Claimant was presently working. He noted that the Claimant is a professional frisbee golf player. Dr. Rook concluded that there was no prior injury to the shoulder in part due to his playing Frisbee golf. Dr. Rook concluded that the mechanism of injury was severe, and that the Claimant had no other explanation for his injury as there was no history of prior injury. Dr. Rook concluded that this was a new and acute injury (Claimant Exhibit 4). Dr. Rook's conclusions were based, in part, on the erroneous misconception that the Claimant had no prior shoulder injuries. This misconception undermines Dr. Rook's ultimate conclusion supporting a compensable industrial injury.

Respondents' IME by Lloyd Thurston, M.D.

15. Respondents requested claimant to undergo an IME with Dr. Thurston on February 3, 2022. Dr. Thurston reviewed the medical chart, recorded statements of both the claimant and VO[Redacted]. He also reviewed the photographs of the tub in question, and the report of Dr. Panchangam. He took a medical history from the Claimant as well as social and Employment history. Noting that the Claimant was now working full time for a new employer. He did not note that the Claimant was a

professional Frisbee golf player. He reviewed the X-Ray, and MRI. He performed a physical exam and continued taking a history. He noted at times that the Claimant was very accurate on his history, but at other times appeared vague, such as concerning the weight of the tile.

16. The Claimant reported to Dr Thurston that he arrived at the work site approximately 10:00 AM. He then set up for the job and reported that the injury occurred at 11:00 AM and that he called his Employer 15-20 minutes later. The Claimant informed Dr. Thurston that he had to go to the Employer's shop first to pick up materials and that he left the shop prior to arriving at the job site.

17. Dr. Thurston noted that the Claimant was sitting on the side of the bathtub and the work was at umbilical height (or below), no reaching "up." Dr. Thurston was of the opinion that the described mechanism of injury is very unlikely to cause biceps tendon tear or subscapularis partial tendon tear because the Claimant was not reaching above shoulder height, the distance the tile would have tipped/fallen was likely 10-12 inches, the tiles would have been somewhat below shoulder height, and the actual weight of the tiles was less than half the weight he told the Dr. Rook (9 pounds versus 20 pounds).

18. Dr. Thurston noted that the Claimant informed him that he had to pick up supplies and set up for the job. The other information provided, however, indicated that the materials were already there and that the prep had been done the day before. Dr. Thurston, in reviewing the initial medical report, noted that the Popeye sign was not present at the time of that exam. In his examiners note, Dr. Thurston noted:

> Examiner's Note: This is 6 days after the injury and with atrophy visible at this time it is my medical opinion this injury was more than one week old. I have no way of knowing if this partial subscapularis tendon tear was causing [Claimant]any symptoms. Asymptomatic rotator cuff tears are very common in [Claimant] age group. The subscapularis partial tear was likely chronic, asymptomatic, and pre-existing.

19. Dr. Thurston then went on to note several other inconsistencies in the Claimant's history on the day in question and noted that the ring doorbell showed the Claimant at the front door of the house at approximately 10:00 AM and that this differed from what the Claimant told TL[Redacted] about arriving at 9:00 AM and other issues. The Claimant told Dr. Thurston that Dr. Horan had recommended to him a complete shoulder replacement surgery, and Dr. Thurston noted there was no mention of this in Dr. Horne's report. This statement of the Claimant seriously undermines his credibility. Dr. Thurston concluded that there was a prior injury to the shoulder and that findings on the MRI were present prior to the injury and the date of the MRI. He noted that the bicep tear was not present on initial exam and that it more than likely occurred after the August 17th date of injury. Dr, Thurston explained that the findings on the MRI would

not be uncommon for the Claimant to have been asymptomatic (Respondents' Exhibit G).

Dr. Rook

20. Dr. Rook reviewed the above reports and disagreed with both conclusions. He stated that neither Dr. Panchangam nor Dr. Thurston had performed a causation analysis, however, based on Dr. Rook's reliance of the Claimant's erroneous history and Dr. Rook's misconception of the facts, the ALJ finds Dr. Rook's ultimate conclusions lacking in credibility.

Analysis of the Evidence

21. Claimant and Dr. Rook specifically deny/reject the proposition that the event of August 17, 2021 was an aggravation of a pre-existing condition. Claimant denies pre-existing issues and specifically testified that Dr. Horan was incorrect in noting he had prior shoulder separations. Dr. Rook went to great length in his report there was no prior injury and he was of the opinion that the findings on MRI were of an acute injury. Both the Claimant and Dr. Rook over-state the weight of the tile. It was not until the Claimant saw Dr. Rook did he mention that he was straddling the tub and that he fell backwards landing on his back. The Claimant had just seen Dr. Thurston the week before and did not make this assertion. He also did not inform TL[Redacted], TT[Redacted], Dr. Frank or Dr. Horan of this alleged mechanism of injury. Dr. Panchangam thoroughly explained even with this new mechanism of injury that the biomechanical forces are not present to support the injuries allegedly sustained by the Claimant. Dr. Thurston is of the opinion that given the findings on both diagnostics and the initial physical exam, that the Claimant had pre-exiting shoulder pathology and that the biceps tear was not incurred until after the injury. He also was of the opinion that given the multiple inconsistences in the Claimant's history that the Claimant was not credible a historian and that the injury was not work related. The Claimant is not credible in his reporting of the injury and description of the injury. This fact fails to support the compensability of the alleged event of Augustv17, 2021.

22. It is undisputed fact that on both X-Ray and MRI, there are findings of degenerative changes and pre-existing changes to the shoulder. Claimant had a prior history of not communicating properly with the Employer and exhibited those same behaviors in the reporting of this alleged incident.

23. Dr. Rook's opinion that neither Dr. Panchangam nor Thurston performed a causation analysis is incorrect. Dr. Panchangam, while he did not interview the Claimant directly reviewed the Claimant's recorded statement and that of VO[Redacted]. Dr. Rook did not review these statements even though these had been provided to the Claimant. Dr. Panchangam noted the Claimant's height and weight as a vital statistic in performing his calculations. He also reviewed the medical records to obtain the diagnosis and obtain the history of the mechanism of injury. He also used a version of the AMA Guides to the

Evaluation of Permanent Impairment, 3rd Ed., Rev. in formulating his report. Essentially, he testified that his report is a causation analysis.

24. Dr. Thurston also performed a causation analysis in his report. He reviewed the medical records and compared the initial report to the MRI and the second office visit and concluded thee bi-ceps rupture was not present on the alleged date of injury. He examined and interviewed the Claimant and reviewed all the various materials in coming to his conclusions. He also disagreed with Dr. Rook that he did not perform a causation analysis.

25. Dr. Rook's causation analysis is flawed. First, in his report he noted that the tile weighed 18-20 pounds even though the Claimant admitted that this was incorrect. Even after reading Dr. Panchangam' s report which showed the tile in question weighed 9 pounds, the Claimant testified that the tile weighed 13 pounds and used this during testimony. Dr. Rook also expressed the opinion that the MRI showed an acute finding of injury despite both the X-Ray taken the day of the incident and the MRI showing degenerative and pre-existing conditions within the shoulder. Dr. Rook testified that the Claimant had to reach several feet for the tile. The tub is 29 inches in width. Dr. Rook's criticism of the Drs. Panchangam and Dr. Thurston that they did not address causation is refuted. Dr. Pangenome explained that the basis of his report is to determine causation and Dr. Thurston, a Level II provider, reviewed the medical records and interviewed the Claimant and addressed the issue of the bicep tear.

26. Dr. Rook also accepted the Claimant's erroneous history in opining that the Claimant had no prior issues with the shoulder. Dr. Rook's explanation for the Claimant not having a prior shoulder injury was that Dr. Horan's notation of the Claimant having a prior separated shoulder was a "mistake". He also stated that the Claimant's ability to play Frisbee golf showed he had no prior issues. As Dr. Thurston explained in his testimony, Dr. Horan recorded that in his note that it was what the Claimant had told him. This is not a typo or misstatement of age; this is clearly the recording of a prior injury which is a standard question for a physician to ask of a new patient. Both the Claimant's testimony and Dr. Rook's opinion that this did not occur is not credible. Dr. Thurston explained in his analysis of the MRI, the cyst that is present is a clear sign of a shoulder separation and was it was caused by a prior shoulder separation. Dr. Rook does not explain these prior conditions.

27. The ALJ infers and finds that the Claimant tends to forget and exaggerate facts in his history. By increasing the weight of the tile and informing Dr. Rook that Dr. Thurston that Dr. Horan had recommended a complete shoulder replacement are compelling examples of this. Dr. Rook's opinions are based on the Claimant's inaccurate history.

28. The Claimant stated that he does not go to the doctor, and he has a high pain tolerance. Yet in his testimony, he admitted to two prior worker's compensation

claims, bi-lateral knee replacement and hip replacement. In his recorded statement he stated he that he had great health insurance and he also informed. TL[Redacted] in the recorded statement that when he was at the Urgent Care for the first visit, they wanted him to go see his regular doctor (Respondents' Exhibit I-9).

29. The Claimant is not credible on several facts for this claim, and thus Dr. Rook in supporting these assertions is also not credible. First, the weight of the tile. Claimant informed TT[Redacted], that the tile weighed 18-20 pounds. Dr. Rook noted this in his report. Claimant then changed the weight to 13 pounds when speaking with TL[Redacted]. VO[Redacted] reported that the tile weighed between 5-10 pounds and Dr. Panchangam' s testing revealed that the tile weighs 9 pounds. After seeing this result, Dr. Rook testified the tile weighed 13 pounds. This is not the case. While the size of the tile is not in dispute the weight is clearly less than what Dr. Rook relied upon for his conclusions.

30. Next, the Claimant's positioning in the tub is fraught with inconsistencies. The Claimant did not report straddling the tub until he saw Dr. Rook. Dr. Rook testified that the Claimant had to reach "several feet" behind him to catch the tile. If the Claimant was straddling the tub as Dr. Rook notes, this would place the Claimant's right arm and shoulder inside the tub thus decreasing the length of the width of the tub he would have to reach to catch the tile. Next, the Claimant has consistently stated that he saw the tile fall out of the coroner of his eye, (to his right), and then reached straight out to catch it. If he had to reach backwards to catch the tile as Dr. Rook testified, the tile *would have behind him and difficult to see if he was* forward as he is now postulating. As Dr. Thurston noted, the initial urgent care report not only does not record this alleged mechanism of injury, but there was no sign of injury to the Claimant's arm, neck back or head had he had fallen backwards. Dr. Panchangam demonstrated that even with this new reported mechanism the rotations and abductions of the elbow and shoulder are still not present to support the findings on MRI.

31. The Claimant's description of his exact duties for the day is inconsistent. VO[Redacted] credibly testified that the prep had been done the night before and that she had to retrieve the three tiles from a different client for the Claimant to replace the tiles. The simple application of the epoxy in order for the tile to stay in place once mounted would have to have been done the night before. Further, the Claimant informed TL[Redacted] that all the materials and tools were present when he arrived at the job site. This differs from what he informed Dr. Thurston and to what he testified. Dr. Thurston is correct in his report that the Claimant has multiple inconsistencies in his reporting's of the events leading up to and after the alleged event.

32. There is also the issue of the gap in time when the Claimant left the job site and when he was finally seen at Urgent Care. The Claimant left at approximately 11 AM. He contacted VO[Redacted] at 12:47 PM. His vital signs were taken at the Urgent Care at 3:30 PM. There is no mention of the Claimant having been seen at a prior facility. There is no explanation for the time gap in between the alleged injury 10:30-11 AM and the

Claimant's reporting of the alleged injury. The Employer had previously disciplined the Claimant for not being truthful as to his whereabouts, time of arriving at jobs and what had been performed. The Claimant's lack of time explanation and changing of what happen do not support his or Dr. Rooks assertions of what occurred on the alleged date of injury.

33. The Claimant denied that Dr. Frank set a third appointment for him. It is mentioned twice in the narrative report and is on the M-164. The Claimant also asserts that he did not inform Dr. Horan of a prior shoulder separation and that he was only to return to Dr. Horan if the injection worked. This is not what is stated in the report and the only mention of surgery was that the Claimant was not interested in bicep surgery. As Dr. Thurston noted in his report and testified to, the Claimant informed him that Dr. Horan recommended a shoulder replacement. This is not mentioned in Dr. Horan's report.

34. The recorded statement is the best evidence of what the mechanism of injury was at the time. It was only two-days after the alleged injury and the Claimant confirmed what was said on each occasion. The Claimant consistently stated he reached out with his arm and caught the tile. He never mentioned to TL[Redacted] of falling backwards or having to reach backwards. Dr. Panchangam was credible in his testimony in describing the flexion and abduction in both the described mechanism. Dr. Panchangam's conclusion is logically based in hat the forces are not present to cause injury as we have presently. He demonstrated the various angles and forces needed to cause the injuries found and concluded that neither mechanism coupled with the tile in question would generate the force needed to cause the structural damage found on the MRI.

35. Dr. Panchangam thoroughly explained that given that the tile was positioned on the edge of the tub the Claimant would only catch half the weight of the tile. The tub is simply not big enough for the Claimant to catch the full weight of the tile as Dr. Rook opines. Also given the Claimant's height of 5-11 to six feet, the elbow flexion and force are not present to sustain the type of injury, Dr. Panchangam also noted that the flexion/abduction motion of throwing a Frisbee would put wear and tear on a shoulder.

36. Dr. Thurston in his report and his testimony explained the multiple degenerative findings on X-Ray and exam. The osteophytes are an arthritic condition which was present well before the alleged date of injury. Dr. Thurston noted that the septated cyst forms over time, is not an acute injury and is a sign of prior shoulder operations. The tendinopathy represents micro tears from overuse and the joint deteriorates over time. The same applies to the arthropathy that is present on MRI. This is an arthritic condition which again develops over time. Dr. Thurston explained why Dr. Rook is incorrect that this was an acute injury.

37. Taken as a whole, there are too many inconsistencies in the Claimant's prior history, the mechanism of his injury, his whereabouts, activities, and what he actually did nor did not do on the date of injury. Dr. Thurston noted many of these inconsistences

in his reports including the mechanism of injury and the Claimant's reporting of the injury. He also noted the degenerative changes and the lack of physical finding on exam of the bicep tear initially. Dr. Panchangam is credible in his report and in his testimony that the force loads are not present in this claim to support the diagnosis. This is given both mechanisms of injury, the size and weight of the tile, Claimants height, and the size of the tub. Dr. Rook's report and in his testimony is wrong that this is an acute injury with no sign of pre-existing condition. The X-Ray and MRI simply do not support these conclusions. Claimant had a history with the Employer of miscommunication and not accurately reporting events. Given the Claimant's age, recreational activities and other factors, the Claimant has failed to prove a compensable event.

Ultimate Findings

38.. Based on the accuracy of the facts of the event relied upon by Dr. Pangangam and Dr. Thurston, the ALJ finds their ultimate conclusions more credible that Dr. Rook's ultimate conclusions, and Dr. Rook's ultimate conclusions do not support a compensable event nor do they support a compensable aggravation of a pre-existing condition.

39. Between conflicting histories and medical opinions, the ALJ makes a rational decision to accept the ultimate opinions of Dr. Pangangam and Dr. Thurston, and to reject the ultimate opinion of Dr. Rook.

40. The Claimant has failed to prove, by preponderant evidence, that he sustained a compensable injury or a compensable aggravation of a pre-existing condition on August 17, 2021, as alleged.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.

App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Sec. 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of ALJ, *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the record. As found, based on the accuracy of the facts of the event relied upon by Dr. Pangangam and Dr. Thurston, the ALJ finds their ultimate conclusions more credible that Dr. Rook's ultimate conclusions, and Dr. Rook's ultimate conclusions do not support a compensable event nor do they support a compensable aggravation of a pre-existing condition.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of ALJ, *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the record. As found, between conflicting histories and medical opinions, the ALJ made a rational decision to accept the ultimate opinions of Dr. Pangangam and Dr. Thurston, and to reject the ultimate opinion of Dr. Rook. Based on the accepted medical opinions and the rejection of Dr. Rook's ultimate opinion, as well as the rejection of THE Claimant's version of the event of August 17, 2021, a compensable event or a compensable aggravation of a pre-existing is not supported by the evidence.

Compensability

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984), For an injury to be

compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Compensable injury is one which requires medical treatment or causes a disability. It is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). As found, the Claimant failed to prove, by preponderant evidence, that he sustained a compensable injury or a compensable aggravation of a pre-existing condition on August 17, 2021, as alleged.

Burden of Proof

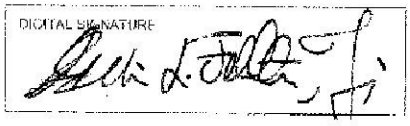
d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1). As found, the Claimant failed to sustain his burden of proof on compensability, thus, a determination of the other issues is moot.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 30th day of June 2022.



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EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

- Did Respondent prove it properly terminated TTD benefits effective January 24, 2022 because Claimant failed to begin modified duty approved by his ATP?

- Did Respondent prove TPD benefits should be terminated on March 15, 2022 because Claimant was responsible for termination of his employment?

- Did Claimant prove TTD benefits be reinstated at any time on or after January 24, 2022?

- Did Respondent prove Claimant's nonwork-related cardiac condition is an efficient intervening cause sufficient to terminate Claimant's eligibility for temporary disability benefits?

FINDINGS OF FACT

1. Claimant worked for Employer as an overnight grocery stocker. He suffered a compensable injury to his right shoulder on November 15, 2020. The claim was initially denied but was later found compensable in a final order dated October 25, 2021. The parties stipulated to an average weekly wage ("AWW") of $867.44.

2. Claimant performed modified light duty for approximately 10 weeks after the accident, primarily cleaning COVID-19 "hot spots." On February 4, 2021, Employer stopped offering light duty because the claim was denied. The assistant store manager, [Redacted, hereinafter Mr. C], advised Claimant that Employer would only provide modified duty for work-related injuries. Because Employer determined the injury was not work-related, Claimant would "need to be 100%" before he could work. Mr. C credibly testified Claimant was not terminated but was put on an unpaid medical leave of absence.

3. After the claim was found compensable, Respondent filed a General Admission of Liability ("GAL") admitting for TTD benefits commencing February 4, 2021.

4. In November 2021, Claimant's ATP, Dr. Hanson, recommended right shoulder surgery. The surgery was authorized and scheduled for January 28, 2022. However, a cardiac condition was discovered during preoperative workup, which prompted Dr. Hanson to postpone the surgery pending clearance from a cardiologist. Claimant underwent quadruple bypass surgery on April 26, 2022. Claimant's cardiac surgeon estimated it would take Claimant eight to 12 weeks to recover from that surgery.

5. On December 14, 2021, Respondent's adjuster wrote to Dr. Hanson about a modified duty position Employer had available for Claimant. A copy of the letter to Dr. Hanson was simultaneously sent to Claimant's counsel. The modified job consisted primarily of "pacing," which involved walking the store greeting customers, answering

customer questions, and escorting customers to merchandise within the store. The work primarily involved standing and walking and required minimal, if any, use of the right arm. Dr. Hanson approved the job on January 5, 2022.

6. On January 13, 2022, Respondent mailed Claimant a written offer of modified duty. At hearing, Claimant confirmed the mailing address used by Respondent is correct. The job offer was simultaneously mailed to Claimant's attorney. The job description and Dr. Hanson's written approval were included with the offer letter. Claimant was offered 40 hours per week, starting on January 24, 2022. He was to be paid $19.16 per hour.

7. Claimant would have earned $766.40 per week performing the modified job, which is less than the admitted AWW of $867.44. Therefore, Respondent would have owed TPD even if Claimant accepted the modified duty ($867.44 - $766.40 = $101.04 x 2/3 = $67.36).

8. Claimant did not report to work on January 24, 2022, or any day thereafter.

9. On January 24, 2022, Respondent filed an amended GAL stating "TTD is being terminated as of 01/23/22 per the attached Rule 6 letter." The GAL was mailed to Claimant and Claimant's attorney.

10. Respondent filed a second amended GAL on March 2, 2022, admitting for TPD benefits commencing January 24, 2022. The GAL states, "TTD is being terminated as of 01/23/22 per the attached Rule 6 letter. On light duty he can only work 40 hours so TPD might be owed." The amended GAL was mailed to Claimant and Claimant's attorney.

11. As of the hearing date, Respondent was still paying TPD based on the March 2, 2022 GAL.

12. Claimant conceded he knew about modified job offer in January 2022. He testified he did not respond or accept the offer because he "didn't think it was valid until I got the surgery and the therapy and the rehab." Claimant testified he disagreed with Dr. Hanson's decision to allow him to return to work "before I had the surgery on my shoulder."

13. Claimant conveyed his disagreement to Dr. Hanson and Dr. Hanson's staff. On March 3, 2022, Dr. Hanson discharged Claimant from his care "effective immediately." Dr. Hanson stated, "My professional opinion, as your treating workmen's compensation orthopedic physician, is the decisions I have made regarding your employment capability and future treatment are valid and will not be changed. Apparently, the medical care decisions have not met with your satisfaction. Also, multiple staff members of our clinic have felt harassed and unable to respond to your demand. Therefore, Hanson Clinic feels strongly that there is no longer a viable doctor-patient relationship in which to continue providing medical care."

14. Despite discharging Claimant from his practice, Dr. Hanson did not amend or rescind his approval of the modified job.

15. Respondent proved Claimant's TTD benefits were properly terminated effective January 24, 2022 because Claimant failed to begin modified employment. Respondent satisfied the statutory prerequisites for termination of TTD benefits under § 8-42-105(3)(d)(I). The offer was sent to Claimant's correct mailing address and to his attorney of record. Claimant conceded he knew of the offer but chose not to accept it because he disagreed with Dr. Hanson's assessment and did not believe he could perform the work. However, the ATP's determination regarding the suitability of modified work is dispositive, notwithstanding a claimant's own contrary self-assessment of their work capacity. The work required minimal to no use of Claimant's injured right shoulder, and was reasonably available to Claimant under an objective standard.

16. Employer required Claimant periodically to submit documentation to verify his ongoing disability while he was on leave. On February 26, 2022, Employer sent Claimant a letter asking him to complete a medical information form and obtain an updated certification from his doctor. Claimant was instructed to return the completed forms no later than March 12, 2022. If he did not do so, "the Company will reevaluate your employment status in light of the information that is available to it, which may result in a change in your status, and potentially the termination of your employment."

17. Claimant did not return the requested documents to Employer. He testified he received the February 26, 2022 letter, but he took no action. Claimant testified he was unsure who could complete the physician certification portion of the form, because Dr. Hanson had discharged him. Claimant did not contact Employer to discuss the matter.

18. Mr. C credibly testified about multiple unsuccessful attempts to reach Claimant by telephone, email, regular mail, and certified mail. Mr. C credibly testified he would have worked with Claimant had he requested additional time to complete the paperwork. Claimant conceded he knew Employer "was trying to get ahold of me" but he did not respond. Claimant conceded he disregarded voicemails from Mr. C and another store employee regarding his status.

19. Employer terminated Claimant on March 12, 2022. The letter stated, "You have been absent without leave for 40 days as of today. You have failed to respond to earlier letters requesting that you contact your Store Manager. [Y]our employment with King Soopers is being terminated due to your absence without leave."

20. Respondent proved Claimant was responsible for termination of his employment on March 12, 2022.

21. Claimant proved no material change in his injury-related condition or other relevant circumstances on or after January 24, 2022 that would support reinstatement of TTD.

22. Respondent filed a Petition to terminate Claimant's TPD benefits effective March 15, 2022. The Petition stated,

> Claimant has been absent without leave for 40 days as of March 9, 2022. Respondent offered claimant a modified job approved by his treating

> physician pursuant to Rule 6-1 (A) . . . but claimant did not return to work. Claimant has never contacted respondent to discuss his modified job. Claimant is therefore responsible for his termination and resulting wage loss, and his temporary disability benefits should be terminated.

23. Claimant timely objected to the Petition and stated,

> I have been awaiting authorization for my right shoulder surgery. During the mandatory pre-op appointment, I was informed that I had a severe blockage in my heart that will not allow me to safely proceed with the shoulder surgery. Obviously, my surgeon will not operate given my compromised cardiac problem. I am therefore scheduled for heart surgery. I have never refused nor been offered modified employment I was capable of doing.

24. Respondent failed to prove Claimant's TPD benefits should be terminated because of he was responsible for termination of employment. Claimant has been continuously disabled from his regular job since the date of injury. The only modified work offered by Employer paid less than his pre-injury AWW. Claimant would have suffered a wage loss of $101.04 per week irrespective of his termination.

25. Respondent failed to prove Claimant's nonwork-related cardiac issues are an intervening cause with respect to temporary disability benefits. Claimant was disabled by the work injury before he developed the cardiac issues. There is insufficient persuasive evidence to prove his disability would have otherwise resolved by any specific date had he undergone the shoulder surgery as originally scheduled. Moreover, there is no persuasive evidence that Claimant had any control over the postponement of his shoulder surgery or that he has delayed treatment needed to resolve the cardiac condition. Claimant's ongoing temporary wage loss remains at least partially attributable to his industrial injury.

CONCLUSIONS OF LAW

A. Termination of TTD benefits effective January 24, 2022

Although Respondent initially disputed the claim, it commenced TTD after the injury was found compensable. Once commenced, TTD benefits shall continue until one of the terminating events enumerated in § 8-42-105(3). Under § 8-42-105(3)(d)(I), TTD is terminated when the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. Termination of TTD benefits is mandatory if the requirements of § 8-42-105(3)(d)(I) are satisfied. *Laurel Manor Care v. Industrial Claim Appealss Office*, 964 P.2d 589 (Colo. App. 1988). The term "fails to begin" is defined as "a failure to start the modified employment in the first instance." *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 874 Colo. App.(2001). The term "modified employment" means employment within the restrictions established by the attending physician. *Flores-Arteaga v. Apple Hills Orchard Juice Co*., W.C. No. 3-101-024 (February 15, 1996). The modified work must be reasonably available to the claimant

under an "objective standard." *Ragan v. Temp Force*, W.C. No. 4-216-578 (June 7, 1996). An injured worker's subjective beliefs about their work capacity are legally irrelevant, and the ALJ has no authority to question the ATP's determination that the claimant could perform the work. *Burns v. Robinson Dairy*, 911 P.2d 661 (Colo. App. 1995).

As found, Respondent proved Claimant's TTD benefits were properly terminated effective January 24, 2022 because Claimant failed to begin modified employment. Respondent satisfied the statutory prerequisites for termination of TTD benefits under § 8-42-105(3)(d)(I). The offer was sent to Claimant's established mailing address and his attorney of record. The work required minimal to no use of Claimant's injured right shoulder, and was reasonably available to him under an objective standard. Claimant conceded he knew about the offer but chose not to accept it because he disagreed with Dr. Hanson's assessment, and did not think he could tolerate the work. However, the ATP's determination regarding the suitability of modified work is dispositive, notwithstanding a claimant's own contrary self-assessment of their work capacity.

B. Reinstatement of TTD on or after January 24, 2022

Once TTD benefits are terminated because a claimant fails to begin modified employment, they cannot be reinstated merely by showing a causal connection between the injury and a subsequent wage loss. *E.g., Laurel Manor Care v. Industrial Claim Appealss Office*, 964 P.2d 589 (Colo. App. 1988). Otherwise "an employer could never rely on § 8-42-105(3)(d) to terminate TTD benefits." *Id*. at 591. Additionally, Claimant's termination on March 12, 2022 creates a separate bar to an award of TTD. Assuming, *arguendo*, that § 8-42-105(3)(d)(I) does not create a permanent bar to receipt of TTD, Claimant must show a material change to his circumstances, such a worsening of condition. *E.g., Anderson v. Longmont Toyota, Inc*., 102 P.2d 323 (Colo. 2004). Here, there is no persuasive evidence of a worsened condition or any other material change that would support reinstatement of TTD on or after January 24, 2022.

C. Termination of TPD benefits based on Claimant's termination for cause

Respondent admitted for TPD benefits commencing January 24, 2022 to account for the difference between Claimant's AWW and the reduced wage he would have earned while working modified duty. Respondent now seeks to terminate TPD because Claimant was responsible for the termination of his employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The "termination statutes" are an affirmative defense to liability for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that the claimant performed a "volitional act" or otherwise

exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondent proved Claimant was responsible for termination of his employment on March 12, 2022. Claimant failed to communicate with Employer despite multiple attempts to reach him by phone, email, regular mail, and certified mail. Claimant conceded he knew Employer “was trying the get ahold of me,” but did not respond. No extrinsic factors impeded Claimant’s ability to reply, and his failure to communicate with Employer was volitional.

However, the finding that Claimant was responsible for termination is not dispositive of his eligibility for temporary *partial* disability benefits. Even though a Claimant may be ineligible for TTD benefits based on the termination statutes, he may still be entitled to an award of TPD benefits if the pre-termination job (or job offer) paid less than the preinjury wage. *See e.g., Garbiso v. Wal-Mart Stores, Inc*., W.C. No. 4-695-612 (March 10, 2008); *Minter v. Diesel Services of Northern Colorado,* W.C. No. 4-513-118 (September 10, 2002)*; Clevenger v. El Paso Glass* Co., W.C. No. 4-712-079 (April 29, 2008); *Tarman v. US Transport*, W.C. No. 4-981-955-01 (June 2, 2016); *Sparks v. Mattas Marine & RV*, W.C. No. 4-982-976-01 (September 26, 2016). These cases stand for the proposition that, to the extent a claimant’s AWW at the time of the termination is (or would have been) less than the AWW at the time of the injury, the difference remains attributable to the injury and does not “result” from the claimant’s termination.

Here, Claimant would have suffered a partial wage loss even if he had accepted the modified job and not been terminated. Claimant was disabled from his regular job, and the only modified work offered by Employer paid less than his pre-injury AWW. Claimant would have lost wages in the amount of $101.04 per week, irrespective of his termination. Thus, he remains entitled to TPD benefits.

D. Termination of temporary disability based on intervening cause

To receive temporary disability benefits, a claimant must establish a causal connection between a work-related injury and the subsequent wage loss. Section 8-42-103(1)(a). A claimant need not prove that the work-related injury was the *sole cause* of the wage loss. Rather, eligibility for temporary disability benefits requires only that the work-related injury contributes *“to some degree”* to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Respondent seeks to terminate Claimant's ongoing eligibility for temporary disability benefits based on an "efficient intervening cause" that has severed the causal connection between the injury and the wage loss. *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986). The existence of an intervening cause is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Atlantic and Pacific Ins. Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Because temporary disability benefits are payable if the injury contributes "to some degree" to a wage loss, Respondent must show that the injury no longer contributes *in any degree* to the claimant's wage loss. *E.g*., *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

Horton v. Industrial Claim Appeals Office, *supra*, is dispositive of Respondent's intervening event defense here. In *Horton*, the claimant was receiving TTD benefits and awaiting surgery when she suffered a non-injury related fall. The fall aggravated a pre-existing condition and necessitated postponement of the surgery. An ALJ concluded that the fall was an intervening event and suspended TTD benefits. The ICAO reversed the ALJ, and the Court of Appeals affirmed the ICAO. The following language is pertinent:

> [P]etitioners admitted liability for temporary total disability benefits and they did not contend that the claimant's disability abated prior to the fall . . . . Since the claimant was already totally disabled by the injury at the time of the alleged "intervening event," the subsequent wage loss was necessarily caused to some degree by the injury. Thus, the ALJ's findings establish that claimant's injury contributed in part to the subsequent wage loss. Therefore, under *PDM Molding* [ ], claimant was entitled to temporary disability benefits for the disputed period. *Id*. at 1211.

Similarly, in *Parks v. Ft. Collins Ready Mix, Inc*., W.C. No. 4-251-955 (March 31, 1999), the claimant had refused a recommended surgery, so the respondents requested termination of TTD benefits based on an "intervening event." The ICAO held the claimant's refusal to proceed with surgery was not an "efficient intervening event" because "benefits are only precluded when the industrial disability plays 'no part' in the wage loss." The Panel stated,

> [I]t is undisputed that the claimant was temporarily disabled at the time Dr. Thomas recommended additional surgery. Thus, the industrial injury contributed "to some degree" to the claimant's wage loss . . . . Under *PDM*, it was incumbent upon the respondents to show that some particular point, the injury no longer contributed in any degree to the claimant's wage loss. . . . Absent evidence that the claimant's temporary disability would have resolved by a specific time but for his delay in undergoing surgery . . . the delay is not an efficient intervening event.

The ALJ perceives no meaningful distinction between *Horton*, *Parks,* and Claimant's case. Although *Horton* and *Parks* involved TTD rather than TPD, the rationale applies equally well to Claimant's situation. Claimant's ongoing temporary wage loss remains attributable, at least in part, to his industrial injury. Claimant was disabled by the industrial injury before he developed the cardiac issues, and there is no persuasive

evidence to prove his disability would have resolved by any specific date had he undergone the shoulder surgery as originally scheduled. Moreover, there is no persuasive evidence that Claimant had any control over the postponement of his shoulder surgery or that he has delayed treatment needed to resolve the cardiac condition. The ALJ is persuaded Claimant will proceed with the shoulder surgery as soon as he is medically cleared to do so. Accordingly, Respondent did not prove an intervening event sufficient to terminate Claimant's TPD benefits.

ORDER

It is therefore ordered that:

1. Respondent properly terminated TTD benefits effective January 24, 2022 because Claimant refused a written offer of modified employment.

2. Claimant's request to reinstate TTD benefits on or after January 24, 2022 is denied and dismissed.

3. Respondent's request to terminate Claimant's TPD benefits effective March 15, 2022 is denied and dismissed.

4. Respondent's intervening event defense is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 30, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 24, 2021 until terminated by statute.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by Authorized Treating Physician (ATP) Michael J. Rauzzino, M.D.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage of $700.00.

FINDINGS OF FACT

1. Claimant is a 53-year-old male who worked for Employer as an order selector/forklift operator. His job duties involved pulling orders from shelves, unloading trucks and operating a forklift in Employer's warehouse.

2. Claimant testified that he began working on April 21, 2021 at around 5:00 a.m. He received a final written warning for a forklift incident and ongoing attendance issues. Claimant was also prohibited from driving a forklift. He was advised that, if he did not improve, he would be terminated.

3. Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt sharp pains in his neck and back. Claimant did not turn or rotate during the incident. He summarized that he experienced pain in his neck, back, hip and shoulder.

4. JH[Redacted] was Employer's warehouse coordinator on the date of the accident. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder.

5. Claimant reported the incident to Employer's production supervisor/warehouse manager MC[Redacted]. Ms. MC[Redacted] testified that she was pulled out of a meeting and met with Claimant in the break room after the incident.

Claimant told Ms. MC[Redacted] that he was pulling trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer directed Claimant to Authorized Treating Physician (ATP) Concentra Medical Centers for treatment.

6. On April 22, 2021 Claimant visited Concentra for an evaluation. He reported pain on the left side of his neck, left shoulder and back. After a physical examination, Deana Halat, NP diagnosed Claimant with a sprain of the left shoulder girdle and a strain of the left trapezius muscle. She directed Claimant for a left shoulder x-ray and physical therapy.

7. Employer completed a First Report of Injury on April 23, 2021. The report specified that the affected body parts were the upper extremity and shoulder. The document noted that Claimant felt a pop in the shoulder while carrying materials.

8. On April 26, 2021 Claimant returned to Concentra for an examination with Carol Dombro, M.D. Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. Dr. Dombro noted that Claimant could return to modified duty work on April 28, 2021.

9. On May 3, 2021 Claimant returned to Dr. Dombro for an examination. Claimant reported pain in the left lateral neck and left trapezius. He described the pain as moderate and aching in nature. Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro noted that Claimant had developed cervical radiculopathy. She determined that her objective findings were consistent with a work-related mechanism of injury.

10. Claimant underwent an MRI of the cervical spine on May 6, 2021. The MRI showed severe spinal canal stenosis with an abnormal cord signal at C4-C5 that was worrisome for the development of myelomalacia. The imaging also revealed severe bilateral foraminal stenosis at the same level.

11. On May 10, 2021 Claimant again visited Dr. Dombro for an examination. A physical examination revealed normal motor strength and no neurological symptoms. Dr. Dombro referred Claimant to neurologist Michael J. Rauzzino, M.D. based on the stenosis and myelomalacia in the MRI report. She restricted Claimant from working.

12. On May 11, 2021 Claimant visited Dr. Rauzzino for an evaluation. Dr. Rauzzino noted that Claimant had a markedly positive Spurlings maneuver, weakness of the hand-wrist bilaterally, diminished sensation in the left C6 and C5 distribution, moderate difficulty with tandem gait, and weakness of his left biceps and deltoid. He commented that Claimant was asymptomatic prior to his April 21, 2021 work injury. Dr. Rauzzino noted that an MRI of the cervical spine revealed a central left-sided disc protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the spinal cord at the same level. Claimant also had similar disease at C5-C6, but to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular symptoms, Dr. Rauzzino recommended surgery. He explained that the proposed surgery was designed to protect the spinal cord as well as

regain some motor and sensory functions. Dr. Rauzzino commented that conservative treatment in the form of injections and physical therapy was not indicated and Claimant would "benefit from decompression of neural elements."

13. On May 20, 2021 Claimant returned to Dr. Dombro for an examination. Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. An MRI of the left shoulder showed post-surgical changes and one centimeter low grade interstitial tearing of the supra/infraspinatus. Dr. Dombro determined that providers needed to repair Claimant's neck and allow time for his left shoulder to heal. She remarked that a return to work was on hold until Claimant completed the requested surgery. Dr. Dombro thus noted that Claimant would remain off work from May 20, 2021 until June 20, 2021.

14. On June 8, 2021 Claimant returned to Dr. Rauzzino for an examination. Dr. Rauzzino noted that Claimant presented for a follow-up visit based on a surgical request in the form of an anterior cervical decompression at C4-C5 and C5-C6 that was denied by Insurer. He could not understand Insurer's denial of the surgical request because he had no evidence Claimant exhibited symptoms prior to the occupational injury, Claimant immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with Claimant's neurological deficits. On physical examination, Dr. Rauzzino noted markedly positive Spurlings, weakness in Claimant's left hand and wrist, diminished sensation in the left C5 distribution and the first two digits of the left hand, moderate difficulty with tandem gait, and weakness in the left biceps and deltoid. Dr. Rauzzino cautioned that delaying surgery placed Claimant at increased risk for permanent neurological deficits.

15. Through July-August 2021 Claimant visit Dr. Dombro for treatment. Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRI of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Dr. Dombro continued to restrict Claimant from working until the proposed surgery was completed.

16. On September 15, 2021 Claimant returned to Dr. Dombro for an examination. Dr. Dombro continued to prohibit Claimant from working. She specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Claimant testified that he has not sought any medical treatment since he last visited Dr. Dombro.

17. Claimant testified at the hearing in this matter. He explained that he continued to perform light duty work for Employer until he ceased working on May 24, 2021 after he was advised he required surgery. Claimant spoke with Ms. MC[Redacted] and she informed him that he would be unable to return to work until he completed his medical treatment.

18. The record reveals that Claimant has a history of prior cervical spine complaints. On November 5, 2016 Claimant sustained a work-related injury to his right shoulder and cervical spine. Claimant sought treatment through Workwell with Paul Ogden, M.D.

19. On April 4, 2017 Claimant underwent an MRI of the cervical spine. The imaging revealed degenerative disc and joint changes superimposed on a borderline narrow spinal canal with mild right paracentral cord indentation and mild right chronic myelomalacia at C4-C5.

20. On September 8, 2017 Claimant visited Barry A. Ogin, M.D. for an examination. Dr. Ogin noted that he was concerned about the spinal cord stenosis with evidence of mild right chronic myelomalacia at C4-C5. He recommended a surgical consultation. Dr. Ogin felt that a decompression would be required based on Claimant's stenosis and cord changes.

21. On November 10, 2017 Claimant underwent a repeat MRI of the cervical spine. The imaging revealed multilevel stenosis with signal alteration posteriorly and to the right of the midline at the C4-C5 level.

22. On December 28, 2017 Claimant was evaluated by Dr. Ogden. Dr. Ogden placed Claimant at MMI with 15% whole person impairment of the cervical spine. He recommended follow-up care with Bryan Andrew Castro, M.D. every six months for two years. Dr. Ogden noted that Claimant would likely need a follow-up MRI and Dr. Castro remarked that, if there was worsening of the myelopathic symptoms, there would be a chance for surgery.

23. On October 4, 2021 Claimant underwent an independent medical examination with Brian Reiss, M.D. Dr. Reiss also testified as an expert in orthopedic medicine in a post-hearing evidentiary deposition conducted on May 25, 2022. Claimant told Dr. Reiss that he was pulling material from about shoulder height onto his left shoulder when he developed sharp pain in the left side of his neck and left suprascapular area.

24. Dr. Reiss remarked that Claimant was reporting a high level of cervical symptomatology for more than a year by the time he reached MMI on December 28, 2017. He noted that Claimant's pain complaints at the time of MMI were the same as his current symptoms. Moreover, Dr. Reiss commented that Claimant's cervical stenosis and spinal cord changes were present in 2017.

25. Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI scan was a little more involved, it would be expected from degeneration over four years. Dr. Reiss explained that myelomalacia generally reflects some damage to the spinal cord. He testified that myelomalacia does not usually go away and there was damage to the spinal cord in 2017. Dr. Reiss commented that he reviewed the 2021 MRI films and there was no evidence of an acute injury including a disc herniation.

26. Dr. Reiss noted that, based on his interview and physical examination, Claimant was not experiencing any weakness, Spurlings was negative, and his tandem gait was normal. Claimant had no complaints of fine motor difficulty and there was no clumsiness or gait disturbance. Dr. Reiss testified that there were no signs of symptoms of myelopathy. He concluded that there did not appear to be any progressive neurologic symptomatology and surgery was not indicated for Claimant's primary complaint of neck pain. He summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

27. On May 24, 2022 the parties conducted the post-hearing evidentiary deposition of Michael J. Rauzzino, M.D. Dr. Rauzzino remarked that Concentra providers referred Claimant in a semi-urgent condition because of significant neurological findings and an enlarged herniated disc. He noted that the mechanism of injury involved a falling object that struck Claimant and caused him to jerk his head. He then felt pain in his neck and left arm as well as progressive neurologic symptoms. Claimant discussed his prior neck injury, but commented that he had been asymptomatic prior to his April 21, 2021 work injury. Notably, Claimant's prior industrial injury on November 5, 2016 involved right-sided symptoms while his current symptoms are located on his left side.

28. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant primarily suffered right-sided symptoms. Providers in 2017 remarked that Claimant had the congenital condition of spinal stenosis, or narrowing of the space surrounding the spinal cord, that predisposed him to injury. Dr. Rauzzino noted that Claimant could have undergone prophylactic surgery to address his condition but chose not to in 2017.

29. Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

30. Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits. Dr. Rauzzino recommended that Claimant not work until his spinal condition is surgically repaired.

31. Claimant has established that it is more probably true than not that he injured his left shoulder and neck during the course and scope of his employment with

Employer on April 21, 2021. Initially, Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt a sharp pain in his neck and back. Claimant summarized that he had pain in his neck, back, hip and left shoulder. Mr. JH[Redacted]'s testimony is consistent with Claimant's account of his injury. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder. Furthermore, Claimant immediately reported the incident to Ms. MC[Redacted]. Claimant told Ms. MC[Redacted] that he was in the aisle pulling some trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer then completed a First Report of Injury on April 23, 2021. The document noted that Claimant felt a pop in the shoulder while carrying material. The preceding chronology reflects that Claimant suffered an accident while moving materials at work on April 21, 2021.

32. Respondents assert that Claimant's left shoulder and neck symptoms constituted pre-existing conditions that only surfaced in response to a disciplinary action. However, the medical records reveal a sufficient nexus between Claimant's work activities and his symptoms to establish that he suffered compensable injuries to his left shoulder and neck. during the course and scope of employment on April 21, 2021. On April 26, 2021 Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. At a follow-up appointment on May 3, 2021 Dr. Dombro assessed Claimant with an acute strain of the neck muscle and noted that Claimant had developed cervical radiculopathy. She recommended MRIs of the left shoulder and cervical spinal canal. Dr. Dombro reiterated that her objective findings were consistent with a work-related mechanism of injury.

33. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRI of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Moreover, Dr. Rauzzino summarized that there was no evidence Claimant exhibited symptoms prior to the occupational injury, he immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with his neurological deficits. Accordingly, the bulk of the persuasive medical records reflect that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable injuries to his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

34. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute. On May 20, 2021 Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. Dr. Dombro remarked that Claimant could not return to work

until the recommended spinal surgery was completed. Dr. Dombro specified that Claimant would remain off work from May 20, 2021 until June 20, 2021. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. She continued to restrict Claimant from working until the proposed surgery was completed. On September 15, 2021 Dr. Dombro specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Finally, Dr. Rauzzino recommended that Claimant not return to work until his spinal condition was surgically repaired.

35. Claimant testified that he continued to perform light duty work for Employer until he was advised on May 24, 2021 that he required surgical intervention. Ms. MC[Redacted] informed Claimant that he would not be able to return to work until he completed his medical treatment. Claimant has thus not worked since May 24, 2021. Claimant noted that he has not sought any medical treatment since he last visited Dr. Dombro on September 15, 2021. The record thus reveals that Claimant's April 21, 2021 work accident caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant has not reached MMI or been released to full duty employment. He is thus entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute.

36. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by ATP Dr. Rauzzino. On May 3, 2022 Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro also noted that Claimant had developed cervical radiculopathy. Dr. Dombro subsequently referred Claimant to ATP Dr. Rauzzino based on the stenosis and myelomalacia in the MRI report. Dr. Rauzzino noted that the MRI of the cervical spine revealed a central left-sided disk protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the cord at the same level. Claimant also had similar disease at C5-C6 to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular symptoms, Dr. Rauzzino recommended surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6.

37. Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

38. Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent

cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits.

39. In contrast, Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI was a little more involved, it would be expected from degeneration over four years. Dr. Reiss commented that there was no evidence of an acute injury including a disc herniation. He explained that there has not been any evolution of Claimant's neurologic complaints. Dr. Reiss summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

40. Despite Dr. Reiss' comments, the persuasive opinions of Drs. Dombro and Rauzzino reflect that Claimant's medical treatment and the proposed anterior cervical decompression surgery is reasonable, necessary and causally related to his April 21, 2021 industrial accident. Claimant's medical care through Concentra addressed his acute cervical strain that caused a significant disc herniation with compression of the spinal cord and warranted surgery. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant previously suffered primarily right-sided symptoms. The 2021 imaging showed a significant disc herniation with compression of the spinal cord. Claimant now suffers from a different condition than he did in 2017 involving a disc herniation on the left side. Accordingly, Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery recommended by ATP Dr. Rauzzino for his April 21, 2021 work injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997)

("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has established by a preponderance of the evidence that he injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021. Initially, Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt a sharp pain in his neck and back. Claimant summarized that he had pain in his neck, back, hip and left shoulder. Mr. JH[Redacted]'s testimony is consistent with Claimant's account of his injury. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder. Furthermore, Claimant immediately reported the incident to Ms. MC[Redacted]. Claimant told Ms. MC[Redacted] that he was in the aisle pulling some trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer then completed a First Report of Injury on April 23, 2021. The document noted that Claimant felt a pop in the shoulder while carrying material. The preceding chronology reflects that Claimant suffered an accident while moving materials at work on April 21, 2021.

9. As found, Respondents assert that Claimant's left shoulder and neck symptoms constituted pre-existing conditions that only surfaced in response to a disciplinary action. However, the medical records reveal a sufficient nexus between Claimant's work activities and his symptoms to establish that he suffered compensable injuries to his left shoulder and neck. during the course and scope of employment on April 21, 2021. On April 26, 2021 Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. At a follow-up appointment on May 3, 2021 Dr. Dombro assessed Claimant with an acute strain of the neck muscle and noted that Claimant had developed cervical radiculopathy. She recommended MRIs of the left shoulder and cervical spinal canal. Dr. Dombro reiterated that her objective findings were consistent with a work-related mechanism of injury.

10. As found, through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRl of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Moreover, Dr. Rauzzino summarized that there was no evidence Claimant exhibited symptoms prior to the occupational injury, he immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with his neurological

deficits. Accordingly, the bulk of the persuasive medical records reflect that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable injuries to his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

Temporary Total Disability Benefits

11. To prove entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute. On May 20, 2021 Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. Dr. Dombro remarked that Claimant could not return to work until the recommended spinal surgery was completed. Dr. Dombro specified that Claimant would remain off work from May 20, 2021 until June 20, 2021. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. She continued to restrict Claimant from working until the proposed surgery was completed. On September 15, 2021 Dr. Dombro specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Finally, Dr. Rauzzino recommended that Claimant not return to work until his spinal condition was surgically repaired.

13. As found, Claimant testified that he continued to perform light duty work for Employer until he was advised on May 24, 2021 that he required surgical intervention. Ms. MC[Redacted] informed Claimant that he would not be able to return to work until he completed his medical treatment. Claimant has thus not worked since May 24, 2021. Claimant noted that he has not sought any medical treatment since he last visited Dr. Dombro on September 15, 2021. The record thus reveals that Claimant's April 21, 2021 work accident caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant has not reached MMI or been released to full duty employment. He is thus entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute.

Medical Benefits and Proposed Surgery

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

16. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by ATP Dr. Rauzzino. On May 3, 2022 Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro also noted that Claimant had developed cervical radiculopathy. Dr. Dombro subsequently referred Claimant to ATP Dr. Rauzzino based on the stenosis and myelomalacia in the MRI report. Dr. Rauzzino noted that the MRI of the cervical spine revealed a central left-sided disk protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the cord at the same level. Claimant also had similar disease at C5-C6 to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular

symptoms, Dr. Rauzzino recommended surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6.

17. As found, Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

18. As found, Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits.

19. As found, in contrast, Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI was a little more involved, it would be expected from degeneration over four years. Dr. Reiss commented that there was no evidence of an acute injury including a disc herniation. He explained that there has not been any evolution of Claimant's neurologic complaints. Dr. Reiss summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

20. As found, despite Dr. Reiss' comments, the persuasive opinions of Drs. Dombro and Rauzzino reflect that Claimant's medical treatment and the proposed anterior cervical decompression surgery is reasonable, necessary and causally related to his April 21, 2021 industrial accident. Claimant's medical care through Concentra addressed his acute cervical strain that caused a significant disc herniation with compression of the spinal cord and warranted surgery. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant previously suffered primarily right-sided symptoms. The 2021 imaging showed a significant disc herniation with compression of the spinal cord. Claimant now suffers from a different condition than he did in 2017 involving a disc herniation on the left side. Accordingly, Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery recommended by ATP Dr. Rauzzino for his April 21, 2021 work injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

2. Claimant shall receive TTD benefits for the period May 24, 2021 until terminated by statute.

3. Claimant earned an AWW of $700.00.

4. Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery proposed by Dr. Rauzzino, for his April 21, 2021 industrial injuries.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: June 30, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-020-610-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her condition has worsened and that her case should be reopened.

II. Whether Claimant is entitled to change physicians to surgeon Dr. Joshua Ariel Metzl if her claim is reopened.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant worked for Employer as a firefighter.
2. On July 9, 2016, Claimant suffered a compensable injury involving her left leg. The injury occurred while Claimant was driving a golf cart to get some medical supplies. While driving the cart, Claimant had her left leg hanging off the side of the cart. While driving the cart with her left leg off the cart, Claimant ran into a gate and crushed the lower portion of her left leg and ankle. Claimant was immediately taken to the emergency room where she was diagnosed with a compartment syndrome fracture. Claimant underwent surgery, with Dr. Fuller, on the day of the accident. Dr. Fuller performed a double fasciotomy. (Ex. B, p. 20.)
3. By December 14, 2016, Claimant was doing well. She had no limitations at work and was working full duty. She would, however, develop pain after running for about 5 minutes in the posterior portion of her left lower leg. It was Dr. Fuller's opinion that she might have pain while running for quite some time. (Ex. B, p. 25.)
4. On January 11, 2017, Claimant was evaluated by Dr. Sharon O'Connor. At this visit, Claimant had continued to improve and had no significant symptoms. Her exercise tolerance was getting better, and she was working full duty without any problems. Her only symptoms at that time included some continued discomfort in the medial aspect of her lower leg as well as some numbness and tingling she had in the immediate area of her scars and a small area where the crush injury occurred. Dr. O'Connor placed Claimant at MMI, released Claimant to fully duty, and concluded that Claimant did not suffer any permanent impairment. (Ex. A, p. 8.)
5. On May 11, 2018, Claimant underwent a Division of Workers' Compensation Independent Medical Examination (DIME) that was performed by Dr. Brian Beatty. At this visit, Claimant stated that overall, her symptoms have not changed. She stated that she has radiation of pain from her ankle into her leg. She also stated that her pain is intermittent and that she has some numbness and tingling around the surgical site. On a scale of 0-10, Claimant rated her daily pain as a 3. Claimant also stated that her symptoms were aggravated by standing for more than one-half hour, walking for more than one-half hour,

lifting 50-75 pounds, and during any type of sports or exercise. Lastly, she noted moderate morning stiffness. (Ex. B, p. 26.) Regarding her activities, she noted that running and lifting are restricted when performed for extended periods of time. (Ex. B, p. 26.) She did not state that her heel hurt at that time. Dr. Beatty agreed that Claimant reached MMI on January 11, 2017, and provided Claimant a 6% scheduled impairment rating. Ex. B, p. 27.)

6. Claimant kept working for Employer, [Redacted], through December 31, 2018. Beginning January 1, 2019, Claimant began working for SM[Redacted[.

7. Around September 2020, Claimant started developing symptoms from her heel up to the medial aspect of her ankle. These symptoms did not, however, cause Claimant to seek medical treatment at this time. (Ex C, p. 31.)

8. On May 19, 2021, Claimant presented to the SM[Redacted]. At this visit, Claimant stated that her left heel had been bothering her for the past six months with increasing pain over the last two months-which Claimant associated with increased activity. Claimant described her increased activity to include running and wearing her "bunker boots," i.e., work boots. At this visit, she was told to purchase a heel cup/pad and to only bike for exercise.

9. On September 16, 2021, more than three years after being placed at MMI, and while working for SM[Redacted], Claimant presented to Erik Thelander, D.P.M. (Exhibit C, p. 39.) Claimant stated that she had been mostly asymptomatic until about one year ago. She also stated that during the last month, the pain became worse. At the time of her appointment, her pain level was 8/10. (Ex. C, p. 35.) That said, Claimant's pain was in a different location than her prior injury. Her pain at this time radiated from her heel up to the medial portion of her ankle. Claimant stated that she was usually asymptomatic while wearing tennis shoes and not working–and symptomatic while working and wearing her work boots. For example, Claimant was on vacation for five weeks and did not wear her work boots but wore tennis shoes. During this time, Claimant was largely asymptomatic. (Ex. C, p. 31.) Dr. Thelander noted that it was odd that Claimant was largely asymptomatic after her surgery for years and is only now having symptoms. He thought that perhaps Claimant's work boots and job had caused compression, overuse and inflammation around her prior scar tissue which caused Claimant's nerve pain and symptoms. (Ex. C, p. 33.) Based on Claimant's pain complaints, and Dr. Thelander's assessment, he ordered an EMG of Claimant's left lower extremity to assess Claimant for possible tibial nerve neuropraxia. (Ex. C, p. 30.)

10. On September 21, 2021, Claimant returned to the SM[Redacted] Clinic. At this appointment, Claimant stated that she took six weeks off for vacation and that her heel was doing well until she returned to work. Claimant stated that her heel was doing well until she ran her METS test and then had a call where she was in her work boots for about three hours. At this point, Claimant was walking with an antalgic gait. (Ex. E, p. 73.)

11. On October 4, 2021, Claimant sought medical treatment at the CU Steadman Hawkins Clinic Denver with Dr. Metzl, when she again repeated that she "was fine" for a "couple years but over the last year she has developed more more [sic] pain." (Exhibit D, p. 60.)

12. On October 28, 2021, Dr. Metzl concluded that Claimant's "discomfort dates back to her prior injury and she would benefit from partial plantar fascial release with tarsal tunnel release. fasciitis is a result of her prior work injury." Dr. Metzl's opinion on causation, however, is mostly conclusory. He did not discuss in detail how he concluded Claimant's current condition was causally related to her 2016 work injury.

13. Claimant's testimony that her complaints that emerged at the end of 2020 while working for SM[Redacted] were persistent and related to the injury she suffered on July 9, 2016, while working for Respondent Littleton are contradicted by the consistent and repeated history of being predominately "asymptomatic" (Ex. C, p. 31), "doing well" (Ex. E, p. 73), and "was fine" (Ex. D, p. 60) for years after leaving employment with Employer Littleton.

14. Claimant repeatedly attributed her left lower extremity problems to her work duties for SM[Redacted], associating her pain "post running, in bunker boots, and duty boots" (Ex. E, p. 73), the requirement "to wear work boots" (Ex. C, p. 31), and running a "METS test and then had call where she was in boots for ≈ 3 hours" (Ex. E, p. 73.)

15. Although Claimant did not assert a Workers' Compensation Claim against SM[Redacted], the medical reports establish that the July 9, 2016, injury suffered while working for Respondent [Employer Redacted] had resolved years before Claimant suffered a new injury to her left lower extremity.

16. On February 10, 2022, Paul Stone, D.P.M, performed an IME. Dr. Stone credibly and persuasively concluded that Claimant "developed injury to the left plantar fascia with swelling and overlying compression of the branches of the posterior tibial nerve in the porta pedis which is unrelated to the 2016 injury and resultant compartment decompression." (Ex. F, p. 80.)

17. Dr. Stone, through his report and testimony, credibly and persuasively concluded that Claimant's history of symptoms related to running and wearing work or bunker boots is consistent with plantar fascia and tarsal tunnel release surgery on December 6, 2021, completed by Dr. Metzl, and that this surgery treated a separate, distinct, and different anatomical problem and area from the 2016 injury that required a four-compartment release surgery. (*See also* Ex. F, p. 80.)

18. Dr. Stone concluded that Claimant's plantar fasciitis and tarsal tunnel symptoms were not caused by her July 9, 2016, work injury. Dr. Stone credibly and persuasively concluded Claimant suffered from a new injury.

19. The ALJ finds Dr. Stone's opinions and conclusions to be credible and persuasive because his testimony is consistent with Claimant's underlying medical records related to the timing of the onset of her pain after being placed at MMI, the location of her new pain, and the conditions for which she was treated via surgery. And such opinions were explained and supported through the demonstrative exhibits presented at hearing and discussed during Dr. Stone's testimony.

20. Claimant's condition and need for additional medical treatment after being placed at MMI did not flow proximately and naturally from the July 9, 2016, work injury.

21. Claimant's July 9, 2016, industrial injury did not leave Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for

additional medical treatment. As a result, Claimant's disability and need for medical treatment do not represent compensable consequences of the industrial injury.

22. The ALJ finds that Claimant's July 9, 2016, condition has not worsened since being placed at MMI. The ALJ further finds that Claimant's need for medical treatment is unrelated to her July 9, 2016, work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact-finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that her condition has worsened and that her case should be reopened.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the Claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

The ALJ found Dr. Stone's opinions and conclusions to be credible and persuasive because they are consistent with Claimant's underlying medical records related to the timing of the onset of her pain after being placed at MMI, the location of her new pain, and the conditions for which she was treated via surgery. And such opinions were credibly and persuasively explained and supported through the demonstrative exhibits presented at hearing and discussed during Dr. Stone's testimony.

As found, Claimant's condition and need for additional medical treatment after being placed at MMI did not flow proximately and naturally from the July 9, 2016, work injury.

As also found, Claimant's July 9, 2016, industrial injury did not leave Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for additional medical treatment. As a result, Claimant's disability

and need for medical treatment do not represent compensable consequences of the industrial injury.

As a result, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that her condition caused by the July 9, 2016, industrial accident has worsened since being placed at MMI and that her claim should be reopened. Thus, the ALJ further finds and concludes that Claimant has failed to establish by a preponderance of the evidence that the need for medical treatment is causally related to her July 9, 2016, work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's petition to reopen is denied. Thus, Claimant's request for additional benefits is denied.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 1, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Have the respondents overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician regarding causation, maximum medical improvement (MMI), and/or permanent impairment?

FINDINGS OF FACT

1. The claimant worked for the employer as a real estate agent and property manager. On January 23, 2020, the claimant sustained a work related injury when she slipped on ice while responding to an HOA complaint. The claimant reported this incident to her supervisor and friend, Deborah Sanderson.

2. On January 24, 2020, Ms. Sanderson completed a First Report of Injury or Illness. In that document, the incident was described as "[the claimant] fell on ice and hit head". The body part identified as injured was the claimant's skull, and the injury was identified as a "contusion".

Medical Treatment Prior to January 23, 2020

3. Prior to January 23, 2020, the claimant has a lengthy medical history for insomnia, anxiety, depression, multiple closed head injuries, and spinal issues. In addition, the claimant has a history of alcohol abuse, domestic violence, and interactions with law enforcement.

4. On January 25, 2016 the claimant sought treatment for head and neck issues with Dr. Bruce Lipmann. The claimant reported that her symptoms began after she was walking up some stairs when she tripped and fell backwards hitting her head. However, the claimant testified that she was not honest with Dr. Lipmann or law enforcement regarding her injuries. The incident occurred when her boyfriend threw her down a flight of stairs.

5. On February 13, 2016, claimant was seen by Dr. Karen Locke regarding a concussion that the claimant sustained when she struck her head against a wall. The claimant was experiencing headaches, mental fogginess, irritable mood, insomnia, and low back pain.

6. On July 21, 2016, claimant sought chiropractic treatment with Dr. Steven Peltzman. At that time, the claimant reported pain in her neck, mid-back, and low back. The claimant also reported occasional headaches. Dr. Peltzman recorded that the claimant symptoms began when she fell down stairs while carrying a table.

7. During 2017, 2018, and 2019, the claimant continued her treatment with Drs. Locke and Peltzman. These medical records identify the claimant's symptoms and conditions included headaches, severe anxiety, moderately severe depression, insomnia, nausea, vomiting, back pain, and neck pain.

8. On April 15, 2019, the claimant was seen by Dr. Locke. At that time, the claimant reported suffering a concussion while in Michigan one month prior. The claimant also reported increased anxiety, vomiting, headaches, nosebleeds, low appetite, mental fogginess, rhinitis and dizziness. Dr. Locke opined that the claimant's symptoms were most likely due to the concussion.

9. On June 12, 2019, the claimant returned to Dr. Peltzman and reported increased neck pain and headaches. The claimant also reported that she had experienced a fall approximately eight weeks prior. On June 19, 2019, the claimant reported neck pain of six out of ten. On June 26, 2019, she reported her neck pain ranged from six to nine out of ten.

10. On February 12, 2018, February 13, 2018, February 17, 2019, May 27, 2019, and June 1, 2019, officers with the New Castle Police responded to incidents involving the claimant. In each instance alcohol was identified as being involved.

Medical Treatment After January 23, 2020

11. The first medical treatment the claimant sought following her fall on January 23, 2020, was on January 24, 2020. On that date, the claimant was seen in the emergency department (ED) at Valley View Hospital. At that time, the claimant described her work injury as falling on ice, hitting the back of her head, and falling onto her back. On exam, Dr. David Hile noted that the claimant's head was "normocephalic atraumatic" and the claimant was neurologically intact. There is no reference to any lacerations, swelling, bruising, or broken teeth. A cervical spine computed tomography (CT) scan was read as negative. Dr. Hile diagnosed post-concussive syndrome, and a thoracic spine muscle spasm. The claimant did not report her prior history for falls, head injuries, or neck symptoms.

12. On January 29, 2020, claimant began treatment at Grand River Clinic[1] and was seen by Mark Quinn, PA-C. On that date, the claimant's description of the January 23, 2020 was different from that on the First Report of Injury and the report at the ED on January 24, 2020. The claimant told PA Quinn that she was struck on the top of her head by a very large icicle (two feet wide, and three to four feet long), causing her to fall and strike her forehead on pavement, but she did not lose consciousness. The claimant also reported returning to work following her fall. At the time of the January 29, 2020 exam, the claimant reported headaches, light sensitivities, and feeling of being off balance. The claimant denied prior head injuries, neck pain, or back pain.

[1] The providers at Grand River Clinic, including PA Quinn have been the claimant's authorized treating providers (ATPs) for this claim.

13. On his examination, PA Quinn noted that the claimant was alert and oriented, her head was completely normal to inspection, her hearing was normal, she had a normal facial exam, her teeth and dentition were normal, her vision was normal, her neck was normal with full range of motion, and her skin examination revealed no wounds, lesions, or rashes. PA Quinn diagnosed a concussion without loss of consciousness.

14. On January 31, 2020, the claimant was seen by Chrisitina Maenle, NP at Valley View Hospital related to a pre-existing diagnosis of vertebral artery calcifications. The claimant mentioned sustaining a migraine on January 24, 2020. NP Maenle noted that the claimant's "history is a little vague". The claimant denied having back pain and NP Maenle noted the claimant's neck examination was normal.

15. On February 4, 2020, the claimant returned to PA Quinn and reported vomiting, feeling off balance, sleeping a long time, blurry vision, and that bright lights were causing headaches. The claimant also reported that she had suffered a concussion three years prior, when she was pushed down some stairs. The claimant denied any other head injuries. The claimant continued to deny neck and back pain. On exam, PA Quinn noted that the claimant's head, face, teeth, and neck were all normal, and she had full range of motion of her neck.

16. On February 12, 2020, the claimant was seen by PA Quinn and reported improvement. PA Quinn noted that the claimant's head, teeth, and neck were normal, and she had no skin wounds. The claimant had full range of motion to her neck and she continued to deny back pain. PA Quinn released the claimant to modified duty.

17. On February 24, 2020, the claimant was seen in the ED at Grand River Medical Clinic after she fell and hit her head. Chelsea Lawrenz, PA-C recorded that the claimant was improving after a prior fall until the current fall three days prior. The claimant reported that after falling she experienced exacerbation of her dizziness, headache, photophobia, nausea, back and neck pain. PA Lawrenz noted a healing laceration on the claimant's lower lip, and tenderness over the midline and bilateral lateral cervical areas.

18. On February 27, 2020, the claimant was seen by PA Quinn. In the medical record of that date, PA Quinn identified a fall on February 21, 2020 when the claimant slipped on ice and struck her head. PA Quinn noted the claimant has experienced a "significant decrease in her functionality following the second fall" and he made a referral for a neurological consultation.

19. On March 13, 2020, the claimant was seen by neurologist Dr. Mitchell Burnbaum. The claimant reported that her second fall involved slipping as she exited her bedroom, and hitting the right side of her head on tile. In his report, Dr. Burnbaum noted that although the claimant had not yet reached her baseline, she had improved following her fall in January 2020, and was "much worse" after the second fall.

20. On March 28, 2020, the respondents filed a General Admission of Liability (GAL) admitting for the January 23, 2020 injury, medical treatment, and temporary total disability (TTD) benefits.

21. On May 7, 2020, the claimant was seen by Louis Passariello, LCSW, for a mental health examination. On that date, the claimant reported that when she was injured on January 23, 2020, she suffered extensive bruising on her head and face. The claimant did not reference her fall on February 21, 2020.

22. On June 10, 2020, the claimant was seen by Dr. Dale Bowen for a neuropsychological evaluation[2]. With regard to the work injury, the claimant told Dr. Bowen that she slipped on ice, but did not mention being struck by an icicle. In addition, the claimant did not mention her second fall in February.

23. On June 10, 2020, PA Quinn released the claimant to work three days per week, working six to eight hours each day.

24. On August 10, 2020, PA Quinn released the claimant to full duty, with no work restrictions. In that same medical record, PA Quinn opined that the claimant would likely reach maximum medical improvement in the next month.

25. On September 8, 2020, the claimant reported to PA Quinn that she was working full time and doing well. On examination, PA Quinn noted that the claimant had bruising in various stages of healing, as well as a hematoma on her head. The claimant first reported that she fell at home and lost consciousness. She then described becoming injured when her dog jumped on her as she exited her car. However, PA Quinn continued to question the claimant about her injuries and he noted:

> Upon further questioning she states that her hematoma on her scalp and bruising was not from a fall as initially stated and that this was from a domestic violence incident. States she was grabbed and thrust up against a wall in her home, states she had a [loss of consciousness]. States that she reported this incident to the police and has since changed all the locks in her house. States that she is working on a restraining order against the offender and that she now feels safe in her home.

Mr. Quinn noted that he would address maximum medical improvement (MMI) in two weeks. The claimant remained working at full duty without restrictions.

26. On September 12, 2020 and September 13, 2020, the New Castle Police documented additional incidents involving the claimant. On September 19, 2020, the claimant contacted that department about obtaining a restraining order. These ALJ finds

[2] Although Dr. Bowen's report was not submitted as evidence, the report is described in the reports of Drs. Orent, Moe, and D'Angelo.

that these records substantiate the domestic violence history PA Quinn identified on September 8, 2020.

27. On September 23, 2020, the claimant returned to PA Quinn. At that time, the claimant reported that most of her symptoms had resolved. PA Quinn recommended additional care through November 23, 2020, at which time he anticipated placing the claimant at MMI.

28. On September 25, 2020, the respondents filed a GAL terminating TTD benefits as of August 10, 2020 because the claimant was released to full duty.

29. On October 2, 2020, claimant was seen in the ED at Grand River Medical Clinic regarding a foot injury. On examination, the claimants' cervical spine was identified as normal.

30. On February 12, 2021, the Rifle police transported the claimant to the ED at Grand River Medical Center because she was hallucinating. The claimant was seen by Dr. Ruth Pitts at that time. Dr. Pitts noted that the claimant was experiencing confusion, tremulousness, and tachycardia. When the claimant was unable to provide a history, Dr. Pitts obtained information from the claimant's father. The claimant's father reported that the claimant had a history of excessive alcohol consumption. Dr. Pitts opined that the claimant was experiencing alcohol withdrawal symptoms.

31. The claimant was hospitalized from February 12, 2021 through February 18, 2021. The medical records indicate that during this time the claimant was combative, agitated, confused, disheveled, lacking insight, and exhibiting poor judgment with delayed cognition. The claimant was also noted to be experiencing delirium tremens as a result of severe acute alcohol withdrawal. The claimant was instructed to pursue alcohol rehabilitation.

32. On February 22, 2021, the claimant returned to PA Quinn. At that time, PA Quinn noted that the claimant had been hospitalized because of acute psychosis. The claimant reported that she had been laid off and traveled to Michigan for approximately one month. During that time, she drank heavily and stopped taking her mental health medications. The claimant reported that upon her return to Colorado she was hospitalized with hallucinations, alcohol dependence, with withdrawal deliriums.

33. On February 25, 2021, PA Quinn ordered magnetic resonance imaging (MRI) of the claimant's brain and made a referral for neuropsychological testing.

34. On March 11, 2021, law enforcement was contacted regarding a domestic violence incident in the claimant's home. The claimant reported to officers that she was thrown down stairs by her boyfriend, which resulted in injuries to her head and hand. The claimant was transported to Valley View Hospital ED. Dr. Charlie Abramson noted that the claimant had a head abrasion and bruising on her palms.

35. On March 15, 2021, the claimant sustained a gunshot wound to her left hand. While undergoing medical treatment at Valley View Hospital, the claimant reported that her boyfriend shot her in the hand during an argument. It was noted that the claimant was heavily intoxicated upon arrival, was shaking, and difficult to control.

36. On March 22, 2021, the claimant was transported to Grand River Medical Center for admission into an alcohol recovery program. The claimant reported that she had been drinking an average of one drink per hour for four days, and she had to wake up three to four times each night to drink alcohol to prevent withdrawal symptoms. The claimant's friend was instructed to transport the claimant straight to a detox in Grand Junction.

37. On April 1, 2022, the claimant was seen by PA Quinn. On that date, PA Quinn noted that the claimant had been working until her gunshot wound and related surgery. The claimant reported occasional headaches, but the majority of her concussion symptoms were quite good.

38. On May 3, 2021, the claimant returned to PA Quinn. At that time, the claimant had full range of motion of her neck.

39. At the request of the respondents, the claimant was scheduled to attend an independent medical examination (IME) with Dr. Douglas Scott on May 16, 2021. The claimant did not appear for the IME and Dr. Scott issued a report of his review of the claimant's medical records. In his May 16, 2021 report, Dr. Scott opined that the claimant suffered a work injury involving a slip and fall, followed by a non-work related fall at her home. Dr. Scott further opined that the claimant's second fall exacerbated her post-concussion symptoms and caused new post-concussion symptoms. With regard to MMI, it was Dr. Scott's opinion that the claimant reached MMI sometime between February 12, 2020 and February 21, 2020 when she fell at home and her current symptoms were not related to her work injury. He also opined that the claimant did not need maintenance medical treatment, or a permanent impairment rating.

40. On June 3, 2021, the claimant was seen by PA Quinn. At that time, PA Quinn referenced Dr. Scott's IME report and stated that he agreed that the claimant's symptoms that were related to her work injury had resolved. PA Quinn also agreed with Dr. Scott that the claimant's fall at home in February 2020 was the cause of her current symptoms.

41. On June 23, 2021, PA Quinn and his supervising physician at Grand River Health, Dr. Bonnie Walsh, authored a letter in which they stated their agreement with Dr. Scott. Specifically, they agreed that the claimant reached MMI somewhere around February 12, 2021 and February 21, 2021.[3] The letter further stated that the claimant was placed at MMI as of June 3, 2021, with no permanent impairment, and no

[3] The ALJ infers that this is a typographical error, as Dr. Scott identified the dates of MMI as occurring between February 12, 2020 and February 21, 2020.

maintenance care. On August 23, 2021, PA Quinn identified the date of MMI as February 12, 2021.

42. On August 5, 2021, the respondents filed a Final Admission of Liability (FAL) consistent with Dr. Walsh and PA Quinn's report of MMI with no impairment.

43. On August 17, 2021, the claimant applied for a Division sponsored independent medical examination (DIME). Dr. Sander Orent was selected to perform the DIME.

44. On November 2, 2021, the claimant attended the DIME with Dr. Orent. In connection with the DIME, Dr. Orent obtained a history from the claimant and performed a physical examination. In addition, he reviewed medical records beginning on January 24, 2020, (the day after the claimant's injury). At the DIME, the claimant denied prior neck issues, and denied using alcohol since college. With regard to her mechanism of injury on January 23, 2020, the claimant reported to Dr. Orent that she was struck in the head by an icicle. The claimant denied that she struck her head on February 21, 2020. She also denied suffering an injury to her head in September 2020. Dr. Orent accepted the history provided by the claimant as true, specifically noting that he was giving her "the benefit of the doubt".

45. Dr. Orent noted that the claimant's case involved a variety of issues including psychological symptoms, possible alcohol withdrawal syndrome, and at least three closed head injuries. Dr. Orent noted that prior to the second fall February 2020 fall the claimant was improving, and experienced worsened conditions thereafter. However, Dr. Orent ultimately opined that the claimant was not at MMI and recommended repeat neuropsychological testing, and a psychiatric IME. With regard to the claimant's cervical spine condition, Dr. Orent diagnosed a cervical strain, and provided a provisional impairment rating of 22 percent, whole person. Dr. Orent explained that he assessed this rating because of deficiencies in range of motion, (even though he noted the claimant's range of motion was substantially better upon his direct observation).

46. On December 7, 2021, the respondents filed an Application for Hearing (AFH) on the issues of overcoming the DIME opinions of Dr. Orent, pre-existing and unrelated conditions, intervening accidents/injuries/conditions. The current hearing resulted.

47. At the request of the respondents, the claimant attended a psychiatric IME with psychiatrist, Dr. Stephen Moe. In connection with this IME, Dr. Moe reviewed the claimant's medical records, and conducted an interview with the claimant. In his January 10, 2022 IME report, Dr. Moe opined that the claimant recovered from her January 23, 2020 work related concussion prior to her February 21, 2020 at-home non-work related concussion. He further opined that no further treatment was necessary for the work injury (including a repeat neuropsychological assessment). In reaching his opinions, Dr. Moe noted that the claimant's report that her conditions worsened after the work injury did not meet the medically expected outcome following a mild concussion.

Dr. Moe also noted a number of inconsistencies in the claimant's reports to various providers and to her recitation of events at the psychiatric IME. Dr. Moe also opined that alcohol use disorder is the likely cause of the claimant's symptoms.

48. On January 24, 2022, Dr. Moe issued an addendum to his IME report after reviewing additional records. In that addendum, Dr. Moe stated that the additional records did not change his opinion that claimant reached MMI, with no permanent psychiatric impairment, no need for additional evaluations or treatment, and no need for restrictions.

49. Upon his review of Dr. Moe's reports, PA Quinn authored a letter dated January 26, 2022. In his letter, PA Quinn agreed with all of Dr. Moe's conclusions. In addition, PA Quinn opined that on January 23, 2020, the claimant injured her head, and that she recovered from that injury prior to the February 21, 2020 fall at home.

50. Thereafter, the claimant attended an IME with Dr. Kathleen D'Angelo. In connection with the IME, Dr. D'Angelo reviewed medical records from before and after the claimant's work injury, interviewed the claimant, and performed a physical examination. In an IME report dated February 26, 2022, Dr. D'Angelo opined that the claimant was at MMI as of February 12, 2020, and the claimant was appropriately released by PA Quinn without maintenance treatment, impairment ratings, or permanent work restrictions. Dr. D'Angelo further opined that Dr. Orent erred in performing his causation analysis, which in turn resulted in errors with regard to his opinions on MMI, impairment, work restrictions, and the need for maintenance care. Dr. D'Angelo noted that Dr. Orent did not appear to have reviewed the claimant's pre-injury medical records.

51. Dr. D'Angelo's testimony was consistent with her written report. Dr. D'Angelo testified that the history portion of her interview of claimant was difficult, because claimant has selective memory and confabulation. Dr. D'Angelo testified that it is her opinion that the claimant confabulates her medical history because of Korsakoff Syndrome[4] (which is secondary to the claimant's chronic alcohol abuse).

52. During her testimony, Dr. D'Angelo reiterated her opinion that Dr. Orent erred with respect to his causation, MMI, and impairment rating opinions. She further testified that this error was not just a mere difference of medical opinions, but a clear contradiction to what is supported by claimant's records. Dr. D'Angelo noted that Dr. Orent essentially deferred his own opinion on the neuropsychological/mental issues to a psychiatric IME, and Dr. Moe's subsequent psychiatric IME clarified that the claimant is at MMI for those issues, with no impairment, and without need for further evaluation or treatment. With regard to the claimant's cervical spine, Dr. D'Angelo testified that between the date of the claimant's work injury and the date of her February 2020 at-home accident, the claimant had multiple evaluations, and during each evaluation she denied cervical pain, she had no positive findings on cervical exam, and she had full cervical range of motion. Additionally, after claimant's fall at home in February 2020, she reported to PA Quinn that she had dramatically worsened after the fall at home, with

[4] Also referred to as chronic Wernicke's encephalopathy.

a significant increase in dysfunction. D'Angelo testified that an accurate prior medical history is essential to a competent forensic causation evaluation. In the current matter, Dr. D'Angelo noted that Dr. Orent had an inaccurate understanding of the claimant's prior cervical history, which caused his cervical causation evaluation to be erroneous.

53. The claimant testified at the hearing. The claimant's testimony was inconsistent, confusing, disjointed, and at times argumentative. The claimant testified that on January 23, 2020, she was struck in the head by a falling icicle, resulting in a fall and a loss of consciousness. The claimant further testified that as a result of her fall she broke her glasses, chipped her teeth, bruised the side of her head, and cut off the tip of her thumb. In addition, at the location where she was struck on her head, she developed a bald spot. The claimant could not explain why the January 24, 2020 ED report did not identify damage to her teeth, lacerations to her head, or thumb. The claimant testified that she had suffered a traumatic brain injury approximately five years ago, and she had fully recovered from that prior injury. The claimant repeatedly denied striking her head on February 21, 2020. During her testimony, the claimant admitted that she lied to a number of her medical providers including Dr. Lipmann, Dr. Locke, and Dr. Peltzman.

54. The ALJ does not find the claimant's testimony to be credible or persuasive.

55. The ALJ credits the medical records, the testimony and opinions of Dr. D'Angelo, and the opinions of PA Quinn, Dr. Scott, and Dr. Moe over the contrary opinions of Dr. Orent. The ALJ finds that Dr. Orent received incomplete records, and an incomplete and inaccurate history from that claimant, and he relied on that history in providing his ultimate opinions regarding diagnosis, MMI, and impairment. For those reasons, the ALJ finds that the respondents have demonstrated by clear and convincing evidence that Dr. Orent's opinions are erroneous. The ALJ concludes that the claimant reached MMI on February 12, 2020 with no permanent impairment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. § 8-42-107 (8) (c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000); *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. As found, the respondents have overcome, by clear and convincing evidence, the opinions of Dr. Orent. The ALJ concludes that there is more than a mere difference of opinions in this matter. Specifically, the ALJ concludes that Dr. Orent erred in finding that the claimant is not at MMI. As found, the opinions of Dr. D'Angelo and PA Quinn are credible and persuasive on this issue. The ALJ concludes that the claimant reached MMI on February 12, 2020.

7. The ALJ further concludes that Dr. Orent erred in assigning a permanent impairment rating to the claimant's cervical spine. As found, the opinions of Dr.

D'Angelo and PA Quinn are credible and persuasive on this issue. The ALJ concludes that the claimant reached MMI with no permanent impairment.

ORDER

It is therefore ordered:

1. The claimant reached MMI for all aspects of her work injury on February 12, 2020.

2. The claimant is not entitled to permanent partial disability (PPD) benefits under this claim.

3. All matters not determined herein are reserved for future determination.

Dated July 5, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-186-645-001

ISSUES

I. The parties seek an order allocating death benefits/dependency benefits between Dependent-Claimants, Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter.

II. Respondents seek an order finding that Respondents are entitled to take an offset for social security survivor benefits against death benefits/dependency benefits owed to Dependent-Claimants.

STIPULATIONS

Prior to hearing, the parties entered into stipulated facts that are referenced below and memorialized within a document identified as "Dependent-Claimant and Respondents' Stipulated Facts for Hearing." (Resp. Ex. H) Dependent-Claimant surviving spouse indicated at hearing that she in fact signed the Stipulated Facts for Hearing document on May 24, 2022, and that remained in agreement with those stipulated facts.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Decedent passed away on October 21, 2021, in the course and scope of his duties as a fire fighter for Employer. (Resp. Ex. H, Stipulated Fact #1, bn 023; Resp. Exs. A-B)
2. Dependent-Claimant surviving spouse married Decedent on December 22, 2012, and Decedent and Dependent-Claimant remained married as of October 21, 2021. (Resp. Ex. H, Stipulated Fact #2, bn 023; Resp. Ex. G, bn 020)
3. In addition to Dependent-Claimant surviving spouse, when he died Decedent also left behind two biological children he had with Dependent-Claimant surviving spouse: Dependent-Claimant surviving son OS[Redacted] (D.O.B. 05/27/16), and Dependent-Claimant surviving daughter KS[Redacted] (D.O.B. 05/20/20). (Resp. Ex. H, Stipulated Facts #3-4; Resp. Ex. G, bn 021-022)
4. Dependent-Claimant surviving spouse is the mother and legal guardian of Dependent-Claimant surviving son and Dependent-Claimant surviving daughter. (Resp. Ex. H, Stipulated Fact #5, bn 023)
5. A Dependents' Notice and Claim for Compensation was filed by Dependent-Claimant surviving spouse on behalf of herself, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter. (Resp. Ex. C)

6. Dependent-Claimant surviving spouse, and Respondents, have no knowledge of any other possible dependents of Decedent as of the date of Decedent's death. (Resp. Ex. H, Stipulated Fact 12, bn 024)

7. On December 21, 2021, Insurer filed a General Admission-Fatal, admitting to death benefits/dependency benefits, and allocating those benefits equally (1/3 each) between Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter. (Resp. Ex. D) Dependent-Claimant surviving spouse testified that she believes this to be a fair and equitable distribution of death benefits/dependency benefits, and she testified that she is in agreement to this allocation.

8. Dependent-Claimant surviving spouse received a one-time $255 award for Social Security Survivor Benefits (herein "SSS Benefits"). She has not received any additional SSS Benefits, and she is not currently receiving SSS Benefits. (Resp. Ex. H, Stipulated Fact #7, bn 024)

9. Dependent-Claimant surviving son received $3,680 in SSS Benefits on January 18, 2022, for money due between October 2021 and December 2021, and he began receiving $1,274 in monthly SSS Benefits beginning in February 2022. (Resp. Ex. H, Stipulated Fact #9, bn 024)

10. Dependent-Claimant surviving daughter received $3,680 in SSS Benefits on January 18, 2022, for money due between October 2021 and December 2021, and she began receiving $1,274 in monthly SSS Benefits beginning in February 2022. (Resp. Ex. H, Stipulated Fact #11, bn 024)

11. On February 16, 2022, Respondents applied for hearing on issues that included obtaining an order regarding proper distribution of death benefits between dependents, SSS Benefit offsets, and/or any other applicable offsets.

12. The parties entered into a written set of stipulated facts on May 24, 2022. (Resp. Ex. H)

13. Dependent-Claimant surviving spouse testified that she works as a 4th grade schoolteacher, and she earns $3,500/month before taxes. She has health insurance for herself through her job and that Dependent-Claimant surviving son and Dependent-Claimant surviving daughter are covered for health insurance by Colorado Health Plan for Children Medicare/Medicaid. She owns her own home, and her mortgage payments were forgiven under a Tunnels to Towers Foundation Benefit award. She has a car payment of $460/month.

14. In addition to the one-time $255 award in SSS Benefits, Dependent-Claimant surviving spouse received $135,000 in widow's/survivor benefits from Provident Insurance, $75,000 from a life insurance policy through her work on Decedent's death, and $250,000 from American Income Life Insurance through Decedent's work.

15. Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter did not testify at the hearing.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

1. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).
2. Section 8-42-121, C.R.S,. 2021, provides in pertinent part that death benefits "shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable."
3. Respondents seek an order affirming the current allocation of death benefits being paid to Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter, at equal amounts of 1/3 each, to try to help protect the dependent children's workers' compensation benefits for their future needs.
4. As found, based on a review of the evidence and the statements and testimony of Dependent-Claimant surviving spouse at hearing, the ALJ finds that an apportionment of the death benefits between Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter, in a 1/3 split before offsets are applied, is equitable and fair. Respondents seek an order affirming this allocation to ensure that the benefits owed to Dependent-Claimant children, who are currently 6 years old (Owen), and 2 years old (Keiley), are clearly identified, with a stated desire to have that those benefits placed in separate bank accounts, and protected, for each child's future needs. It is noted that Dependent-Claimant surviving spouse has a regular salary, she recently received $460,000 in widow's survivor benefits from three non-social security based sources, she had her mortgage assumed by a beneficent source, and she does not identify any other large current expenses beyond her monthly car payment.
5. An argument can be made to provide a greater allocation of the death benefits to the dependent children, to provide more money for them in the future for education and/or other personal expenses. Such an allocation would lessen the impact of the dependent children's SSS Benefit award offset against their death benefits. Supporting this argument is that the dependent children's entitlement to workers' compensation death benefits will end by no later than each child's 21st birthday, meaning each has a known limited window within which to receive such benefits, and as each child's entitlement to such benefits ends, the allocation of benefits will be modified (each time increasing Dependent-Claimant surviving spouse's allocation), ultimately with all workers' compensation death benefits allocated to Dependent-Claimant surviving spouse (so long as she is living, and does not remarry). Moreover,

as found, Dependent-Claimant surviving spouse has received $460,000 in other widow benefits, which when coupled with her salary, and when considering her limited expenses, theoretically supports a distribution more heavily in favor of the dependent children.

6. While the above argument could be made, the ALJ has no reason to believe Dependent-Claimant surviving spouse does not have her children's best interests in mind, or reason to believe she will not protect her children's workers' compensation benefits to the greatest extent possible for their future. As such, it is the ALJ's determination that the fairest and most equitable distribution of workers' compensation death benefits continues to be an equal division of those benefits of 1/3 to each Dependent-Claimant before application of offsets. This is the allocation currently in place, and this is the allocation the Dependent-Claimant surviving spouse indicated she would like to have continued. Given the above, the ALJ finds and concludes that an equal allocation of death benefits among the three identified Dependent-Claimants if fair and equitable.

7. Section 8-42-114, C.R.S., (2021), states that "In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits." (Emphasis added)

8. By virtue of 8-42-114, C.R.S. (2021), Respondents are entitled to take a SSS Benefit offset against death benefits paid to each Dependent-Claimant. Dependent-Claimant surviving spouse does not contest Respondents' entitlement to SSS Benefit offsets, and there is no known factual or legal basis to deny Respondents' request to take SSS Benefit offsets.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall continue to apportion workers' compensation death benefits with 1/3 of the benefits being paid to be allocated to Dependent-Claimant surviving spouse, 1/3 being paid to be allocated to Dependent-Claimant surviving son, and 1/3 being paid to be allocated to Dependent-Claimant surviving daughter.

2. Respondents are entitled to take SSS Benefit offsets against death benefits paid to Dependent-Claimants, to be calculated consistent with statute and caselaw.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues set for determination included:

- Did Claimant overcome the opinions of the physician who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") [Eric Shoemaker, D.O.] regarding permanent medical impairment by clear and convincing evidence?

- Did Respondents prove by a preponderance of the evidence that they are entitled to recover the overpayment?

FINDINGS OF FACT

1. On January 6, 2020, Claimant suffered an admitted industrial injury while working for Employer. Claimant testified she was sweeping the floor when she fell on her left side. She suffered injuries to her arm and low back.

2. Claimant testified she received treatment through the providers at Concentra, who were ATP-s for Claimant's treatment. Claimant was initially evaluated by Richard Shouse, PA-C at Concentra on January 7, 2020, who noted pain in Claimant's lower back, right knee and right arm, as well as the sacrum. Claimant was given work restrictions and x-rays were taken, which were negative for fracture and dislocation. In the follow-up evaluation on January 9, 2020, Lacey Esser, PA-C, who noted Claimant fell on her back and who documented physical findings that correlated with her symptoms.[1]

3. From January 2020 through September 2020, the Concentra records reflected consistent pain in Claimant's lower back, including loss of range of motion ("ROM"). Claimant received physical therapy ("PT"), as well as chiropractic treatment.[2] The ALJ found these records were evidence of Claimant's continued pain complaints, as well as objective findings on examination that were documented by her ATP-s .

4. Claimant was referred to John Sacha, M.D. on or about September 15, 2020. Claimant reported persistent pain in her low back. Dr. Sacha' report noted the MRI of the lumbar spine showed mild disc bulging and facet spondylolysis, with borderline foraminal narrowing from L3 to S1. Dr. Sacha recommended injections and the ALJ inferred that Claimant's low back symptoms were the basis for this treatment recommendation.

[1] These records were summarized in Dr. Shoemaker's DIME report. [Exhibits 4 and D].

[2] *Id.*

5. On October 30, 2020, Dr. Sacha administered a staged L5-S1 intra-laminar epidural injection, staged left L3-4 intra-articular facet injection, staged left L4-5 intra-articular facet injection and staged left L5-S1 intra-articular facet injection; all of which were done with fluoroscopic guidance and conscious sedation. Claimant's diagnoses by Dr. Sacha were: lumbosacral facet syndrome and lumbosacral radiculopathy.

6. Claimant returned to Dr. Sacha on November 20, 2020. He noted she did not have short term relief with either the lumbar epidural or lumbar facet injections. On examination, Dr. Sacha noted Claimant had lumbar paraspinal spasm, pain with forward flexion, extension and extension rotation. She had a negative straight leg raise and equivocal neural tension test bilaterally. Dr. Sacha's impression was: lumbosacral radiculopathy. Dr. Sacha concluded Claimant was at MMI.

7. Dr. Sacha noted that, although he did not know what Claimant's pain generator was or where the symptoms were from, she had been consistent with complaints and he recommended impairment rating. Dr. Sacha concluded Claimant sustained a 5% whole person impairment, using the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition revised. Claimant had 0% permanent impairment based upon loss of range of motion ("ROM"). Dr. Sacha completed the ROM testing and the sheets were attached to his report. Dr. Sacha's rationale for assigning an impairment rating was persuasive to the ALJ.

8. The medical records admitted at hearing documented more than six months of pain in the lumbar spine for which Claimant received treatment. At the time Dr. Sacha concluded Claimant was an MMI, Claimant had received treatment for her low back pain for more than ten (10) months.

9. The ALJ took judicial notice of portions of the *AMA Guides* governing the evaluation of permanent impairment-lumbar spine, pp.78-81.[3]

10. On November 23, 2020, Claimant returned to Concentra and was evaluated by Jonathan Claassen, D.O. At the time, Claimant reported he was having difficulty sleeping due to discomfort and pain, as well as a tingling sensation in the left leg. Dr. Classen's report documented Claimant had received physical therapy, chiropractic, dry needling and medication management for her injuries. Dr. Classsen did not make specific findings with regard to Claimant's lumbar spine, but concurred she was at MMI. His assessment was: sacral contusion and lumbar contusion. Dr. Classen completed a WCM 164 at this time.

11. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on December 21, 2020. The FAL admitted for the 5% medical impairment rating issued by Dr. Sacha. The total PPD award to which Claimant was entitled was $12,329.58.

[3] C.R.E. 201.

12. MR[Redacted] testified on behalf of Respondents. She is employed by Respondent-Insurer. Ms. MR[Redacted] testified that the previous claims handler before was the one who filed the December 21, 2020 FAL.

13. Ms. MR[Redacted] testified she was familiar with the case, including the pleadings that were filed. She confirmed that the PPD benefits admitted to in the December 21, 2020 FAL were paid out completely. The PPD paid out totaled $12,236.10. Ms. MR[Redacted] testified there were three checks issued. Two were sent to Claimant's attorney in the respective amounts of $663.42 and $9,906.52 and then one check was mailed directly to Claimant in the amount of $1,666.16.

14. An attorney disbursement sheet, dated January 24, 2021, was admitted into evidence. That sheet documented a gross recovery of $10,569.94, less attorney's fees in the amount of $2,465.91; with a net to Claimant of $8,104.03. $1,175.00 in costs were expended, leaving a net paid to Claimant of $6,929.03. Copies of checks in those amounts were also admitted into evidence.[4]

15. Claimant testified that she received and cashed the check mailed to her by her attorneys.

16. On May 4, 2021, Dr. Shoemaker performed the DOWC IME. At that time, Claimant reported pain in her low back on the left side. She stated her pain got worse with sitting and decreased with changes in position. She described her pain as 7/10. Dr. Shoemaker stated Claimant had no pain behaviors during their discussion, but had dramatic displays of pain during very superficial palpation on the left lumbar paraspinals from L2 to the sacrum.

17. Dr. Shoemaker described Claimant's lumbar ROM as full and she was able to touch her toes, though she described pain. There was no evidence that Dr. Shoemaker tested Claimant's lumbar ROM with dual inclinometers. No ROM worksheets were attached to the report. Dr. Shoemaker said Claimant had significant reproduction of pain with simulated maneuvers including axial roll and axial load.

18. Dr. Shoemaker concluded Claimant did not qualify for an impairment rating. Dr. Shoemaker said she did not meet Desk Aid 11 criteria for the use of Table 53, as there was no objective pathology. He respectfully disagreed with Dr. Sacha that disc bulging was present and with Dr. Cox that facet arthropathy or effusion was present.

19. Dr. Shoemaker opined that Claimant's pain was far too superior to be considered emanating from the sacroiliac joint. Dr. Shoemaker stated Claimant's physical examination demonstrated four out of five signs of symptom magnification which suggested a non-physiologic/non-organic component to her symptoms. He concluded Claimant's subjective complaints did not correlate with objective findings. Dr. Shoemaker said Claimant had no permanent impairment.

[4] Exhibit F.

20. Claimant testified she was not sure whether an interpreter was present during the evaluation with Dr. Shoemaker.

21. The ALJ determined a Spanish interpreter was present for the DIME appointment.[5]

22. Dr. Shoemaker testified as an expert medical doctor with board certifications in Physical Medicine and Rehabilitation, Sports Medicine and Pain Medicine. He is Level II accredited pursuant to the W.C.R.P. Dr. Shoemaker testified he received extensive training in reviewing MRI-s of the lumbar spine. During fellowship, he trained at Washington University in the Mallinckrodt School-Institute of Radiology in the Department of Radiology reviewing spine MRI-s. He reviewed the MRI and determined that the disc heights were well-preserved. He opined the canal lateral recesses and foramen widely patent and the facet joints were unremarkable with no degenerative changes. No effusion was present and Dr. Shoemaker described the lumbar MRI to be unremarkable.[6]

23. Dr. Shoemaker testified he relied on the Desk Aid 11 when deciding whether Claimant qualified for an impairment under Table 53. He said that in order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualified for a numerical impairment rating of greater than zero under Table 53. Dr. Shoemaker opined Table 53, II B did not apply in because it referred to the presence of an intervertebral disc or other soft tissue lesions. He said Claimant had no identified objective findings to support the presence of intervertebral disc or other soft tissue lesion. Dr. Shoemaker said in this circumstance, Claimant didn't consider 6 months of medically documented pain and rigidity unless you qualify for an impairment under II. He described Section B as "a subset" to II. [7]

24. Dr. Shoemaker testified Claimant demonstrated four out of five signs of symptom magnification during the DIME which suggested a nonphysiologic, nonorganic component to her symptoms. He noted she also demonstrated 2 out of the 5 Waddell's signs during Dr. Sacha's evaluation. Dr. Shoemaker stated Claimant's subjective complaints of significant pain through a large area of her spine and the reproduction of pain with certain maneuvers did not correlate with what was seen structurally in her spine on advanced imaging and response to injections. Dr. Shoemaker did not believe there were objective findings to support her subjective complaints. The ALJ concluded this opinion concerning Waddell's signs was too limiting when evaluating impairment.

25. Dr. Sacha authored a letter, dated November 11, 2021, in which he reviewed the report issued by the DIME physician. Dr. Sacha opined that Dr. Shoemaker

[5] Exhibit G.

[6] Exhibit E, p. 23: 3-25.

[7] Exhibit E, pp. 37:18-38:18.

did not follow the Division of Workers‘ Compensation Level II accreditation course in making his determination of no permanent impairment. Dr. Sacha stated Claimant clearly qualified for an impairment, as “she had a specific mechanism of injury that fit ongoing symptoms, had consistency of complaints in the low back for greater than six months and although she was very somatic in nature, she qualified for the 5% whole person impairment for the lumbar spine”.[8] Dr. Sacha concluded Dr. Shoemaker did not follow the Level II accreditation course or the *AMA Guides* when finding Claimant sustained a 0% impairment. The ALJ inferred that Dr. Sacha concluded Claimant was entitled to a medical impairment rating, as she met the criteria for such a rating, despite the fact she was somatic.

26. Dr. Sacha noted Claimant had specific complaints, consistency of complaints, mechanism of injury and objective findings on exam. The ALJ concluded the presence of exaggerated physical complaints did not obviate Claimant’s entitlement to a medical impairment rating in this case. Dr. Sacha’s opinion supported this conclusion and was persuasive to the ALJ.

27. The ALJ found Dr. Shoemaker’s report failed to address the question of whether Claimant would be entitled to Table 53 impairment even with a normal MRI. Dr. Shoemaker’s testimony indicated his opinion that Claimant would not qualify for an impairment with an unremarkable MRI, despite the presence of six months of pain/rigidity and the treatment related to same. Dr. Shoemaker failed to confirm Claimant’s lumbar ROM by testing with a dual inclinometer. These were errors.

28. Claimant overcame Dr. Shoemaker’s opinions by clear and convincing evidence.

29. The ALJ found Dr. Sacha’s calculation of Claimant’s impairment was correct.

30. Since Respondents paid PPD benefits based upon Dr. Sacha’s rating, no overpayment exists.

31. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers’ Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted

[8] Exhibit 1, p. 5.

neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). In the case at bench, there was conflicting medical evidence, including by the physicians who evaluated Claimant for permanency.

Overcoming the DIME

The question of whether Claimant overcame Dr. Shoemaker's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician*. Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). In the case at bar, the ALJ determined Claimant met the elevated burden of proof to overcome the DIME physician's' opinion on impairment.

As determined in Findings of Fact 1-2, Claimant suffered an injury at work on January 6, 2020 and received medical treatment provided by authorized providers at Concentra. The medical records from these providers documented the presence of objective findings, including spasm. (Finding of Fact 3). Claimant received conservative treatment and was referred to Dr. Sacha, as she had continued symptoms in the low back. *Id.* Dr. Sacha administered injections, which did not ameliorate Claimant's low back pain. then concluded Claimant was at MMI. Dr. Sacha assigned a medical impairment rating, pursuant to Table 53 II B. (Findings of Fact 7, 25-26).

The *AMA Guides* provide the basis for calculation impairment in the lumbar spine. More particularly, the *AMA Guides* provide in pertinent part:

"Evaluation of impairment of the spine involves both diagnosis-related factors, such as structural abnormalities, and musculoskeletal or neurologic factors that require physiologic measurements.[9]

[9] *AMA Guides*, page 78.

Table 53 II applied to Claimant's injury in the case at bench and provides:

"Intervertebral discs or other soft tissue lesions:

…

B. Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests".

The ALJ reasoned that a plain reading of the aforementioned section of the *AMA Guides* provided for the assignment of a medical impairment rating in this case, even when Waddell's signs were present and there was a question as to the presence of degenerative changes in Claimant's lumbar spine. The medical evidence reflected the fact that Claimant had medically documented injury, along with at least ten months of medically documented pain and rigidity. (Finding of Fact 8). As found, Dr. Sacha cited this specific provision of the *AMA Guides* when concluding Claimant was entitled to a 5% medical impairment. (Finding of Fact 25). In this regard, the ALJ concluded that Dr. Sacha considered the question of Claimant's symptom exaggeration when he performed ROM testing and applied the validity criteria. *Id.* Dr. Sacha's reasoning that Claimant was entitled to a Table 53 medical impairment rating was credible to the ALJ. (Finding of Fact 26).

The ALJ determined Dr. Shoemaker made factual errors in assessing impairment, starting with the failure to address the objective findings in Claimant's lumbar spine which were documented in the medical records. (Finding of Fact 27). Dr. Shoemaker also did not perform ROM testing with dual inclinometers. *Id.* The ALJ also viewed Dr. Shoemaker's construction of the pain and rigidity requirement of Table 53 to be too circumscribed, in that he concluded Claimant's had no permanent impairment because of the presence of Waddell's signs and what he described as nonorganic pain complaints. (Finding of Fact 24). Dr. Shoemaker, while disagreeing with Dr. Sacha and Dr. Cox regarding the MRI, did not believe Claimant would qualify for a Table 53 impairment, despite meeting the plain language of Table 53 II B. The AJ determined Dr. Shoemaker's opinions were erroneous and that Claimant qualified for a permanent medical impairment (and PPD benefits) in these circumstances.

The ALJ considered Respondents' argument that Dr. Sacha and Dr. Shoemaker were simply expressing different opinions and the mere difference of opinion did not constitute unmistakable evidence that the DIME was wrong. [citing *Vega-Arreola v. Buxman Dairy & Farms*, W.C. 4-889-919, February 25, 2014]. The ALJ found Dr. Shoemaker made errors with regard to his conclusions about impairment and accordingly his opinions were overcome by clear and convincing evidence.

Overpayment

In light of the ALJ's findings with regard to permanency, no overpayment exists. The remaining issue with regard to overpayment, specifically Respondents' request that Claimant repay the overpayment is moot.

ORDER

It is therefore ordered:

1. Claimant met her burden to overcome the DIME physician's findings with regard to her medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 5% whole person impairment of her lumbar spine as a result of her industrial injury.

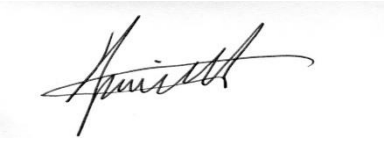
3. Respondents shall pay PPD benefits based upon 5% medical impairment rating. Respondents are entitled to a credit for PPD benefits previously paid.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-136-634-002

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that his upper extremity scheduled rating for his arm at the shoulder should be converted to a whole person rating?

- Are Respondents entitled to reimbursement of the cancellation fee incurred as a result of Claimant's last-minute cancellation of his Independent Medical Examination ("IME")?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on June 8, 2022. Respondents requested a full Order on June 15, 202, which was received on June 16, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant, who was 20 years old on the date of injury (D.O.B. April 15, 1999) worked as an HVAC technician for Respondent-Employer.

2. On April 13, 2020, Claimant suffered an admitted industrial injury when he fell while he was working 15 to 20 feet in the air at a job site. Claimant testified the work space was dark and he fell through the ceiling tile. Claimant fell on his left side, hurting his left knee and shoulder. He said he felt his left shoulder dislocate, but it went back into place.

3. Claimant was a minor when he was injured at work on April 13, 2020.

4. Claimant was taken by ambulance by the Castle Rock Fire and Rescue Department to Castle Rock Adventist Hospital. The records reflected Claimant complained of left knee and left shoulder pain to the EMS personnel.

5. At the Castle Rock Adventist Hospital Emergency Department, Claimant underwent a head and cervical CT scan. X-rays were also taken of the left knee, tibia/fibula and left shoulder. The CT scans were negative for an intracranial hemorrhage or major abdominal pelvic visceral injury, hemoperitoneum, or acute fracture. Claimant was evaluated by Derrick Morford, D.O., whose clinical impression was fall, initial encounter; acute pain of left knee.

6. On April 14, 2020, Claimant was evaluated by Troy Manchester, M.D. at Concentra and was complaining of left knee, as well as left shoulder pain. On examination, Claimant's left knee and tenderness diffusely over the anterior knee and mild flexion caused medial pain. Claimant's cervical and thoracic spine had no tenderness and full range of motion ("ROM").

7. Dr. Manchester's assessment was: fall from height of greater than 3 feet; contusion of left shoulder and left knee; abrasion lower left leg, initial encounter; other internal derangement of left knee; shoulder dislocation, left, initial encounter. Claimant was prescribed hydrocodone, ibuprofen and an MRI was ordered for the left knee.

8. On April 15, 2020, Claimant underwent an MRI of the right knee and the films were read by Clinton Anderson, M.D. Dr. Anderson's impression was: grade 1 MCL injury; small joint effusion; small popliteal cyst.

9. Claimant had telemed appointments with Dr. Manchester on April 16 and 30, 2020, at which time he reported continued pain in both the left knee and left shoulder. A course of physical therapy ("PT") was ordered, which Claimant received at Concentra.

10. On April 29, 2020, Claimant underwent an MRI of the left shoulder and the films were read by Robert Leibold, M.D. Dr. Leibold's impression was: non-displaced tear of the inferior glenoid labrum extending from approximately the 5:00 to 9:00 position, with posterior decentering of the humeral head; recommend clinical correlation with posterior instability; intact rotator cuff.

11. Mark Fallinger, M.D. evaluated Claimant for an orthopedic consult on April 30, 2020. Dr. Failinger's impression was: left shoulder status post apparent dislocation event with persistent voluntary instability and increased posterior translation on exam. Dr. Failinger referred Claimant to Carry Motz, M.D for shoulder surgery.

12. On May 19, 2020, Claimant was evaluated at Concentra by Dr. Motz, M.D., who discussed the possibility of performing a left shoulder arthroscopy with posterior labral repair and capsulorrhaphy. Claimant requested the surgery.

13. On July 6, 2020, Claimant underwent surgery on his left shoulder, which was performed by Dr. Motz. Dr. Motz performed a left shoulder arthroscopy, with posterior labral repair and capsulorrhaphy, using ConMed Y-Knot flex 1.8 mm. double–loaded anchors times two. The preoperative diagnosis was: left shoulder posterior instability, with the post-operative diagnosis: left shoulder grade II posterior instability. The operative report noted the posterior labrum had a tear, which was non-displaced; also was frayed and worn.

14. Dr. Motz evaluated Claimant on July 14, 2020, at which time Claimant reported continued symptoms. Claimant returned to Dr. Manchester for an evaluation on August 6, 2020 and August 20, 2020. At the August 6th appointment, Dr. Manchester noted pain in Claimant's axilla (i.e., armpit) upon physical exam. At the August 20

appointment, Dr. Manchester noted that Claimant reported persistent neck and mid-back pain.[1] It is also noted in the Review of Systems that Claimant was experiencing neck pain and pain in his axilla upon physical exam.

15. Claimant received underwent PT after the surgery with Courtney Spivey, PT beginning on July 24, 2020. Overall, he attended 12 post-operative PT visits. At all 12 sessions, Claimant complained of pain in his left scapula and underwent scapula therapy. At nine of the sessions, beginning on August 5, 2020, Claimant complained of left upper trapezius pain and underwent therapy to his trapezius. The ALJ found these records reflected evidence of post-surgery pain in anatomic structures beyond the shoulder joint.

16. Claimant was evaluated on April 13, 2021 by Brian Beatty, D.O. Dr. Beatty noted Claimant underwent surgery on July 4, 2020 and received PT on both his knee and shoulder thereafter. He also experienced some neck and upper back pain. Claimant had worked modified duty with limitations of 10 pounds lifting and no climbing ladders and gradually transitioned to full duty.

17. Dr. Beatty, concluded Claimant was at MMI on April 13, 2021 and assigned a 7% scheduled impairment, which converted to a 4% whole person impairment. The impairment rating was based upon loss of ROM at the shoulder.

18. On June 3, 2021, a Final Admission of Liability ("FAL") was filed on behalf of Respondents, admitting for Dr. Beatty's 7% scheduled impairment for the right shoulder. The FAL reflected an overpayment of TTD in the amount of $1,530.95.

19. Respondents requested an IME with Robert Messenbaugh, M.D., which was scheduled for September 29, 2020. Claimant did not attend the IME.[2]

20. Claimant testified that he missed the IME because due to the death of his best friend.

21. There was no evidence in the record that Claimant refused to attend the IME or that his failure to attend the IME was willful.

22. There was no Court Order compelling Claimant's attendance at the IME with Dr. Messenbaugh.

23. Claimant's IME with Dr. Messenbaugh was rescheduled and took place on November 16, 2021.

[1] Exhibit 5, pp. 61-63.

[2] The written request for the IME was not admitted into evidence.

24. Dr. Messenbaugh concluded that he agreed with Dr. Beatty's opinion that Claimant had a 7% upper extremity impairment rating. Dr. Messenbaugh also stated there was "no justification to convert [Claimant's] 7% upper extremity impairment rating into a whole person impairment rating based on Mr. Oline's cervical spine complaints". [3] He said Dr. Beatty did not mention any cause of Claimant's neck and back discomfort and did not indicate that these complaints were related to Claimant's left shoulder injury. Dr. Messenbaugh opined that if Dr. Beatty found that Claimant had impairment issues related to his cervical spine, Dr. Beatty would have provided Claimant with a cervical impairment rating in addition to the upper extremity impairment rating. Dr. Messenbaugh testified as an expert at hearing and his testimony was consistent with his report

25. Dr. Messenbaugh testified as an expert at hearing. He stated that he did not see any evidence of muscular instability when he evaluated Claimant.[4] Dr. Messenbaugh emphasized the critical importance of the lack of any reports of the type of pain that Claimant suddenly complained of in his hearing testimony and to Dr. Beatty on April 13, 2021. Dr. Messenbaugh said that he thought "if someone who has a workers' compensation injury such as this, were to have lingering issues that were of a significant concern, they would have contacted their primary treating physician and would have sought evaluation and treatment, which . . . he did not do". Dr. Messenbaugh opined that there was no evidence or objective findings that Claimant's site of functional impairment extends beyond the shoulder.[5]

26. Claimant testified that he still has pain in his left shoulder, trapezius, scapula and neck. In his job, Claimant has to frequently reach overhead, which causes discomfort. He testified that when he is doing overhead work, he experienced pain in his left shoulder that involves "burning and fatigue" in his "back muscle by the shoulder blade" Claimant stated he has changed his body mechanics in order to protect his left shoulder. The ALJ credited Claimant's testimony regarding his residual complaints and this was evidence of impairment beyond the shoulder joint.

27. The ALJ finds Claimant's injury affected structures beyond the glenohumeral joint and had a functional impairment beyond the shoulder.

28. The ALJ concluded Claimant sustained a permanent impairment beyond the shoulder joint and is entitled to a whole person impairment.

29. Evidence and inferences inconsistent with these findings were not persuasive.

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[3] Exhibit H.

[4] Hearing Transcript ("Hrg. Tr.") p. 42:16-19.

[5] Hrg. Tr. p. 42:20-24.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Conversion of Impairment Rating

As determined in Findings of Fact 1-8, Claimant was injured at work when he fell through a ceiling. Claimant suffered an injury to his left shoulder and knee, requiring emergency treatment, as well as treatment through his ATP-s at Concentra. *Id*. As found, Claimant's ATP's concluded he required a left shoulder arthroscopy, with posterior labral repair and surgery was performed on July 6, 2020. (Findings of Fact 11–12).

After surgery, Claimant underwent PT and the ALJ found he reported left trapezius and scapular pain. (Finding of Fact 15). As found, Dr. Beatty, noted neck and upper back pain in the evaluation conducted on April 13, 2021. (Finding of Fact 16). Dr. Beatty placed Claimant at MMI that day, assigning a 7% scheduled impairment, which converted to a 4% whole person impairment. (Finding of Fact 17). Respondents admitted for Dr. Beatty's medical impairment rating, filing an FAL on June 3, 2021. (Finding of Fact 18).

On the question of whether Claimant was entitled to a whole person impairment rating, the ALJ noted the inquiry starts with § 8-42-107(1)(a), C.R.S. The statute provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)". When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

The issue was whether Claimant sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). To make this determination, the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id.* Pain and

discomfort that limit Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

The ALJ concluded Claimant met his burden of proof for conversion of the impairment rating and his rationale was two-fold. First, in the medical records admitted at hearing, Claimant described pain in his right upper extremity following his surgery, which extended beyond the shoulder joint, including the scapula and trapezius. As found, Claimant also reported pain in the mid back, neck and axilla following the surgery. (Finding of Fact 14). The involvement of these structures beyond the glenohumeral joint was borne out in the medical records, including the post-surgery PT records. (Finding of Fact 15). Second, the ALJ found Claimant also had a loss of function in that he had to self-limit his activities at work. (Finding of Fact 26). Claimant's testimony persuaded the ALJ that Claimant experienced pain and discomfort which constituted functional impairment beyond the shoulder joint itself. (Finding of Fact 27). Therefore, Claimant's testimony regarding the injury to his shoulder and its sequelae, provided additional factual support for the ALJ's determination that he was entitled to a whole person rating.

The ALJ considered Respondents' argument that Claimant's impairment was limited to the scheduled impairment rating. Respondents argued Claimant's impairment involve the only the glenohumeral joint and did not extend beyond that. Respondents pointed to the fact Claimant did not have complaints of neck pain immediately after his fall and relied upon Dr. Messenbaugh's expert testimony in support of this argument, as well. Respondents also cited *Newton v. Broadcom Inc.*, W.C. No. 5-095-589-002 (July 8, 2021); *Lovett v. Big Lots*, WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (Dec. 28, 2006).

The ALJ credited Claimant's testimony, as well as the references in the medical records which established Claimant's impairment was beyond the glenohumeral joint. The ALJ also noted that the result in *Newton v. Broadcom Inc., supra,* where the Claimant also had pain in the scapula and trapezius supports the conclusion here.

Based upon the evidence admitted at hearing, the ALJ concluded Claimant met his burden of proof to show an entitlement to PPD benefits for the whole person medical impairment rating issued by Dr. Beatty. (Finding of Fact 28). Respondents are therefore liable to pay said benefits.

Payout Rate

"Where an employee is a minor and the disability of such minor is permanent compensation to said minor shall be paid at the maximum rate of compensation payable under said articles at the time of the determination of such permanency". § 8-42-102(4), C.R.S.; See also *Casa Bonita v. ICAO,* 677 P.2d 344 (Colo. App. 1983). "At the time of injury" refers to the date of the employee's accident. § 8-42-102(5). A minor is an individual who has not attained the age of twenty-one. The maximum wage rate on April 13, 2021, the date of Claimant reached MMI, is $1,074.22. § 8-42-105, C.R.S.

As found, Claimant was a minor on the date of injury. (Finding of Fact 3). Accordingly, Claimant has proven by the preponderance of the evidence that the maximum pay rate at the time of MMI ($1,074.22) must be used when calculating the value of Claimant's whole person impairment. The Order will require Respondents to pay PPD benefits at pursuant to § 8-42-102(4), C.R.S.

Sanctions

Respondents argued that because W.C.R.P. Rule 8-8, required Claimant to submit for an independent medical examination, pursuant to § 8-43-404, C.R.S., they were entitled to sanctions for Claimant's failure to appear on September 29, 2020. Respondents averred that because Claimant failed to attend the examination, Employer can recover the costs incurred for that cancellation. Respondents also argued that while the statute was silent on the issue of what costs shall be reimbursed, C.R.C.P. 37 established that the Court can impose sanctions upon a party who fails to cooperate in discovery, including reasonable expenses caused by the failure of an individual to attend an Independent Medical Examination. C.R.C.P. 37(b)(2)(E).

§ 8-43-404(3), C.R.S. provides in pertinent part:

> "So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division appointed pursuant to section 8-43-208(1) or in any way obstructs the same, all right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred".

This section provides a remedy for Claimant's refusal to attend an evaluation. In the case at bar, there was no evidence presented that Claimant refused to attend the IME or that the failure to attend the appointment with Dr. Messenbaugh was willful. (Finding of Fact 21).

The ALJ concluded that Respondents did not establish a factual basis for the request that Claimant reimburse them for the cancellation fee for the appointment with Dr. Messenbaugh. As found, there was no Court order compelling Claimant's attendance

at this appointment. (Finding of Fact 22). The ALJ determined there was insufficient evidence to show Claimant's failure to attend the appointment was willful, warranting sanctions under CRCP 37. Specifically, CRCP 37(b)(2)(E) does not provide for the imposition of sanctions under these circumstances where there was no Court Order.

ORDER

It is therefore ordered:

1. Respondents shall pay PPD benefits based upon the 4% whole person rating. The benefits shall be paid pursuant to § 8-42-102(4), C.R.S.

2. Respondents shall pay 8% interest on all benefits not paid when due and owing.

3. Respondents' request that Claimant reimburse them for the cost of the IME appointment cancellation on September 29, 2020 is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 7, 2022

STATE OF COLORADO

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $505.03.

FINDINGS OF FACT

1. Employer is a national moving and storage company based in Carrolton, Texas with an office located in Colorado Springs, Colorado. At the outset of employment, all new employees receive Employer's *Employee Safety Commitment*. New employees also review Employer's *Policies and Safety Manual*. The *Policies and Safety Manual* details Employer's safety philosophy, rules and procedures.

2. Employer's *Policies and Safety Manual* specifically addresses drivers. The *Manual* outlines "Driving and Stopping Rules," including avoiding driving too fast for highway conditions, only driving at speeds that allow the driver to maintain control of the vehicle at all times and under all conditions, and always avoiding excessive and unnecessary lane changes. The section further mandates that "responsible, safe and efficient and courteous drivers not only follow [Employer's] rules in conjunction with federal, state, and city driving and stopping rules, they also demonstrate their professionalism as drivers," including utilizing defensive driving behaviors, such as "seeing and being seen," having "heightened awareness," and "managing speed and space."

3. Claimant applied for employment with Employer on or about April 2, 2021. On April 2, 2021 Claimant received, reviewed and acknowledged his understanding of Employer's *Employee Safety Commitment* and *Policies and Safety Manual*. On April 19, 2021 Claimant began working as a moving "helper." In his capacity as a moving helper Claimant rode as a passenger to various job locations where he loaded and/or unloaded trucks. In late June of 2021 Claimant applied for a driver position with Employer. He had 8-10 years of prior driving experience and training in driving military vehicles of 31 feet or less in length.

4. Employer has additional safety protocols that focus specifically on drivers. All prospective new drivers must separately apply for a driver position. Employer considers each applicant's prior driving experience and training. Each driver applicant

reviews and acknowledges Employer's *Company Vehicle Policy*. Furthermore, all applicants receive and review *Entry Level Training Guide for Drivers*, which provides that it is "Drivers responsibility to comply with safety regulations." The *Guide* provides that each driver is responsible for the safe operation of Employer's vehicles and must operate them in accordance with the laws, ordinances, and regulations in the appropriate jurisdiction and with the Federal Motor Carrier Safety Administration. Finally, each driver applicant must pass a written test and an "on road" driving examination focused on Employer's driver-based safety rules. Notably, during the road portion, each driver is tested on safe passing procedures, including allowing sufficient space for passing and only passing in safe locations.

5. Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

6. Employer's National Safety Director RB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules after a violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation, from coaching, to escalating suspensions, to removal from a driver position.

7. In late July 2021, Employer assigned Claimant a moving job that required transport of a quarter-full size load of small household items and boxes from Crestone, Colorado to El Prado, New Mexico. The load was small compared to most jobs and the largest item was a computer desk.

8. Operations Manager of Employer's Colorado Springs office MC[Redacted] explained that Employer assigned Claimant its smallest truck for the job. The vehicle was a 2020 Isuzu Box Truck with limited horsepower and a governor that regulated its top speed to 65 mph. Mr. MC[Redacted] noted that Claimant drove the truck on 60% of his jobs since becoming a driver, it was his primary truck and he was very familiar with the truck's capabilities and limitations.

9. On July 21, 2021 Claimant and his helper for the job, MB[Redacted], loaded the box truck in Crestone, Colorado. They then drove to Alamosa, Colorado and spent the night. The next morning, Mr. MC[Redacted], who was monitoring their progress on a tele-track system, noticed they were late getting started. Mr. MC[Redacted] called and asked them to get on the road. Claimant and Mr. MB[Redacted] left Alamosa at 8:34 a.m. mountain standard time and arrived in El Prado around 11:58 a.m. They began downloading the truck at 12:16 p.m. Claimant and Mr. MB[Redacted] started driving back towards Colorado Springs at 1:59 p.m.

10. On the drive to Colorado Springs, Claimant made a scheduled stop for gas, and two unscheduled stops for snacks. During the second stop, Mr. MC[Redacted] called Claimant, inquired why he stopped again, and told him to get back on the road. Mr.

MC[Redacted] did not tell Claimant to speed or otherwise engage in unsafe driving. He simply directed Claimant to cease taking unscheduled stops.

11. Mr. MC[Redacted] continued to monitor Claimant's progress. After again noticing the box truck had stopped, he called Claimant. A state patrol officer picked up Claimant's phone and told Mr. MC[Redacted] there had been a motor vehicle accident. Mr. MC[Redacted] then drove to the crash site where he personally observed the area of the accident.

12. Claimant's route back to Colorado Springs proceeded north to Alamosa, where he turned east on US 160 towards I-25. The route traverses La Veta Pass and is one lane in both directions in certain areas. As claimant approached Fort Garland, he found himself directly behind a semi-truck that was behind a pick-up truck pulling a long livestock trailer. Claimant entered the westbound lane, while heading east, with the intent to pass both of the slower vehicles. His truck had not even cleared the semi-truck when he realized a car was coming directly at him from the opposite direction. He swerved to avoid a collision, drove his truck off the highway, and ultimately crashed into a ditch. Claimant suffered catastrophic injuries to his spine and is paralyzed from the waist down as a result of the accident.

13. The parties stipulated at the hearing that Claimant was in a legal passing zone at the time of the accident. Moreover, he was not exceeding the speed limit when the accident occurred on July 22, 2021.

14. A State of Colorado Traffic Crash Report completed by Corporal Roybal on August 1, 2021 described the crash as follows: "[v]ehicle #1 was eastbound Colorado 160 237' west of MP 271. Vehicle #1 attempted to pass, proceeded into the westbound lane which was occupied by a westbound vehicle. Vehicle #1 went off the left side of the roadway, collided with a ditch and continued eastbound." Corporal Roybal's accident diagram illustrated that Claimant was coming around a bend while attempting to pass. However, Corporal Roybal mistakenly believed Claimant was trying to pass a single smaller vehicle before the accident. The accident occurred at 4:10 p.m. during daylight hours. Claimant was ticketed for careless driving causing bodily injury.

15. On July 23, 2021 Employer completed a First Report of Injury. On August 5, 2021 Insurer filed a General Admission of Liability (GAL). Respondents took a 50% safety rule offset under §8-42-112, C.R.S.

16. The box truck Claimant drove on the date of his accident was equipped with a Netradyne camera system consisting of a total of four cameras. The system included a forward facing camera. After the accident, the Netradyne system was sent to the manufacturer to obtain videos of the accident. In January 2022, MP4 video files provided clips from several minutes before and during the accident. The videos begin with Claimant following four or five vehicles. Each of the vehicles is following a long semi-truck that is directly behind a pick-up truck pulling a long livestock trailer. The section of highway includes numerous curves and bends. The terrain on the sides of the highway is elevated,

with areas of foliage limiting visibility. Vehicles can be seen traveling in the opposite direction in the westbound lane prior to the accident.

17. As the video progresses, the four or five vehicles in front of Claimant's truck each find an opportunity to pass the semi and the pick-up truck pulling the livestock trailer. Claimant's box truck is then directly behind the two vehicles. The highway then curves to the left, and, because of the slightly elevated terrain and foliage on the west side of the road, visibility of westbound traffic is limited. At that moment, Claimant entered the westbound lane to attempt to pass both the semi-truck and the pick-up truck pulling the livestock trailer. However, while the box truck was still in the process of passing the semi, a westbound vehicle can be seen coming into view. Both Claimant's box truck and the oncoming vehicle swerve off the road to avoid a head on collision. Claimant's truck continues into a field and ultimately crashes into a ditch.

18. Respondents hired Adam Michener, M.S., P.E., ACTAR, to perform a forensic accident reconstruction evaluation and provide an expert opinion regarding the cause of the accident. Mr. Michener examined the truck, available records, and the video. In his report Mr. Michener noted the limitations of Claimant's vehicle. Specifically, the box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis Mr. Michener explained that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. Mr. Michener concluded that the July 21, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver. He maintained his opinions when he testified at the hearing in this matter.

19. Mr. TB[Redacted] testified that Claimant's attempt to pass under the circumstances violated several company safety policies, including avoiding unnecessary lane changes, failing to see and be seen, not engaging in defensive driving, not allowing sufficient space and time for passing, and failing to pass in a safe location. Furthermore, Mr. TB[Redacted] remarked that Claimant's decision to pass under the circumstances did not reflect the common sense required of all Employer drivers.

20. Employer's Colorado Spring's office assistant operations manager LO[Redacted] reviewed the video from the events preceding Claimant's accident. She explained that Claimant violated numerous safety rules in attempting to pass the vehicles. Ms. LO[Redacted] noted that Claimant was trying to pass on a curve but lacked the visual range to pass safely. She also remarked that Claimant violated Employer's safety rules because he did not have sufficient time and space for passing and was attempting to pass in an unsafe location.

21. Mr. MC[Redacted] testified that he drove to the accident location on July 22, 2022. He observed that the section of US 160 in which the accident occurred is winding, mountainous, contains foliage, and includes blind spots. Visibility is thus difficult. Mr. MC[Redacted] subsequently visited Claimant at the hospital in Denver and they

discussed the incident. During the conversation Claimant acknowledged his responsibility for the accident and did not blame other factors.

22. After the data from the box truck was converted to video in January 2022, Mr. MC[Redacted] reviewed the footage. Based upon his observations and considering the circumstances of the accident, he concluded that Claimant violated numerous Employer safety rules. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

23. MB[Redacted] testified that he worked for Employer as a helper for 3-4 months in 2021. He was Claimant's co-worker and passenger in the truck on the date of the accident. Mr. MB[Redacted] remarked that as they drove up La Veta Pass there was "a semi" in front of them. Clamant attempted to pass the vehicle, but neither he nor Claimant saw the car coming from the opposite direction. Claimant then swerved off the road and crashed. Mr. MB[Redacted] summarized that the accident occurred because "neither of us saw the car coming." He acknowledged that the section of US 160 where the incident occurred had curves with foliage on the sides of the road. Mr. MB[Redacted] also remarked that, before Claimant attempted the pass, he inquired whether he should attempt the maneuver. From Mr. MB[Redacted]'s vantage point in the passenger seat, he could not see the truck pulling the long livestock trailer or the vehicle traveling in the opposite direction around the curve.

24. Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. He testified he did not believe he was driving recklessly or that his pass attempt was unsafe. Nevertheless, Claimant admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. In fact, he could not see the car coming in the opposite direction because of the bend and foliage. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant attempted the pass because the vehicles were going slower than normal. He commented the cause of the accident was human error, "which is on me." Finally, although Mr. MC[Redacted] told him to get going while he was stopped for a break, he was not directed to forgo safety or drive recklessly.

25. Respondents have proven that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty

percent. Initially, Claimant asserts his accident was not willful because he did not intend to make an unsafe pass and break a safety rule. He contends the accident occurred due to human error because he simply could not see the vehicle coming in the opposite direction. However, he attempted to pass both a semi-trailer truck and a pickup truck pulling a long stock trailer around a curve. Importantly, Claimant was driving a box truck with limited horsepower and a speed governor. Based on the obvious danger presented by the attempted pass, as well as the persuasive testimony of Employer's witnesses and Mr. Michener, Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving.

26. The record reflects that Employer has adopted reasonable safety rules regarding safe driving and passing while operating a company vehicle. Safety protocols include several general rules, such as defensive driving, driving at speeds that allow the driver to maintain control of the vehicle at all times and under all circumstances, driving with heightened awareness, managing space and speed, and assuring the driver is able to "see and be seen." Employer also has specific safety rules, including avoiding unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations. Employer's safety rules are unambiguous, definite, and non-conflicting.

27. Claimant was aware of Employer's reasonable safety rules for drivers. Employer expressed the rules to Claimant through its safety manual, safety training, and safety testing. Notably, Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

28. The record reflects that Employer enforces its safety rules. Notably, Mr. TB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules any time there is a noted violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation that proceeds from coaching, to escalating suspensions, to removal from a driver position.

29. The record reveals that Claimant willfully violated Employer's safety rules. Claimant decided to pass under unsafe conditions. He lacked clear vision of vehicles coming in the opposite direction due to terrain and the curve in the road. Although passing was not prohibited in the area, Claimant was attempting to pass both a semi-truck and a pick-up truck pulling the livestock trailer while driving a box truck limited by a speed governor. Mr. Michener persuasively explained that Claimant's box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis, Mr. Michener concluded that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. He determined that the July 22, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver.

30. Mr. MC[Redacted] persuasively concluded that Claimant violated numerous Employer safety rules by attempting to pass both the semi-truck and the pick-up truck pulling the livestock trailer on July 22, 2021. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

31. In contrast, Claimant testified that the reason he attempted to pass the other vehicles on July 22, 2021 was because they were moving slower and other vehicles in front of him were passing. He explained that, when he attempted to pass the vehicles, he believed that he had enough room to safely make the pass. Claimant remarked that at the time of the accident he was neither driving recklessly nor taking a risk he would not normally have taken. He remarked that he would never intentionally violate any of Employer's safety rules. Nevertheless, Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. Moreover, he admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. He thus could not see the car coming in the opposite direction. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant summarized the cause of the accident was human error, "which is on me."

32. Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving. Under the circumstances, Claimant's pass attempt specifically violated Employer's safety rules including "seeing and being seen," avoiding excessive and unnecessary lane changes, allowing sufficient space to pass and only passing in safe locations. The record reflects that Claimant was aware of Employer's safe driving rules but deliberately attempted to pass two long vehicles while driving a box truck in an area of limited visibility. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003).

5. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAP, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAP, Aug. 31, 2006).

6. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

7. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAP, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

8. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant asserts his accident was not willful because he did not intend to make an unsafe pass and break a safety rule. He contends the accident occurred due to human error because he simply could not see the vehicle coming in the opposite direction. However, he attempted to pass both a semi-trailer truck and a pickup truck pulling a long stock trailer around a curve. Importantly, Claimant was driving a box truck with limited horsepower and a speed governor. Based on the obvious danger presented by the attempted pass, as well as the persuasive testimony of Employer's witnesses and Mr. Michener, Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving.

9. As found, the record reflects that Employer has adopted reasonable safety rules regarding safe driving and passing while operating a company vehicle. Safety protocols include several general rules, such as defensive driving, driving at speeds that allow the driver to maintain control of the vehicle at all times and under all circumstances, driving with heightened awareness, managing space and speed, and assuring the driver is able to "see and be seen." Employer also has specific safety rules, including avoiding unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations. Employer's safety rules are unambiguous, definite, and non-conflicting.

10. As found, Claimant was aware of Employer's reasonable safety rules for drivers. Employer expressed the rules to Claimant through its safety manual, safety training, and safety testing. Notably, Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

11. As found, the record reflects that Employer enforces its safety rules. Notably, Mr. TB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules any time there is a noted violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation that proceeds from coaching, to escalating suspensions, to removal from a driver position.

12. As found, the record reveals that Claimant willfully violated Employer's safety rules. Claimant decided to pass under unsafe conditions. He lacked clear vision of vehicles coming in the opposite direction due to terrain and the curve in the road. Although passing was not prohibited in the area, Claimant was attempting to pass both a

semi-truck and a pick-up truck pulling the livestock trailer while driving a box truck limited by a speed governor. Mr. Michener persuasively explained that Claimant's box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis, Mr. Michener concluded that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. He determined that the July 22, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver.

13. As found, Mr. MC[Redacted] persuasively concluded that Claimant violated numerous Employer safety rules by attempting to pass both the semi-truck and the pick-up truck pulling the livestock trailer on July 22, 2021. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

14. As found, in contrast, Claimant testified that the reason he attempted to pass the other vehicles on July 22, 2021 was because they were moving slower and other vehicles in front of him were passing. He explained that, when he attempted to pass the vehicles, he believed that he had enough room to safely make the pass. Claimant remarked that at the time of the accident he was neither driving recklessly nor taking a risk he would not normally have taken. He remarked that he would never intentionally violate any of Employer's safety rules. Nevertheless, Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. Moreover, he admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. He thus could not see the car coming in the opposite direction. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant summarized the cause of the accident was human error, "which is on me."

15. As found, Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving. Under the circumstances, Claimant's pass attempt specifically violated Employer's safety rules including "seeing and being seen," avoiding excessive and unnecessary lane changes, allowing sufficient space to pass and only passing in safe locations. The record reflects that Claimant was aware of Employer's safe driving rules but deliberately attempted to pass two long vehicles while driving a box truck in an area of limited visibility. Accordingly, Claimant willfully failed to obey a reasonable safety rule

in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

2. Claimant earned an AWW of $505.03.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 8, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence that a left total hip arthroplasty, as requested by Authorized Treating Physician (ATP) Jeremy Kinder, M.D., is causally related to Claimant's admitted March 5, 2020 work injury.

FINDINGS OF FACT

1. On March 5, 2020, Claimant sustained an admitted injury to his right hip arising out of the course of his employment with Employer. On that date, Claimant tripped and fell directly onto his right lateral hip while performing his job duties for Employer.

2. Following his March 5, 2020 injury, Claimant was initially seen by physician assistant Andrew Hildner, PA-C, at SCL Health Medical Group on March 18, 2020. Claimant saw Mr. Hildner four additional times from March 25, 2020 to June 16, 2020. Claimant did not complain of issue with his left hip during these visits. At his initial visit, Mr. Hildner noted that Claimant had a significant limp. At later visits, on May 4, 2020 and May 26, 2020, he characterized Claimant's gait as a "very slight antalgic gait." At his June 16, 2020 visit, Mr. Hildner noted in his examination note "minimally right antalgic" which the ALJ infers is a description of Claimant's gait. (Ex. 4).

3. Claimant also had consults with Joseph Hsin, M.D., at Cornerstone Orthopedics and Sports Medicine on March 10, 2020, and Michael Ellman, M.D., at Panorama Orthopedics for evaluation of his right hip. During those visits, Claimant did not complain of issues with his left hip. At his visit, Dr. Ellman a normal examination of Claimant's left hip, including negative Patrick's (FABER) and impingement (FADIR) tests. (Ex. B and 5)

4. On July 7, 2020, Claimant reported to Mr. Hildner experiencing left hip and low back pain. Mr. Hildner attributed to the new symptoms to his right hip pain which he indicated was affecting his gait. On examination, he noted a mildly positive FADIR test for hip impingement, but no other objective findings. (Ex. 4). Claimant also reported left hip and low back pain at his July 27, 2020 visit with Mr. Hildner. (Ex. 4).

5. On July 30, 2020, Claimant was evaluated by Barbara Wright, P.A., at Panorama Orthopedics. Ms. Wright noted that Claimant reported "over the last month or two, his left hip and lumbar spine have also been causing significant pain for him due to compensation." Ms. Wright did not document an examination of Claimant's left hip or otherwise comment on Claimant's left hip in the medical record. (Ex. 5).

6. On August 4, 2020, Respondents filed a General Admission of Liability, admitting for medical benefits related to the Claimant's right hip. (Ex. 3)

7. On August 6, 2020, Claimant saw Jeremy Kinder, M.D., at Panorama for evaluation of his right hip. Dr. Kinder recommended a total hip arthroplasty to replace Claimant's right hip. Claimant's left hip was not evaluated at this visit. (Ex. 5).

8. On September 2, 2020, Claimant saw Jon Erickson, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Erickson documented that Claimant reported chronic, severe pain in the right hip and "gait related low back and left hip pain." Dr. Erickson did not address Claimant's left hip in his IME report. Dr. Erickson raised concerns that Claimant's right hip pain was not related to his hip joint but may have related to a sports hernia or insufficiency fracture in his pubic ramus region. (Ex. 7).

9. Over the next two months, Dr. Ellman evaluated Claimant to determine if Dr. Erickson's hypothesis related to the source of Claimant's right hip pain was correct. During these visits, Claimant did not report left hip symptoms. (Ex. 4, 5). Based on Dr. Erickson's IME, Dr. Ellman referred Claimant to Dr. Robert MacDonald for evaluation of a potential sports hernia. Ultimately, Dr. MacDonald ruled out a sports hernia and noted that he suspected Claimant's right hip issues were "all hip pathology." (Ex. C).

10. Claimant's next reported left hip pain when he returned to Mr. Hildner on November 18, 2021. Mr. Hildner noted that Claimant's left hip pain was "likely compensatory from [right] hip pain with likely underlying chronic [osteoarthritis]," and noted that Claimant had a significant right antalgic gait. Claimant also reported bilateral knee pain which Mr. Hildner also characterized as "probably also compensatory with underlying [osteoarthritis]." Mr. Hildner indicated that Claimant's knees are "not worker's comp related. (Ex. 4).

11. On December 3, 2020, Dr. Kinder evaluated Claimant. Claimant reported left hip pain at the same severity as his right hip pain. Claimant also reported right knee pain, difficulty walking, and symptom aggravation with activity. Left hip x-rays taken on December 3, 2020 demonstrated a progression of arthritis and moderate joint space narrowing in the right hip. Claimant's left hip arthritis was characterized as "moderate." Dr. Kinder opined that hip replacements were the only treatment likely to help Claimant significantly. Claimant elected to proceed with a right hip arthroplasty, and Dr. Kinder requested authorization for the procedure. Dr. Kinder's request for authorization for right hip was approved on March 2, 2021. (Ex. 5).

12. Between December 16, 2020 and April 14, 2021, Claimant saw Mr. Hildner five times and continued to report left hip symptoms. On March 3, 2021, Mr. Hildner indicated Claimant was "developing additional symptoms – particularly lumbar paraspinal spasm – and worsening of other joint pain due to antalgic gait and compensatory movements/positioning." Mr. Hildner documented Claimant's left hip pain at these visits, and described Claimant's gait as slow and antalgic on the right. (Ex. 4).

13. Dr. Kinder performed a right hip arthroplasty surgery on April 22, 2021. (Ex. 5).

14. On May 6, 2021, Claimant saw Dr. Kinder and reported he was experiencing pain in his left hip and was placing all his weight on the left side. On examination, Dr. Kinder

noted pain with internal rotation in both flexion and extension. Dr. Kinder found a positive impingement sign and recommended an MRI of Claimant's left hip to evaluate for a potential labral tear and to evaluate the severity of his arthritis. (Ex. 5).

15. On May 19, 2021, Claimant saw Mr. Hildner, who noted Claimant's right hip pain had improved following surgery. Mr. Hildner stated "the improving right hip pain has made his left hip and bilateral knee pain feel much worse." (Ex. 4).

16. On June 3, 2021, Claimant saw Dr. Kinder for a post-surgical evaluation of his right hip. Claimant's left hip was not evaluated at this visit. (Ex. 5).

17. On October 4, 2021, an MRI of Claimant's left hip was performed. The MRI showed a nondisplaced tear of the left acetabular labrum, and slight narrowing of the ischiofemoral distance, which the radiologist indicated can "predispose to ischiofemoral impingement." (Ex. 5).

18. Claimant saw Dr. Kinder on October 7, 2021, reporting improving left hip pain, although with stabbing pain and symptoms exacerbated by weight bearing. On examination, Dr. Kinder noted there was no crepitus or tenderness to palpation over the greater trochanteric region. He further noted mild pain with range of motion. Claimant's MRI showed a labral tear in the left hip, and recommended a cortisone injection. Dr. Kinder also recommended a second opinion from Daniel Haber, M.D., to determine if Claimant would benefit from a hip arthroscopy vs. a total hip replacement. Claimant had the left hip injection on October 15, 2021. The hip injection provided complete short-term relief of Claimant's left hip pain, but the pain returned within two weeks. (Ex. 5).

19. On October 28, 2021, Claimant saw Daniel Haber, M.D., for a second opinion. Dr. Haber reviewed Claimant's MRI images and interpreted the images as showing a non-displaced degenerative appearing labral tear with moderate chondrosis in the weight bearing aspect of the acetabulum. He also noted that Claimant had a moderate cam deformity. Dr. Haber diagnosed Claimant with primary osteoarthritis of the left hip and "other articular cartilage disorders." Dr. Haber indicated that he did not believe Claimant would benefit from an arthroscopy. He opined "I believe that this labrum is degenerative in nature as a consequence of having mild to moderate osteoarthritis. (Ex. C).

20. On November 11, 2021, Claimant returned to Dr. Kinder. Dr. Kinder noted that Claimant had moderate osteoarthritis of the left hip with a cam lesion and labral tear. He indicated Claimant's arthritis disqualified him from arthroscopic surgery and that Claimant requires a hip replacement. (Ex. 5). Dr. Kinder requested authorization for Claimant's left hip arthroplasty through Insurer. Insurer denied authorization on November 22, 2021. (Ex. 1).

21. From November 16, 2021 through March 14 2022, Claimant saw Mr. Hildner four additional times. During this time, Claimant continued to report various levels of left hip pain. On November 16, 2021, Mr. Hildner noted that Claimant's gait "appears to be a mix of right hip weakness and left hip antalgia, but overall fairly normal and much improved

from previous exams." At the December 28, 2021 visit, Claimant reported tearing pain in his left groin" when performing right hip flexion stretches. (Ex. 4).

22. On June 13, 2021, Robert Messenbaugh, M.D., performed an independent medical examination of Claimant at Respondent's request. Dr. Messenbaugh testified at hearing and was admitted as an expert in orthopedic surgery. In his report, Dr. Messenbaugh opined that Claimant had no actual left hip complaints, and that the areas Claimant identified on examination with pain were indicative of a strain of his left hamstring. He further opined that Claimant did not require surgery on his left hip. The ALJ finds neither of these opinions credible or persuasive. At hearing, Dr. Messenbaugh testified that he reviewed Claimant's MRI from October 4, 2021, and that the MRI showed arthritis and an abnormal hip anatomy identified as a congenital "cam" deformity. Dr. Messenbaugh testified that a cam deformity can lead to labral tearing, fraying and degeneration, and can create degenerative arthritis. Dr. Messenbaugh further opined that Claimant's work injury did not accelerate or permanently alter Claimant's left hip. Dr. Messenbaugh opined that Claimant's left hip symptoms were most likely caused by degenerative changes, and that the labral tear was likely caused by Claimant's congenital cam deformity. While the ALJ finds credible Dr. Messenbaugh's opinion that the pathology in Claimant's left hip was not caused by his work injury, he offered no credible explanation why Claimant's left hip symptoms emerged only after Claimant spent four months walking with an altered gait caused by his right hip injury. He testified that Claimant's weight increased the risk for development of hip pain, but no credible evidence was admitted to indicate that Claimant experienced a significant weight gain following his injury which would have caused his hip pain. Dr. Messenbaugh's opinion that Claimant's left hip symptoms are unrelated to his work-related injury is unpersuasive.

23. At hearing, Claimant testified that he had no issues with his left hip prior to his March 5, 2020 work injury. Claimant has worked performing body work on automobiles for most of his adult life and was able to perform his job duties without restrictions. Claimant credibly testified that after his work injury, he walked different and felt as if he was putting more weight on his left side to keep weight off of his right hip. He further testified that after his left hip pain began, it did not resolve, and presently exists.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the left hip total arthroplasty recommended by Dr. Kinder is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's initial injury was directly to his right hip. As a result of this injury, Claimant developed an altered, antalgic gait. The ALJ finds credible PA Hildner's opinion that the altered gait resulted in pain to Claimant's hip

approximately four months after the initial injury. Beginning in July 2020, Claimant began reporting hip pain which was documented in the records of multiple providers. The ALJ further finds credible Claimant's testimony that his left hip pain did not resolve.

Following the emergence of his left hip pain, Claimant's primary treatment was focused on his right hip, despite reports of continued left hip symptoms. In December 2020, Dr. Kinder evaluated Claimant's left hip, reviewed left hip x-rays and opined that hip replacements were the only procedure likely to help Claimant significantly. The ALJ infers from this statement that Dr. Kinder's opinion was that hip replacement would be the only treatment likely to relieve Claimant's reported hip pain. After the December 3, 2020 visit with Dr. Kinder, Claimant continued to report left hip pain and exhibit an altered gait. Ultimately, in November 2021, Dr. Kinder sought authorization from Insurer for a left hip total arthroplasty, which was denied.

No credible evidence was admitted to suggest a plausible alternative cause for the emergence of his left hip symptoms in July 2020. Prior to May 2020, Claimant had no left hip symptoms, and the symptoms only developed after four months of walking with an altered gait and compensating for his right hip pain. The ALJ does not find credible Dr. Messenbaugh's opinion that Claimant's hip pathology was not aggravated or exacerbated by his altered gait. Similarly, Respondents' contention that Claimant's non-work-related knee pain could be an equally likely cause of his left hip pain is not persuasive because Claimant did not report knee pain until approximately four months after he developed left hip pain.

Based on the totality of the evidence, the ALJ concludes that it is more likely than not that Claimant's right hip injury resulted in an altered gait which caused the emergence of symptoms in his left hip. The Claimant has pre-existing arthritis and a degenerative labral tear which were asymptomatic until he spent approximately four months walking with an altered gait and compensating for his right hip pain. Although Dr. Kinder's recommended surgery is to address the pre-existing pathology of Claimant's left hip, but for the pain caused by Claimant's altered gait and compensation for his right hip injury, treatment of Claimant's left hip would not have been necessary. Consequently, the need for a left hip arthroplasty is causally related to Claimant's May 5, 2020 work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the left hip total arthroplasty is GRANTED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 7-8-2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-588-918-010

ISSUES

The issues set for determination included:

- Did Respondents overcome the conclusions of Kathie McAlpine, M.D., who performed the twenty-four month Division-sponsored Independent Medical Examination ("DIME"), by clear and convincing evidence?

- Did Claimant proved by a preponderance of the evidence that the proposed surgery for the right knee was reasonable necessary and related?

- Does the doctrine of issue preclusion preclude Claimant from litigating the issue of whether Respondents should be responsible for his right shoulder surgery?

- Did Claimant prove by a preponderance of the evidence that the proposed surgical evaluation for the right shoulder was reasonable necessary and related?[1]

PROCEDURAL STATUS

At the close of Respondents' case in chief, Claimant made an oral Motion for Directed Verdict, asserting that Respondents had not adduced sufficient evidence to meet the clear and convincing evidentiary standard to overcome the DIME physician's opinions.

The matter was taken under advisement and the ALJ concluded that the Motion should be denied. Respondents introduce sufficient evidence to controvert the opinions of Dr. McAlpine to defeat the Motion for Directed Verdict. However, as noted *infra*, Respondents did not overcome Dr. McAlpine's opinions by clear and convincing evidence.

A Summary Order was issued on June 9, 2022. On June 14, 2022, Respondents submitted a "Request for Specific Findings of Fact, Conclusions of Law and Order". The Claimant and Respondents filed Proposed Orders on June 22, 2022. A Full Order was served on July 13, but had a typographical error in the case number. This Order corrects that.

[1] At the outset of the hearing, counsel for Claimant requested that the issues of permanent total ("PTD") and permanent partial disability ("PPD") benefits be deferred and counsel for Respondents agreed PTD benefits issue would be deferred. Respondents' counsel stated that because Claimant had received an excess of the statutory cap in TTD benefits, he would not be entitled to PPD benefits.

FINDINGS OF FACT

1. On July 22, 2003, Claimant was injured while working for Employer. The injury occurred when his truck rolled back after he parked it and he rolled his left ankle as he was trying to chase after it.

2. Claimant suffered a peroneal tear and underwent multiple surgeries on the left ankle, including multiple attempts at an ankle fusion. Claimant required extensive treatment following the surgeries, as he developed complications with infections.

3. Claimant underwent a below knee amputation on May 12, 2012. Claimant was treated by multiple physicians after the amputation surgery.

4. On June 4, 2012, a General Admission of Liability was filed on behalf of Respondents. The GAL admitted for medical and wage benefits (TTD). The GAL reflected that fact that Claimant was paid TTD benefits from January 28, 2005 to the present, with reduction for the receipt of SSDI benefits beginning on June 1, 2012.

5. Following the amputation surgery in 2012, Claimant testified that his balance was affected and he has fallen down a number of times.[2]

7. The medical records admitted at hearing reflected treatment following the surgery, as well as the fact that Claimant sustained injuries as the result of falls. Claimant sustained a tear of the quadriceps tendon in right knee after a fall in 2012. That required a surgical repair and rehabilitation treatment. The ALJ concluded this fall affected the condition of Claimant's right knee. There was evidence in the record that Claimant required treatment for injuries Claimant sustained when he fell.

8. At a hearing conducted on September 26, 2019, ALJ Cannici considered the issue of medical benefits, specially the request for authorization of a right shoulder arthroplasty. In the Findings of Fact, Conclusions of Law and Order issued by ALJ Cannici on or about October 29, 2019, the request for a right shoulder arthroplasty was denied and dismissed. ALJ Cannici credited Nicholas Olsen, M.D.'s testimony that Claimant's right shoulder condition (end-stage osteoarthritis) was familial and the result of the natural progression of age-related arthritis.[3]

9. On October 31, 2019, Claimant was evaluated by Jeremy Kinder, M.D, at which time Claimant was reporting right knee pain. Dr. Kinder referred Claimant for an MRI.

10. Claimant underwent an MRI of the right knee on December 9, 2019. The MRI showed postsurgical changes of the distal quadriceps tendon without acute tear;

[2] Hearing Transcript ("Hrg. Tr.") p. 65:2-8.

[3] Exhibit SS, pp. 2112-2120; Exhibit 12, pp.141-148.

postsurgical changes affecting the patellar tendon without acute injury; extensive chronic degenerative changes at the patellofemoral articulation which could indicate chronic patellofemoral tracking; moderate sized horizontal tear of the medial meniscus mid body and posterior horn with associated 2 mm. medial extrusion; mild degenerative changes in the medial lateral compounder of articular surfaces; collateral ligaments and cruciate ligaments remained intact.[4]

11. On January 2, 2020, Claimant was evaluated by Dr. Kinder. At that time, pain was present in the medial and lateral aspect of his right knee. On examination, tenderness was noted on the medial and lateral joint line, but no varus valgus instability was present. Dr. Kinder noted Claimant had "continued downfall' since the quadriceps tear. Dr. Kinder noted the MRI (December 9, 2019) showed a horizontal tear with some extrusion, with some chronic changes, as well as some arthritic changes underneath the patellofemoral joint. Dr. Kinder administered a cortisone injection to Claimant's right knee.

12. Claimant returned to Dr. Kinder on January 22, 2020 and it was noted Claimant fell on his right knee the day before and had significant pain. Claimant reported he did not have relief with the cortisone injection. Dr. Kinder's diagnosis was: tear of medial meniscus of right knee, unspecified tear type and he was of the opinion that viscosupplementation would not help. Dr. Kinder recommended an arthroscopy for the medial meniscal tear, including possible meniscectomy and Claimant wanted to proceed with the surgery. The ALJ credited Dr. Kinder's opinion that Claimant needed surgery for the right knee.

13. Claimant was evaluated by Dr. Olsen, on February 5, 2020, at the request of Respondents. Claimant reported right knee pain which had gotten worse. Claimant advised Dr. Olsen that he had had several falls, the last of which was approximately January 21, 2020. Claimant said he did not know the dates of each of these falls and did not go to the doctor each time he fell.

14. On examination, Claimant's right knee demonstrated mild atrophy in the quadriceps mechanism, with full extension and 150° of flexion. Moderate tenderness along the medial joint line was present with palpation. The McMurray's maneuver was positive for medial joint line pain, with Apley's compression positive for medial joint line pain. The anterior drawer sign and Lachman's maneuver were negative no evidence of instability in the collateral ligaments with testing was found.

15. Dr. Olsen reviewed the right knee MRI and noted that Claimant had an equal chance of improving with rehab and viscosupplementation as he did from a partial meniscectomy of the right knee. Dr. Olsen stated he was unable to relate Claimant's knee condition to the work injury that occurred on July 22, 2012 (sic) and unable to relate it to the fall that occurred on October 10 or 12, 2012 when he ruptured the quadriceps tendon. The MRI did not show fraying or chronic degeneration that would have been

[4] Exhibit A, pp. 9–10.

seen with a long-standing tear and Dr. Olsen, believe the MRI findings were new. Dr. Olsen, agreed that viscosupplementation would be appropriate for the right knee, but it was not related to Claimant's work injury.

16. The ALJ concluded that to the extent that Claimant fell in January 2020 and it was related to his loss of balance, the tear would be related to the original work injury.

17. On August 14, 2020, Claimant underwent a Division Independent Medical Examination, which was performed by Dr. McAlpine. Claimant testified that he met with Dr. McAlpine over three days. Claimant's current symptoms included: left knee weakness, as well as right knee weakness and constant pain (6/10). Claimant also had what he estimated to be 50% of the strength and mobility in his left shoulder since reverse replacement surgery was performed on July 13, 2018. He said his shoulder pain was 5/10 nightly. Claimant described constant pain (5/10) in his right shoulder, which spiked when lifting or moving his right arm. Claimant advised Dr. McAlpine that his right shoulder deteriorated after using crutches.

18. On examination, Claimant's left shoulder had restricted range of motion ("ROM") and mild atrophy was present in the right knee quadriceps. The McMurray's maneuver was positive for medial joint line pain, with the drawer sign and Lachman's maneuver both negative. No evidence of instability was present in the collateral ligaments.

19. Dr. McAlpine's diagnoses were: Below the knee amputation, left; left ankle-diagnoses prior to left BKA: peroneal tendon dislocation; 715.17: osteoarthrosis and allied disorders: osteoarthrosis, localized, primary ankle and foot; 733.82: non-union of fracture; bilateral osteoarthritis of the knees; S/P right quadriceps tendon repair; right quadriceps tendon tear; S/P left knee patellofemoral arthroplasty; S/P left shoulder reverse total replacement; left shoulder rotator cuff tear; right shoulder osteoarthritis; medial meniscus tear, right knee. The DIME report indicated Claimant was at MMI as of the date of the evaluation. However, Dr. McAlpine opined that if surgery were recommended on either the knee or shoulder that Claimant was not at MMI.[5]

20. Dr. McAlpine further amplified her opinions when she provided expert testimony on October 6, 2020. Dr. McAlpine testified as an expert and stated opined that the condition of the right knee was caused or to the sequelae of the work injury that the condition of Claimant's right knee was related to the work injury and its sequalae. Dr. McAlpine noted:

> "So part of it, it has to be qualified. I agree that there was a significant incident that caused trauma to the right leg, including the knee and where he tore his quadriceps at that time. I also – the statement I made before, probably in a

[5] Exhibit 7, p. 44.

logical way there has been increased pressure on that leg after injuring the left, you know, leg on 7/22/2003.

The physics and the biomechanics of it, it probably had increased strain for that whole time. But there was a significant incident that occurred on the date that you – you know, I don't have the date right in front of me. I'd have to look at that." [6]

21. Dr. McAlpine acknowledged there was question whether the tear noted in the December 2019 MRI was "acute" because the radiologist did not describe it as such. However, Dr. McAlpine noted Claimant had multiple falls any one of which could have caused the tear.[7] Dr. McAlpine agreed that a torn medial meniscus would cause pain, but here where Claimant had multiple falls, the degree to which it was torn would impact the degree of pain he felt, as well as his pain tolerance. Claimant advised her that he was having pain and swelling in October 2019 at the time he was using a recumbent bike. Dr. McAlpine also testified that when Claimant subsequently fell (after December 2019), he could have torn the medial meniscus more. This opinion was persuasive to the ALJ.

22. The rationale provided by Dr. McAlpine showed she considered the issue of relatedness and causation with regard to the condition of Claimant's right knee. Dr. McAlpine opined that additional pressure was put on the right leg after the injury to the left leg and that, coupled with trauma from various falls (including January 2020) led to the need for surgery. Dr. McAlpine's testimony led the ALJ to conlude she considered multiple causes of the condition of Claimant's right knee. Dr. McAlpine believed the condition of Claimant's knee was related to the work injury. Her reasoning was persuasive to the ALJ.

23. Dr. McAlpine testified that she reviewed the research on the biomechanics of crutches and canes (citing the Journal of Biomechanical Engineering, as well as other sources). The studies indicated that recurrent use of crutches and straight canes would probably increase the progression of underlying degenerative disease. She believed this would increase the pressure and cause more extension type problems with the shoulder. Dr. McAlpine said long term use of crutches can create changes in the loading of the elbow/shoulder joints. Dr. McAlpine also testified that her opinion was based upon general principles of biomechanics.[8] This was the basis of her recommendations that Claimant be evaluated by a surgeon. Dr. McAlpine opined the condition of Claimant's shoulder was related to the work injury.

24. Dr. Olsen performed four independent medical evaluations of Claimant, at the request of Respondents. The first evaluation took place on May 7, 2014 and the

[6] Exhibit 8 (Dr. McAlpine's testimony), pp. 68-69.

[7] Exhibit 8 (Dr. McAlpine's testimony), p. 20:2-8.

[8] Exhibit 8 (Dr. McAlpine's testimony), pp. 103:6-16, 104:1-8; 106:20-22, 108:12-16.

second evaluation was on May 1, 2017. The next evaluation took place on June 19, 2019 and the last evaluation occurred on February 5, 2020. Dr. Olsen also testified as an expert at the most recent hearing, as well as the hearings in which ALJ Cannici, ALJ Felter and ALJ Jones presided.

25. Dr. Olsen testified as to the general accepted types of tears of a meniscus. Dr. Olsen stated that there are two kinds of medial meniscus tears-acute tears and chronic tears. Dr. Olsen said that an acute tear of the meniscus on MRI will show a bright white signal indicating that there is a tear from one edge of the meniscus to the other edge of the meniscus. Dr. Olsen testified that the meniscus tear, as shown on the December 9, 2019 MRI, was an acute tear and not a chronic tear. Dr. Olsen opined that Claimant's need for knee surgery was not related to the work injury, rather it was the result of the degenerative process in the knee. The ALJ concluded Dr. Olsen was expressing a different opinion with regard to the cause of Claimant's knee condition.

26. Dr. Olsen disagreed with Dr. McAlpine that Claimant's shoulder issues were related to use of crutches. He said Claimant described his crutch use as intermittent and would switch back and forth between using crutches and the wheelchair. In the June 19, 2019, report Dr. Olsen opined that, at best, Claimant only suffered a temporary aggravation of his right shoulder while he was using his crutches. Dr. Olsen opined Claimant's crutch use did not cause a permanent aggravation of the underlying osteoarthritis in his right shoulder.[9] Dr. Olsen said this was the natural progression of the underlying osteoarthritis is that, as one ages, the osteoarthritis simply gets worse.

27. Dr. Olsen also testified at the September 26, 2019 hearing as follows:

> "Mr. Robbins is using the crutches and wheelchair alternatively and on an intermittent basis. And, he is rarely mobile. And when he is mobile, he can switch between one mode of ambulation [with] the other depending on his symptomology. There is simply not enough documented time to result in a permanent deviation of a natural progression of his familial age-related osteoarthritis. Now, the crutches could cause a temporary increase in his symptoms as it did in 2013 for a period of months, but it was not great enough to affect the underlying progression of his osteoarthritis".[10]

28. At the hearing on July 8, 2021, Dr. Olsen testified the studies upon which Dr. McAlpine relied were based on uninterrupted crutch use. Dr. Olsen disagreed that Claimant's shoulder condition was related to his work injury. The ALJ concluded Dr. Olsen was expressing a different opinion with regard to the etiology of Claimant's shoulder condition.

[9] Exhibit A, p. 26.

[10] Exhibit QQ, p. 2086.

29. Respondents did not meet their burden of proof to show Dr. McAlpine's opinions concerning Claimant's knee and shoulder were more probably wrong.

30. The ALJ found it was more probable than not that Claimant requires surgery in the right knee because his balance was altered as a result of his industrial injury and this led direct to falls, which aggravated and accelerated the condition of his right knee.

31. The doctrine of issue preclusion does not apply with regard to the treatment proposed for Claimant's shoulder. The ALJ finds that a different issue was presented at this hearing, namely overcoming the DIME opinions. The ALJ also finds the burden of proof on this issue was different.

32. Based upon the totality of the medical evidence, the ALJ found that it is reasonable and necessary for Claimant to undergo an evaluation of his right shoulder. Respondents are required to pay for an evaluation of the shoulder. The ALJ makes no findings what treatment Claimant requires for the right shoulder at this time.

33. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). In the case at bench, there was conflicting medical evidence, including by the physicians who evaluated Claimant on the issue of MMI.

Overcoming the DIME

As determined in Findings of Fact 1-3, Claimant was injured on July 22, 2003 when a vehicle rolled back on his ankle. Claimant suffered a peroneal tear and underwent

multiple surgeries when his doctors attempted to fuse the ankle after his injury. On May 12, 2012, Claimant underwent a below the knee amputation. *Id.* After his amputation Claimant testified his balance was affected and he has fallen on multiple occasions since that time. (Finding of Fact 4). Claimant's testimony was credible to the ALJ. *Id.*

As a result of one of his falls, Claimant suffered a tear of the quadriceps tendon in his right knee in 2012. (Finding of Fact 7). Claimant required extensive treatment after that time. Respondents requested a 24-month DIME and Dr. McAlpine performed the evaluation on August 14, 2020. (Finding of Fact 16). Dr. McAlpine concluded Claimant was not at MMI with regard to his right knee and right shoulder. (Finding of Fact 18). Respondents then filed an AFH to contest these findings. Claimant requested treatment, including surgery for the right knee and right shoulder.

The question of whether Respondents overcame Dr. McAlpine's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Respondents had the burden of proof to overcome Dr. McAlpine's conclusion on MMI. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

As found, Respondents did not meet their burden of proof to show that Dr. McAlpine's conclusions that Claimant was not at MMI with regard to his right knee and right shoulder were more probably wrong. (Finding of Fact 29). As determined in Findings of Fact 19-22, Dr. McAlpine reviewed Claimant's treatment records and concluded that he was not an MMI and required treatment for the right knee. In this regard, while recognizing the complex issues involved in Claimant's lengthy course of treatment, Dr. McAlpine opined that the cause of the medial meniscus tear was weakness resulting from the original injury, as well as the falls Claimant experienced. Dr. McAlpine noted there was a question as to whether the meniscus tear shown in the MRI was acute and then offered an opinion as to why the right knee was related. *Id.* The ALJ credited this opinion.

Likewise, Dr. McAlpine concluded Claimant was not an MMI for the right shoulder because of extensive use over time with crutches. Dr. McAlpine opined that the cause of

Claimant‘s shoulder symptoms was the result of the use of crutches. The ALJ determined that what was offered into evidence on the both the right knee and right shoulder was a differing expert opinion (Dr. Olsen), who disagreed with the opinion offered by Dr. McAlpine. (Findings of Fact 25 and 28). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician.

In summary, Respondents did not adduce sufficient evidence to overcome Dr. McAlpine’s opinions as to whether Claimant was at MMI, specifically with reference to the right knee and right shoulder.

Medical Benefits

Turning to the question of medical benefits, the ALJ reviewed the extensive medical records adduced on behalf of the parties and determined that the proposed surgery for the right knee was reasonable and necessary, as well as related to the industrial injury in 2003. Claimant is entitled to such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Respondetns are liable to provide such treatment provided it is reasonable, necessary and related to the work injury. In the case at bench, the ALJ credited the opinion of Dr. Kinder, who was an ATP, on Claimant’s need for right knee surgery. (Finding of Fact 12).

The ALJ concluded the doctrine of issue preclusion did not apply in this case. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. App. 2001). The issue regarding Claimant‘s shoulder surgery, despite having previously gone to hearing is subject to a different burden of proof, as the issue being adjudicated concerns Respondents’ attempt to overcome the conclusions of the DIME physician. (Finding of Fact 31). *Holcombe v. FedEx. Corp.*, W.C. 4-828-259 (ICAO March 24, 2007).

With regard to the potential shoulder surgery, the record was less clear. Based upon the most recent medical records, the record did not clearly establish surgery was being recommended for Claimant‘s right shoulder at this time. However, the ALJ determined the proposed evaluation of Claimant‘s right shoulder was reasonable and therefore, Respondents will be ordered to provide this treatment. (Finding of Fact 32).

When making the determinations with regard to the shoulder and knee, the ALJ considered Respondents‘ argument that Claimant‘s symptoms were the result of a degenerative condition in his knee and the natural progression of this condition. The ALJ found that despite the time that had elapsed since the industrial injury, it was the initiating event, which constituted the cause of Claimant‘s need for treatment. The ALJ considered Respondents‘ assertion that Claimant’s shoulder condition was not related to the work injury. After considering Dr. McAlpine’s opinion, as well as those offered by the ATP-s,

the ALJ found Claimant met his burden of proof to show that the condition of his shoulder and knee were related to the July 22, 2003 injury.

ORDER

It is therefore ordered:

1. Claimant's Motion for Directed Verdict is denied.

2. Claimant is not at MMI and Respondents shall provide medical benefits to Claimant, including the proposed surgery on the right knee.

3. Respondents shall provide medical benefits to Claimant, including an orthopedic evaluation of Claimant's shoulder.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 12, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that this claim should be reopened pursuant to Section 8-43-303, C.R.S., due to fraud.

If the claim is reopened, whether the respondents have demonstrated, by a preponderance of the evidence, that they are entitled to recover benefits paid to the claimant in the amount of $16,364.90.

FINDINGS OF FACT

1. On June 4, 2019, the claimant suffered a work injury while employed with the employer. The body parts injured at that time included the claimant's neck and back.

2. On July 8, 2019, the respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits. The claimant's TTD benefits were paid at a rate of $558.80 per week.

3. The claimant's authorized treating physician (ATP) for this claim has been Dr. Larry Kipe. Beginning on June 20, 2019, Dr. Kipe restricted the claimant from all work.

4. On August 20, 2019, the claimant was seen by Dr. Kipe. At that time, the claimant reported that he had not returned to work and "does not feel he can work." The claimant also reported constant neck pain, paresthesia down his arms, and pain in his lumbar spine. Based upon the statements made by the claimant on that date, Dr. Kipe continued to restrict the claimant from all work.

5. On August 21, 2019, the claimant attended a Department of Transportation (DOT) medical examination for purposes of obtaining a commercial driver's license (COL) medical certificate. The medical examination was performed by Noel K. McKey, DC.

6. In preparation for the DOT examination, the claimant completed a Medical Examination Report Form. In that form, the claimant reported that he had no neck or back problems. The claimant also reported no bone, muscle, joint, or nerve problems. On exam, Dr. McKey noted that the claimant's back and spine were normal. The claimant was cleared to receive a two year medical certificate.

7. On December 4, 2019, the claimant returned to Dr. Kipe. At that time, the claimant reported problems with pain and an inability "to get around". Dr. Kipe continued to restrict the claimant from all work. On that same date, Dr. Kipe authored a letter in which he stated that the claimant should remain off of work "indefinitely".

8. On January 30, 2020, Dr. Kipe issued a report in which he determined that the claimant reached maximum medical improvement **(MMI)** on January 28, 2020. Dr. Kipe also noted that the claimant could return to full duty work, with no permanent impairment.

9. Based upon Dr. Kipe's January 30, 2020 report, on January 31, 2020, the respondents filed a Final Admission of Liability (FAL). The FAL was amended on February 12, 2020 to accurately reflect the amount of TTD paid to the claimant.

10. Dr. Kipe testified that each time he restricted the claimant from all work he did so based upon the claimant's subjective reports that he could not work. Dr. Kipe testified that he relied upon the statements made by the claimant in determining whether the claimant had any work restrictions. Upon learning of the August 21, 2019 DPT examination and the statements made by the claimant as part of that examination, Dr. Kipe determined that the claimant had reached **MMI,** was released to full duty, with no permanent impairment.

11. MV[Redacted], Senior Resolution Manager with the insurer was the individual that filed the FALs in January and February 2020. Ms. MV[Redacted] testified that the claimant's TTD benefits were terminated on January 28, 2020 because the claimant had reached MMI with no permanent impairment rating.

12. Ms. MV[Redacted] also testified that between August 20, 2019 and January 28, 2020, the respondents paid the claimant $16,364.90 in TTD benefits.

13. The ALJ credits the medical records, the DOT examination records, and the testimony of both Dr. Kipe and Ms. MV[Redacted]. The ALJ finds that it is more likely than not that the claimant intentionally misled Dr. Kipe regarding his inability to work. This is evidenced by the contradictory information he provided Dr. McKey on August 21, 2019. The ALJ finds that the claimant was kept off of work by Dr. Kipe because of the claimant's subjective report that he could not work. However, it is clear that the claimant was capable of working as evidenced by his report to Dr. McKay.

14. Based upon the evidence and testimony presented, the ALJ finds that the claimant did engage in fraud in this matter. In reaching this determination, the ALJ finds the following. 1) The claimant's claim that he could not work was a false representation of a material fact. 2) The claimant knew that he was not providing Dr. Kipe with accurate information when he continued to report he was unable to work. 3) Dr. Kipe relied upon the claimant's false representations. 4) The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations. 5) The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant,

resulting in damage to the respondents. The ALJ infers that the claimant also knew that his false representations would result in continued TTD payments.

15. The ALJ also finds that the respondents have successfully demonstrated that they are entitled to recover amounts paid to the claimant between August 20, 2019 and January 28, 2020. The ALJ finds that the amount overpaid as a result of the claimant's misrepresentations to Dr. Kipe totals $16,364.90.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.$. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos,* 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers,* W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim.

Berg v. Industrial Claim Appeals Office, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission,* 646 P.2d 399 (Colo. 1981).

5. In the present case, the respondents seek to reopen the claim on the basis of fraud. The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.,* W.C. No. 4-156-147 (ICAO, Dec. 15, 2005), *citing Morrison v. Goodspeed,* 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra*

6. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.,* W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

7. As found, the respondents have successfully demonstrated, by a preponderance of the evidence, that the claim should be reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud. The elements of fraud identified above are found to exist in the present matter. Specifically:

- The claimant's claim to Dr. Kipe on August 20, 2019 that he could not work was a false representation of a material fact.
- The claimant knew that he was not providing Dr. Kipe with accurate information when he reported he was unable to work.
- Dr. Kipe relied upon the claimant's false representations.
- The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations.
- The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant, resulting in damage to the respondents.

8. As found, the respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

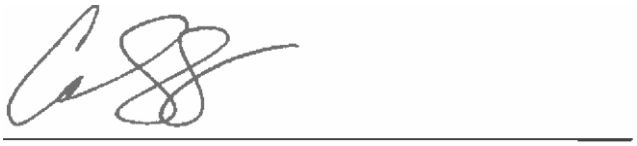
ORDER

It is therefore ordered:

1. The claim is reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud.

2. The respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

Dated this 13th day of July 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **DELIA CARTER,** Claimant, v. **LANDVEST CORPORATION,** Employer, and **ACCIDENT FUND INSURANCE COMPANY OF AMERICA,** Insurer, Respondents.	**COURT USE ONLY** **CASE NUMBER:** **WC 5-175-275-001** **5-179-157-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A VIDEO HEARING in the above captioned matter was held on May 3, 2022, before Administrative Law Judge (ALJ), Richard M. Lamphere.

Claimant was present and represented by Gordon J. Heuser, Esq. Respondents were represented by Eliot J. Wiener, Esq. The proceeding was digitally recorded on the Google Meets platform between 1:00 and 3:05 p.m.

Claimant testified on her behalf. In lieu of his live testimony, Respondent lodged a transcript of the April 26, 2022, deposition of Dr. William Ciccone, II. The deposition testimony of Dr. Ciccone is admitted into the evidentiary record. In addition, to the aforementioned testimony, the parties submitted hearing exhibits which were admitted into the evidentiary record as follows: Claimant's Exhibits 1-22 and Respondents Hearing Exhibits A-K.

At the conclusion of the hearing, the ALJ granted the parties' request to hold the record open through May 27, 2022, to allow counsel time to file position statements with the ALJ in lieu of closing argument. The deadline to submit the position statements was subsequently extended to June 9, 2022. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this order, Delia Carter will be referred to as "Claimant"; Landvest Corporation will be referred to as "Employer" and Accident Fund Insurance Company of America will be referred to as "Insurer". Employer and Insurer will be referred to as "Respondents". All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2015); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

Gordon J. Heuser, Esq.
gordon.heuserlaw.com

Eliot J. Wiener, Esq.
eliot.wiener@ritsemalaw.com

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: July 13, 2022

/s/ Matthew Chavez_____
Court Clerk

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her right knee on May 20, 2021 (W.C. No. 5-175-275-001), July 29, 2021 (W.C. No. 5-179-157-001), December 15, 2021 (W.C. No. 5–194–727) or January 6, 2022 (W.C. No. 5–194–728)?

II. If Claimant established that she suffered a compensable right knee injury, whether she also established, by a preponderance of the evidence, that the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden is reasonably necessary and causally related to the compensable claim.

III. If Claimant established that she sustained a compensable injury, did she also prove that she is entitled to an award of temporary total disability (TTD) benefits from July 30, 2021 through October 3, 2021?

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $1,127.98. The stipulation is approved. Claimant's counsel also noted that the December 15, 2021 and January 6, 2022 claims represented temporary exacerbations of Claimant's condition caused by either the May 20, 2021 or July 29, 2021 injuries.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged May 20, 2021 Injury

1. Claimant works as a General Manager for Employer who operates a storage unit facility. She has been worked for Employer since November 26, 2018. Claimant's job duties include performing inspections several times a day to ensure safety, security, and cleanliness of the facility and storage units. In performing such inspections, Claimant is required to walk up and down hallways where the storage units are located. Claimant's job duties also require her to perform administrative tasks such as renting storage units, monitoring the front office, and doing paperwork.

2. Claimant testified that on May 20, 2021, she was performing an inspection on the second floor of the storage facility when she developed pain in her right knee.

According to Claimant, she had walked the length of a hallway and turned her body to the left to view a storage unit. She then turned back to the right to continue with her rounds. When turning, Claimant testified that she did not move (turn) her feet. As noted, Claimant felt pain in her right knee as she pivoted back to the right to continue with her rounds.

3. Claimant finished her rounds and returned to her desk. Claimant testified that her right knee hurt the rest of the day and she could not find a position of comfort. Upon completing her shift and leaving the office, Claimant testified that she stepped awkwardly off a curb and experienced sharp pain in her right knee while walking to her car in the employee parking lot.

4. Claimant did not report the alleged injury or seek medical care on May 20, 2021. Rather, Claimant proceeded to a previously scheduled massage and after that, massage went home for the evening.

5. When Claimant got home following her massage, she testified that she was having sharp right knee pain when going upstairs and was forced to set off her car alarm to alert her children that she needed help to get into her home.

6. During cross-examination, Claimant testified that she completed a manager's incident report. She testified that she wrote that she had experienced discomfort in her knee that day and when she stepped off a curb at the end of the day the pain got worse. Claimant testified that she explained to Dr. Wu what had happened at work and that she had explained it to Dr. Bisgard as well. The incident report in question does not indicate that Claimant twisted her knee while making rounds. (See CHE 14, p. 216). Claimant testified that she did not put down the details of twisting her knee on the incident report because she was trained to keep information on the form brief.

7. Claimant testified that she presented to presented to UCHealth Emergency Department (ED) on the morning of May 21, 2021 with complaints of right knee pain. The ER note from this visit indicates that the onset of right knee pain was yesterday evening and that Claimant was walking down some stairs when she started feeling sharp right knee pain, which worsened when straightening her leg. Claimant denied injury. Physical exam revealed medial lateral joint line tenderness to palpation of the right knee with full range of motion. There was noted a positive McMurray's sign with mild joint effusion. The ED physician's clinical impression was a potential meniscus injury of the right knee. The ED report does not contain a history that Claimant's injuries were work-related. It was recommended that Claimant follow up with her primary care physician and consider using an OTC knee sleeve for support in conjunction with Ibuprofen and Tylenol for pain. (CHE 3, pp. 81-82, 87-88).

8. The Claimant was seen by Physician Assistant (PAC) Jayme Eatough at UCHealth Urgent Care on May 24, 2021. Claimant completed a patient intake form at that time, reporting a mechanism of injury (MOI) of "stepping off curb" (CHE 4, p. 107). PAC Eatough reported:

> She felt leg pain in the front when she was sitting at her desk doing computer work. The pain was mild … When she went to leave she stepped off a curb and felt shooting pain. She did not fall or have any trauma to the leg … she then went and got her massage which didn't help. She then drove home and had a hard time using the gas and brake pedal … to get in the house you have to go down and upstairs. She had sharp pain with both going up and down. She set off the car alarm to get her kids to come out and help.

Id. at p. 108-109.

9. Physical exam was positive for an inability to fully straighten the right knee, an inability to bear weight enough to perform a Thessaly test, significant decreased strength in the right quadriceps and hamstrings when compared to the left, and some swelling on the lateral inferior aspect of the right knee. X-rays of the knee did not reveal any acute abnormalities although a patellar enthesophyte at the quadriceps insertion was found. PAC Eatough diagnosed “Acute pain of right knee” and “Sprain of right knee, unspecified ligament, initial encounter”. The Claimant was provided with a knee brace, told to use crutches in conjunction with rest, ice, NSAIDs, and elevation to help with pain. She was also assigned physical restrictions of “sitting/sedentary work only”. (Id. at p. 111). As part of this encounter, Dr. Elizabeth Bisgard signed a WC-164, which indicated that the relatedness of the objective findings on examination to the described MOI was undetermined. Indeed, Dr. Bisgard noted: “Causality unsure”. (Id. at p. 120).

10. On June 4, 2021, Claimant presented to Emily Burns, M.D. with continued complaints of right knee pain, which becomes sharp with extension. The worst pain was along the bottom of the kneecap. Dr. Burn’s note indicated that she reviewed the claimant’s MOI. The mechanism reported was that the Claimant had a mild tweak from walking down the hall and turning down the hallway to the left. Dr. Burns reported the Claimant was just walking and had a clipboard in her hand. At the end of the day, the Claimant stepped off a curb and had a sharp pain. Dr. Burns reported that the Claimant did not fall and categorized the injury as minor. Dr. Burns reported, “It is unclear if this is a true work-related injury. However, given the minor mechanism we would certainly expect improvement by now and she is still requiring crutches for ambulation." Dr. Burns was most suspicious for either patella chondromalacia/cartilage injury versus lateral meniscus injury. She recommended an MRI with continued use of crutches as needed. (CHE 3, pp. 99-101).

11. A MRI performed on June 14, 2021 was read as being normal. (CHE 6, p. 128).

12. Claimant returned to Dr. Burns on June 15, 2021 with throbbing pain in her right knee, which was shooting mostly underneath and along the lower side of the right

kneecap. Dr. Burns advised the Claimant that her MRI findings were normal. Physical exam was similar to that performed at the previous appointment with Dr. Burns, except for mild atrophy of the right quadriceps was noted when compared to the contralateral side. Dr. Burns diagnosed right knee pain and recommended home exercises and sitting work only. Dr. Burns reported that because Claimant did not have a significant work injury and had a completely normal MRI, she could not say with greater than 50% certainty that the Claimant's current symptoms were caused by a work-related mechanism. (CHE 3, pp. 102-105).

13. Respondents filed a Notice of Contest denying liability for the May 20, 2021 injury on July 26, 2021 (Respondents' Hearing Exhibit (RHE) F, pp. 88-89).

14. Claimant presented to Penrose St. Francis Primary Care on July 7, 2021 with reports of persistent right knee pain. She reported that she developed "sharp right knee pain" while walking down some stairs, which was worse with straightening the right knee out. Claimant requested an orthopedic referral. (RHE D, p. 53).

Claimant's Alleged July 29, 2021 Injury

15. Claimant contends she sustained a second work-related right knee injury on July 29, 2021, while maneuvering/scooting a wheeled chair she was sitting in to get a better view of an on-site incident involving a motor vehicle and an overhead door at the storage facility. Claimant's work area is covered by a security camera and there is video tape of the alleged July 29, 2021 injury.

16. Claimant testified that on this date (July 29, 2021), she was sitting in a rolling chair at her workstation when she reinjured her right knee. According to Claimant, she noticed a customer running into the loading bay door. In order to get a better look at what was happening; Claimant testified that while sitting down, she used her right leg, with "quite a bit" of pressure to push her chair to the left side of the desk. Claimant testified that as she pushed her wheeled chair to the left with her right leg, she experienced immediate severe pain in her right knee, which she would subsequently describe as sharp and throbbing. (CHE 7, p. 133).

17. The ALJ has carefully reviewed the aforementioned video recording of the July 29, 2021 incident contained at RHE J, p. 127. The video recording is 15 minutes 37 seconds in length. Review of security video shows the Claimant at her desk, completing paperwork and generally attending to a customer. She is sitting in a wheeled rolling chair placed on a hard surface floor, which she maneuvers side to side and front to back by pushing her feet on the floor. In the video, Claimant uses both the right and left leg to move her chair short distances within her work area. She wears a knee brace on the right leg. (RHE J).

18. At approximately 3 minutes and 43 seconds into the video, Claimant's attention is drawn to the garage bay directly in front of her desk. In order to get a better

view what is transpiring in the garage bay, Claimant grabs the left side of her desk with her left hand and pulls herself past the left side of her desk. She is not observed to push the chair to the left by using her right leg with "quite a bit of pressure" as she testified. Indeed, the movement is primarily accomplished with use of the left arm. At best, there is minimal use of the right leg as Claimant moves her rolling chair to the left side of her desk. (RHE J).

19. From 3:44 to 4:04 of the video, Claimant is observed to be sitting in her chair located just beyond the left side of her desk looking into the garage bay. There are no outward signs of injury. Indeed, Claimant appears to sit comfortably in her chair at the left side of her desk until the 4 minute and 5 second mark of the video, at which time she scoots her chair back under her workstation by using both legs to propel the chair forward. She then resumes her duties without any obvious signs of pain, injury or difficulty.

20. From 4:06 to 15:37, Claimant works on completing the paperwork for the customer who is standing directly in front of her desk. She briefly interacts with co-workers and occasionally scoots her chair from side to side and backward to reach for documents on a printer tray located behind her. Again, she gives no indication that she sustained an injury or is in discomfort during the remainder of the video. (RHE J).

21. Claimant filed two additional right knee claims with dates of injury on December 15, 2021 and January 6, 2022. At hearing, the Claimant testified that these two claims represented nothing more than temporary exacerbations of the injuries she sustained on May 20, 2021 and/or July 29, 2021.

22. The Claimant did not return to UCHealth in connection with her July 29, 2021 claim, but instead went to see Dr. George Johnson at Concentra Medical Centers (Concentra) on July 29, 2021. Dr. Johnson reported that the mechanism of injury occurred when the Claimant was scooting in her wheeled office chair at work. Dr. Johnson reported the Claimant did have a prior May 2021 injury when she was walking at work, and that the Claimant's condition had not improved over the past two months. (RHE E, p. 55). Physical examination of the right knee, which revealed swelling and tenderness over the medial joint line along with limited range of motion in all planes. (Id. at p. 57). Dr. Johnson's assessment was internal derangement of the right knee. (Id. at p. 54). He opined that Claimant's objective examination findings were "consistent with history and/or work-related mechanism of injury/illness." (Id.) Dr. Johnson recommended a knee brace, medications, and X-rays. Claimant was also given restrictions to include lifting, pushing/pulling up to 2 pounds, walking for 1 hour a day, standing for 1 hour per day, continuous use of crutches and wearing a brace or splint on her right knee for at least eight hours per day. (Id.) Dr. Johnson did not review the video of the July 29, 2021 incident that gives rise to this claim.

23. X-rays of the right knee performed on July 29, 2021 were read as normal. (RHE B, p. 19).

24. An August 12, 2021 note from Dr. Johnson indicates that Claimant's right knee symptoms were unchanged and that Claimant was not working due to restrictions. (RHE E, p. 58).

25. Claimant testified that Dr. Johnson imposed restrictions on her to include not being allowed to drive. She testified that she worked up until July 30, 2021, albeit in a modified capacity. She also testified that she was not told by her employer when she could return to work. Claimant stated that she was told by her employer that she had to wait for the insurance company for further direction on return to work. Claimant testified and the evidence presented supports a finding that she returned to work on October 4, 2021.

26. On August 23, 2021 Claimant presented to orthopedic surgeon Janie Friedman, M.D. According to Dr. Friedman's note, Claimant had had several years of off/on knee pain, which "got acutely worse after two incidents of twisting her knee at work on 5/19/21 (sic) and 7/29/21." At the time of Dr. Friedman's evaluation, Claimant was having pain primarily on the medial aspect of her knee without radiation. Her symptoms were reportedly unchanged after the second incident at work. Physical exam was positive for decreased range of motion. Dr. Friedman felt that Claimant's history and exam are consistent with a knee sprain. Dr. Friedman ordered x-rays, which demonstrated "well maintained joint spaces with no osseous abnormalities." She also reviewed Claimant's June 14, 2021 MRI, which she opined was "normal with no pathology noted." Dr. Friedman advised Claimant to "stop relying" on the brace and crutches as she felt they may be "hindering" her recovery. She administered a steroid injection and told Claimant if she didn't improve in 6-8 weeks, consideration would be given for a repeat MRI. (RHE E, pp. 78-80).

27. A repeat MRI performed on September 10, 2021 revealed the following:

- Subtle horizontal cleavage tear of root of medial meniscus without detachment measuring 4.5 mm.

- The cruciate ligaments, collateral ligaments, and extensor apparatus are all within normal limits. No osseous abnormalities.

- Focal prepatellar subcutaneous edema could reflect low-grade subacute soft tissue contusion status post history of trauma.

- Tri-compartmental low-grade partial-thickness articular cartilage loss most prominently involving the patellofemoral compartment.

(RHE B, p. 21).

28. Claimant returned to Dr. Johnson on September 16, 2021, with bilateral knee and back pain. Dr. Johnson noted that the September 10, 2021 MRI revealed a medial meniscus tear. Dr. Johnson also noted that Claimant was experiencing

compensatory left knee and back pain. Dr. Johnson assigned Claimant work restrictions of no driving the company vehicle, no lifting over 10 pounds, walking, and standing up to 2 hours per day, and referred Claimant to orthopedic surgeon David Walden, M.D. for further workup. (CHE 9, pp. 156-159).

29. Claimant was evaluated by Dr. Walden on October 4, 2021. According to his note, Claimant told Dr. Walden that she had a normal right knee until May 2021 when she was checking some units and twisted her right knee. Later that day, she stepped off a curb, causing further injury. The knee pain increased to the point where Claimant needed crutches. This note further indicates that Claimant re-injured herself in a second work-related incident on July 29, 2021, when she "got up quickly to check on a client who had pulled into the overhead door." Physical exam revealed decreased range of motion, diffuse tenderness of the medial lateral facets of the patella, medial lateral tissues with confluence of the medial facets of the patella, tibia, and femur. There was medial joint line tenderness, slight lateral joint line tenderness, and posterior mild pain. McMurray maneuvers were noted as equivocal. Dr. Walden reviewed the June 14, 2021 and September 10, 2021 MRIs which he interpreted as normal and with a possible medial meniscal tear respectively. Dr. Walden recommended conservative care including physical therapy to improve Claimant's range of motion for what he assessed was a flexion contracture of the right knee due to arthrofibrosis. He also administered a second steroid injection. There is no indication that Dr. Walden reviewed the aforementioned video tape of the July 29, 2021 incident during which Claimant alleges to have reinjured her knee. (CHE 12, pp. 207-209).

30. Based upon the content of his October 4, 2021 report, the ALJ finds Dr. Walden's understanding of the mechanism of injury alleged to have caused re-injury inconsistent with the July 29, 2021 security video tape. Indeed, there is no indication that Claimant "got up quickly" at any point during the incident in question to check on a client who had "pulled into the overhead door."

31. On December 22, 2021 Claimant was seen for a follow-up evaluation of her right knee. Dr. Walden noted that she had six visits of PT without lasting relief. Claimant was not convinced that the condition of her knee was improving and "wanted to discuss possible surgical intervention." Examination of the right knee revealed, in part, reports of pain along the medial joint line, which was exacerbated by medial McMurray testing. Dr. Walden's diagnoses on this day were acute meniscus tear and arthrofibrosis of the right knee. Dr. Walden opined that Claimant's symptoms correlated with the MRI findings of a medial meniscus tear. He also, without specifying which incident, noted that the mechanism of injury also could have produced this. Dr. Walden recommended arthroscopic surgery. (CHE 9, pp. 195-196; see also RHE E, p. 77).

Dr. Ciccone's Independent Medical Examination and Subsequent Testimony

32. At Respondents' request Claimant was evaluated by orthopedic surgeon William Ciccone II, M.D. Claimant gave Dr. Ciccone a history that on May 20, 2021, she

injured her right knee turning around while checking the storage units and noticed pain. This pain increased while leaving work when she had to “step down some stairs quickly.” According to this note, Claimant also alleged that she injured her knee further on July 29, 2021, while she was leaning around a desk to see out the window to watch a truck back into a door. Claimant also relayed to Dr. Ciccone that she injured her right knee again in December 2021 while watching video footage at work when, while pulling her chair forward, she hit her knee on the handle of the desk. She had a similar incident about a week later while stepping quickly to get to her phone. Dr. Ciccone’s report indicated that Claimant has most of her pain in the anteromedial and anterolateral aspect of her right knee, which gets worse with walking and stairs. (RHE A).

33. Dr. Ciccone opined that he did not believe the Claimant sustained a work-related injury to her knee, but that she may have suffered “increased pain with work activities.” He agreed with Dr. Burns who, on June 4, 2021, questioned whether this was a true work-related injury, and who on June 15, 2021, reported that she could say with greater than 50% certainty that Claimant's current symptoms were caused by a work-related injury. Moreover, Dr. Ciccone did not believe that the July 29, 2021 mechanism would cause a work-related injury. He reported that while the September 10, 2021 MRI may have revealed a subtle meniscal tear, Claimant did not have examination findings consistent with an acute meniscal tear. Dr. Ciccone was not provided the MRI imaging for review. (RHE, A).

34. Dr. Ciccone testified by evidentiary deposition on April 26, 2022 as an expert in orthopedic surgery. Prior to his deposition, Dr. Ciccone reviewed additional materials to include Claimant’s discovery responses, the June 14, 2021 MRI and the aforementioned July 29, 2021 security camera video.

35. After reviewing the additional information, Dr. Ciccone reiterated his previous opinion that Claimant did not suffer a work-related injury to her knee because the mechanisms of injury were not ones that he associated with acute meniscal pathology. (Depo. Trans. p. 10, lines 1-7). Dr. Ciccone then testified that he did not review the September 2021 MRI, but assuming that a meniscal tear was present, it may be degenerative in nature and unrelated to any injury, including the July 29, 2021 or May 20, 2021 incidents. (Depo Trans. p. 12, lines 7-25, p. 13, lines 1-21).

36. While he agreed that Dr. Walden documented an examination that correlated with an acute meniscal tear, Dr. Ciccone noted that Dr. Walden’s examination was inconsistent with all other providers who had examined the right knee. (Depo. Trans. p. 15, lines 10-22).

37. Dr. Ciccone testified that he disagreed with Dr. Walden’s recommendation for surgery because Claimant did not have a mechanism of injury likely to cause meniscal tearing and because Claimant would not likely benefits from surgery because her “knee pain is not consistent with meniscal pathology”. (Depo. Trans. p. 17, lines 8-19).

38. During cross-examination, Dr. Ciccone explained that the presence of a subchondral cyst and "scattered, low-grade partial thickness cartilage loss on imaging represents findings consistent with degenerative change. (Depo. Trans. p.p. 21-23, see also RHE B, p. 20-21). He also explained that the phrase "mild attenuation of the medial meniscus" as used in the September 10, 2021 MRI meant that the meniscus was "a little thinner" in appearance than normal. (Depo. Trans. p. 25, lines 5-8). He testified that "attenuation" is not synonymous with a tear. (Id. at p. 25, lines 9-10). He also explained that as used in the September 10, 2021 MRI, the phrase "mild attenuation of the medial meniscus towards the root favored subtle horizontal tear" meant:

> . . . that it's not clearly a tear. It means that it could be a tear, may be a tear. In the setting of early degenerative change, it may mean nothing as far as injury. It may just be part of the degeneration that is occurring within the knee.

(Depo. Trans. p. 25, lines 11-20).

39. Dr. Ciccone clarified that the word subtle meant that there may or may not be a meniscal tear present on the September 10, 2021 MRI. (Depo. Trans. p. 37, lines 16-24). According to Dr. Ciccone, MRI is very sensitive in discerning meniscal tearing and in MRIs that are read as "normal" it is unlikely there is any meniscal tearing. (Depo. Trans. p. 38, lines 14-22). Dr. Ciccone explained that in this case, the radiologist reading the September 10, 2021 MRI noted an abnormality in the medial meniscus, which he felt "might" be a tear. (Depo. Trans. p. 38, lines 14-19). Dr. Ciccone was then asked to assume that there was a meniscal tear by the time of the September 10, 2021 MRI that was not present by MRI obtained on June 14, 2021. Assuming this to be the case, Dr. Ciccone was asked whether the July 29, 2021 incident would have caused the tear present on the September 10, 2021 MRI. In response, Dr. Ciccone testified: "By work-related mechanism, I think it's unlikely that that (July 29, 2021 incident) would have caused a tear." (Depo. Trans. p. 39, lines 5-14).

40. The ALJ has carefully considered the reports of Dr. Walden and the expressed opinions of Dr. Ciccone and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. Ciccone's opinions credible and more persuasive than those of Dr. Walden.

41. The evidence presented, persuades the ALJ that Claimant has failed to prove that she suffered an acute tear of the medial meniscus as a direct consequence of either the May 20, 2021 or July 29, 2021 alleged injurious incidents. To the contrary, the evidence presented persuades the ALJ that Claimant's meniscal tear is, more probably than not, degenerative in nature and precipitated by her underlying, osteoarthritis rather than by pivoting on her feet, ascending/descending stairs, stepping off a curb or pushing a rolling chair on a hard surface with her right foot as she claims. Consequently, Claimant has failed to prove by a preponderance of the evidence that she sustained a work related injury arising out of her employment on May 20, 2021 or July 29, 2021.

42. Even if Claimant had established a causal connection between her right medial meniscal tear and her work related functions, on May 20, 2021 or July 29, 2021, she failed to prove by a preponderance of the evidence that the surgery recommended by Dr. Walden is reasonable or necessary. To the contrary, the ALJ is persuaded by Dr. Ciccone's testimony that the recommended surgery is unlikely to result in any benefit. Accordingly, the ALJ finds the recommendation for surgery unreasonable.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found, the ALJ concludes the testimony of Dr. Ciccone to be credible and more persuasive than the contrary opinions of Dr. Walden.

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence

or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the evidence presented supports a conclusion that Claimant's alleged injuries occurred in the course of her employment. Nonetheless, Claimant must also establish that her alleged injuries arose out of her employment before the claim(s) can be found compensable.

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2014. Here, Dr. Ciccone persuasively testified that the pain and suspected medial meniscal tear in Claimant's right knee is probably emanating from and related to the natural progression of degenerative arthritis in the knee rather than any activity or condition associated with Claimant's employment, i.e. walking, pivoting, ascending/descending stairs, stepping up onto and down from a concert curb or scooting in a rolling chair. The record evidence, including the physical examinations of Dr. Burns and the evaluation of Dr. Friedman support Dr. Ciccone's opinions. Based upon the evidence presented, the ALJ is convinced that the condition of Claimant's right knee, including her suspected meniscus tear are unrelated to either the May 20, 2021 or July 29, 2021 incident occurring at work.

F. The question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and her need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, Claimant has failed to establish a causal connection between her employment related duties and the resulting condition for which medical treatment benefits are sought. Here, the origin of Claimant's pain and the cause of her suspected medial meniscus tear, more probably than not, is progressing degenerative change within the right knee rather than any activity associated with her job. Consequently, her claims must be denied and dismissed.

G. Although Claimant is not alleging that her meniscal tear was "precipitated" by a pre-existing condition and instead by a discrete injury, the ALJ finds and concludes, that Respondents are suggesting, among other things, that Claimant's meniscal tear is a likely consequence of a pre-existing condition (degenerative arthritis) brought by Claimant to the workplace. Consequently, the ALJ has also analyzed the compensable nature of this case pursuant to the decision announced by the Colorado Supreme Court in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) and the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

H. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean, "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of the pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the

employment and the injury. *See Ramsdell v. Horn, supra.* In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* Courts have previously held that hard level concrete floors, concrete stairs, and curbs are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). There is no requirement that the pre-existing condition is symptomatic prior to the injury in order for the special hazard rule to apply. *Alexander v. Emergency Courier Services, supra*. Here, Claimant did not testify that any particular flaw in the curb caused her right knee injury. As presented, the evidence supports a finding that the curb in this case is not a special hazard of employment but rather a ubiquitous condition, which Claimant could have encountered off the job. Moreover, as found, the record evidence supports a conclusion that Claimant's meniscal tear was precipitated by her pre-existing osteoarthritis. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury to Claimant's right knee under any claim that stepping off the curb caused her injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); See *also Ramsdell v. Horn*, *supra.* Here Claimant failed to establish that a special hazard of employment combined with her pre-existing condition to cause the injury in question. Accordingly, her claim for benefits based upon an injury suffered while stepping off a curb must be denied and dismissed.

I. As Claimant failed to establish that she sustained a compensable, work related injury on May 20, 2021 or July 29, 2021, her alleged exacerbations of these injuries occurring on December 15, 2021 and January 6, 2022, must also be denied and dismissed. Because Claimant has failed to carry her burden to establish that she sustained compensable work-related injuries, this order does not address her claims to medical and lost wage benefits.

ORDER

It is therefore ordered that:

1. Claimant's claims for worker's compensation benefits alleged to have occurred from injuries sustained on May 20, 2021 and July 29, 2021 are denied and dismissed.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the

above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-248-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury from a motor vehicle accident, on June 17, 2021, while in the course and scope of his employment with Employer.

2. Whether Claimant is entitled to medical benefits for services rendered related to the June 17, 2021 motor vehicle accident.

3. Whether Claimant should be awarded TTD benefits from June 18, 2021 to January 9, 2022. If so, what was Claimant's AWW?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Employer is in the business of sanitizing hog farm facilities. CS[Redacted] is the owner of Employer, and he lives in Yuma, Colorado. The registered address for Employer is 313 S. Main Street, Yuma, Colorado 80759 (Ex. S). Employer's "office" is in Yuma, Colorado.

2. Mr. CS[Redacted] testified that Seaboard Farms was Employer's only client in June 2021. Seaboard Farms had several locations, each housing pigs at different stages of their preparation for slaughter. All of the locations were in Holyoke, Colorado. Holyoke is approximately an hour from Yuma, by car.

3. Claimant began working for Employer in February 2020. Claimant testified that he earned $13 an hour plus bonus, and his job was to power wash and sanitize facilities at various hog farms.

4. Claimant credibly testified that on approximately six occasions prior to June 17, 2021, he traveled to Yuma, Colorado to work for Employer. Claimant testified that he cleaned up the yard and pulled weeds at Mr. CS[Redacted] 's house, the "other" house, and also at the "office". Claimant's pay for this work was a part of what he would earn as an employee of Employer. Claimant presented no evidence to support these payments.

5. MG[Redacted] also worked for Employer. Mr. MG[Redacted] credibly testified that on approximately three occasions he worked at Mr. CS[Redacted] 's home in Yuma. Mr. MG[Redacted] testified that the first time he worked at Mr. CS[Redacted] 's house he cleaned the yard, hung sheet rock, and took tools to the "office." Mr. MG[Redacted] testified that his pay for this work was part of his regular paycheck.

6. The ALJ finds that Claimant's employment included performing work for Employer in Yuma at Mr. CS[Redacted] 's personal residence, the other house and the office. Claimant traveled to Yuma at the express or implied direction of Employer, and conferred a benefit to Employer.

7. Employer and Seaboard Farms had a fee dispute. On June 14, 2021, Claimant and other employees were told by Employer to report to the hog farm owned by Seaboard Farms, and begin removing the equipment. On June 14, 2021, Claimant helped remove Employer's equipment off the hog farm.

8. Claimant's timecard for June 14, 2021, reflects 10 hours of work that day. The 10 hours of work is hand-written on the time card. (Ex. D). According to Mr. CS[Redacted] , Claimant did not punch his time card that day, but Employer paid him for 10 hours of work.

9. Mr. MG[Redacted] testified that on June 14, 2021, he moved Employer's equipment from the farm to a garage in another location. Employer also paid Mr. MG[Redacted] for 10 hours of work that day even though he did not punch his time card.

10. Employer was not able to remove all of its equipment on June 14, 2021. There is conflicting testimony as to what other day or days the equipment was removed.

11. Claimant testified that he did not work on June 15, 2021 because he had the day off, but on June 16, 2021, he continued to remove equipment from Seaboard Farms for Employer.

12. Mr. CS[Redacted] 's brother, JSV[Redacted], testified that he is not employed by Employer. Mr. JSV[Redacted] further testified that he helped Claimant and Mr. MG[Redacted] remove equipment on June 14 and 15, 2021. Mr. JSV[Redacted] testified that he helped Claimant move personal things on June 16, 2021. Claimant testified that Mr. JSV[Redacted] used the "company truck" to help him move furniture on either June 15 or 16, 2021.

13. Mr. CS[Redacted] testified that Employer was no longer in business as of June 15, 2021 because all of the equipment had been pulled from the hog farm. Mr. CS[Redacted] , however, was not present in Holyoke when the equipment was removed.

14. The ALJ finds that on at least two days between June 14 and June 16, 2021, Claimant helped remove Employer's equipment from the hog farms with Mr. JSV[Redacted] 's assistance.

15. There is no evidence that Employer paid Claimant for any work he performed after June 14, 2021.

16. Mr. CS[Redacted] testified that he asked his brother, Mr. JSV[Redacted] , to tell Claimant and the other employees that there was no more work for them.

17. Claimant credibly testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer.

Claimant further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

18. Mr. MG[Redacted] corroborated Claimant's testimony. He testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer. He further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

19. Mr. CS[Redacted] testified that in June 2021, he had health issues and had them "for a while." Because of his health issues, Mr. CS[Redacted] , did not spend much time in Holyoke, near the hog farms. Mr. JSV[Redacted] assisted his brother with personal and employment issues.

20. The ALJ finds that even though Mr. JSV[Redacted] was not technically employed by Employer, he was an agent of Employer, and specifically acted on behalf of Mr. CS[Redacted] and Employer.

21. Mr. JSV[Redacted] lived in Holyoke and had a social relationship with Claimant and Mr. MG[Redacted] .

22. Claimants credibly testified that Mr. JSV[Redacted] regularly picked them up and drove them to and from the specific hog farms where they worked each day. Claimants did not know where they were needed for work on any given day. They relied upon Mr. JSV[Redacted] to communicate where they would be working, and to transport them to and from the location for work. Claimants further testified that when they worked for Employer in Yuma, Mr. JSV[Redacted] drove them to Yuma from Holyoke.

23. It is uncontroverted that Mr. CS[Redacted] relied upon his brother, Mr. JSV[Redacted] , to communicate with the employees, including Claimant, on his behalf.

24. Mr. JSV[Redacted] testified that he went to Yuma on June 17, 2021, to "help" his brother, Mr. CS[Redacted] . That morning, Mr. JSV[Redacted] picked up Claimants in a truck owned by Employer. A man by the name of JV[Redacted] and Mr. JSV[Redacted] 's dog were also in the truck.

25. Claimant testified that on June 17, 2021, he went to Yuma with Mr. JSV[Redacted] to clean Mr. CS[Redacted] 's yard, and other properties he owned, just as he had done in the past. Mr. MG[Redacted] corroborated this testimony. Both Claimant and Mr. MG[Redacted] credibly testified that they had each been to Yuma on previous occasions to work for Employer by cleaning the yard and doing odds and ends.

26. Mr. JSV[Redacted] testified that Claimant and Mr. MG[Redacted] were his friends and they wanted to go for a ride with him on June 17, 2021. The ALJ does not find this testimony credible. The ALJ finds that Claimants had not been informed that their employment ended on June 15, 2021. Claimants believed they were going to work for Employer in Yuma on June 17, 2021, and they expected to be paid by Employer for this

work. The ALJ infers that neither Claimant nor Mr. MG[Redacted] would voluntarily go to Yuma to clean the yard of Mr. CS[Redacted] if they knew their employment ceased on June 15, 2021, as Mr. CS[Redacted] testified.

27. Claimant and Mr. JSV[Redacted] testified that they when they got to Yuma, they went to the "other house" to pick up tools. Claimant cleared weeds and cleaned the area behind Employer's office. Claimant testified that he also picked weeds at Mr. CS[Redacted] 's house.

28. Mr. JSV[Redacted] drove Claimants back to Holyoke. When close to Holyoke, Mr. JSV[Redacted] lost control and rolled the truck. Claimant was ejected and the truck landed on top of him. (Ex. 1). Mr. MG[Redacted] wanted Mr. JSV[Redacted] to call 911, but he declined and called his brother, Mr. CS[Redacted] . Mr. MG[Redacted] and Mr. JV[Redacted] lifted the truck and pulled Claimant out from under it.

29. Claimant called his girlfriend, who came and took him to Melissa Hospital in Holyoke. Claimant was transferred by helicopter to Swedish Medical Center in Englewood. The medical reports show that Claimant suffered neck pain, a C5 fracture, and a left wrist styloid fracture. (Ex. 6). Claimant testified he remained hospitalized for approximately four days.

30. Claimant testified that one week after he was released from the hospital he called Mr. JSV[Redacted] to ask when he could return to work, and Mr. JSV[Redacted] told him that there was no more work. Claimant testified that this was the first time he learned there was no more work with Employer. The ALJ finds Claimant's testimony credible.

31. Claimant credibly testified that he has received extensive medical bills that remain unpaid to date, including the helicopter transportation from Melissa Hospital to Swedish Medical Center, diagnostic testing and additional treatment. Bills for these services were not presented at hearing.

32. Claimant filed a Workers' Claim for Compensation on August 4, 2021. (Ex. R). Respondents' filed a First Report of Injury on August 11, 2021, and a Notice of Contest on August 27, 2021, claiming that further investigation was needed. (Ex. N).

33. Employer objected to Claimant's claim on the basis that Claimant was not on the payroll on that date, and that "it [Employer] quit June 15, 2021." (Ex. D).

34. The ALJ finds that on June 17, 2021, Claimant was an employee of Employer, was performing work on behalf of Employer in Yuma, Colorado at the express or implied direction of Employer, and this work conferred a benefit on Employer.

35. Claimant's gross earnings from January 1, 2021 to June 14, 2021 (164 days or 23.42 weeks) were $15,627. (Ex. 7). Based on this information, Claimant's AWW was $667.25.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Employment Status

In order for an injury to qualify under the Act, there must be an employer/employee relationship at the time of the injury. §§ 8-40-202(b) and 8-40-203(b) C.R.S. The ALJ credits Claimants' testimony that the alleged termination of work was not communicated to either of them prior to the accident on June 17, 2021. Both Claimant and Mr. MG[Redacted] credibly testified that neither Mr. CS[Redacted] nor Mr. JSV[Redacted] told them that Employer no longer had work for them until several days after the June 17, 2021 accident. Claimant and Mr. MG[Redacted] both credibly testified that neither of them understood that Employer did not have any more work for them on the hog farms at the time they helped remove the equipment between June 14 and June 16, 2021. As found, Claimant has proven by a preponderance of the evidence that he was working for Employer on June 17, 2021, and he conferred a benefit on Employer.

Course and Scope

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.,* W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

The Colorado Supreme Court applied the *Madden* factors in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 867 (Colo. 1999). In that case, Claimant was injured in a motor vehicle accident as he was driving to a temporary construction site operated by Employer-Armendariz Construction Company. Claimant did not meet with other workers at a service station in Grand Junction, Colorado, where Employer customarily paid for the cost of fuel and employees carpooled. The ALJ concluded that the employer expected claimant to travel as part of his job and he performed services at a substantial distance from his home. The ALJ's decision that the claim was compensable was affirmed by the ICAO, the Court of Appeals and the Colorado Supreme Court. The Court stated:

> Applying these variables to the facts of this case, we find that there is no evidence that Reynolds' injury occurred during working hours or that it occurred on his employer's premises. In addition, there is no evidence in this case that Reynolds' injury occurred within a zone of special danger warranting recovery. However, there is sufficient evidence to support the ALJ's finding that travel was contemplated by Reynolds' employment contract with his employer, Armendariz Construction Company, to warrant recovery under the Workers' Compensation Act of Colorado.

Id. As the Court in *Staff Adm'rs,* recognized, even where not all of the *Madden* factors were present, it was possible that an employee's injuries arose out of his/her employment.

The *Madden* Court cited several cases where compensability was found because travel by an employee was at the express or implied request of the employer, or the travel conferred a benefit on the employer beyond the sole fact of the employee's arrival at work. 977 P.2d at 864-65 (citations omitted). Such travel is contemplated by the employment contract even if the advantage to the employer may have been slight. *Berry's Coffee Shop,* 423 P.2d at 5.

When considering the role travel played, the ALJ determined Claimant's travel to and from Yuma was at Mr. JSV[Redacted] 's request, and as found, Mr. JSV[Redacted] was an agent of Employer. (Findings of Fact ¶ 20). Thus, Claimant's travel was at the express or implied request of Employer. Additionally, as found, Claimant's travel to Yuma conferred a benefit on Employer as he performed work for Employer on June 17, 2021. (Findings of Fact ¶ 34). In addition, the evidence in the record showed that Mr. JSV[Redacted] regularly drove Claimant to and from work assignments. (Findings of Fact ¶ 22). The ALJ credits Claimant's testimony that he had been paid for work he performed for Employer in Yuma on previous occasions, and he expected to be paid for the work on June 17, 2021. (Findings of Fact ¶ 26). The ALJ concludes there was a causal connection between Claimant's travel to various locations, including, but not limited to, Yuma and his employment. *Loffland Brothers v. Baca*, 651 P.2d 431, 432-433 (Colo. App. 1982); *Cf. Lewis Essary v. General Dynamics,* W.C. 5-117-912 (ICAO December 1, 2020) *aff'd, Colo. Ct. App, 10CA2103,* August 12, 2021, *unpublished*. The ALJ concludes that Claimant proved by a preponderance of the evidence that his injury arose out of the course and scope of employment, and Claimant's June 17, 2021 injury, is compensable under the Act.

AWW

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW was $667.25. (Findings of Fact ¶ 35).

TTD

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled as of June 17, 2021 through January 9, 2022, during which time he underwent medical care. (Ex. 5 and 6). Claimant

is entitled to TTD benefits beginning June 18, 2021 and ending January 9, 2022. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days.

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*, 797 P.29 777 (Colo. App. 1990). "Authorization" refers to the provider's legal status to treat the injury at the Respondent's expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ that must be upheld if supported by substantial evidence in the record. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony of contrary inferences. See *F.R. Orr Constr. v. Rinta*, 171 P.2d 965 (Colo. App. 1985).

The evidence established that at no time following the auto accident of June 17, 2021, did Employer refer Claimant for medical care. He received emergency medical care from Melissa Hospital, as well as Swedish Medical Center, including a flight for life helicopter flight from Holyoke to Denver. The precise amounts of the bills outstanding remains to be determined. Claimant's care at Melissa Hospital and continued care at Swedish Medical Center are compensable. *See Sims v. ICAO*, 797 P.2d 777 (Colo. App. 1990) (emergency care is compensable).

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 17, 2021 in the course and scope of employment.

2. Claimant's treatment at Melissa Hospital and Swedish Medical Center is reasonable and necessary.

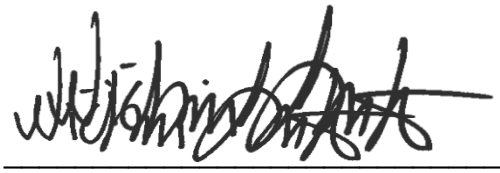
3. Claimant's AWW at the time of his injury was $667.25.

4. Claimant has shown that due to his injury he was out of work from June 18, 2021 through January 9, 2022. He is entitled to a weekly TTD rate based on an AWW of $667.25.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2022



Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-139-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury from a motor vehicle accident, on June 17, 2021, while in the course and scope of his employment with Employer.

2. Whether Claimant is entitled to medical benefits for services rendered related to the June 17, 2021 motor vehicle accident.

3. Whether Claimant should be awarded TTD benefits, and if so, what was Claimant's AWW?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Employer is in the business of sanitizing hog farm facilities. CS[Redacted] is the owner of Employer, and he lives in Yuma, Colorado. The registered address for Employer is [Redacted], Yuma, Colorado 80759 (Ex. S). Employer's "office" is in Yuma, Colorado.

2. Mr. CS[Redacted] testified that Seaboard Farms was Employer's only client in June 2021. Seaboard Farms had several locations, each housing pigs at different stages of their preparation for slaughter. All of the locations were in Holyoke, Colorado. Holyoke is approximately an hour from Yuma, by car.

3. Claimant could not recall exactly when he began working for Employer, but thought it was in February or March of 2021. The earliest payroll record for Claimant is from March 8, 2021. (Ex. D.) Claimant testified that he earned $13 an hour plus bonus, and his job was to power wash and sanitize facilities at various hog farms.

4. Claimant credibly testified that on approximately three occasions prior to June 17, 2021, he traveled to Yuma, Colorado to work for Employer. Claimant testified that the first time he worked at Mr. CS[Redacted] 's house he cleaned the yard, hung sheet rock, and took tools to the office. Claimant testified that his pay for this work was part of his regular paycheck. Claimant presented no evidence to support these payments.

5. OR[Redacted] also worked for Employer. He credibly testified that on approximately six occasions prior to June 17, 2021, he traveled to Yuma to work for Employer. He cleaned up the yard and pulled weeds at Mr. CS[Redacted] 's house, the "other" house, and also at the office. Mr. OR[Redacted] 's pay for this work was a part of what he would earn as an employee of Employer.

6. The ALJ finds that Claimant's employment included performing work for Employer in Yuma at Mr. CS[Redacted] 's personal residence, the other house and the office. Claimant traveled to Yuma at the express or implied direction of Employer, and conferred a benefit to Employer.

7. Employer and Seaboard Farms had a fee dispute. On June 14, 2021, Claimant and other employees were told by Employer to report to the hog farm owned by Seaboard Farms, and begin removing the equipment. On June 14, 2021, Claimant helped remove Employer's equipment off the hog farm.

8. Claimant's timecard for June 14, 2021, reflects 10 hours of work that day. The 10 hours is handwritten on the time card. (Ex. D). According to Mr. CS[Redacted] , Claimant did not punch his time card that day, but Employer paid him for 10 hours of work.

9. Mr. OR[Redacted] testified that on June 14, 2021, he helped remove Employer's equipment from the farm. Employer paid Mr. OR[Redacted] for 10 hours of work that day even though he did not punch his time card.

10. According to Mr. CS[Redacted] 's brother, JSV[Redacted], Employer was not able to remove all of its equipment on June 14, 2021. Mr. JSV[Redacted] testified that he helped Claimant and Mr. OR[Redacted] remove equipment on June 14 and 15, 2021. Mr. JSV[Redacted] further testified that he is not employed by Employer.

11. Mr. CS[Redacted] testified that Employer was no longer in business as of June 15, 2021 because all of the equipment had been pulled from the hog farm. Mr. CS[Redacted] was not present in Holyoke when the equipment was removed.

12. The ALJ finds that Claimant helped remove Employer's equipment from the hog farms with Mr. JSV[Redacted] 's assistance on June 14 and 15, 2021.

13. There is no evidence that Employer paid Claimant for any work he performed after June 14, 2021. The ALJ finds that Employer did not pay Claimant for his work on June 15, 2021.

14. Mr. CS[Redacted] testified that he asked his brother, Mr. JSV[Redacted] , to tell Claimant and the other employees that there was no more work for them.

15. Claimant testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer. Claimant further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

16. Mr. OR[Redacted] corroborated Claimant's testimony. He testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with employer. He further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

17. Mr. CS[Redacted] testified that in June 2021, he had health issues and had them "for a while." Because of his health issues, Mr. CS[Redacted] , did not spend much time in Holyoke, near the hog farms. Mr. JSV[Redacted] assisted his brother with personal and employment issues.

18. The ALJ finds that even though Mr. JSV[Redacted] was not technically employed by Employer, he was an agent of Employer, and specifically acted on behalf of Mr. CS[Redacted] and Employer.

19. Mr. JSV[Redacted] lived in Holyoke and had a social relationship with Claimant and Mr. OR[Redacted] .

20. Claimants credibly testified that Mr. JSV[Redacted] regularly picked them up and drove them to and from the specific hog farms where they worked each day. Claimants did not know where they were needed for work on any given day. They relied upon Mr. JSV[Redacted] to communicate where they would be working, and to transport them to and from the location for work. Claimants further testified that when they worked for Employer in Yuma, Mr. JSV[Redacted] drove them to Yuma from Holyoke.

21. It is uncontroverted that Mr. CS[Redacted] relied upon his brother, Mr. JSV[Redacted] to communicate with the employees, including Claimant, on his behalf.

22. Mr. JSV[Redacted] testified that he went to Yuma on June 17, 2021, to "help" his brother, Mr. CS[Redacted] . That morning, Mr. JSV[Redacted] picked up Claimants in a truck owned by Employer. A man by the name of JV[Redacted] and Mr. JSV[Redacted] 's dog were also in the truck.

23. Claimant testified he went to Yuma on June 17, 2021, with Mr. JSV[Redacted] to clean Mr. CS[Redacted] 's yard, and other properties he owned, just as he had done in the past. Mr. OR[Redacted] corroborated this testimony. Both Claimant and Mr. OR[Redacted] credibly testified that they had each been to Yuma on previous occasions to work for Employer by cleaning the yard and doing odds and ends.

24. Mr. JSV[Redacted] testified that Claimant and Mr. OR[Redacted] were his friends and they wanted to go for a ride with him on June 17, 2021. The ALJ does not find this testimony credible. The ALJ finds that Claimants had not been informed that their employment ended on June 15, 2021. Claimants believed they were going to work for Employer in Yuma on June 17, 2021, and they expected to be paid by Employer for this work. The ALJ infers that neither Claimant nor Mr. OR[Redacted] would voluntarily go to Yuma to clean the yard of Mr. CS[Redacted] if they knew their employment ceased on June 15, 2021, as Mr. CS[Redacted] testified.

25. Mr. JSV[Redacted] testified that Claimant did no work at all on June 17, 2021. Mr. JSV[Redacted] testified that Claimant drank beer while they drove to Yuma, and that he smoked marijuana later in the day while there. Mr. CS[Redacted] testified that Claimant smoked marijuana that day, but later testified he never actually saw Claimant do this.

26. Claimant testified that he worked at Mr. CS[Redacted] 's house and cleaned the outside of the office. Claimant also testified that he smoked marijuana that day, but he denied drinking beer. Mr. OR[Redacted] testified that he saw Claimant working and using the wheelbarrow that day. Mr. OR[Redacted] further testified that he never saw Claimant smoke marijuana, and while he saw a beer bottle, he never saw Claimant drink any beer.

27. The ALJ credits the testimony of Claimant and Mr. OR[Redacted] . The ALJ finds that even though Claimant smoked marijuana at some point while in Yuma on June 17, 2021, Claimant performed work for the benefit of Employer, at the express or implied direction of Employer.

28. Mr. JSV[Redacted] drove Claimants back to Holyoke. When close to Holyoke, Mr. JSV[Redacted] lost control and rolled the truck. (Ex. 1). Mr. OR[Redacted] was ejected and the truck landed on top of him. Claimant wanted Mr. JSV[Redacted] to call 911, but he declined and called his brother, Mr. CS[Redacted] . Claimant and Mr. JV[Redacted] lifted the truck and pulled Mr. OR[Redacted] out from under it.

29. Mr. OR[Redacted] called his girlfriend, who came and took Mr. OR[Redacted] and Claimant to Melissa Hospital in Holyoke. Claimant was hospitalized with a contusion of his lung, a fracture to his sternum and multiple abrasions. Claimant was kept overnight for observation. (Ex. 12 and Ex. A).

30. Claimant was discharged on June 18, 2021. Dr. Harris gave Claimant a release to work that said Claimant had a fractured sternum, his expected healing was six to eight weeks, and that he would be able to gradually return to work after that time. Dr. Harris recommended Claimant see his primary physician to be cleared and his restrictions determined. (Ex. 12 and Ex. A).

31. Claimant testified that to date, he has not undergone follow-up care. Without employment, Claimant returned home to Thornton. Claimant lacked the ability and means to get follow up care. Thus, he has not had any medical care since being discharged from Melissa Hospital post-accident.

32. Claimant filed a Workers' Claim for Compensation on August 4, 2021. (Ex. P). Respondents' filed a First Report of Injury on August 10, 2021, and a Notice of Contest on August 27, 2011, claiming that further investigation was needed. (Ex. Q).

33. Claimant testified that he contacted Mr. JSV[Redacted] , about four days after his discharge, via the What's Up app, to see when he could return to work. Claimant testified that this was the first time he learned there was no more work with Employer. The ALJ finds Claimant's testimony credible.

34. Employer objected to Claimant's claim on the basis that Claimant was not on the payroll on that date, and that "it [Employer] quit June 15, 2021." (Ex. D).

35. The ALJ finds that on June 17, 2021, Claimant was an employee of Employer, was performing work on behalf of Employer in Yuma, Colorado at the express or implied direction of Employer, and this work conferred a benefit on Employer.

36. Claimant's gross earnings from March 8, 2021, to June 14, 2021 (98 days or 14 weeks) were $8,973.47. (Ex. 7). Based on this information, Claimant's AWW was $640.96.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Employment Status

In order for an injury to qualify under the Act, there must be an employer/employee relationship at the time of the injury. §§ 8-40-202(b) and 8-40-203(b) C.R.S. The ALJ credits Claimants' testimony that the alleged termination of work was not communicated to either of them prior to the accident on June 17, 2021. Both Claimant and Mr. OR[Redacted] credibly testified that neither Mr. CS[Redacted] nor Mr. JSV[Redacted] told them that Employer no longer had work for them until several days after the June 17, 2021 accident. Claimant and Mr. OR[Redacted] both credibly testified that neither of them understood that Employer did not have any more work for them on the hog farms at the

time they helped remove the equipment between June 14 and June 16, 2021. As found, Claimant has proven by a preponderance of the evidence that he was working for Employer on June 17, 2021, and he conferred a benefit on Employer.

Course and Scope

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.,* W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

The Colorado Supreme Court applied the *Madden* factors in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 867 (Colo. 1999). In that case, Claimant was injured in a motor vehicle accident as he was driving to a temporary construction site operated by Employer-Armendariz Construction Company. Claimant did not meet with other workers at a service station in Grand Junction, Colorado, where Employer customarily paid for the cost of fuel and employees carpooled. The ALJ concluded that the employer expected claimant to travel as part of his job and he performed services at a substantial distance from his home. The ALJ's decision that the claim was compensable was affirmed by the ICAO, the Court of Appeals and the Colorado Supreme Court. The Court stated:

> Applying these variables to the facts of this case, we find that there is no evidence that Reynolds' injury occurred during working hours or that it occurred on his employer's premises. In addition, there is no evidence in this case that Reynolds' injury occurred within a zone of special danger warranting recovery. However,

> there is sufficient evidence to support the ALJ's finding that travel was contemplated by Reynolds' employment contract with his employer, Armendariz Construction Company, to warrant recovery under the Workers' Compensation Act of Colorado.

Id. As the Court in *Staff Adm'rs,* recognized, even where not all of the *Madden* factors were present, it was possible that an employee's injuries arose out of his/her employment.

The *Madden* Court cited several cases where compensability was found because travel by an employee was at the express or implied request of the employer, or the travel conferred a benefit on the employer beyond the sole fact of the employee's arrival at work. 977 P.2d at 864-65 (citations omitted). Such travel is contemplated by the employment contract even if the advantage to the employer may have been slight. *Berry's Coffee Shop,* 423 P.2d at 5.

When considering the role travel played, the ALJ determined Claimant's travel to and from Yuma was at Mr. JSV[Redacted] 's request, and as found, Mr. JSV[Redacted] was an agent of Employer. Thus, Claimant's travel was at the express or implied request of Employer. Additionally, as found, Claimant's travel to Yuma conferred a benefit on Employer as he performed work for Employer on June 17, 2021. (Findings of Fact ¶¶ 27 and 35). In addition, the evidence in the record showed that Mr. JSV[Redacted] regularly drove Claimant to and from work assignments. (Findings of Fact ¶ 20). The ALJ credits Claimant's testimony that he had been paid for work he performed for Employer in Yuma on previous occasions, and he expected to be paid for the work on June 17, 2021. (Findings of Fact ¶ 24). The ALJ concludes there was a causal connection between Claimant's travel to various locations, including, but not limited to, Yuma and his employment. *Loffland Brothers v. Baca*, 651 P.2d 431, 432-433 (Colo. App. 1982); *Cf. Lewis Essary v. General Dynamics,* W.C. 5-117-912 (ICAO December 1, 2020) ***aff'd,*** *Colo. Ct. App, 10CA2103,* August 12, 2021, *unpublished*. The ALJ concludes that Claimant proved by a preponderance of the evidence that his injury arose out of the course and scope of employment, and Claimant's June 17, 2021 injury is compensable under the Act.

AWW

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW is $527.85. (Findings of Fact ¶ 37).

TTD

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of

the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled for eight weeks, during which time he was restricted from working. (Ex. 12 and Ex. A). Claimant is entitled to TTD benefits beginning June 18, 2021 and ending August 13, 2021. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days.

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*, 797 P.29 777 (Colo. App. 1990). "Authorization" refers to the provider's legal status to treat the injury at the Respondent's expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ that must be upheld if supported by substantial evidence in the record. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony of contrary inferences. See *F.R. Orr Constr. v. Rinta*, 171 P.2d 965 (Colo. App. 1985).

The evidence established that at no time following the auto accident of June 17, 2021, did Employer refer Claimant for medical care. He received emergency medical care from Melissa Hospital. The precise amounts of the bills outstanding remains to be determined. Claimant's care at Melissa Hospital is compensable. *See Sims v. ICAO*, 797 P.2d 777 (Colo. App. 1990) (emergency care is compensable).

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 17, 2021 in the course and scope of employment.

2. Claimant's treatment at Melissa Hospital was reasonable and necessary.

3. Claimant's AWW at the time of his injury was $527.85.

4. Claimant has shown that due to his injury he was out of work from June 18, 2021 through August 13, 2021. He is entitled to a weekly TTD rate based on an AWW of $527.85.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 7-13-22

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the lumbar spine surgery recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 24, 2020 work injury?

FINDINGS OF FACT

1. On February 24, 2020, the claimant was working as a teacher in the severe needs classroom. On that date, the claimant and two other employees were injured by an autistic student. This student was at least 16 years old and approximately six feet tall. The student became agitated to the point that he grabbed the claimant by her hair and roughly shook her "like a rug". During this interaction, the claimant's head struck a metal door frame, and her head was pulled down toward the floor.

2. The claimant's coworkers testified at the hearing and corroborated the events of February 24, 2020. The claimant and her two coworkers were transported by the school psychologist to the emergency department (ED) at Community Hospital.

3. Immediately following the incident, the claimant had pain in her head and neck. She had blurred vision, nausea, and dizziness. In addition, the claimant vomited twice between the time of the incident and arriving at the ED for treatment.

Low back treatment prior to February 24, 2020

4. In 2017, the claimant sought medical treatment for low back symptoms. On July 13, 2017, the claimant was seen by Jason Bell, PA-C, at Rocky Mountain Orthopaedic Associates. At that time, the claimant reported experiencing about a week of severe and acute low back pain, with leg pain (right greater than left). Lumbar spine x-rays taken on that date showed no evidence of any acute injury. The x-rays also showed some minor narrowing at the L5-S1 level. PA Bell ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

5. On July 17, 2017, a lumbar spine MRI was performed and showed a large right paracentral disc extrusion at the L5-S1 level causing severe foraminal stenosis.

6. On July 27, 2017, the claimant returned to Rocky Mountain Orthopaedic Associates and was seen by Dr. Kirk Clifford. On that date, the claimant continued to report low back pain, with right greater than left leg symptoms. Given the MRI results, Dr. Clifford recommended right sided L5-S1 and S1-S2 transforaminal epidural steroid

injections (TFESIs). These injections were administered by Dr. Clifford on August 10, 2017.

7. On September 13, 2017, the claimant was seen by PA Bell and reported "pretty good relief" from the injections. The claimant asked about repeat injections.

8. On September 14, 2017, Dr. Robert Frazho administered ESIs at the right L5-S1 and S1-S2 levels.

9. The claimant returned to Dr. Frazho on November 15, 2018, and reported "good relief" from the September 2017 injections. Dr. Frazho noted that the claimant's pain was not bilateral. In addition, Dr. Frazho recommended core strengthening, weight loss, and bilateral L5-S1 ESIs. Dr. Frazho administered the recommended injections on that same date.

10. On December 6, 2018, the claimant was seen by Dr. Frazho. At that time, the claimant reported that the most recent injection provided some relief. Dr. Frazho noted that the claimant continued to have axial pain, with possible facet pain. He recommended bilateral L5-S1 facet injections. Dr. Frazho also identified medial branch blocks and/or surgery as potential future treatment. On January 10, 2019, Dr. Frazho administered bilateral L5-S1 facet injections to address the claimant's diagnosis of lumbar spondylosis.

Medical treatment beginning February 24, 2020

11. In the ED at Community Hospital on February 24, 2020, the claimant's initial symptoms were listed as headache, nausea, tenderness at the left temple, with her greatest pain in the right side of her neck and right shoulder. Lynda Steinbach, FNP noted that the claimant's back was normal on examination, with full range of motion. FNP Steinbach listed the claimant's diagnoses as neck strain and head contusion.

12. The claimant testified that she does not recall whether her back was examined at Community Hospital. At that time, her focus was on her head related symptoms.

13. On February 28, 2020, the claimant sought treatment in the ED at St. Mary's Hospital because of ongoing headaches. At that time, the claimant was seen by Jacob Cimolin, PA-C. On examination, PA Cimolin noted midline cervical tenderness. The medical record of that date noted "no midline tenderness to palpation" of the claimant's back. PA Cimolin opined that the claimant suffered a concussion and recommended computed tomography (CT) scans of the claimant's head and neck.

14. The CT scans were performed on that same date. The head CT was negative for any intracranial abnormalities. The CT of the claimant's cervical spine showed a disc protrusion at the C6-C7 level which was causing moderate canal stenosis.

15. On March 2, 2020, the claimant was seen by her authorized treating provider (ATP), Dr. Craig Stagg. On that date, the claimant reported ongoing headaches with photophobia. The claimant also reported pain in her cervical spine and lumbar spine. On examination, Dr. Stagg noted that the claimant was tender to palpation over the right sacroiliac (SI) joint. Dr. Stagg listed the claimant's diagnoses as closed head injury with post concussive symptoms; disc protrusion at the C6-C7 level; and a lumbar strain. Dr. Stagg ordered a lumbar spine x-ray and an MRI of the claimant's cervical spine. Dr. Stagg made a referral to Dr. Clifford for a orthopedic evaluation; a referral to Dr Joel Dean for a neurological evaluation; and to Dr. Dale Bowen for a neuropsychological evaluation. In addition, the claimant was taken off of all work.

16. On March 5, 2020, the claimant returned to Dr. Stagg and reported ongoing headaches and numbness into her left leg. Dr Stagg made a referral to physical therapy.

17. On March 12, 2020, the claimant was seen by Dr. Clifford. The purpose of that appointment was to address the claimant's neck[1] related symptoms. The claimant reported to Dr. Clifford that since her injury, she had noticed pain in the posterior aspect of her left leg.

18. The claimant was also seen by Dr. Stagg on March 12, 2020. At that time, the claimant reported pain in her low back with numbness into her left leg. Dr. Stagg noted that the claimant's lumbar spine had mild diffuse tenderness, with a positive straight leg raise on the left. He recommended an MRI of the claimant's lumbar spine.

19. On April 7, 2020, a lumbar spine MRI showed a loss of disc space height at the L5-S1 level, with a mild posterior disc bulge. There was no significant spinal stenosis. It was noted that the neural foramen did appear somewhat narrowed bilaterally due to bony overgrowth. The MRI also showed that the prior large herniated disc had resolved.

20. The claimant continued treating with Dr. Stagg. The claimant reported improvement of her headaches. However, she continued to report low back pain with radicular symptoms.

21. On June 8, 2020, the claimant returned to Dr. Clifford. At that time, the claimant reported pain across her lumbar spine, into her left buttock, left posterior thigh, left calf, and left foot. Her back pain was at a six out of ten, while her leg pain was a five out of ten. On examination, Dr. Clifford noted that range of motion for the claimant's lumbar spine was restricted by fifty percent on flexion, extension, and lateral bending. Dr. Clifford recommended a left sided L5-S1 (TFESI) for therapeutic and diagnostic

[1] The ALJ recognizes that the claimant has undergone a number of treatment modalities related to her cervical spine. However, as the claimant's cervical spine (and related treatment) is not at issue at this time, the ALJ does not recite all cervical spine treatment in this order.

purposes. On July 15, 2021, Dr. Clifford administered the recommended left L5-S1 TFESI.

22. On July 28, 2020, the respondent filed a General Admission of Liability (GAL) regarding the February 24, 2020 injury.

23. On October 7, 2020, the claimant was seen by Dr. Clifford. With regard to the recent injection, the claimant reported 100 percent relief for two days, but no relief after that. The claimant continued to report pain across her lumbar spine, into her left buttock, left posterior thigh, left calf, and left foot. Her back pain was at four out of ten, and her leg pain at 5 out of ten. At that time, Dr. Clifford recommended core strengthening and stretching.

24. On January 18, 2021, the claimant returned to Rocky Mountain Orthopaedic Associates and was seen by Todd Ousley, PA-C. The claimant reported one to two months of relief from the October 2020 injection. As of the time of the appointment, the claimant's left sided symptoms had returned. PA Ousley recommended left L5-S1 and S1-S2 TFESIs. He also noted that the claimant was a candidate for an L5-S1 anterior lumbar interbody fusion (ALIF). On February 17, 2021, Dr. Clifford administered left L5-S1 and S1-S2 TFESIs.

25. On April 8, 2021, the claimant was seen by PA Ousley. In the medical record of that date, PA Ousley noted that the claimant's pre-existing L5-S1 foraminal stenosis and disc degeneration was "exacerbated by an injury at work". PA Ousley further noted that injections had provided the claimant with "some good temporary relief" of her symptoms. Surgical options were discussed, including a fusion at the L5-S1 level, or an artificial disc replacement. In the interim, facet joint injections at the L5-S1 level were recommended. Bilateral L5-S1 facet injections were performed by Dr. Clifford on May 26, 2021.

26. On August 11, 2021, the claimant was seen by PA Bell. At that time, the claimant reported "modest temporary relief" from the facet injections. PA Bell noted that the claimant's symptoms were "consistent with degenerative disc disease, with acute exacerbation during a work related injury." PA Bell further noted possible surgical intervention involving an anterior approach L5-S1 disc replacement.

27. On November 9, 2021 a request for an L5-S1 disc replacement was sent to the respondent for authorization.

28. At the request of the respondents, on December 17, 2021, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Rauzzino opined that the claimant does not have a left sided foraminal disc herniation at the L5-S1 level. Dr. Rauzzino further opined that the requested disc replacement surgery is not reasonable, necessary, or related to the claimant's work injury. In support of this opinion, Dr. Rauzzino noted that the claimant suffered minimal

direct injury to her lumbar spine on February 24, 2020. Therefore, it is his opinion that any treatment of the claimant's lumbar spine would not be work related. Dr. Rauzzino further opined that the claimant has reached maximum medical improvement (MMI).

29. Based upon Dr. Rauzzino's report, the respondent denied authorization for the lumbar surgery.

30. On March 14, 2022, the claimant was seen by PA Ousley. The denial of the surgical request was discussed at that time. PA Ousley recommended repeat L5-S1 and S1-S2 TFESIs. PA Ousely noted that these same injections had previously provided the claimant with relief.

31. On March 15, 2022, Dr. Albert Hattem reviewed the request for epidural injections to the claimant's lumbar spine. Dr. Hattem recommended denial of the injections. In support of this opinion, Dr. Hattem noted that the Colorado Medical Treatment Guidelines (MTG) provided that repeat ESIs are indicated if the initial injection resulted in an 80 percent improvement of symptoms. Dr. Hattem noted that the claimant underwent injections on February 17, 2021 and on March 17, 2021 reported that she did not receive significant relief of her symptoms.

32. Based upon Dr. Hattem's report, the respondent denied authorization for the requested injections.

33. On May 2, 2022, Dr. Hattem authored a report after performing a review of the claimant's medical records. In that report, Dr. Hattem opined that the claimant did not suffer a temporary or permanent aggravation of her pre-existing lumbar spine condition on February 24, 2020. In support of this opinion, Dr. Hattem noted that on the date of the injury, the medical records indicate that the claimant's lumbar spine had normal range of motion. In addition, on February 28, 2020, the claimant identified her symptoms as headache, neck pain, and shoulder pain. Dr. Hattem further noted that the first report of lumbar spine pain was documented on March 2, 2020. As it is his opinion that the claimant's lumbar spine was not injured on February 24, 2020, it is also Dr. Hattem's opinion that the requested surgery is not causally related to the work injury. Dr. Hattem identified the claimant's date of MMI as December 29, 2020, as this was the date she was released to full duty.

34. Dr. Rauzzino's deposition testimony was consistent with his written report. Dr. Rauzzino reiterated his opinion that the claimant did not injure her lumbar spine on February 24, 2020. If the claimant did suffer an injury to her lumbar spine on that date, Dr. Rauzzino posits that it was a soft tissue injury and/or a possible irritation of the nerve that did not cause any permanent injury. It continues to be his opinion that the claimant's symptoms are related to her pre-existing degenerative disc disease at the L5-S1 level. Dr. Rauzzino agrees that the surgery is reasonable to treat the claimant's symptoms. However, it is not causally related to her work injury.

35. Dr. Clifford testified via deposition. In his testimony, Dr. Clifford addressed his prior treatment of the claimant. Specifically, Dr. Clifford testified that in 2017 he did not recommend the claimant undergo disc replacement surgery. Dr. Clifford further testified that in 2017, the claimant was improving without surgical intervention. In comparison, Dr. Clifford noted that the claimant's 2017 symptoms were right sided, whereas her current post-injury symptoms are left sided. With regard to the April 2020 lumbar spine MRI, Dr. Clifford testified that he saw resolution of the prior disc herniation. He also noted left more than right sided neural foraminal stenosis. Dr. Cliffor testified that it is his opinion that the claimant's work injury exacerbated her pre-existing low back condition. Dr. Clifford reiterated that he has recommended the claimant undergo an L5-S1 artificial disk replacement. With regard to the request for injections, Dr. Clifford explained that since the claimant could not get the recommended surgery, the injections would be intended to provide some relief of her symptoms.

36. The claimant testified that her current symptoms include persistent nerve type pain down her left leg, with throbbing down the leg and into her knee. The claimant further testified that she has only experienced this pain since the work injury. She described the pain as being "relentless" for the past two years. The claimant has undergone various treatments since her injury, including massage, acupuncture, dry needling, and chiropractic treatment. Nothing has resolved these back and left leg symptoms.

37. The claimant testified that her prior back symptoms were short term "bouts" of pain, nothing persistent. The claimant testified that following the injections in 2017, her back symptoms resolved.

38. The ALJ credits the claimant's testimony regarding the nature and onset of her low back symptoms. The ALJ is persuaded that the claimant's low back was symptomatic immediately following the work injury. The ALJ is also persuaded that initially the injuries to the claimant's head and neck were the primary focus of the claimant and her medical providers, as those body parts caused the most pain and discomfort.

39. The ALJ also credits the medical records and the opinions of Dr. Clifford over the contrary opinions of Dr. Rauzzino.The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the February 24, 2020 work injury resulted in an aggravation/exacerbation of the claimant's pre-existing lumbar spine condition, resulting in the need for medical treatment. The ALJ also credits the testimony of Dr. Clifford and finds that the recommended lumbar spine surgery is reasonable, necessary, and related to the claimant's work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section

8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that her lumbar spine was injured during the admitted February 24, 2020 work injury. Specifically, the claimant has demonstrated, by a preponderance of the evidence, that her pre-existing low back condition was aggravated by the work injury. As found, the claimant has demonstrated, by a preponderance of the evidence, that treatment of her lumbar spine, including disc replacement surgery as recommended by Dr. Clifford, is reasonable medical treatment necessary to cure and relieve the claimant from the

effects of the work injury. The claimant's testimony, the medical records, and the opinions of Dr. Clifford are found to be credible and persuasive.

ORDER

It is therefore ordered:

1. The respondent shall pay for reasonable and necessary medical treatment of the claimant's lumbar spine, pursuant to the Colorado Medical Fee Schedule.

2. The respondent shall pay for the recommended L5-S1 disc replacement surgery, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined here are reserved for future determination.

Dated July 14, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES[1]

- Whether Claimant proved by a preponderance of the evidence that she sustained a compensable occupational disease.

- If compensable, whether Claimant proved by a preponderance of the evidence she required medical care that was authorized and reasonably necessary to cure and relieve from and related to the occupational disease.

- If compensable, whether Claimant proved by a preponderance of the evidence she was entitled to temporary indemnity benefits.

- If compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 33-year-old, right hand dominant female. Claimant worked for Employer as a phlebotomist from June 2019 to December 6, 2021. Claimant's job duties included performing check-ins, assessing vital signs, and typing.

2. Claimant's work involved manually pumping a blood pressure cuff. Claimant testified that she would pump the bulb 12 to 15 times per patient, and that she often took vitals signs multiple times per patient.

3. Claimant worked three 12-hour shifts per week. Claimant's standard two-week work hours totaled 72 hours.

4. Claimant testified that she began working substantial overtime during the COVID-19 pandemic, starting around October 2020. Claimant testified that during the COVID-19 pandemic the number of patients per day almost tripled by the end of 2020 – up to 80 to 100 patients per day. Claimant's wage records indicate Claimant occasionally worked an extra 1-3 hours in addition to her standard 72-hour work week per two-week around this time period.

[1] In his position statement, Claimant also endorsed the issue of "Whether Claimant is entitled to an award of costs pursuant to § 8-43-315(1), C.R.S. (ALJ can order witness fees and costs where need to call a subpoenaed witness arose out of 'the raising of any incompetent, irrelevant, or sham issues by the other party')." This issue was not endorsed on any Application for Hearing, Case Information Sheet, nor at either hearing. Evidence was not offered at hearing and Respondents did not brief the issue. Accordingly, the ALJ does not address the issue in this Order.

5. Claimant began experiencing right forearm pain in late December 2020, with subsequent loss of grip strength. She reported this problem to her Employer and was sent to Concentra.

6. Claimant first presented to Jonathan Claassen, D.O. at Concentra on January 14, 2021 with complaints of bilateral forearm and hand pain, mostly on the right, which she felt resulted from repetitive motion. Claimant reported the onset of symptoms began approximately two weeks prior with the pain gradually increasing. Claimant further reported an inability to grip with her right hand. On physical examination, Dr. Claassen noted diffuse tenderness along the extensor muscles of the right forearm and full range of motion, tenderness in the carpal tunnel of the right wrist and decreased sensation of touch of the ulnar nerve distribution on palpation with full range of motion and generalized hypertonicity. Dr. Claassen assessed Claimant with right radial tunnel syndrome and referred Claimant to a hand specialist and for an EMG. He placed Claimant on temporary restrictions until 1/15/2021 of no repetitive lifting or carrying above two pounds; no gripping/pinching/squeezing with the right hand; no pronating/supinating; and no keyboard/mouse use. Dr. Claassen completed a WC-164 form indicating his findings were consistent with a work-related mechanism of injury/illness.

7. Dr. Claassen testified that David M. Bierbrauer, M.D., a hand surgeon, happened to be staffing the Concentra office where Claimant was seen on January 14, 2021, and Dr. Bierbrauer also examined Claimant. He testified he relied on Dr. Bierbrauer's expertise when diagnosing Clamant with radial tunnel syndrome.

8. Kathy McCranie, M.D. performed an EMG of Claimant's right upper extremity on February 1, 2021. Claimant reported that she began experiencing pain and weakness in her right upper extremity around early January 2021 that gradually worsened. Dr. McCranie noted Claimant was unsure of the cause, but "I attributed it to repetitive motion." (Cl. Ex. 2, p. 20). Dr. McCranie opined that the EMG was within normal limits. She concluded that Claimant's physical examination was more consistent with epicondylitis and forearm tendinitis and recommended that Claimant follow-up with Dr. Claassen and Dr. Bierbauer.

9. Dr. Bierbauer reexamined Claimant on February 4, 2021. Dr. Bierbauer opined that Claimant has right radial tunnel syndrome, which he noted was "notoriously difficult" to find on nerve conduction testing, noting several studies suggested that upward of 80% of people with such condition will have a negative nerve test. He stated that Claimant's clinical exam was fairly uncontroversial and pointed towards radial tunnel syndrome. Dr. Bierbauer administered a cortisone injection to Claimant and provided a shoulder sling.

10. On February 15, 2021, Claimant reported to Dr. Claassen that her symptoms had worsened since receiving the cortisone injection. Claimant reported that her elbow was now popping and that she was experiencing pain in her hand. Dr. Claassen referred Claimant for physical therapy.

11. Claimant began physical therapy with Heather Markus, D.P.T. on February 17, 2021 and underwent a total of four sessions of physical therapy prior to her follow-up appointment with Dr. Bierbauer on March 4, 2021.

12. On March 4, 2021, Dr. Bierbauer opined that Claimant continued to experience persistent right radial tunnel syndrome symptoms despite injections and therapy. He discussed surgical intervention with Claimant, who declined at that point. Dr. Bierbauer recommended Claimant resume use of her right upper extremity as tolerated and return for follow-up as needed. Dr. Bierbauer completed a WC-164 form indicating his objective findings were consistent with a work-related mechanism of injury/illness.

13. Dr. Claassen reexamined Claimant on March 9, 2021. Claimant reported her pain was the same but that her grip strength was slowly improving. Claimant was working modified duty.

14. Claimant testified at hearing that she returned to work abiding by her restrictions performing modified duty from 3/1/21 through 12/6/21, when she and the Employer essentially agreed she would separate her employment because she could not perform her phlebotomist duties.

15. Claimant continued to undergo physical therapy with Dr. Markus until her next visit with Dr. Claassen on March 17, 2021. Dr. Claassen recommended continuing physical therapy, which Claimant did until her authorization for PT visits ended. As of her last (11th) visit with Markus, DPT, Claimant was only 30-40% towards recovery.

16. On February 25, 2021, Jill Adams, C.R.C., performed a Job Demands Analysis and Risk Factor Analysis ("JDA"). Ms. Adams issued a report on March 1, 2021. Due to Claimant's restrictions, Ms. Adams observed other workers performing Claimant's job duties for the purpose of her evaluation. Ms. Adams interviewed Claimant by telephone. Ms. Adams noted Claimant's job schedule consisted of three 12-hour shifts per week, during which time Claimant rotated every three to four hours to perform medical screenings. Ms. Adams categorized Claimant's job duties in eight essential functions:

1) Machine setup comprising of 1-3% of job tasks.
2) Labeling comprising of 1-5% of job tasks.
3) Medical screening comprising of 25-30% of job tasks. (Including use of blood pressure cuff to obtain blood pressure and removal of cuff).
4) Phlebotomy comprising of 25-30% of job tasks. Ms. Adams noted it was typical to process at least 20-25 phlebotomy procedures per work shift, which took 1-3 minutes at most, with the entire process taking 10-15 minutes.
5) Donor disconnects comprising of 10-15% of job tasks.
6) Lab work comprising of 10-15% of job tasks.
7) Packing/shipping comprising of 1-5% of job tasks.
8) Ice comprising of 1-5% of job tasks.

17. Ms. Adams determined no primary or secondary risk factors were present per the MTG.

18. On August 9, 2021, Jonathan L. Sollender, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Sollender reviewed Claimant's medical records dated June 22, 2020 through March 24, 2021, including the JDA conducted on February 25, 2021. Claimant reported to Dr. Sollender that her daily tasks depended on her assignment. If assigned for the day as a technician, she reported spending 5-10 minutes registering patients typing and taking vital signs. If drawing blood, she reported she would inflate, deflate, and reinflate a blood pressure cuff and insert a needle. Dr. Sollender noted that, at the time of her work incident, was working three 12-hour shifts and would rotate positions every three hours, with two blocks of technician work and two blocks of drawing blood. He further noted that the blood pressure cuff in the technician room was automated, and thus did not require manual pumping of air by the technician. The blood pressure cuff in the blood drawing area was manual. Dr. Sollender noted Claimant could not tell him how many patients she would see, but estimated 15 patients in a three-hour period as a technician, and 8 patients in three-hour period when drawing blood. Based on the numbers estimated by Claimant, Dr. Sollender calculated that Claimant saw approximately 25 patients per day over a six-hour period at four patients per hour. Claimant reported that it would take 7-10 pumps to inflate the manual blood pressure cuff over a period of 5-10 seconds, twice per patient. He calculated this to total 80 seconds of pumping the blood pressure cuff per hour. Dr. Sollender further calculated Claimant was subject to eight minutes of potential exposure in a shift (noting that, a 12-hour shift alternating technician and blood drawing duties with six potential hours of 80 seconds/hour of exposure, totaled 480 seconds or eight minutes). Dr. Sollender concluded that such exposure was neither repetitive nor forceful under the MTG.

19. Dr. Sollender's impression was: mild bilateral medial epicondylitis, mild left radial tunnel syndrome moderate right radial tunnel syndrome, and right cubital tunnel syndrome. Dr. Sollender outlined the steps for a causation analysis under the MTG and analyzed Claimant's case with respect to each step. He concluded that Claimant's condition is unrelated to her work, and that Claimant did not have exposure to any occupational risk factor to cause, contribute, or aggravate an underlying condition to establish her condition is the result of an occupational disease. He remarked that the JDA was objective, unbiased and took into consideration all work flow performed by Claimant at her job. He noted that Claimant's description of her job duties to him did not vary to any significant degree from the JDA. Dr. Sollender concluded that Claimant's work did not include any sufficient exposure to repetition, awkward posture, application of force, mouse use, cold or vibration exposure as required for a primary or secondary risk factor under the MTG. Dr. Sollender determined from the job analysis and Claimant's job description as provided to him by Claimant at the IME, that Claimant's upper extremity complaints, medial epicondylitis, bilateral radial tunnel syndrome and right cubital tunnel syndrome were not caused by her employment with Respondent Employer. In his IME report, Dr. Sollender described Claimant's job duties, frequency and exertional levels

consistent with the Job Analysis and the information Claimant provided to Dr. Sollender during the IME.

20. Dr. Claassen testified at hearing on behalf of Claimant. Dr. Claasen obtained Level II certification approximately one month prior to hearing in this matter, and was not Level II certified at the time he diagnosed and treated Claimant. Dr. Claasen did not specifically review the MTG or perform a causation analysis pursuant to the MTG in Claimant's case. Dr. Claassen testified that prior to seeing Claimant, he saw only four or five patients with radial carpal tunnel syndrome and that he relied on Dr. Bierbauer for his diagnoses. Dr. Claasen opined that Claimant's radial tunnel syndrome is work-related. He further testified he did not discuss Claimant's non-work activities with her, despite acknowledging that a patient's non-work activities are relevant in making a causation opinion. Dr. Claassen testified he did not know how many pounds of pressure was required to operate a blood pressure cuff.

21. On January 21, 2021, Claimant reported to Insurer that Claimant continued to work out at the gym at her apartment complex and in her home. Claimant reported she worked out every day, and worked out with weights five days per week.

22. At hearing, Claimant denied she did anything outside of work at the time she reported her symptoms to Respondent Employer (in January 2021) that involved using her arms heavily like at work. Claimant testified she did not perform any weight lifting exercises between June 2020 and December 2020. Claimant testified she only had resistance bands at her home which she did not use during this time because she did not have the space to use them. Claimant denied having any barbells, dumbbells or curl bars at her home. Claimant testified she participated in paddle boarding a few years prior. She denied paddle boarding in 2019 and in the summer of 2020. Claimant's boyfriend purchased a paddle board for her for her birthday in July 2020. Claimant denied ever having used the paddle board her boyfriend purchased for her.

23. Since the denial of her claim by Respondents, Claimant has been treating with Daniel L. Masters, M.D. at Boulder Orthopedics.

24. The ALJ credits Dr. Sollender's opinion, as supported by the records, and testimony over the opinion of Dr. Classen and Claimant's testimony and finds that Claimant failed to prove it is more probable than not she sustained a compensable occupational disease.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Occupational Disease

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

Claimant failed to prove it is more probable than not she sustained an occupational disease as a result of her work activities. Claimant argues that the JDA fails to take identify gripping and squeezing the blood pressure bulb as part of Claimant’s duties, and failed to consider the increase in the number of patients Claimant saw at the end of 2020. Ms. Adams’ JDA notes she took into consideration that firm grip was frequently required. To the extent Ms. Adams did not note or consider the increase in patients in her analysis, Dr. Sollender performed a detailed and thorough causation analysis in which performed his own calculations based on Claimant’s reports of an increased number of patients. Dr. Sollender thoroughly detailed Claimant’s reports to him of her job duties, including the use of the blood pressure cuff. He conducted a detailed causation analysis pursuant to the MTG, and ultimately determined that Claimant’s exposure was neither repetitive or forceful under the MTG. Dr. Sollender’s opinion is more credible and persuasive than that of Dr. Claasen, who did not perform a causation analysis under the MTG, did not discuss Claimant’s non-work related activities, or consider the pounds of pressure used. The preponderant evidence does not establish Claimant’s condition was proximately caused by her work activities. As Claimant failed to prove she sustained a compensable occupational injury, the remaining issues are moot.

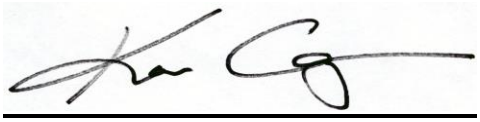
ORDER

1. Claimant’s claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-010-900-002

ISSUES

The issues set for determination included:

- Is Claimant entitled to maintenance medical treatment?

PROCEDURAL STATUS

A Summary Order was issued on February 9, 2022. On February 28, 2022, Claimant filed a timely Request for Specific Findings of Fact, Conclusions of Law and Order. However, the case was inadvertently closed at the Office of Administrative Courts. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Employer as a janitor. On March 18, 2016, Claimant sustained an admitted industrial injury when he hurt his low back while lifting a carpet.

2. Claimant received medical treatment at Concentra for the injury, including conservative treatment which included physical therapy and chiropractic treatment, as well as injections.

3. Claimant also underwent right–sided L4 and L5 medial facet joint nerve branch RF neurotomy procedures on November 10, 2017.[1]

4. The parties reached a Joint Stipulation that resolved the issues of average weekly wage and PPD, which was approved by the Order issued by ALJ Broniak on April 9, 2018. In particular, Respondents agreed to increase Claimant's AWW based upon his concurrent employment. The Stipulation provided Claimant reached MMI on January 17, 2018 (as determined by ATP Stephen Danahey, M.D.) and Respondents agreed to admit for the 9% medial impairment rating provided by Robert Kawasaki, M.D. (also an ATP). As part of the Stipulation, the parties agreed that it would never be reopened, except on the grounds of fraud or mutual mistake of material fact.

5. On April 25, 2018, Respondents filed a Final Admission of Liability ("FAL") for a 9% whole person impairment rating, based upon the aforementioned Stipulation. The FAL admitted for post-MMI medical treatment provided by the authorized treating physician that was reasonably necessary and related to the compensable injury.[2]

[1] Exhibit J, p. 59.

[2] Exhibits 2, A.

6. There was no evidence that Claimant received medical treatment following the filing of the FAL through January 2019.

7. On January 15, 2019, Claimant underwent an independent medical evaluation ("IME") that was performed by Hugh Macaulay, M.D. at the request of his attorney. Claimant's chief complaint was low back pain to the right side, which he said sometimes was "stabbing" and to the right side. At that time, he was working for two employers, performing janitorial work.

8. On examination, Claimant had pain in the right sacroiliac joint and right hemipelvis, as well as right piriformis. Dr. Macaulay opined that Claimant continue to have right sacroiliac dysfunction. Dr. Macaulay stated Claimant was not at MMI. He thought Claimant would respond favorably to osteopathic manual therapy, as he had a mechanical issue in the sacroiliac joint. Dr. Macaulay's opinion was not as persuasive as the opinions offered by Dr. Danahey and Dr. Kawasaki.

9. Claimant filed a Petition to Reopen on or about October 25, 2019.[3] The stated basis for reopening was change in medical condition. Claimant subsequently withdrew this issue, which was confirmed by Order issued by Prehearing ALJ John Sandberg on May 6, 2020.

10. Claimant was evaluated by Dr. Danahey on February 19, 2020. At that time, he complained of pain in the right lower back/gluteal area with radiation to the right hip, along with right toe pain. He described the pain as being worse, but stated he had suffered no new injury. On examination, Dr. Danahey noted tenderness in the level L5 right paraspinal, right sciatic notch and right sacroiliac joints. Claimant had full range of motion ("ROM") in his lumbar spine.

11. Dr. Danahey's assessment was: lumbosacral strain, initial encounter; sacroiliac dysfunction. Dr. Danahey opined Claimant remained MMI, but agreed that osteopathic manipulation was appropriate. He also recommended a reevaluation with Dr. Kawasaki, along with possible repeat SI injection and/or repeat rhizotomy. Dr. Danahey did not believe Claimant's pain in the great right toe was related to the work injury.

12. On May 18, 2020, Claimant returned to Dr. Kawasaki for a follow-up evaluation. Claimant stated he continued to have pain in the right low back and buttock region, which he described as 8/10. On examination, Dr. Kawasaki noted tenderness to palpation in the right lower lumbar segments and the lumbosacral junction, the lumbar paraspinal musculature and over the gluteus. Claimant was able to forward flex and nearly touch his toes, but had pain on lumbar extension that was more than flexion. Claimant's neurologic exam showed 5/5 strength and intact sensation.

13. Dr. Kawasaki's impression was: lumbar spondylosis; status post lumbar rhizotomy procedure, with no long-term relief. Dr. Kawasaki reiterated Claimant was at

[3] Exhibit 3.

MMI as of January 2018. Dr. Kawasaki said he would not recommend repeating rhizotomies, as Claimant did not have expected relief for the first set of rhizotomies.[4] He did not believe there was be any significant treatment option for this patient which would alter his situation. The ALJ credited Dr. Kawasaki's opinion as to Claimant's need for maintenance treatment.

14. Claimant underwent an independent medical evaluation on February 13, 2020, which was performed by Lawrence Lesnak, D.O. at the request of Respondents. Claimant complained of constant central/midline lower lumbar pain with constant radiation to his right superior buttock region. Claimant related that the pain had remained the same since his date of injury.

15. On examination, Claimant was able to forward flex at the waist to 80–90°, with reproduction of mild to moderate central/midline lower lumbar pains. Backward bending was accomplished to 30° without reproduction of any symptoms. Sitting straight leg raising maneuvers were negative bilaterally at 90°. Supine straight leg raising maneuvers on the left at 70° reproduced no symptoms and on the right at 70° he reported some mild central/midline lower lumbar pains. Claimant's muscle strength was 5/5.

16. Dr. Lesnak stated Claimant had chronic midline/central lower lumbar pains extending into his right superior buttock region and occasional symptoms radiating to his right lateral thigh. He believed Claimant remained at maximum medical improvement and there was no evidence of a worsening of his condition. Claimant reported that his symptoms had essentially been the same since the date of injury and he continue to work full-time at two jobs with no restrictions. Dr. Lesnak opined that the recommendation of osteopathic manipulative treatment was not reasonable or necessary, given Claimant's clinical course.

17. Dr. Lesnak testified as an expert at hearing and his opinions were consistent with his written report. Dr. Lesnak is a board-certified physiatrist and Level II accredited pursuant to the W.C.R.P. He has been licensed to practice medicine since 1990 and 1996 in Colorado.

18. Dr. Lesnak reviewed his evaluation of Claimant which took place on February 13, 2020. Dr. Lesnak described this as a fairly normal exam. At that time, Claimant complained of constant central midline lower lumbar pains with constant radiation of pain into his right superior buttock, occasional pain radiating into his right lateral thigh occasional right great toe irritation. Claimant told Dr. Lesnak these symptoms were exactly the same as when he originally hurt his back in March of 2016. Dr. Lesnak testified there was no change or worsening of condition, but rather a continuation of his ongoing symptoms.[5]

[4] "Rhizotomy" and "RF neurotomy" are used interchangeably in this Order, as these describe the same procedure.

[5] Dr. Lesnak deposition, p. 18:5-18.

19. Dr. Lesnak noted Claimant was working in excess of sixty hours per week without restrictions. Dr. Lesnak reviewed Claimant's records from Kaiser and noted he had normal ROM of the lumbar spine. Dr. Lesnak stated that pursuant to the DOWC Medical Treatment, repeat rhizotomy procedures were not warranted because Claimant had a nondiagnostic response to the rhizotomies performed by Dr. Kawasaki. Dr. Lesnak said Claimant had not lost any function since reaching MMI. Dr. Lesnak opined Claimant remained at MMI and did not require maintenance medical treatment.[6]

20. On or about June 17, 2020, Dr. Danahey responded to a letter authored by Respondents' counsel, which referenced Dr. Kawasaki's May 18, 2020 evaluation. Dr. Danahey opined Claimant did not require maintenance treatment. The ALJ credited Dr. Danahey's opinion as to Claimant's need for maintenance treatment.

21. Dr. Kawasaki issued a report in a response to letter authored by Claimant's counsel on or about July 6, 2020. Dr. Kawasaki reiterated that he did not believe Claimant required any maintenance treatments. Dr. Kawasaki also noted that although an interpreter was not present, Claimant spoke English and the communication was sufficient. Dr. Kawasaki said he had no problem seeing Claimant back with an interpreter, but was doubtful that his opinion would change. Dr. Kawasaki respectfully disagreed with Dr. Macaulay's opinion that osteopathic manipulation would substantially change Claimant's symptomatology. This opinion was persuasive to the ALJ.

22. Claimant testified that because of the pain he feels, he is only able to do a single staircase per day and is very tired at the end of the day. He said it is very hard for him to carry the heavy items and he continues to have pain in his low back. He wishes to have additional treatment, as he wants his pain to be at the same level as when he stopped receiving treatment. Claimant was credible when describing his pain.

23. Based upon the totality of the medical evidence, the ALJ determined Claimant failed to meet his burden of proof to show he was entitled to maintenance medical benefits.

24. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

[6] Lesnak deposition, p. 22:2-13.

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Grover Medical Benefits

As determined in Findings of Fact 1-3, Claimant suffered an admitted injury at work on March 18, 2016 in which he injured his low back. Claimant received conservative treatment, as well as right sided L-4 and L5 medial facet joint nerve branch RF neurotomy procedures that were performed by Dr. Kawasaki. *Id.* The rhizotomy procedures did not provide pain relief to Claimant. Claimant reached MMI on January 17, 2018 and was assigned a 9% whole person impairment rating by Dr. Kawasaki. (Finding of Fact 4). Respondents filed a FAL on April 25, 2018, which admitted for maintenance medical benefits provided by an ATP that was reasonably necessary and related to it the injury. (Finding of Fact 5).

In the case at bench, there was conflicting medical evidence on the issue of maintenance medical treatment. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Comm'n of Colorado,* 759 P.2d 705, 711-712 (Colo. 1988). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ concluded Claimant did not meet his burden of proof to show he was entitled to receive maintenance treatment. (Finding of Fact 23). Based upon the medical records admitted at hearing, the ALJ concluded Claimant did not require maintenance treatment to maintain MMI or prevent deterioration of his condition. More particularly, Dr. Danahey evaluated Claimant on February 19, 2020 and considered the recommendations made by Claimant's IME physician, Dr. Macaulay. At that time, Dr. Danahey stated Claimant remained at MMI and thought osteopathic manipulation was appropriate. He believed Claimant should be reevaluated by Dr. Kawasaki. (Findings of Fact 10-11).

Dr. Kawasaki evaluated Claimant on May 18, 2020 and opined he did not have significant treatment options and was not a candidate for repeat rhizotomy procedures. (Finding of Fact 13). On or about June 17, 2020, Dr. Danahey stated Claimant did not require maintenance treatment. (Finding of Fact 20). On July 6, 2020, Dr. Kawasaki stated that he did not believe osteopathic manipulation would change Claimant's symptoms. (Finding of Fact 21). Accordingly, the ALJ credited the opinions offered by ATPs, Dr. Kawasaki and Dr. Danahey, both of whom concluded Claimant did not require

maintenance treatment. The ATP-s conclusions were buttressed by the opinions expressed by Respondents' expert, Dr. Lesnak. (Findings of Fact 16-19). On balance, these opinions were more persuasive than those offered by Dr. Macaulay. (Finding of Fact 8).

Since Claimant failed to meet his burden of proof to show he was entitled to maintenance medical benefits, the claim for those benefits will be dismissed.

ORDER

It is therefore ordered:

1. Claimant did not establish by a preponderance of the evidence that he is entitled to *Grover* medical benefits under the Colorado Workers' Compensation Act.

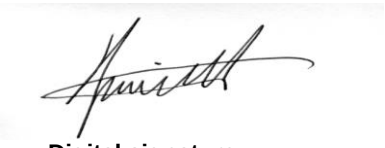
2. The claim for maintenance medical benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she is entitled to reopen her claim due to a change or worsening of condition.

II. If Claimant proves she is entitled to reopen her claim, whether Claimant established by a preponderance of the evidence that she is entitled to temporary indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 62-year old woman who has worked for Employer since 2001.

2. Claimant sustained an admitted industrial injury on November 19, 2016. While Claimant was scanning a 65-inch television in a shopping cart, the television tipped and struck Claimant on the head. Claimant fell to her knees and testified she "saw stars," became nauseated, and experienced blurred vision and dizziness.

3. Claimant was taken to North Suburban Medical Center the day of the injury with complaints of headache, lightheadedness, nausea and vomiting, upper neck pain and photophobia. CT scans of the head and cervical spine revealed degenerative changes with no evidence of a traumatic intracranial injury.

4. Claimant continued to complain of headache, neck pain, and numbness and tingling in her hands and upper back. Claimant underwent medical treatment including physical therapy, massage therapy, chiropractic treatment and acupuncture.

5. On July 27, 2017, Dr. Sacha performed right C4-7 intra-articular facet injections. On August 18, 2017, Dr. Sacha noted Claimant had 100% relief from the injections but then returned to baseline.

6. Claimant underwent a brain MRI on October 11, 2017 which revealed a single small FLAIR hyperintensity in the white matter bilaterally, nonspecific, which was noted might be a sequelae of chronic small vessel ischemic disease, small areas of gliosis from prior brain insult or chronic migraine headaches.

7. On October 12, 2017, Dr. Sacha performed right C4-7 medial branch blocks. Again, Dr. Sacha indicated Claimant had 100% temporary relief with the medial branch blocks. He recommend radiofrequency neurotomies.

8. Dr. Sacha proceeded with C5-7 radiofrequency neurotomies on November 30, 2017. At the next visit with Dr. Sacha on December 12, 2017, Claimant complained of postoperative pain, neuritis and burning since the radio frequency neurotomies.

9. On December 26, 2017, Claimant described minimal improvement from the rhizotomies.

10. On January 8, 2018, Dr. Sacha opined Claimant reached maximum medical improvement ("MMI") with an 8% whole person impairment to the cervical spine. Claimant reported that her headaches were nearly gone and that she had better neck range of motion, but still experienced pain. Dr. Sacha's impression at the time was cervical facet syndrome, occipital neuralgia, and adjustment disorder. He released Claimant to work full duty. He recommended maintenance care in the form of a gym and pool pass, six more visits of physical therapy, and medication maintenance program for 6-12 months.

11. On June 13, 2018, Dr. Machanic performed an independent medical examination ("IME") at the request of Claimant. Claimant complained of daily headaches, bilateral neck pain, blurred vision and problems focusing, dizziness, difficulty with memory, anxiety and depression. Claimant reported that the rhizotomy performed by Dr. Sacha was unsuccessful and injections only helped temporarily. Claimant disagreed she was at MMI as she felt she still had problems that had not been properly addressed. Claimant indicated she awakes in the morning with headaches. Up to two times per week the headaches cause her to become nauseated and eventually lead to vomiting, photophobia and sonophobia which cause her to need to go to bed. Claimant stated she has headaches and neck pain every day. Dr. Machanic assessed Claimant with posttraumatic mixed headaches and chronic daily migraines. He opined Claimant was not at MMI. Dr. Mechanic recommended potential medications to treat the headaches and referral to a headache specialist.

12. On August 1, 2018, Claimant underwent a Division Independent Medical Examination ("DIME") with Linda Mitchell, M.D. Claimant complained of daily headaches described as a pressure sensation in the frontal region bilaterally. She indicated the headaches were "like a rod pressing on the top of her head." She also described pain from the back of her head to the retroorbital areas. The pain was worse with sleeping and caused sleep disturbances. The headaches also caused blurred vision and tearing and caused her to miss work. The headaches also affected her daily living. Claimant also complained of neck pain and soreness, numbness in the right upper trapezius.

13. Dr. Mitchell diagnosed Claimant with a mild traumatic brain injury, cervical strain with underlying spondylosis and facet arthropathy, cervicogenic headaches and adjustment disorder with anxious mood. She noted Claimant had underlying degenerative changes of the cervical spine. Dr. Mitchell opined Claimant reached MMI as of January 26, 2018 with 13% whole person impairment for the cervical spine and 1% psychological impairment.

14. Dr. Mitchell noted Claimant had a very thorough course of treatment but had persistent cervicogenic headaches. Dr. Mitchell recommended Claimant continue to see a physiatrist for chronic headache management as maintenance care. She noted Claimant had not sustained relief from the rhizotomies and thus did not recommend further invasive cervical procedures. She opined that Claimant could continue medications and an independent exercise program and attend 10 sessions with a psychologist if needed.

15. On September 10, 2018, Respondents filed an Final Admission of Liability ("FAL") consistent with the DIME. Respondents admitted for two days of temporary total disability ("TTD") benefits, and a 13% whole person impairment rating and medical benefits after MMI based upon the report from Dr. Mitchell.

16. Claimant filed an Application for Hearing to overcome the DIME.

17. Claimant continued to see Dr. Sacha for maintenance care. On January 7, 2019, Claimant stated she was seeing headache specialist Dr. McCranie and taking headache medication. But she described ongoing significant headaches. Claimant requested a TMJ referral, to which Dr. Sacha opined was unrelated to the work injury. Dr. Sacha recommended that Claimant undergo an ultrasound guided occipital nerve block. He discharged Claimant to the maintenance medication program and follow-ups and cleared Claimant for light duty.

18. Dr. Sacha performed the bilateral occipital nerve block on January 17, 2019.

19. On January 21, 2019, Claimant saw Dr. McCranie for a follow up of her headaches. Claimant stated she felt the same and rated her pain at a 6. Claimant reported no improvement following the occipital nerve block with Dr. Sacha. Dr. McCranie continued to see Claimant under maintenance care.

20. On March 9, 2019, Dr. Sacha recommended chiropractic and acupuncture as maintenance care. On March 11, 2019, Dr. Sacha noted Claimant had light duty restrictions that were permanent in nature.

21. On April 26, 2019, Claimant presented to Dr. McCranie for a follow up of her headache. Claimant stated she was doing the same and rated her pain at 6. Claimant described ongoing daily headaches with severe headache occurring once a week. Claimant was to follow up as needed.

22. Rather than proceeding to hearing on Claimant's application to overcome the DIME, the parties stipulated to a 16% whole person impairment for the cervical spine, 1% psychological impairment, and that Claimant's TMJ was unrelated. Respondents filed an Amended FAL pursuant to the stipulation on May 15, 2019. The FAL reflects an admitted average weekly wage of $973.78 and a corresponding TTD rate of $649.19 per week.

23. Claimant subsequently filed an Application for Hearing to reopen Claimant's claim.

24. On July 15, 2019, Dr. Sacha ordered chiropractic and acupuncture under maintenance care which was pending. He completed FMLA records.

25. On May 1, 2020, Claimant told Dr. Sacha she wanted to restart chiropractic and acupuncture to which he agreed. Claimant's work status was unchanged. Dr. Sacha specifically noted Claimant remained at MMI. He referred Claimant for six to eight visits of chiropractic care and acupuncture.

26. On November 12, 2020, Claimant reported to Dr. Sacha experiencing an increase in neck pain and headaches. He remarked, "At this point, we are going to get a repeat MRI of the cervical spine as the symptoms do seem somewhat different than prior symptoms, but I cannot rule out the possibility of doing a repeat neurofrequency procedure." (Cl. Ex. 8, p. 110).

27. On February 1, 2021, Claimant returned to Dr. Sacha with complaints of left-sided neck pain and headaches. Claimant was working her full duty job. Dr. Sacha recommended left C2-4 facet injections. Dr. Sacha noted that Claimant had recently undergone radiofrequency neurotomy and it was starting to wear off resulting in increased pain. Dr. Sacha noted different treatment options including more chiropractic care and acupuncture, repeat facet injections and occipital nerve blocks, or a repeat radiofrequency procedure. Claimant wanted to proceed with an injection and medication.

28. On April 6, 2021, Claimant reported to Dr. Sacha an increase in headaches on the left side. Dr. Sacha noted Claimant likely has some hypersensitivity or neuritis of the 3rd occipital nerve after the radiofrequency procedure, which he noted was noted uncommon.

29. Claimant returned to Dr. Sacha on April 26, 2021 with a flare in her left-sided occipital nerve with headaches. She also reported some increased ringing in the left ear and increased neck pain. Dr. Sacha performed a left occipital nerve block.

30. On May 10, 2021, Dr. Sacha noted he was seeing Claimant for a maintenance follow-up. Claimant's work status was unchanged. Claimant described no lasting relief with the nerve block. Dr. Sacha discussed with Claimant that her symptoms may or may not improve. He noted that Claimant appeared to have radicular pain, likely due to stenosis. Dr. Sacha recommended a one-time cervical epidural but not any more aggressive or interventional care. Claimant was to return in one month under maintenance program.

31. Claimant returned to Dr. Sacha for maintenance follow up on June 8, 2021. He noted Claimant was awaiting authorization for the cervical epidural.

32. On September 13, 2021 Dr. Sacha noted that the cervical epidural and cervical MRI were denied. He noted that he was unsure if the cervical injection would be enough to determine if it is facet pain causing Claimant's ongoing symptoms versus radiculopathy

pain. He reordered an MRI, injection and a medical branch block for diagnostic and therapeutic purposes.

33. On November 4, 2021, Dr. Sacha performed bilateral C2-5 medial branch blocks and a C7-T1 interlaminar epidural injection.

34. Respondents obtained surveillance of Claimant taken November 3, 9, 21, 28, 30, 2021. Claimant is observed turning her head, bending over, using her bilateral upper extremities to carry items, wipe frost from a car window, pull herself into a truck, and open a truck door. Claimant is also observed firing a large rifle attached to a stand with the butt of the rifle against her left shoulder.

35. At a follow-up appointment on December 6, 2021, Claimant Dr. Sacha noted Claimant had diagnostic responses to both the medial branch blocks and the epidural injection. He further noted that Claimant has both a facet pain generator causing her neck pain and headaches as well as a discogenic or radicular pain causing the radiating pain down the arm. Claimant reported ongoing neck and headache pain. Dr. Sacha noted that the MRI revealed significant straightening of her cervical lordosis and canal stenosis from C4-5 down to C6-7. He recommended radiofrequency neurotomy in the cervical spine.

36. On December 8, 2021, Michael Striplin, M.D. performed a medical record review at the request of Respondents. He reviewed and summarized Claimant's medical records since the DIME with Dr. Mitchell. He was asked whether Claimant suffered a worsening of her condition that would justify reopening of her workers' compensation claim. He noted Dr. Sacha recommended repeat cervical epidural steroid injections and cervical medial branch blocks even though Dr. Mitchell explicitly recommended no further invasive cervical procedures. Dr. Striplin noted Claimant had continued subjective complaints that had not substantially changed. The cervical MRI scan performed on 11/11/2021 only showed slight worsening compared to the one done five years earlier and were due to the natural progression of her underlying disease. Dr. Striplin opined that the treatment recommended by Dr. Sacha could be done under maintenance care.

37. Claimant testified at hearing that her symptoms began to worsen in 2020. Claimant testified she experienced headaches of longer duration that were more debilitating as to her functioning. She testified that the pain in her neck and arms with numbness affected her ability to grasp and hold objections and were more intense, causing the Claimant to have to miss work more often. Claimant testified she was unable to do "regular stuff" that she normally did. Claimant testified that the frequency and duration of her symptoms worsened. Claimant testified that her symptoms in 2020 were by far worse than those she had in 2017-2019.

38. Claimant missed work and incurred wage loss as a result of her worsened condition, as outlined in Claimant's Exhibit 5.

39. Dr. Sacha testified at hearing on behalf of Claimant as an expert in physical medicine and rehabilitation. Dr. Sacha testified that patients with cervical facet syndrome,

such as Claimant, often return for follow-up treatment. He testified that he recommended a follow-up MRI based on worsening and different symptoms and clinical findings noted at his November 12, 2020 evaluation. Dr. Sacha explained that he found worsening segmental dysfunction, forward head and shoulder posture, as well and firm endpoints to range of motion. Dr. Sacha confirmed that all of the Claimant's objective findings on MRI and other objective clinical exam findings were a natural progression of the work-related injury. Dr. Sacha testified that Claimant also presented with subjective symptoms supporting the objective findings, including worsening headaches, dizziness, ringing in the ears, light sensitivity, jaw pain, and arm numbness.

40. Regarding the MRI results, Dr. Sacha testified that there was straightening of the cervical lordosis as well as worsening of the canal and foraminal narrowing, consistent with Claimant's symptoms. He explained that it is not unusual for patients who have undergone radiofrequency ablation ("RFA") to experience a return of symptoms when the nerves grow back. He testified that in Claimant's case, she had additional symptoms, including arm numbness and paresthesia--that represented a "clinical red light." (Tr. Hearing at 53:8-19). Dr. Sacha further testified that Claimant now has symptoms of compressive pathology from the narrowing of the joints and bone being laid down. Dr. Sacha opined that the Claimant's condition was objectively worse both on inspection and examination, as well as radiographically on the MRI. He explained that another RFA procedure would help some of Claimant's symptoms but would not treat the compressive symptomatology. Dr. Sacha testified that Claimant needed a staged epidural steroid injection to address the compressive symptomatology. Dr. Sacha explained that diagnostic medial branch blocks were also needed to see if the RFA procedure would be effective. Dr. Sacha confirmed that the compressive pathology was new and a progressively worsening problem, and the recommended injections would be to treat Claimant's symptoms.

41. Dr. Sacha clarified that, to the extent his records refer to maintenance care, it is done for billing purposes. Dr. Sacha opined that Claimant is clearly and objectively worse and requires additional care. He testified that Claimant has symptoms she did not previously have that are consistent with the progression of the disease, requiring treatment not just to maintain Claimant's prior condition. Dr. Sacha disagreed with Dr. Striplin's opinion that Claimant's continued subjective complaints have not substantially changed.

42. The ALJ finds the opinion and testimony of Dr. Sacha, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Striplin.

43. Claimant proved it is more probable than not she sustained a worsening of condition entitling her to reopening her claim as of November 12, 2020.

44. Claimant proved she is entitled to temporary indemnity benefits from November 12, 2020 and ongoing.

45. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reopening

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by

a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

As found, Claimant met her burden to prove she sustained a change in condition entitling her to reopen her claim. Claimant credibly testified her condition changed and worsened in 2020. There is no evidence Claimant sustained an any sort of intervening injury subsequent to being placed at MMI. Having treated Claimant over the course of multiple years, Dr. Sacha is familiar with Claimant's condition and course of treatment. Dr. Sacha was the first to place Claimant at MMI in 2018. Subsequently, Dr. Sacha continued to treat Claimant and had the opportunity to observe any changes in her condition. In November 2020, Claimant reported increased neck pain and headaches and Dr. Sacha noted that Claimant's symptoms appeared somewhat different than her prior symptoms. He credibly testified that Claimant has experienced worsening and different symptoms, which are supported by objective findings on examination and imaging. Dr. Sacha credibly testified that Claimant's worsening condition is related to the work injury. Dr. Sacha further credibly testified that Claimant required medial branch blocks and cervical injections to treat her new and worsening symptoms. The surveillance video showing Claimant participating in activities does not persuade the ALJ that Claimant has not sustained a change in her condition. The preponderant evidence establishes Claimant has sustained a change in her condition causally related to the original work injury, and thus is entitled to reopen her claim.

Temporary Indemnity Benefits

City of Colorado Springs Disposal v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997) stands for the proposition that a worsening of condition after MMI may entitle a claimant to additional temporary disability benefits if the worsened condition caused a "greater impact" on a claimant's temporary work capacity than existed at the time of MMI. *Root v. Great American Insurance Company*, W.C. No. 4-534-254 (April 15, 2009). ICAO has previously ruled that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss" where, for example, a claimant was not working immediately before the worsened condition. *Moss v. Denny's Restaurants*, W.C. No. 4-440-517 (September 27, 2006). As ICAO stated in *Lively v. Digital Equipment Corporation*, W.C. No. 4-330-619 (June 14, 2002): "[a]s we read *City of Colorado Springs*, in order to establish entitlement to additional temporary disability benefits the claimant must show the worsened condition resulted in increased physical restrictions (over those which existed on the original date of MMI), and that the

increased restrictions caused a 'greater impact' on the claimant's temporary 'work capability' than existed at the time of MMI."

In *Kreimeyer v. Concrete Pumping Inc.*, W.C. No. 4-303-116 (March 22, 2001), ICAO concluded that the critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." *See also El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993); *Ridley v. K-Mart Corp.*, W.C. No. 4-263-123 (May 27, 2003). The question of whether a claimant proved increased disability, as measured by actual wage loss or a reduction in her capacity to earn wages, is a question of fact for the ALJ's determination. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has established both actual wage loss and loss of earning capacity. Her actual wage loss and loss of earning capacity is greater since November 12, 2020 than it was at the time of MMI. Although Claimant had prior periods of absences, the medical and testimonial evidence establishes her entitlement to additional temporary disability benefits from November 12, 2020 for the hours missed in Claimant's Exhibit 5, pages 52-53 and continuing. The FAL reflects an admitted average weekly wage of $973.78 and a corresponding TTD rate of $649.19 per week. The temporary disability rate is $16.23 for each hour missed ($649.19/40). Respondents shall pay the Claimant at that rate for each hour or partial hour missed by the Claimant. Temporary disability benefits begin on November 12, 2020 for the missed hours set forth in Claimant's Exhibit 5, pages 52–53 and continue after that until terminated by operation of law.

ORDER

1. Claimant proved she sustained a change in condition entitling her to reopen her claim as of November 12, 2020.

2. Respondents are liable for Dr. Sacha's medical treatment beginning November 12, 2020 as medical treatment designed to cure and relieve Claimant as a result of her work-related injury and no longer as maintenance medical treatment.

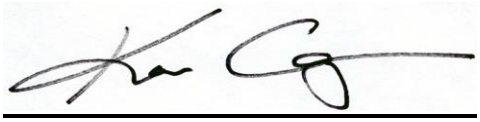
3. Respondents shall pay temporary disability benefits at the rate of $16.23 per hour for each hour or partial hour missed set forth in Claimant's Exhibit 5, pages 52-53 beginning on November 12, 2020 and continuing until terminated by operation of law.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-195-283-001

ISSUES

I. Whether Claimant's temporary total disability benefits were properly terminated due to his failure to accept an offer of modified employment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On January 25, 2022, Claimant suffered a compensable injury. Claimant was injured when he slipped on ice and fractured the left distal radius of his left arm.
2. On January 26, 2022, Claimant underwent surgery in which a left sided "ORIF" procedure was performed as well as a "C.T.R." of the left wrist.
3. On February 1, 2022, Claimant was evaluated at Denver Health Occupational Health by Douglas Scott, M.D. Dr. Scott returned Claimant to restricted duty. The restrictions precluded Claimant from using his left hand and arm. Claimant was also restricted from driving. (Ex. C, pp. 10-12)
4. Claimant kept treating with Dr. Scott. As a result, Dr. Scott was Claimant's attending physician.
5. On February 9, 2022, Employer, through TB[Redacted], wrote to Dr. Scott to see if he would approve Claimant performing a modified job. In the letter, Ms. TB[Redacted] stated that Claimant's restrictions included no left hand use and no driving. Ms. TB[Redacted] also stated that they identified a sedentary job for Claimant to perform. (EX. E, p. 41)
6. On February 10, 2022, Dr. Scott reviewed and approved the modified employment described by Employer–which consisted of sedentary work. (Ex. E, p. 41)
7. On February 10, 2022, Employer wrote to Claimant and offered Claimant modified employment which was to start no later than February 16, 2022. The letter also stated that Claimant's failure to start the modified employment would result in the termination of his temporary disability benefits. The letter provided:

> This will confirm that as of **Thursday, February 10, 2022**, the Employer[Redacted] has offered you a temporary modified duty assignment that must begin no later than February 16, 2022 (emphasis in original). Your temporary modified duty assignment will consist of sedentary work at the DOTI Leaf Drop Booth. Your shifts will be Monday thru Thursday from 6:30 a.m. to 5:00 p.m.

> The most recent restrictions recommended by the authorized treating physician include the following: no driving. No use of the left-hand or arm.
>
> Attached is correspondence signed by Dr. Scott from the Center for Occupational Safety and Health. He reviewed the modified duty assignment and restrictions as stated above and concurs that the temporary assignment is within your restrictions.
>
> . . .
>
> You will continue to receive your regular wages according to Career or Civil Service rules and statutory requirements while on modified duty. Pursuant to Workers' Compensation Rule of Procedure 6–1(A)(4), if you do not accept and begin this offer of modified duty, your wage continuation and/or temporary indemnity benefits will be terminated.

(Ex. E, pp. 39-40)

8. Since Claimant could not drive, he looked into alternative means of transportation to and from work. Claimant looked into taking public transportation – the bus – to and from work. Claimant contends that he did not want to take the bus because the weather was bad and he was afraid he might slip and fall while walking to and from the bus stop.

9. It took Claimant about 30 minutes to drive to work. Taking the bus to and from work would have taken Claimant about 1 hour and 15 minutes each way. At hearing, Claimant did not contend that the time to travel to and from work was unreasonable.

10. Claimant also looked into taking Uber and Lyft to work. Claimant, however, stated that using Uber or Lyft would cost approximately $23.00 each way to work and was cost prohibitive since he only made $23.00 per hour.

11. Because Claimant did not want to take the bus to work, and thought Uber or Lyft was too expensive, Claimant did not accept the offer of modified employment.

12. On February 23, 2022, Respondent filed a General Admission of Liability. Respondents admitted for a closed period of temporary total disability benefits (TTD). Respondent admitted for TTD from January 26, 2022, through February 15, 2022.

13. Despite Claimant being unable to drive due to his work injury, Claimant had access to public transportation to and from the modified job.

14. The ALJ finds that Claimant had reasonable access to public transportation and could have taken public transportation to and from work each day. Claimant, however, chose to not use it. The ALJ further finds that taking public transportation to and from work was a reasonable option for Claimant to get to work. Therefore,

the ALJ finds that the modified employment was reasonably available to Claimant under an objective standard.

15. Claimant failed to present credible and persuasive evidence that the weather conditions created an undue risk of falling while walking to and from the bus stop. As a result, Claimant's contention that walking to and from the bus stop was not a safe option and made accepting the modified employment impractical is neither credited nor found persuasive. Depending on the weather each day, Claimant could have also used a combination of Uber, Lyft, or the bus. Therefore, the ALJ finds, under an objective standard, Claimant's reason for refusing to accept the offer of modified employment was unreasonable. The ALJ finds that Claimant had reasonable access to public transportation – the bus - to get to work and chose not to use it. Thus, the modified employment was reasonably available to Claimant.

16. In this case, Dr. Scott, the attending physician, gave Claimant a written release to return to modified employment, approved the modified job, the modified job was reasonably available to Claimant and offered to Claimant in writing, and Claimant failed to begin the job. Moreover, Claimant's reason for refusing the offer of modified employment, which was reasonably available to Claimant, was not reasonable. Thus, Claimant's TTD benefits were properly terminated.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and

credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant's TTD benefits were properly terminated due to his failure to accept an offer of modified employment.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Where the employers seek to terminate benefits under this statute, they bear the burden of establishing the factual predicate for its application. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). It is a question of fact for the ALJ to decide whether a claimant has been released to return to work. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App.2016). There may be more than one "attending physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008); *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328, 330 (Colo. App. 2005). If there is a conflict between the attending physicians concerning whether or not the claimant is able to perform modified employment, the ALJ must resolve the conflict as a question of fact. *See Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000).

The offered modified employment must be reasonably available to the claimant under an objective standard. *Willhoit v. Maggie's Farm*, WC 5-054-125-01 at 4 (ICAO, July 26, 2018). A claimant's rejection of offered modified employment does not constitute responsibility for termination. The ALJ should consider the consequences of the industrial injury, the financial hardship that would be imposed on the claimant by accepting the modified employment and "[a]ny other reasons that would, in the opinion of the administrative law Judge, make it impracticable for the claimant to accept the offer of modified employment." § 8-42-105(4)(b)(II). Failure to inform the claimant of the modified employment starting date can be characterized as a reason for which it was "impracticable for the claimant to accept the offer." *Mccloud v. Progressive Insurance*, WC 4-980-200-01 (ICAO. Apr. 1, 2016); *see Aguilera v. Valley Nissan Subaru, LLC*, WC 5-112-736 (ICAO, Dec. 1, 2020) (the termination of temporary disability benefits is not contingent on a claimant's responsibility for termination because the termination of disability benefits requires the employer to comply with the statute and rules governing modified duty job offers).

As found, Claimant refused an offer of modified employment due to transportation issues caused by the injury. As further found, Claimant's work injury precluded Claimant from driving to and from work. On the other hand, Claimant had available public transportation – the bus - and chose not to use it. As also found, Claimant contended that he did not use the bus because he was afraid he might fall and reinjure himself. While the ALJ has considered such factor, Claimant failed to present sufficient credible and persuasive evidence to establish that the weather created an undue risk of walking to and from the bus stop and that the job was therefore not reasonably available. For example, Claimant presented no photographs documenting the bad weather conditions which he contends precluded him from taking the bus. Nor did Claimant call Employer to discuss his concerns about taking the bus to work on a particular day due to the weather. Therefore, the ALJ finds and concludes that Claimant's refusal to take the bus to get to work was not reasonable under the circumstances. Thus, the ALJ finds and concludes that the offer of modified employment was not too impractical to be considered a legitimate job offer.

As a result, the ALJ finds and concludes that Respondents established by a preponderance of the evidence that Claimant was released to modified employment, the Employer offered Claimant modified employment that was approved by his attending physician, the employment was reasonably available to Claimant under an objective standard, and Claimant failed to start the employment. Thus, the ALJ finds and concludes that Claimant's TTD was properly terminated.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's TTD was properly terminated as of February 15, 2022.
2. Claimant's claim for additional TTD is denied and dismissed.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 15, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to a disfigurement award for his left ankle pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. On January 29, 2020 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer. Specifically, Claimant was on his way into Employer's building when he stepped in a crack with his left foot and fell to the ground.

2. Claimant began receiving treatment with Blake Hines, D.P.M. on February 5, 2020. Dr. Hines assessed a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle.

3. On November 6, 2020 Dr. Hines performed a left ankle arthroscopy with debridement, a modified Brostrom-Gould procedure and a synovectomy. His preoperative and postoperative diagnoses were left ankle anterior talofubular ligament tear, lateral ankle instability, chronic ankle pain and synovitis. Claimant subsequently received additional physical therapy and steroid injections.

4. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant also exhibited a noticeable limp while walking.

5. By June 7, 2021 Dr. Hines determined that Claimant's structures were stable and his left ankle was solid. He noted that Claimant's return to full activities would not disturb the surgical correction. Dr. Hines felt Claimant was nearing Maximum Medical Improvement (MMI). He recommended Claimant return to work as he was able and suggested follow-up on an as-needed basis.

6. On June 22, 2021 Claimant visited Authorized Treating Physician (ATP) Carlos Cebrian, M.D. for an evaluation. Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. The 7% extremity rating converted to a 3% whole person rating. Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions.

7. On August 2, 2021 Insurer filed a Final Admission of Liability (FAL) acknowledging an MMI date of June 22, 2021, medical benefits previously paid, and Permanent Partial Disability (PPD) benefits for an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report. The FAL also denied liability for maintenance care after MMI because it was not reasonable, necessary or related. The admitted PPD benefits totaled $4,672.30 (208 x $320.90 x .07), to be paid from June 22, 2021 through October 4, 2021.

8. On April 12, 2022 Claimant underwent an independent medical examination with John Burris, M.D. Dr. Burris agreed with Dr. Cebrian that Claimant reached MMI on June 22, 2021. He assigned a 6% lower extremity impairment rating for range of motion loss that converted to a 2% whole person rating. Dr. Burris noted there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Moreover, Dr. Burris determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident.

9. Dr. Burris testified at the hearing in this matter. He explained that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program.

10. Dr. Burris reiterated that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

11. Claimant testified at the hearing in this matter. He explained that he has difficulties ascending and descending stairs because his left leg. Claimant commented that standing for more than three hours results in so much pain in his leg that he is not able to walk for the rest of the day. He has changed careers and is working as a tattoo artist because his new profession allows him to change positions and does not require static standing. Claimant remarked he has difficulties functioning at home and performing chores because of the need to rest his leg. He also commented that he is unable to participate in sports and hobbies because of his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, climbing up and down stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. Claimant seeks physical therapy and pain medication for his continuing symptoms.

12. Claimant has failed to prove that it is more probably true than not that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating. Initially, on January 29, 2020 Claimant suffered a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle while working for Employer. Claimant subsequently underwent left ankle surgery.

13. Claimant testified that he has a number of difficulties functioning at home and performing chores because of pain and discomfort associated with his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, ascending and descending stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. However, the record reveals that Claimant's functional limitations pertain to his left leg and do not extend to portions of his body beyond the schedule of impairments.

14. The medical records reveal that Claimant's industrial injury is limited to his left lower extremity. At a June 22, 2021 evaluation with ATP Dr. Cebrian Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. Respondents subsequently filed a FAL noting an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report.

15. Dr. Burris reasoned that Claimant warranted a 6% lower extremity impairment rating for his left ankle based on range of motion loss. He remarked there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Dr. Burris reiterated during his hearing testimony that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

16. The preceding medical records reflect that Claimant's functional disability is limited to his left leg. Both Drs. Cebrian and Burris persuasively determined that Claimant's June 29, 2021 industrial injury warranted an extremity rating based on loss of range of motion. As Dr. Burris remarked, Claimant's injury was limited to his left ankle region. Moreover, Claimant's testimony reveals that the primary catalyst for his pain is using or standing on his left leg. The record reflects that Claimant's pain does not extend to a portion of the body beyond the schedule of impairments. The situs of Claimant's functional impairment is thus in his left lower extremity. Specifically, Claimant's left lower extremity symptoms are limited to his leg and do not extend into a portion of his body beyond the schedule of impairments at the hip. Accordingly, Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

17. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant seeks physical therapy and pain medication for his continuing symptoms. However, the record reveals that Claimant does not require medical maintenance benefits to relieve the effects of his industrial injury or maintain his condition.

18. In his June 22, 2021 MMI report Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions. Dr. Burris also determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident. Dr. Burris specifically testified that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program. The persuasive medical opinions of Drs. Cebrian and Burris reflect that Claimant has failed to demonstrate that he is entitled to receive medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

19. Claimant has established that it is more probably true than not that he is entitled to a disfigurement award for his left ankle pursuant to §8-42-108, C.R.S. On November 6, 2020 Claimant underwent left ankle surgery as a result of his January 29, 2020 admitted industrial injury. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The

scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant's surgical scarring is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Furthermore, Claimant exhibited a noticeable limp while walking. Based on Claimant's surgical scarring and limp, he is entitled to a disfigurement award in the amount of $1,800.00.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Left Lower Extremity Conversion

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the "loss of a leg above the foot including the ankle." *See* §8-42-107(2)(w.5), C.R.S. However, when an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. The dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). The question of whether a claimant has sustained a scheduled "injury" compensable under §8-42-107(2)(w.5), C.R.S. or a whole person impairment compensable under §8-42-107(8)(c), C.R.S. depends on whether the claimant sustained "functional impairment" beyond the leg at the hip. *See* §8-42-107(2)(w), C.R.S. Whether a claimant has suffered the "loss of a leg above the foot including the ankle" under §8-42-107(2)(w.5) , C.R.S. or a whole person medical impairment is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional

impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68.

8. As found, Claimant has failed to prove by a preponderance of the evidence that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating. Initially, on January 29, 2020 Claimant suffered a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle while working for Employer. Claimant subsequently underwent left ankle surgery.

9. As found, Claimant testified that he has a number of difficulties functioning at home and performing chores because of pain and discomfort associated with his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, ascending and descending stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. However, the record reveals that Claimant's functional limitations pertain to his left leg and do not extend to portions of his body beyond the schedule of impairments.

10. As found, the medical records reveal that Claimant's industrial injury is limited to his left lower extremity. At a June 22, 2021 evaluation with ATP Dr. Cebrian Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. Respondents subsequently filed a FAL noting an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report.

11. As found, Dr. Burris reasoned that Claimant warranted a 6% lower extremity impairment rating for his left ankle based on range of motion loss. He remarked there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Dr. Burris reiterated during his hearing testimony that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

12. As found, the preceding medical records reflect that Claimant's functional disability is limited to his left leg. Both Drs. Cebrian and Burris persuasively determined that Claimant's June 29, 2021 industrial injury warranted an extremity rating based on loss of range of motion. As

Dr. Burris remarked, Claimant's injury was limited to his left ankle region. Moreover, Claimant's testimony reveals that the primary catalyst for his pain is using or standing on his left leg. The record reflects that Claimant's pain does not extend to a portion of the body beyond the schedule of impairments. The situs of Claimant's functional impairment is thus in his left lower extremity. Specifically, Claimant's left lower extremity symptoms are limited to his leg and do not extend into a portion of his body beyond the schedule of impairments at the hip. Accordingly, Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

Medical Maintenance Benefits

13. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant seeks physical therapy and pain medication for his continuing symptoms. However, the record reveals that Claimant does not require medical maintenance benefits to relieve the effects of his industrial injury or maintain his condition.

15. As found, in his June 22, 2021 MMI report Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions. Dr. Burris also determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident. Dr. Burris specifically testified that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program. The persuasive medical opinions of Drs. Cebrian and Burris reflect that Claimant has failed to demonstrate that he is entitled to receive medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

Disfigurement

16. Section 8-42-108(1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view" he may receive a disfigurement award "in addition to all other compensation benefits provided in this article." As found, Claimant has established by a preponderance of the evidence that he is entitled to a disfigurement award for his left ankle. On November 6, 2020 Claimant underwent left ankle surgery as a result of his January 29, 2020 admitted industrial injury. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant's surgical scarring is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Furthermore, Claimant exhibited a noticeable limp while walking. Based on Claimant's surgical scarring and limp, he is entitled to a disfigurement award in the amount of $1,800.00.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

2. Claimant's request for maintenance medical benefits is denied and dismissed.

3. Claimant shall receive a disfigurement award in the amount of $1,800.00.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 15, 2022.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-384-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable work injury on February 3, 2022?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 57 year-old man who is a Lieutenant with the Denver Fire Department. Claimant has worked for Employer for 17 years. Claimant credibly testified that Employer requires him to work out one hour per shift.

2. On February 3, 2022, Claimant was walking on the elliptical machine at the firehouse. About eight minutes into his workout, Claimant felt a pain in his chest above his heart. Claimant's colleague checked his blood pressure and it was 166/110, so the paramedics were called. When the paramedics arrived, Claimant's blood pressure had gone up to 178/120. The paramedics recommended that Claimant go to the emergency room because of his elevated blood pressure.

3. The paramedics transported Claimant to Denver Health. According to the Emergency Department report, Claimant had "left-sided exercise-induced chest pain with radiation to left shoulder." Claimant told the physicians that over the past few months his blood pressure had been "slowly creeping up." According to the Emergency Department record, Claimant's chest pain resolved after 10 minutes of rest. In the ambulance he received 324 mg Aspirin and 0.4 mg nitroglycerin. The Emergency Department noted Claimant had no prior history of chest pain, a normal ECG, normal blood work (troponin protein), and no evidence of a pulmonary embolism. (Ex. B).

4. The hospital discharged Claimant and instructed him to see his primary care physician to coordinate outpatient cardiology follow up and cardiac risk stratification. (Ex. B).

5. Claimant testified that on-the-job injuries are to be reported via the City of Denver's OUCH line. Right after being discharged, Claimant contacted the OUCH line to report his injury for workers' compensation purposes. Claimant explained that he was not able to call the OUCH line prior to seeking treatment because the paramedics took him to the Emergency Room. Claimant reported that he was "walking on the elliptical machine to start [his] morning workout . . . and [he] started experiencing tightness and pain in [his] chest and around [his] heart." Claimant was advised to see one of the following doctors at COSH: Koval, Pula, Mankowski, or Keen.

6. Claimant saw ATP, Joan Mankowski, M.D. at COSH that same day. Dr. Mankowski diagnosed Claimant with chest pain, unspecified. Dr. Mankowski noted that based upon the history Claimant provided, his chest pain occurred while walking on the treadmill, and there was no unusual exertion. She further noted "[c]hest pain is a symptom, etiology unclear, as is cause of his HTN. His symptoms while manifested at work, are not necessarily work related." Given Claimant's hypertension, Dr. Mankowski instructed Claimant to contact his primary care physician for further evaluation, and work clearance. (Ex. C).

7. Claimant testified that he told his immediate supervisor he was not cleared to work. This was reported to Captain Erik Haag who recommended that Claimant see Dr. Koval. Claimant testified that he saw Dr. Koval on February 8, 2022, and she recommended multiple tests. Claimant testified that he followed the recommendations of Dr. Koval since she was one of names given by the OUCH line, and she was recommended by Captain Haag. Dr. Koval, however, is not Claimant's primary care physician.

8. Claimant testified that he has returned to work and has had no similar incidents.

9. The ALJ finds that Claimant did not have a diagnosed injury. At the time Claimant experienced chest pains, he had just begun his workout by walking on the elliptical. There is no evidence that this form of exercise required any unusual exertion.

10. The ALJ finds that Claimant did not suffer a compensable work injury on February 3, 2022.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among

other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

For an injury to be compensable it must arise out of, and in the course of, employment. § 8-41-301(1)(c) C.R.S. These are two separate requirements that create a two-pronged test for compensability. "In the course of" refers to the time, place and circumstances under which a work-related injury occurs. *Wild West Radio, Inc. v. ICAO*, 905 P.2d 6 (Colo. App. 1995). "Arising out of" deals with the casual connection between the employment and injury. *Gen. Cable Co. v. ICAO*, 905 P.2d 6 (Colo. App. 1995). The "arising out of" element requires that an injury have its origin in the employee's work-related functions and be sufficiently related to those duties to be considered part of the employee's service to the employer. *Price v. ICAO*, 919 P.2d 207 (Colo. 1996).

Claimant has the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. §8-41-301(1), C.R.S.; see *Younger v. Denver*, 810 P.2d 647 (Colo. 1991) and *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after consideration of all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Claimant also maintains the burden of proof to establish that the disability and need for treatment is proximately caused by the injury or occupational disease arising out of and in the course of employment. *Id*. citing *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985).

Here, claimant was in the course of his employment when he experienced chest pain and high blood pressure. The question that must be resolved is whether Claimant is able to prove the "arising out of" prong of the compensability test. Arising out of requires a connection between the employment and the injury. Here, there is no diagnosed injury, only Claimant's chest pain and high blood pressure, both of which resolved. Without an injury, the arising out of prong cannot be satisfied. Even if experiencing chest pain and high blood pressure is considered an injury for the purposes of a compensability determination, the medical records, the quick resolution of the chest pain, and Claimant's

own statement that his blood pressure has been increasing over time, show there is no connection between the underlying condition and Claimant's employment.

The mere fact that a claimant experiences symptoms at work, does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." *See also F.R. Orr Constr. v. Renta*, 717 P.2d 965 (Colo. App. 1995) (the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment).

In this case, Claimant did not sustain an injury in the workplace. Claimant experienced a symptom (chest pain and high blood pressure) at work and sought treatment through Employer. The symptoms were preexisting and underlying. Both the treating physician and the Emergency Department physicians could find no relation between the symptoms and Claimant's employment, nor could they diagnose any injury or illness. In this case, Claimant's condition was the natural progression of a pre-existing condition that was not altered by his employment and therefore cannot be found to have arisen out of employment.

Because there was no injury, only the natural progression of a pre-existing condition, this claim cannot be found compensable and must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits under the Act is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 15, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant overcame Dr. Hughes' DIME opinion on maximum medical improvement ("MMI") and permanent impairment by clear and convincing evidence.

II. Whether Claimant proved she is entitled to additional temporary indemnity benefits.

III. Whether Claimant proved additional medical treatment is reasonable, necessary and related to her work injury.

FINDINGS OF FACT

1. Claimant is a 73-year-old female who worked for Employer as a housekeeping attendant.

Prior History

2. Claimant's pre-existing conditions include endocrine disease, hypothyroidism, hyperlipidemia, GERD, musculoskeletal disorder, fibromyalgia, arthritis, high cholesterol, sinusitis, ear trouble, IBS, and headaches.

3. On June 17, 2009 Claimant reported to her primary care physician ("PCP") at Kaiser Permanente that she had an MRI of her head/ears approximately two years prior.

4. On February 9, 2010 PCP records note Claimant saw an ear, nose and throat ("ENT") specialist in 2007. Claimant reported that she wakes up every day with a headache that is gone by 10am for which she sometimes takes Advil. She reported that every day her entire body hurt, complaining that "everything hurts." Claimant reported feeling ear, mouth and nose problems. The PCP noted that Claimant was "Asking to be evaluated for disability – hurts too bad, is too fatigued to do job in housekeeping." (R. Ex. A, p. 8).

5. On May 19, 2010, Claimant reported complaints of arthritis to her PCP. She reported that she stopped taking arthritis medications because could not sleep and was so tired and got dizzy at work. Claimant complained of pain in her back, hips, knees, ankles, elbows, shoulders and hand. She requested a lung x-ray for tingling and numbness. She was assessed with fibromyalgia.

6. On August 30, 2010 Claimant presented to her PCP reporting “more and more problems.” (R. Ex. A, p. 18). Claimant reported that her right eye teared for two days in the morning and that she had a bit of headache on that eye and could not see the same out of the eye. She further reported severe pain in her neck and head and requested a CT scan or MRI of her head. She was quoted in the medical note as saying, “I want to get SSI and stop working – will you do the disability forms or write a letter to support me stopping working.” (Id.)

7. On December 2, 2011, Claimant reported having problems with her right eye. She reported that every day her vision worsened and that her right eye was blurry. Claimant was taking medication for depression.

8. July 25, 2012 Claimant complained of a stabbing pain in her left ear and ongoing headaches.

March 6, 2013 Work Injury

9. On March 6, 2013 Claimant sustained an admitted industrial injury when she tripped over a power cord and fell, striking her head on the concrete floor.

10. Claimant was taken to the emergency room at St. Anthony Hospital that same day. She reported falling backwards and hitting her head on the floor. Claimant complained of a slight headache and some neck soreness, but denied loss of consciousness, blurry vision, dizziness and weakness of her extremities. PA Mary Stults noted Claimant was not displaying any signs of symptoms of a concussion at the time. On neurological examination, Claimant was alert and oriented with no focal neurological deficits and was ambulatory with no problems. A CT scan of the head revealed a small to moderate right parietal subgaleal hematoma with no evidence of acute bony or acute intracranial injury, mass lesion, extra-axial fluid collection or acute hemorrhage, or acute ischemia or infarction. Incidental benign right basal ganglia calcification was noted. A cervical spine x-ray revealed facet arthrosis with no evidence of an acute fracture or subluxation. Claimant was diagnosed with closed head injury, subgaleal hematoma, and cervical sprain. She was prescribed Tylenol, discharged from care, and ordered to follow-up with her primary care physician.

11. A Kaiser note dated March 6, 2013 indicates Claimant’s daughter called Kaiser from the St. Anthony Hospital emergency room regarding the injury. It was noted Claimant was not having significant symptoms at the time other than a mild headache.

12. Claimant subsequently underwent evaluation and treatment at Concentra. On March 7, 2013, Claimant presented to Matt W Slaton, PA-C with complaints of pain in the head, upper right back, right shoulder and neck. Claimant reported falling backwards and hitting the back of her head and right side. On examination, PA Slaton noted decreased neck range of motion with pain on the posterior occipital temporal area and palpable muscular tenderness bilateral trapezius through the scapular region. Neurologic exam was normal. There was limited range of motion in the trunk. Palpation of the spine was

positive for pain at C7-T9 on the right. Cervical range of motion was decreased with pain. A large “goose egg” was noted over the occipital temporal area. PA Slaton gave the following assessment: concussion with no loss of consciousness, contusion of the thorax, trapezius strain, thoracic strain, and cervical strain. He prescribed Claimant Skelaxin and tramadol and removed Claimant from work.

13. Claimant returned to PA Slaton on March 11, 2013 reporting improvement in back pain but continuing stiffness and soreness in her neck. Claimant reported feeling better and that her symptoms were improving. PA Slaton referred Claimant for physical therapy and released Claimant to modified duty with restrictions of no lifting more than 20 lbs., no walking or standing more than 45 minutes per hour, no reaching over shoulder height, and sitting 25% of the time.

14. On March 13, 2013 Employer offered Claimant modified duty within her temporary restrictions.

15. On March 25, 2013 Claimant sought treatment at the emergency department of Lutheran Medical Center with complaints of headaches and dizziness and memory loss. Memory and speech were noted as normal. Claimant was diagnosed with post-concussion syndrome and a cervical strain and referred back to her workers’ compensation provider.

16. Later on March 25, 2013 Claimant saw Gary A. Landers, M.D. at Concentra reporting dizzy spells and periods of confusion. A CT scan of the brain with no contrast was obtained. The impression was: 1. No acute intracranial abnormality detected. No evidence for skull fracture or acute intracranial hemorrhage; and 2. Suspect changes of mild chronic microangiopathic ischemic disease. X-rays of the cervical spine revealed multilevel sclerotic facet arthrosis with no fractures. Dr. Landers assessed post-concussion syndrome and increased Claimant’s restrictions to no standing or walking for more than four minutes per hour.

17. A physical therapy note from Concentra dated April 10, 2013 notes Claimant had thus far attended seven sessions. Claimant was reporting throbbing and tingling on the right side of her head, neck pain, and dizziness.

18. On April 11, 2013 Claimant again presented to the emergency department at Lutheran Medical Center with complaints of dizziness. Claimant felt as though the muscle relaxants she was taking might be too strong. Examination of the neck revealed normal range of motion and her head was atraumatic. A CT scan of the head was obtained and compared to the March 25, 2013 CT scan. No significant intracranial abnormalities were noted. The emergency department physician opined Claimant was likely suffering from post-concussion syndrome but may also be feeling dizzy due to muscle relaxers. Claimant was diagnosed with dizziness and dehydration and discharged.

19. On April 12, 2013 Claimant presented to Julie Parsons, M.D. at Concentra with complaints of dizzy spells, increased forgetfulness and emotion, anxiety, depression, and

continued head and neck symptoms and balance issues. On examination Dr. Parsons noted an antalgic gait and positive Romberg's test. Dr. Parsons further noted Claimant could not do finger-to-nose without overshooting dramatically, trouble with diadochokinesis, and an inability to walk heel-to-toe. Dr. Parsons assessed Claimant with a closed head injury, concussion, and cervical strain. She restricted Claimant to working 100% seated duty and instructed Claimant to stop physical therapy. Dr. Parsons referred Claimant to John Burris, M.D., a physical management specialist. Dr. Burris is Level II accredited.

20. Claimant presented to Dr. Burris on May 14, 2013. Regarding the mechanism of injury, Claimant reported striking her back and the back of head on the floor, losing consciousness, and waking up while seated in a chair. Claimant complained of 8/10 throbbing pain and burning sensation throughout her head and neck, dizziness, and difficulty ambulating. Dr. Burris noted Claimant appeared very somatically focused and displayed moderate pain behaviors. On examination, Dr. Burris noted Claimant appeared to be somewhat unsteady on her feet. Her head was atraumatic and neck displayed full range of motion. Neurologic exam was grossly intact. Dr. Burris diagnosed Claimant with a cervical strain and scalp contusion. He recommended Claimant undergo an ear, nose and throat ("ENT") evaluation to assess her vestibular system, as well as a neurologic evaluation. Claimant's work restrictions of 100% seated work continued.

21. On May 16, 2013, Stanley H. Ginsburg, M.D. performed a neurological Independent Medical Examination ("IME") at the request of Respondents. Dr. Ginsburg is Level II accredited. Claimant reported falling backwards and hitting her head on concrete and being rendered unconscious. Claimant complained of headache on the posterior right with pounding/tingling/burning, neck discomfort, poor balance, and difficulty ambulating. Dr. Ginsburg noted,

> When I asked the patient to ambulate, she staggered even with casual ambulation and staggered even more prominently when I asked her to tandem or assume a Romberg position. This occurred in a way that would cause her to fall if her balance were not good. I believed that her gait disturbance is, from my observation, not organic.

(R. Ex G, p. 116).

22. Dr. Ginsburg reviewed Claimant's medical records, including a CT scan of Claimant's brain and cervical spine imaging. He documented that motor examination was unremarkable except for finger-to-nose testing which demonstrated some marked abnormalities that were corrected when Claimant's eyes were open, which he felt was nonorganic. Dr. Ginsburg diagnosed Claimant with a work-related minor closed head injury and a cervical strain with minor radicular symptomatology. He noted that he was unsure if Claimant was rendered unconscious as a result of the fall, so it may be regarded as post-concussion syndrome. He further noted there were complaints of memory issues that were not expressed frequently, so he was unsure of the significance. Dr. Ginsburg concluded that there was no evidence of myelopathic process and the restriction of

Claimant's neck movement was variable and not accompanied by neurological abnormalities on examination with some degree of pain behavior. He opined, "Clearly her gait disturbance is not organically based, according to my observations, but one cannot rule out the possibility she has post-concussion vertigo, which would probable (*sic*) ear related rather than brain related." (Id. at p. 118). Dr. Ginsburg recommended performing an MRI with careful posterior fossa views. He stated that if the MRI results were negative, he recommended obtaining an opinion from ENT consultant due to Claimant's persistent symptoms and possible consideration of some vestibular therapy. He recommended Claimant continue conservative therapy for her cervical strain.

23. On May 23, 2013, Claimant presented to Level II accredited Alan Lipkin, M.D. for an ENT evaluation. Claimant reported to Dr. Lipkin falling and hitting the right side of her head on the concrete floor and losing consciousness for an unspecified amount of time. Claimant reported that she began noticing dizziness about a week after the incident. She also complained of occasional right-sided ringing tinnitus. On examination, Dr. Lipkin noted Claimant walked using a walker with wide-based station and unsteady without lateralization. Dr. Lipkin performed a series of tests that revealed bilaterally symmetrical sensorineural hearing loss, but concluded that the test findings revealed that it was unlikely Claimant sustained a catastrophic vestibular injury. He diagnosed Claimant with vertigo, tinnitus, dizziness and giddiness, and cerumen impaction. Dr. Lipkin recommended that some additional vestibular testing be completed on a later date and that Claimant return after the testing had been completed.

24. Claimant underwent a neurological evaluation with Level II accredited Eric K. Hammerberg, M.D. on June 20, 2013. Claimant reported losing consciousness during the work incident. Her major symptoms were dizziness and light-headedness. Claimant complained of having trouble walking using a cane and that her head had a hot and burning sensation. Dr. Hammerberg's impression was: post-traumatic headache with cervical strain and post-traumatic vertigo. He recommended Claimant take analgesic medication as needed and continue physical therapy for the cervical spine. He opined that Claimant's major problem at the time appeared to be post-traumatic vertigo and stated he would defer to Dr. Lipkin for further evaluation and treatment in that regard.

25. On June 26, 2013, Claimant underwent a vestibular evaluation by Cara Fiske, Au.D. Dr. Fiske noted the following tests were performed: video onystagmogram; fistula test; brainstem evoked response; electrocochleography; spont nystag test with eccentric gaze fixation; nystag with red; positional nystag test, minimum of 4 positions; with red optokinetic nystag test; biodirectional foveal/peripheral stimulation, with red oscillating tracking test. All testing could not be completed due to Claimant's inability to stand without assistance and her keeping her eyes open. Dr. Fiske noted all gaze, positional and fistula tests were within normal limits. The right Dix-Hallpike was within normal limits, however the left could not be completed due to neck pain. Saccades and pendular tracking were abnormal. Bilateral bithermal air caloric stimulation revealed robust and symmetric labyrinthine function. Claimant was to follow-up with Dr. Lipkin regarding the test results.

26. On July 2, 2013, Claimant saw her PCP Heather Shull, M.D., at Kaiser for an annual exam. Claimant presented without acute complaints. It was noted Claimant stopped taking citalopram and her pain and depression were feeling better.

27. On July 23, 2013, Claimant returned to Dr. Lipkin, who reviewed the recent balance tests. He noted the Brainstem Auditory Evoked Response test and electrocochleography were normal. The electronystagmography was limited testing due to mobility and neck issues. Dr. Lipkin noted that symmetrical calorics and tracking problems could suggest central issues. Audiometrics showed symmetrical sensorineural loss. Dr. Lipkin's assessment continued to be vertigo, tinnitus, dizziness and giddiness, and sensorineural hearing loss. He again opined that it was unlikely Claimant sustained a catastrophic vestibular injury. He noted that if Claimant's problems persisted, the next step would be vestibular rehabilitation/physical therapy.

28. From August 20, 2013 through March 25, 2014 Claimant attended multiple sessions of vestibular rehabilitation/physical therapy at Select Physical therapy. From August 20, 2013 through March 25, 2014 Claimant presented for vestibular rehabilitation/physical therapy for a total of eighteen (18) visits. Rehab/therapy consisted of: Gait Training, Active Assistance Range of Motion Activities, Active Range of Motion Activities, Adaptive Equipment Education, Client Education, Home Exercise Program, Manual Range of Motion Activities, Manual Therapy Techniques, Neuromuscular Re-Education, Passive Range of Motion Activities, Proprioceptive/Closed Kinetic Chain Activities, Soft Tissue Mobilization Techniques, Stretching/Flexibility Activities, Therapeutic Activities, and Therapeutic Exercise. The physical therapist noted, "Pt seems to ambulate with less unsteadiness and less need for support when unaware that she is being observed versus requiring contact guard when observed." (R. Ex. J, p. 149). As of March 25, 2014, Cliamant was demonstrating slight improvement with decreased dizziness and improved balance and was discharged from care.

29. Dr. Burris reexamined Claimant on August 27, 2013. He noted that an August 12, 2013 brain MRI was essentially normal, but did identify some nonspecific white matter changes with no evidence of acute abnormalities. MRI of the cervical spine obtained on August 12, 2013 showed some degenerative changes with a small shallow disk protrusion at C6-7, but no clear evidence of foraminal stenosis. Dr. Burris noted that the most recent diagnostic testing was somewhat indeterminate as to why Claimant continued to have the severity of her reported symptoms. He opined that it may be possible Claimant has whiplash syndrome from the work injury, which could attribute much of her complaints, including dizziness. Dr. Burris recommended Claimant undergo an evaluation with an interventional spine specialist and noted she may be a candidate for facet injections or medical branch blocks. He referred Claimant to John T. Sacha, M.D. Dr. Sacha is Level II accredited.

30. Claimant first presented to Dr. Sacha on September 16, 2013. Dr. Sacha noted complaints of right neck pain, right-sided headaches, and mild dizziness. He noted there were no problems with concentration, memory or following directions. On examination, Dr. Sacha documented moderate to severe pain behaviors and a non-physiologic antalgic

gait. Dr. Sacha's impression was: cervical facet syndrome with headaches and reactive depression that is multifactorial. He opined there was no evidence of a closed-head injury at this point. He agreed with Dr. Burris that Claimant has cervical facet syndrome and dizziness secondary to that, which he noted happens frequently with whiplash syndrome. Dr. Sacha recommended Claimant take antidepressants and undergo a trial of cervical facet injections.

31. At a follow-up evaluation on October 7, 2013, Dr. Sacha noted Claimant decided not to proceed with the facet injections and thus was likely at MMI. He noted moderate pain behaviors and that Claimant's gait was normal when using her cane. Dr. Sacha remarked that Claimant was now seven months into her injury and had less than 10% improvement in her overall symptoms by her own report. Dr. Sacha's final impression was cervical facet syndrome with headaches and dizziness secondary to that. He discharged Claimant from his care and noted facet injections could be performed as maintenance treatment in the event Claimant chose to proceed with the injections at some future point.

32. On October 8, 2013, Claimant saw Dr. Burris and reported improvement with therapy. Dr. Burris noted that Claimant appeared to be responding to change of medicines and conservative measures directed at her neck. Work restrictions were changed to sitting 90% of the time.

33. Dr. Burris placed Claimant at MMI at a follow-up evaluation on November 19, 2013. Claimant reported improvement in her symptoms with no new complaints. She continued to note some dizziness when looking up and 3/10 neck pain and mild headaches. Dr. Burris noted, "Dr. Sacha describes (*sic*) all of her symptoms to cervical facet syndrome and therefore to avoid duplication of impairment, only a cervical spine impairment will be performed." (R. Ex. D, p. 77). Using the AMA Guides, Dr. Burris assigned a total 10% whole person impairment, comprised of 4% impairment under Table 53(II)(B) and 6% for range of motion deficits. He opined Claimant reached MMI as of November 19, 2013 for her work-related neck injury. Permanent work restrictions were assigned to limit overhead activities that cause an extension of the neck and exacerbation of symptoms. Claimant was to sit 25% of the time. As maintenance care, Dr. Burris recommended finalizing her remaining physical therapy sessions, medication management for three to six months, and injections within the next six months if Claimant changed her mind and wished to proceed with the injections. He noted no other maintenance care was otherwise required.

34. On January 9, 2014, Employer provided Claimant with modified duty within her temporary restrictions.

35. On June 5, 2014, Claimant underwent a DIME with Ronald J. Swarsen, M.D. Dr. Swarsen gave the following assessment: trip and fall; closed head injury with concussion without loss of consciousness; dizziness, likely vestibular in origin-partially treated; neck sprain with persistent pain; persistent head pain and point of impact; and symptoms magnification, depression with anxiety. He opined that Claimant was not at MMI with respect to her head and neck injuries. He provided a provisional impairment rating of 24%

whole person of the cervical spine (consisting of 21% for range of motion deficits and 4% for cervical specific disorder). He noted he did not provide a provisional mental impairment rating as Claimant was not at MMI and he did not have the applicable records for review. Dr. Swarsen recommended Claimant complete vestibular therapy and undergo a follow-up ENT evaluation. He noted Claimant's symptoms likely included a psychological component that had not yet been addressed comprehensively, and recommended Claimant undergo evaluation with a Spanish-speaking psychologist and at least six to eight sessions of counseling. He further recommended a one-time consultation with an ophthalmologist. Dr. Swarsen noted future medical needs of physical therapy twice a week for two months, medication for the next three to six months, and facet injections in the next six months.

36. On July 21, 2014, Claimant had declined to return to modified duty, but was still considered an employee of Employer.

37. On September 5, 2014, Claimant again declined to return to modified duty and voluntarily resigned from Employer.

38. On September 16, 2014, Claimant sought treatment at Swedish Medical Center with complaints of dizziness, headaches, unsteady gait and memory loss. CT scans of the head and neck revealed of the head revealed coarse calcification within the inferior aspect of the right basal ganglia with differential diagnosis and atherosclerotic disease without hemodynamically significant stenosis. There was atherosclerotic disease without hemodynamically significant stenosis.

39. On September 29, 2014, Stephen A. Moe, M.D. performed a psychiatric IME at the request of Respondents. Dr. Moe is board certified and Level II accredited. Based on his interview of Claimant and review of Claimant's records, Dr. Moe concluded that Claimant's current complaints suggesting multiple disabling neurological problems could not be explained by the physical injuries from the March 6, 2013 work injury. Dr. Moe explained that the available data was insufficient to either definitively determine or rule out a concussion, but that if Claimant did suffer a concussion, it was at the mildest end of the spectrum of severity, given that the impact did not result in loss of consciousness and it resulted in no more than a very brief period of a change in her cognitive functioning. Dr. Moe opined that Claimant's injury could not account for the problems to which Claimant attributes her disability. He opined that any probable neck injury was mild and not likely to cause significant pain or a sense of dizziness that persists for 18 months post-injury. He noted that, while vestibulopathy has not been definitively ruled out, if present, it was likely mild.

40. Dr. Moe noted Claimant reported multiple symptoms in the absence of any particular illness or injury, that her subjective experience of symptoms at times involved unusual characteristics, that a number of her pre-injury complaints were similar to those that have been her focus since the work injury, and that Claimant has previously expressed the desire to be declared disabled. He opined that Claimant suffered a mild work-related injury that subsequently grew into widespread symptoms and severe

disability, which represented an idiosyncratic, rather than normative, outcome. He opined that a reaction to a return to work and anxiety about her symptoms resulted in the transformation from symptoms that were limited in scope and expected to be time-limited to a presentation suggestive of profound disability.

41. Dr. Moe further opined that Claimant does not suffer from a psychiatric disorder manifested in overt depressive or anxiety symptoms. He noted that the contribution of non-injury factors to Claimant's current symptoms and impairment is great. He concluded that Claimant's current complaints are not caused by the work injury and strongly doubted that any interventions are likely to be of benefit so long as Claimant's claim remains unresolved. He disagreed with Dr. Swarsen that Claimant's condition is related to the work injury, opining that her symptoms were largely the product of reversible psychological factors.

42. On November 12, 2014, Douglas C. Scott, M.D. performed an IME at the request of Respondents. He assessed Claimant with a closed heard injury with possible post concussive syndrome; subgaleal hematoma without skull fracture, intracranial hemorrhage, or intracranial space occupying lesion with residual skin sensitivity; cervicothoracic muscle strain; and possible post traumatic vertigo with balance issues. He opined that Dr. Swarsen did not err in finding Claimant was not MMI or in his provisional impairment rating.

43. On November 21-22, 2014 surveillance video was obtained of Claimant. Claimant is observed at times walking without assistance and at other times using a cane, wall or shopping cart for assistance.

44. Dr. Sacha reviewed the video surveillance of Claimant as well as Dr. Swarsen's DIME report and issued a report dated April 29, 2015. He noted that on the surveillance video, Claimant had "quite good gait pattern was able to bend and twist without difficulty and hold balance." (R. Ex. K, p. 166). Dr. Swarsen remarked that Claimant's presentation in the surveillance video was clearly different than when he saw Claimant on April 22, 2015. He concluded, "This patient clearly has a significant nonphysiologic presentation in the office compared to what is viewed on the surveillance video. The patient clearly has no evidence whatsoever of any problems with balance or difficulty standing or walking, and it calls into question many of this patient's complaints." (Id.) He opined that "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim." (Id. at 168).

45. On June 11 and June 30, 2015, Claimant presented to Lupe Ledezma, Ph.D. for a Spanish-speaking psychological evaluation, per the referral of Dr. Sacha. Dr. Ledezma wrote a report dated June 30, 2015. Claimant's chief complaints included depression, anxiety, cognitive issues, and physical symptoms. Dr. Ledezma noted that Claimant was very unsteady and swayed while standing or walking and held onto furniture or walls when walking. She was able to recall 3/3 words on immediate recall. After 30 minutes, she remembered 1/3 words with two intrusions. She was unable to perform simple or complex mental calculations. Her judgment abilities and abstraction abilities were poor. Her short-

term memory skills were fair, but her mental control skills were poor. She was able to follow simple and multiple-step commands well. Dr. Ledezma further noted that on the physical symptoms scale Claimant scored in the 94th, 97th and 90th percentile indicating that she focuses mainly on her subjective pain complaints and deems them the most limiting factor in her life. Depressive and anxiety scales were also high, showing lack of motivation and fear of further pain. Her dependency score was in the high range. She noted Claimant is pessimistic about her future and feels she is incapable of managing her problems and looks to others for help. She is passive and unassertive. Dr. Ledezma wrote that, of greater concern, is that Claimant may be passive in her approach to her recovery and functioning, leaving it to others to "cure" her. She lacks trust in her providers and does not feel they are acting in her best interest. She noted significant psychological overlay to Claimant's physical issues. Dr. Ledezma diagnosed Claimant with major depression, moderate; generalized anxiety disorder; and psychological factors affecting other medical conditions. She recommended Claimant undergo psychotherapy, continue antidepressant medication, and undergo neuropsychological testing in Spanish to determine the presence of a neurocognitive disorder and provide treatment recommendations.

46. On June 25, 2015, Dr. Sacha issued an addendum after reviewing Claimant's medical records, Dr. Swarsen's DIME report, and video surveillance of Claimant. He opined, "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim." (R. Ex. K, p. 170). He agreed that Dr. Burris provided appropriate care at all points. Regarding whether he agreed or disagreed with Dr. Swarsen's DIME conclusion, Dr. Sacha stated "I wholly disagree with Dr. Swarsen, and my guess is that Dr. Swarsen did not have all the medical records or did not pick up that the patient has such a non-physiologic presentation, and he may not have seen the surveillance video on this patient." (Id. at 171). Dr. Sacha concluded Claimant was at MMI and did not require further medical care, including any further vestibular physical therapy and rehabilitation.

47. Claimant continued to see Dr. Ledezma on July 23, September 1, September 17, and October 8, 2015. She continued to report headaches, dizziness and cognitive issues, with intermittent improvement. Dr. Ledezma continued with her same recommendations.

48. On November 3, 2015, Dr. Hughes performed a follow-up DIME, as Dr. Swarsen had retired in the interim. A Spanish interpreter was present at the evaluation. As part of his evaluation, Dr. Hughes reviewed Claimant's medical records, including, *inter alia*, the March 6, 2013 emergency room report, Concentra records, Dr. Lipkin's May 23, 2013 report, the neurological reports of Drs. Ginsburg and Hammerberg, Dr. Burris' reports, Dr. Swarsen's DIME report, Dr. Moe's report, Dr. Scott's report, Dr. Sacha's reports and Dr. Ledezma's June 30 and July 23, 2015 reports. Regarding the mechanism of injury, Claimant reported tripping and falling over computer cables and having progressive symptoms of hearing voices but not being able to see. Claimant continued to report right-sided 4/10 head pain, balance issues, depression and anxiety. Dr. Hughes noted Claimant reported to him having no past history of traumatic injuries, headaches, neurological conditions or depression. He remarked Claimant's history understated the

severity of her preexisting conditions, which included active problems of depression, fibromyalgia, and headache disorder.

49. On physical examination, Dr. Hughes noted Claimant had a flat affect and neutral mood but did not exhibit word-finding difficulties, bizarre thought process or flights of ideas. Claimant reported tenderness to palpation over her right temporal head. Regarding the cervical spine, Dr. Hughes noted,

> There is a rather remarkable amount of discrepancy between informally observed and formally measured cervical spine ranges of motion, with formal measurements being fairly consistent with those obtained by Dr. Swarsen, using dual inclinometers, with cervical spine flexion and extension maximally 32 and 28 degrees, right and left lateral flexion 26 and 25 degrees, right and left rotation of the head and neck 37 and 34 degrees. Informally, I observed full right and left rotation of the head and neck as well as full flexion chin to chest.

(R. Ex. O, p. 236).

50. He further noted bilateral finger-nose testing was intact, and Romberg testing was grossly abnormal with Claimant demonstrably unable to stand without her cane. Under general appearance, Dr. Hughes noted, “She ambulates with a cane in her right hand, lurching back and forth and nearly falling in the clinic. This is quite variable from observed ambulation out to her car, although she had the assistance of a young female who walked with her.” (Id.)

51. Dr. Hughes reviewed surveillance video of Claimant from November 21 and November 22, 2014, noting the video showed ambulation without difficulties and without a cane to mailbox, and ambulation using a cane and then in the store walking briskly without cane while holding onto her cart. He remarked that he did not observe Claimant demonstrating any problems with balance while getting items off shelves and putting them into the cart without use of her cane.

52. Dr. Hughes gave the following assessment:

> (1) Past medical history of a depressive disorder, on citalopram, as documented in Kaiser notes. (2) Past medical history of headaches. (3) Work-related fall with multiple injuries sustained on March 6, 2013. (4) Closed head injury, secondary to #3, with documented symptoms consistent with a post-concussive syndrome, but without objective evidence of residuals of traumatic brain injury. (5) Cervical spine sprain/strain, resolved. (6) Progressive balance problems of unclear etiology with psychiatric features that suggested to Dr. Moe that she had a conversion disorder. (7) Hypothyroidism.

(Id.)

53. Noting "[Claimant] presents with a perplexing medical history that contains inconsistencies and non-documentation of persistent organic pathology," Dr. Hughes agreed with Dr. Sacha that residuals of all of Claimant's injuries reached MMI by April 29, 2015. (Id.) He opined that Claimant's previous cervical spine impairment had resolved, as there was no mention of cervical spine pain in recent medical records, during his interview of Claimant or on Claimant's pain diagram completed for his evaluation. He added, "This is further clouded by rather extreme inconsistencies between informally observed and formally measured cervical spine ranges of motion." (Id.)

54. Dr. Hughes stated he could not provide a medical explanation for Claimant's progressive balance problems. He wrote,

> I agree with Dr. Moe that findings are "bizarre" and perhaps consistent with a conversion disorder. I am not sure if a permanent impairment rating can be assigned for a conversion disorder, as it is virtually indifferentiable in many cases from exaggeration of signs and symptoms for the purpose of secondary gain. I would leave this up to a board certified psychiatrist to sort out. It does not appear that Dr. Moe felt that [Claimant] had sustained a permanent psychiatric impairment as a result of her injuries of March 6, 2013.

(Id. at 237)

55. Dr. Hughes concluded that Claimant sustained no permanent impairment as a result of the March 6, 2013 work injury. He reiterated that Claimant's headaches and depression were well-documented pre-existing problems, and "I really cannot objectify any changes in her condition that [Claimant] has sustained as a result of her injuries of March 6, 2013." (Id.) Dr. Hughes stated he agreed with Dr. Ledezma's recommendations for further counseling, but explained that the need for such psychological treatment was not attributed to the March 6, 2013 work injury. He noted that although much of Claimant's treatment appeared to be reasonable, it did not appear to be related to Claimant's March 6, 2013 work injury.

56. On November 12, 2015 Respondents filed a Final Admission of Liability ("FAL") admitting for $25,186.20 in temporary benefits ending April 28, 2015, but zero percent rating for permanent impairment benefits. Claimant objected to the FAL and applied for a hearing to challenge the DIME.

57. Claimant returned to Dr. Ledezma on December 14, 2015 Ledezma reporting decreased neck pain and stiffness but poor mood and increased depressive symptoms. Claimant feared she would worsen in the near future. Dr. Ledezma continued to recommend neuropsychological and follow-up, pending authorization of continued treatment.

58. Claimant continued vestibular rehabilitation through her personal health insurance with Heather Campbell, P.T. and other therapists. Claimant began treating with PT Campbell on May 5, 2016. Ms. Campbell's impressions included impairment in deceleration of head, adversely affecting gait stability; suggestion of otolithic impairment and central organization impairment; persistent recurrent right head scalp dysesthesia and headache with balance challenges due to co-contraction of neck musculature. Claimant presented for physical therapy on May 12, May 26, June 2, June 6, and June 16, 2016.

59. On September 16, 2016 PT Campbell issued a written report at the request of Claimant's daughter. PT Campbell reviewed records provided to her by Claimant's daughter, as well as Dr. Benson's reports, an IME report of Dr. Moses, and surveillance video of Claimant. She noted that Claimant's findings are consistent with reported head impact injury resulting in balance, oculomotor and processing disorders. She opined that Claimant's significant emotional overlay does not negate the underlying physical and functional impairments. PT Campbell concluded that the four months of physical therapy with her had resulted in improvements in various areas. She opined that Claimant remains impaired in deceleration of head, adversely affecting gait stability, suggesting otolithic impairment and central organization impairment; scalp dysesthesia and headache with balance challenges. PT Campbell recommended continued vestibular rehabilitation therapy. She noted that she observed the surveillance video of Claimant and Claimant's gait pattern and reliance on touch or support from a cane or grocery cart was the same gait pattern she observed in her clinic.

60. On June 9, 2016, Randall Benson, M.D. performed a neurological IME at the request of Claimant. He later issued a report. Dr. Benson reviewed Claimant's medical records and conducted an advanced MRI including Susceptibility Weighted Imaging (SWI), Gradient Echo (GE), Quantitative Diffusion Tensor Imaging (DTI), and Fractional Anisotrophy (FA). Claimant reported issues with memory, depression, increased anxiety, balance issues, light aversion, occasional tinnitus, and sleeping issues. Dr. Benson concluded that Claimant sustained traumatic brain injuries and continues to experience symptoms as a direct result of the work injury. He outlined five specific areas in support of his conclusion:

1) Biomechanical information along with the immediate alteration in sensorium. Dr. Benson summarized initial medical reports which noted complaints of blurry vision, dizziness, cervical spine pain, and memory loss, which he stated were characteristic of a TBI.

2) Post-traumatic symptoms, including those that are now permanent. Dr. Benson noted that Claimant endorsed various cognitive, psychological and physical symptoms including, *inter alia*, lower thought processes, issues with memory and multitasking and focus, fatigue, increased irritation, depression, balance issues, ringing in her ears, changes in vision, and gait disturbances.

3) Neurobehavioral findings on examination. Dr. Benson noted exam findings of decreased cognitive efficiency, mild PTSD, poor balance with retropulsion, and tremor, along with evidence of right hemisphere damage such as decreased empathy, social interaction and general change in personality.

4) Dr. Perrillo's August 26, 2016 neuropsychological assessment.

5) Neuroimaging. Dr. Benson opined that the combined findings of the imaging showed an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres.

61. On June 23, 2016, Richard J. Perrillo, Ph.D. performed a neuropsychological IME at the request of Claimant. Dr. Perrillo issued a report dated September 19, 2016. Part of the assessment was conducted with an interpreter. Claimant's results were compared with updated "NeuroNorma" norms for Spanish-speaking individuals. Dr. Perrillo diagnosed Claimant with: mild/moderate brain dysfunction and damage with significant changes in white matter affecting efficient brain connectivity and some aspects of prefrontal and frontal functioning consistent with the effects of brain damage and inconsistent with baseline compared to normal brain at Claimant's age. He noted that Claimant gave optimal or adequate effort on neuropsychological measures. Dr. Perrillo opined that Claimant is 100% disabled on both a neuropsychological and psychological level. He explained that loss of consciousness is not a clinical requirement to establish a concussion. Dr. Perrillo opined that the radiological scans as performed by Dr. Benson as well as the previous MRI are positive and consistent with Claimant's functional brain impairment results as revealed by her current neuropsychological test data. He concluded that, by all neuropsychological and neurological standards of definition, Claimant continues to suffer from mild brain damage, which does not appear to be resolving with persisting mild/moderate organic brain dysfunction and changes as evidenced by the objective neuropsychological test results. Dr. Perrillo noted that Claimant's scores showed Claimant has "accelerated aging" with a significant risk for early dementia. He opined that Claimant's brain functioning is worse than the average 70 year-old with normal brain functioning.

62. Dr. Perrillo noted that there was nothing in Claimant's background that would have predicted such cognitive changes other than her brain injuries and the overlapping effects of aging. He further noted that the accident parameters, as well as the current comprehensive examinations and the results from the various scans including DTI as performed by Dr. Benson were consistent with the effects of axonal shearing, axonal bundling and cellular disturbances leading to 'slowness' of response times and information processing speed. Dr. Perrillo opined that Claimant should start with neuroexercise as soon as it is reasonable, as well as psychological intervention for moderate anxiety and depression including PTSD.

63. On August 24, 2016, X.J. Ethan Moses, M.D. performed an IME at the request of Claimant. Claimant reported to Dr. Moses that she fell and struck the right side of head on ground and lost consciousness for maybe 10-15 minutes. She reported that she could

hear people around her at the time but could not see them, and that she could not remember much regarding what happened for the next three hours or so. Claimant complained of 4/10 head pain with burning and tingling sensations, memory loss, blurry vision in the right eye, and a balance disorder. Dr. Moses reviewed medical records, physically examined Claimant and gave Claimant a psychological assessment and functional assessment. His assessment was: head contusion resulting in occipital neuralgia; mild traumatic brain injury resulting in diffuse axonal injury noted on MRI with DTI causing memory loss, vertigo and emotional disturbances; cervical sprain aggravating pre-existing facet arthrosis; and symptom magnification, likely a combination of culturally normative expressions of loss and function, psychological factors adversely affecting recovery, and a pre-existing desire to discontinue working.

64. Dr. Moses opined that, while it was clear some symptom magnification was present, Claimant was inadvertently magnifying her symptoms in order to receive the care she believes she needs. He noted that surveillance video provided clear evidence of Claimant's need for assistance with ambulation at all times and showed Claimant stumbling several times in precisely the same way she stumbled during his evaluation. Dr. Moses agreed with Dr. Ledezma that Claimant is experiencing psychological distress due to physical limitations and pain, which he noted presents a psychological barrier to recovery and is likely heightened by her emotional disturbance due to her traumatic brain injury and possibly compounded by her desire to discontinue working.

65. Regarding the reliance on MRIs with DTI, Dr. Moses noted that the current MTG for traumatic brain injuries do not currently recommend MRIs with DTI to diagnose mild traumatic brain injuries because there were no studies validating their clinical use to differentiate with mild traumatic brain injury patients with cognitive deficits from those without. Dr. Moses noted, however, that the MTG were last revised November 2012, and since that time there have been multiple studies demonstrating the usefulness and effectiveness of MRIs with DTIs in diagnosing and stratifying the severity of mild TBI. He opined that the MRI with DTI performed by Dr. Benson provides significant evidence of the physiological basis for Claimant's reported symptoms. He remarked that the opinions of Dr. Moe and Dr. Hughes may have been different if they had access to these results, and if a neuropsychological evaluation had been accomplished.

66. Dr. Moses concluded that Claimant's current functional deficits are proximately related to the March 6, 2013 work injury. He opined that Claimant likely reached MMI for her aggravated cervical facet arthrosis, unless Claimant desired to undergo the injections previously recommended. He further opined that Claimant was not at MMI for her other conditions and recommended additional evaluation and treatment in form of a consultations with a neuro-ophthalmologist, a physical medicine and rehabilitation specialist with traumatic brain injuries, neuropsychological testing, and a functional capacity evaluation. He assigned a 24% whole person provisional impairment rating consisting of 15% for the cervical spine and 10% for loss of function due to the brain injury.

67. On September 15, 2016, Dr. Benson performed a neurobehavioral evaluation. Claimant reported hitting her head and her first memory being waking up in a chair with people around her. Claimant reported she could not see for the first 4-5 minutes and when her sight returned it was blurry. Dr. Benson noted that his examination revealed decreased cognitive efficiency; mild PTSD; evidence of hemorrhage in an area of brainstem (lack of balance/retropulsion); evidence of R-hemisphere (frontal/parietal) damage (decreased empathy, decreased social interaction/communication, general change in personality); and binocular visual dysfunction caused by the head trauma. He recommended that Claimant undergo a neuro-optometric evaluation and prescription for prism lenses, as well as a trauma protocol MRI.

68. On October 27, 2016, Dr. Benson issued a comprehensive medical report after reviewing Claimant's medical records. Dr. Benson opined that Claimant sustained a traumatic brain injury and continues to experience symptoms as a result of that injury, as evidenced by biomechanical information, post-traumatic symptoms, neurobehavioral findings, neuropsychological findings, and neuroimaging. Regarding biomechanical information, Dr. Benson explained that the medical records documented evidence of symptoms characteristic of a traumatic brain injury including, but not limited to, headache, blurred vision, dizziness, extremity weakness, cervical spine pain and reduced cervical range of motion, a 2 centimeter "goose egg" over the occipital area, and memory loss. He noted Claimant endorsed most cognitive, psychological and physical symptoms consistent with a traumatic brain injury. With respect to neurobehavioral findings. Dr. Benson noted examination findings included decreased cognitive efficiency, mild post-traumatic stress disorder, poor balance with retropulsion, tremor and evidence of right hemisphere(oval/parietal) damage manifested by increased empathy, social interaction/communication in general change in personality. Dr. Benson summarized and relied on Dr. Perrillo's neuropsychological assessment and his own neuroimaging findings.

69. On January 18 & 20, 2017, board certified Jose M. Lafosse, Ph.D. performed a neuropsychological IME at the request of Respondents. Dr. Lafosse issued a report dated February 7, 2017. Dr. Lafosse, a native Spanish-speaker, conducted the IME of Claimant entirely in Spanish. Claimant reported to Dr. Lafosse being rendered unconscious after falling backwards and hitting her head. Claimant complained of memory issues, depression, lack of motivation and socialization, and difficulty sleeping. She reported not having much difficulty with concentration or slower thinking speeds. Physical complaints included headache, dizziness, disequilibrium, neck pain and blurry vision. Claimant advised Dr. Lafosse that she had no difficulties with activities of daily living. Dr. Lafosse reviewed Claimant's records and identified several perceived issues with Dr. Perrillo's June 23, 2016 report. He noted Dr. Perrillo is not board certified in clinical neuropsychology, only used an interpreter for portions of the evaluation, and did not adequately consider Claimant's status as an older Spanish-speaking Latina female from Mexico with only six years of formal education in a very small farming community school in Mexico. He further noted that Dr. Perrillo provided tests to Claimant in English and had them interpreted by a person rather than using the available testing documents in her native language of Spanish. Further inadequacies noted by Dr. Lafosse included

comparing Claimant's test results to individuals with more and better quality education than Claimant to determine she had lower ability. Dr. Perrillo gave Claimant multiple computer-based tests, requiring the Claimant to respond quickly when she had no previous experience with such technology via computer, gaming system, TV interface or joystick usage.

70. Dr. Lafosse conducted 26 tests, all in Spanish. He performed seven performance validity tests, of which Claimant failed all seven. Dr. Lafosse explained that failure of two or three performance validity tests could indicate malingering and lack of effort. Dr. Lafosse noted that 93% of patients with dementia scored higher than Claimant did, which he opined supports the likelihood of malingering. He opined that Claimant's behavior during testing was disingenuous, with a lot of exaggerated shrugging, opinging of her hands, facial gestures and confused looks. He noted that Claimant's speech was normal and fluid on the first day of testing but markedly slower and more confused on the second day of testing. Dr. Lafosse concluded that Claimant was clearly not performing to her true capability.

71. Dr. Lafosse noted that on language tests conducted in her native language, Claimant was very slow to respond; however, in her normal daily conversation she did not show any signs of word-finding difficulty, nor did she report any word-finding difficulty in her everyday life, which would be expected with the severely impaired score she received on the examination. Claimant failed to even complete the NeSBHIS Block Design test that required her to manually manipulate blocks to create a particular spatial pattern, however she scored in the average range when performing the test for Dr. Perrillo. Dr. Lafosse noted that, when Claimant was aware he was observing her walking, she leaned on the wall with her hand and walked in a cautious manner. When Claimant was unaware he was behind her, she appeared to walk normally with a good and rhythmic pace, then when she became aware he was observing her, she began walking more slowing and her movements became more irregular.

72. Dr. Lafosse concluded that Claimant's premorbid level of intellectual ability is estimated to be in the low average range. Within this context, her current level of cognitive functioning is at least within normal limits as compared to Spanish-speaking Latina women of similar age and education. In light of the empirical evidence of underperformance the Claimant normal range performance may well be an underestimate of her actual ability level. The findings from this evaluation are inconsistent with Claimant's numerous cognitive complaints, and in fact, contradict them. Dr. Lafosse concluded that Claimant may have suffered a concussion, but at almost four years since the date of injury, would no longer be suffering symptoms. He stated several factors that could account for Claimant's prolonged complaints, including depression, somatic symptom disorder, "cognitive and emotional vulnerabilities" mentioned by Dr. Perrillo, pre-existing history of fibromyalgia, iatrogenic effects creating an expectation for prolonged symptomology and litigation. He opined that Claimant demonstrates cognitive functioning within normal limits and at least in the same range as her premorbid cognitive abilities.

73. On July 27, 2017, Dr. Hammerberg issued an addendum report after reviewing additional medical records. Dr. Hammerberg disagreed with the determinations of Drs. Perrillo and Benson. He explained,

> …Dr. Perrillo attributed all of Claimant's neurological symptoms to a traumatic brain injury, apparently believing that the increased T2 signal in the MRI scans represented axonal sheering rather than chronic microvascular ischemia secondary to the patient's hyperlipidemia; he apparently also believed that Dr. Benson had conclusively documented brain injury on the basis of diffusion tensor imaging (DTI). However, diffusion tensor imaging has not gained wide acceptance in the neurological community because, when it comes to evaluation individual patients in whom mild traumatic brain injury is suspected, it cannot distinguish adequately normal from abnormal. It fact, this case is an excellent example of why DTI studies are not helpful – Dr. Benson has apparently convinced himself that the patient has a traumatic brain injury, when in fact she's merely psychiatrically ill.

(R. Ex. U, pp. 22-23)

74. Dr. Hammerberg noted that DTI can have both false positives and false negative results and that the medical community has not embraced the medical studies outside of a research setting. He opined that none of the requests for additional treatment, including traumatic brain injury therapy, vestibular therapy, imaging, and lifetime maintenance and meds, are reasonable or necessary. Dr. Hammerberg opined Claimant did not suffer a traumatic brain injury, she has returned to her pre-injury condition, and her current complaints are not causally related to the March 6, 2013 work injury. He noted that individuals with traumatic brain injuries have cognitive symptoms immediately and then usually slowly improve, especially when the initial imaging studies are entirely normal. He explained that Claimant, to the contrary, has exhibited progressive worsening of her condition with bizarre highly variable symptoms and findings. Dr. Hammerberg stated that Claimant is at MMI without impairment consistent with the opinion of Dr. Hughes.

75. On October 16, 2017, Dr. Moe issued a supplemental report after reviewing additional records, including Claimant's IME reports and Dr. LaFosse's report, and surveillance video. He opined that the breadth, severity, duration and/or treatment-resistance of Claimant's complaints are grossly in excess of what is reasonably ascribed to the injury in question. Dr. Moe explained that such extensive symptomatology argues strongly against a medical explanation and instead to the influence of noninjury factors. He opined that Dr. Benson, Dr. Perrillo and PT Campbell ignore Claimant's transition from one with mid, episodic postural dizziness and a subjective sense of cognitive impairment in the weeks following the injury to someone who has subsequently reported significant balance problems, a dramatically abnormal gait, and severe cognitive deficits. Dr. Moe pointed out Claimant's inconsistent reporting of information i.e. loss of consciousness and loss of vision. He further noted that Claimant's gait was independently judged to be non-

physiological by Drs. Sacha, Ginsburg, himself, Dr. Hughes and Dr. Moses. He also noted that physical therapists commented on various inconsistent behaviors.

76. Dr. Moe explained that DTI research remains at a preliminary research level of understanding, and the papers referenced by Dr. Moses in support of using DTI implicitly or explicitly acknowledge that DTI as applied to concussions remains investigational rather than clinically applicable. Dr. Moe referred to two recent papers that he noted substantiate the reason that DTI is not an accepted diagnostic measure in assessing injured workers in Colorado. Dr. Moe opined that the DTI technique cannot be used diagnostically as of yet, and currently is only an investigational tool with no clinical utility at this time. He stated,

> In brief, whereas DTI is a sensitive measure for detecting changes in the structure of white matter tracts, the findings are highly nonspecific, insofar as all manner of causes can result in such changes, including non-medical conditions such as depression, PTSD, and low socioeconomic status. Hence the interpretation of positive DTI findings following a possible or confirmed concussion remains to be determined.
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> Dr. Benson has sought to use DTI to detect at-most subtle microscopic structural changes to the axons in the brain ostensibly due to a concussion in the presence of grossly-apparent, pre-existing macroscopic axonal damage. Such a mission is impossible.

(R. Ex. W, p. 103)

77. Dr. Moe noted that Claimant's 8/12/2013, 9/17/2014, and 6/9/2016 MRIS were consistent in revealing the presence of white matter hyperintensities, and opined that it was probable the brain MRI findings are due to microvascular disease that resulted in grossly-apparent damage of the white matter. He opined that there is no evidence to support Dr. Benson's claim of evidence of hemorrhage in the brain stem. He disagreed with PT Campbell's assessment that Claimant lacked ability to perceive acceleration when she walked, noting that Claimant invariably is able to sense her movement in space and take appropriate corrective actions when she is about to fall. Dr. Moe again opined that Claimant's current complaints were not caused by the work injury. He concluded that Claimant has no incentive to recover as she would then be expected to return to work, and that her symptoms are largely the product of reversible psychological factors.

78. On November 28, 2017, board certified neuroradiologist Eric Nyberg, M.D. performed an independent medical record review at the request of Respondents. Dr. Nyberg concluded that there was no evidence of TBI on the initial CT scan of March 6, 2013, nor on the several subsequent CT scans and conventional MR examinations. He opined that there was no evidence of TBI or diffuse axonal injury (DAI) on subsequent conventional MR imaging performed by Dr. Benson on June 9, 2016, and that the MR

diffusion tensor imaging (DTI) study by Dr. Benson does not demonstrate evidence of TBI or DAI. Dr. Nyberg stated that the points elucidated by Dr. Benson failed to demonstrate evidence of a TBI in general, DAI in particular, and that his conclusions that perceived findings on the DTI to Claimant's fall is misguided. He opined that the methods used by Dr. Benson are seriously misguided, have no support in the scientific literature, and have no basis in clinical practice. He noted that the neuroradiology community has explicitly warned against the misuse and misinterpretation of the DTI data as committed in Dr. Benson's analysis.

79. On July 6, 2018, Dr. Hammerberg issued an addendum report after reviewing Dr. Nyberg's November 28, 2017 report and Dr. Moe's October 16, 2017 report. He agreed with the conclusions of both Dr. Nyberg and Dr. Moe, noting Claimant's presentation is indistinguishable from someone who is malingering.

80. On August 18, 2018, Dr. Nyberg issued a response to Dr. Benson's response regarding his initial opinion. Dr. Nyberg opined that there is no evidence of TBI on either the clinical MRI performed in 2013, or on the MRI performed by Dr. Benson in 2016. He noted that subcortical changes are highly characteristic for changes related to high blood pressure and high cholesterol, both of which Claimant has had for years. Dr. Nyberg explained that DTI will always pick up abnormalities found in a FLAIR image, as DTI magnifies at a greater scale than FLAIR – meaning if it is on the FLAIR it will show in a DTI – but not necessarily the other way around. Dr. Nyberg noted that calcification was evident, but not edema; without both, there is no evidence of a hemorrhage.

81. Surveillance video of Claimant's was taken September 1-3, 2019 and was viewed and discussed at hearing. Claimant is observed by the ALJ no longer exhibiting retropulsion in her walk. She is exhibit a wide stance when standing or walking. Claimant is observed walking without assistance, shopping by herself for groceries, bending over, looking up, reaching up, and picking up objects. Claimant is observed walking stairs and babysitting. Claimant is observed occasionally using a shopping cart for assistance and on one occasion is accompanied by her cane.

Testimony of Claimant's Experts

Heather Campbell, PT

82. PT Campbell testified at hearing on behalf of Claimant as an expert in physical therapy with a specialization in vestibular rehabilitation. She testified that she saw Claimant on 23 occasions, and Claimant saw someone else at the same clinic on 11 more occasions. A Spanish interpreter was present. PT Campbell testified that she did not see evidence that Claimant's vision and motor skills to control eye balls was evaluated. She acknowledged that Dr. Lipkin performed two tests for the eyes (saccades and smooth pursuit), which were abnormal, but there was no follow-up on Dr. Lipkin's tests. She testified that Dr. Lipkin did not perform a vestibular evoked myogenic potential test – which is a test different from those others administered by Lipkin to test particular function vestibular systems.

83. PT Campbell further testified that Dr. Hughes did not have access to a clinical vestibular testing, gait testing, ocular motor testing and intervention at the time he issued his DIME opinion. She opined that Dr. Hughes erred in failing to have Claimant undergo a neuropsychological evaluation before placing Claimant at MMI. She stated that Claimant's presentation in the November 2014 surveillance video was the same as it was in her clinic. She stated that Claimant's gait presentation is one of the many types of abnormal presentations TBI patients may demonstrate, including retropulsion. She testified that she performed eight tests on Claimant, all industry standard, at which Claimant provided valid effort and provided objective evidence explaining Claimant's gait disorder. She testified that none of the other providers administered the complete battery of tests that she did. PT Campbell opined that her findings are consistent with the reported head impact resulting in balance, oculomotor and processing disorders.

84. PT Campbell stated that Claimant did experience improvement from vestibular rehabilitation, including increased neck range of motion, better response to balance changes, improved gait and walking pattern. She reviewed the September 2019 surveillance and observed Claimant consistently demonstrating a wide base of support, abnormally short stride, swaying. She testified that the video showed Claimant walking unsupported for no longer than about four or five feet, and need about 10 meters for comprehensive and useful actual gait analysis. She opined that Claimant did not have proper physical therapy before she began treating Claimant, as Claimant's gait had not changed in three years. She opined that Claimant did not have adequate and consistent physical therapy before being placed at MMI. On cross-examination, PT Campbell acknowledged that Claimant did not have catastrophic loss of vestibular function although she was displaying catastrophic symptoms.

X. Ethan Moses, M.D.

85. Dr. Moses testified at hearing on behalf of Claimant as an expert in occupational medicine. Dr. Moses is Level II accredited, including teaching courses on how to rate neurologic impairment ratings. Dr. Moses disagreed with Dr. Hughes that there is no objective evidence of residuals of a TBI. He testified that the medical records revealed multiple specialists have found organic findings and the DTI MRI showed diffuse axonal injury which provides clear organic physiological evidence for Claimant's symptoms. Dr. Moses explained that, while the current MTG do not recommend DTI MRI for diagnostic purposes, he believes they will in the future based on his review of the medical literature.

86. Dr. Moses opined that Claimant suffered an acceleration/deceleration-induced closed head injury. He testified that Dr. Hughes erred by not having Claimant undergo neuropsychological testing, explaining that the MTG state that a neuropsychological evaluation should occur in such circumstances. Dr. Moses testified that, even if Dr. Hughes was relying on Dr. Moe's statement regarding a conversion disorder, he would still be required to perform neuropsychological testing for a differential diagnosis. Dr. Moses explained that conversion disorder can be assigned an impairment rating, and opined that if the conversion disorder was proximately related to Claimant's work injury it

therefore could be rated under the AMA Guides using the DOWC worksheet that allows physicians to classify what level of impairment a person suffers as a result of a psychiatric disorder. He clarified that he does not believe Claimant has conversion disorder and further treatment would not be helpful for Claimant. Dr. Moses disagreed the November 2014 surveillance footage showed Claimant walking normally. On cross-examination Dr. Moses testified that Claimant case is atypical in that the normal progression of TBI is "worst first", with the vast majority of symptoms resolving within three days to six weeks, and that very few individuals have residual symptoms beyond that time.

Richard Perrillo, Ph.D.

87. Dr. Perrillo testified at hearing on behalf of Claimant as an expert in clinical and neuropsychology. Dr. Perrillo disagreed with Dr. Hughes' determination that there is no objective evidence of residuals of TBI, noting that Dr. Hughes' ultimate determination was inconsistent with Dr. Hughes' prior statement that there are documented symptoms consistent with post-concussion syndrome. Dr. Perrillo testified that the MTG provide that you need to collect neuropsychological data if there is a differential diagnosis and to determine if the work event has affected the individual's memory, spatial relations, processing speed or reaction time. He disagreed with Dr. Hughes' statement that Claimant's balance problems are of unclear etiology. Dr. Perrillo testified that the etiology was clear based on the radiological findings of Dr. Benson and the neuropsychological data. He further disagreed that Claimant has conversion disorder.

88. Dr. Perrillo explained that because there is no normative data from Mexico, used neurotrauma norms from Spain. He testified that he was satisfied that the language difference was not a barrier to proper administration of his tests. Dr. Perrillo testified that he administered multiple validity tests and that there was no evidence of suboptimal effort, malingering, negative or positive impression management or bias. He stated that his testing revealed issues with Claimant's working memory, processing speed and cognitive proficiency, selective attention deficits, simple focus and immediate recall and auditory recall. There were no impairments in fine and gross motor ability or verbal fluency. Dr. Perrillo testified that his neuropsychological test data demonstrates Claimant's brain experienced axonal shearing along with metabolic and cellular imbalances. He remarked that the age of someone who sustains a TBI is important to the outcome, noting that older individuals have less time and capacity to heal. Dr. Perrillo opined that Dr. Benson's DTI results corroborate his neuropsychological findings. He testified that the November 2014 surveillance video shows imbalance, and retropulsion.

89. Dr. Perrillo opined that Dr. Hughes erred because he did not refer Claimant for a neuropsychological evaluation before placing Claimant at MMI. He explained that the MTG state that individuals with a TBI warrant neuropsychological evaluation, and that it is necessary when there is a differential diagnosis, for proper cognitive rehabilitation and to rule out exaggerating or malingering.

90. Dr. Perrillo disagreed with Dr. LaFosse that a Spanish speaker is required to administer the tests. He stated that Dr. LaFosse was incorrect in his assessment that he

only used an English language test developed in the United States for English-speakers with at least 12 years of education. He explained that he used tests that assumed an education level of 8 years or less. Dr. Perrillo testified that because Claimant has lived in United States for at least 25 it was more appropriate to use neuronorma norms that he used in his testing. Dr. Perrillo testified that, for at least one test, Dr. Lafosse used an African American norm instead of Caucasian norm, which was inappropriate. He testified that Claimant actually passed two of the seven validity tests given by Dr. Lafosse, and at least three were not internally reliable. Dr. Perrillo explained that there are numerous articles that dispute the theory of "worst first." He opined that both his and Dr. LaFosse neuropsychological evaluation demonstrated cognitive impairment and brain damage. On cross-examination Dr. LaFosse stated that he did not take into consideration that before the work injury Claimant had twice requested that her personal doctors determine her disabled because she did not want to work anymore. He testified that such behavior could fit the definition of malingering.

Randall Benson, M.D.

91. Dr. Benson testified at hearing as expert in functional MRI and DTI MRI and susceptibility weight imaging. Dr. Benson testified that he was able to diagnose Claimant with a TBI based on neurological evaluation alone. Dr. Benson explained that the video he took of Claimant in his office shows Claimant lurch backwards when she stops and when she turns. Claimant was videotaped with her knowledge. He stated Claimant's gait was plodding, which is a typical response to the type of neurological problem in Claimant's case. Dr. Benson testified that his observations of Claimant on surveillance footage were virtually identical to her gait at his examination.

92. Dr. Benson explained that DTI-MRI is an imaging test used to identify alteration in axonal structure and is able to detect microscopic changes in white matter constitution. He testified that standard, conventional MRIs do not identify microscopic changes, but rather visible, macroscopic changes in the structure of the brain. DTI scans look at water diffusion at the microscopic level, which is associated with axonal change, an indicator of brain damage. Dr. Benson opined that the findings on various scans revealed: an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres; diffuse axonal injury; evidence of a deep hemorrhage in the brain in an area called the basal ganglia, which is an area of the brain that is critical for motor function; and significant damage to the right hemisphere of Claimant's brain. He opined that there is objective evidence of permanent residuals due to the TBI suffered by Claimant.

93. Dr. Benson testified that CT scans obtained after the industrial injury will not reveal the same findings of the DTI images because CT scans are not sensitive enough to identify the deep hemorrhage or to alteration in the white matter. Dr. Benson testified that there are clinical manifestations of the injury including loss of cognitive efficiency, alteration in Claimant's emotional processing, and motor dysfunction. He stated that the objective data obtained from radiological scans demonstrated "three different hits to the center of the brain", a bleed in the basal ganglia, an area of DTI abnormality of the

cerebellum right side, and an abnormality in the visual fibers the occipital lobe close to where Claimant fell. He opined that these three issues resulted in the movement disorder or motor problem that Claimant has. Dr. Benson testified that Clamiant's movement pattern, including retropulsion, was bizarre, but organically based. He testified that he conducted a thorough examination of Claimant in which he found similar findings that were organic, including the cerebellar tremor that she had, one of the right side left side, which is consistent with the ipsilateral (on the same side) lesion that she had in the cerebellum; her gait exam was very internally consistent with no deviation, embellishment, emotion or histrionics; and her eye movements were consistently abnormal, meaning that her right gaze was very abnormal. Dr. Benson opined that Claimant's condition is not consistent with a congenital disorder, early dementia or something other than TBI because clearly Claimant's symptoms began after the work injury and she was able to work before the injury. He testified that a congenital problem would have manifested earlier in life, and that Claimant does not have a degenerative problem because she is not necessarily getting worse.

94. Dr. Benson testified that his findings correlate with those of Dr. Perrillo. He opined that Dr. Hughes erred by concluding that Claimant's balance problems were of unclear etiology because we know the etiology. He believes that the battery of tests he administered for identification of motor dysfunction were helpful for his diagnosis, and he determined that Claimant had cerebellar problems and that she most likely had a basal ganglia lesion to explain the retropulsion that she had. He stated he did not witness any symptom magnification. Dr. Benson testified that, while the actual course of recovery after a TBI is improvement, in the short term many patient's concussions get worse over the ensuing days to even a few weeks. He explained that a pituitary injury and symptoms secondary to a pituitary injury can manifest in the delayed fashion and can be progressive; people with brain injuries often develop maladaptive strategies that can cause problems down the road; and TBIs are associated with ongoing inflammation that accelerates the aging process. Dr. Benson opined that Dr. Hughes erred in is conclusion that there are documented symptoms consistent with a post-concussive syndrome without objective evidence of residuals of TBI, as he and PT Campbell found objective signs and symptoms consistent with an organically based injury. On cross-examination Dr. Benson acknowledged that Claimant's case is not the norm in terms of expected recovery time, and that if Claimant did not have gait disturbance right after the fall, would not expect her to suddenly develop gait disturbance three years later.

Testimony of Respondents' Witnesses

95. Dr. Hammerberg testified at hearing on behalf of Respondents as a Level II accredited expert in neurology and electromyography. Dr. Hammerberg testified that medical literature establishes DTI should not be used by neurologists to determine whether someone has suffered a TBI. He explained that Dr. Benson's MRI revealed tiny spots at three different levels of the scan, which are not seen in TBI and are common spots resulting from microvascular ischemia caused by high blood pressure and/or high cholesterol, of which Claimant has a history. Dr. Hammerberg further explained that the calcification evidenced on Claimant's CT scan was pre-existing and chronic and had no

bearing on whether there was a TBI. Dr. Hammerberg opined that Claimant did not sustain any brain injury. He testified that Claimant could have a problem with her balance mechanism of the ear, but that Claimant does not truly have a neurological problem causing imbalance. He agreed Claimant's abnormal gait presentation was not organic, which he stated suggests a psychological problem. Dr. Hammerberg offered two possible explanations for Claimant's condition: psychosomatic or malingering, stating that he believes both are occurring. He testified that Claimant's ongoing fear regarding imbalance is not malingering, but that her exaggerated lurching appears to be.

96. Dr. Hammerberg testified that the Select Physical Therapy records indicating Claimant ambulated with less unsteadiness and less need for support when unaware she is being observed was consistent with his opinion in regard to his observations of Claimant's behavior in the September 2019 surveillance video. Dr. Hammerberg also discussed the difference in Claimant's presentation in the surveillance video taken at the store versus taken in Dr. Benson's office, noting the former showed much better ability. Dr. Hammerberg testified that neuropsychological testing would assess the cognitive and emotional problems at the time of testing and that, in the total context of the case where there is no TBI, it would not likely have changed Dr. Hughes' opinion. He opined that Dr. Hughes was not in error for failing to refer Claimant for a neuropsychological evaluation under the MTG because the MTG are merely guidelines. He explained that, while a neuropsychological evaluation may have been helpful prior to the follow-up DIME, it would not be related to the work injury because there was no TBI.

97. Dr. Hammerberg greed with Dr. Hughes that Claimant is at MMI with zero impairment and no need for further treatment as related to the work injury. He testified that Claimant's current conditions are not causally related and that her ongoing issues are the result of a psychiatric illness that is not related to her work injury. He explained that Dr. Hughes only should have deferred for a psychiatric evaluation if the thought the psychiatric problem was caused by the closed head injury, which both Dr. Hughes and Dr. Hammerberg concluded was not related. He testified that Dr. Hughes did defer to a psychiatric evaluation when he incorporated into his own opinion that of Dr. Moe. Dr. Hughes had it as a separate category from the workers' compensation injury indicating it was not related.

Stephen Moe, M.D.

98. Dr. Moe testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Moe explained the concept of "worst first," stating that the clinical course of mild TBI is that symptoms are worse closest to the injury. He testified that this was not the case for Claimant. Dr. Moe testified that, if Claimant does have conversion disorder, it is not related to the work injury. He explained that preexisting factors and "very idiosyncratic" features of Claimant's presentation are the two overriding reasons why the conversion disorder is not work-related. He opined that Claimant did not sustain a TBI and that Claimant's continuing symptoms are not the result of TBI. Dr. Moe reiterated his opinion that Claimant is at MMI with no impairment. He testified that the collective information at the time of the follow-up DIME indicated more information is not needed to arrive at a

conclusion about the reason for Claimant's gait problems. He explained that Dr. Hughes had determined the symptoms were not work related. Dr. Moe testified that it was very clear to him that Dr. Hughes did not believe any additional psychiatric or neurological evaluations were needed as a result of the work injury.

99. On cross-examination, Dr. Moe testified that the most likely cause of Claimant's symptoms is functional neurological symptom disorder, formerly called conversion disorder. He testified that Dr. Hughes could have recommended a neuropsychological evaluation and referred Claimant to a vestibular expert if he so chose. He explained that the mental evaluation worksheet would not be used in this case to rate conversion disorder as it is not work related. He testified that if Dr. Hughes was unable to rate the conversion disorder, could have referred the task out to someone board certified in psychiatry and Level II accredited.

Eric Nyberg, M.D.

100. Dr. Nyberg testified at hearing on behalf of Respondents as an expert in neuroradiology. Dr. Nyberg testified that there was no evidence of TBI on the initial CT scan of March 13, 2013 or the several subsequent CT scans and conventional MRIs. He explained that the first CT scan showed abnormalities in the white matter which were chronic and commonly from vascular risk factors. He explained that the abnormalities shown on the DTI were the same abnormalities resulting from the pre-existing chronic vascular risk factors, not a TBI. Dr. Nyberg testified that calcification was already present as of the first CT scan. He explained that calcification occurs as a result of hemorrhage and takes months to develop, indicating that the calcification was not the result of the work fall. Dr. Nyberg testified that diffused axonal injury (DAI) is an imaging pattern that can be seen in the setting of moderate to severe brain injury and sometimes be seen in the setting of mild TBI as well. He concluded that there was no evidence of brain injury on the imaging studies. He acknowledged on cross-examination that the absence of objective evidence on radiological imaging does not prevlude the possibility of a concussion.

Jose LaFosse, Ph.D.

101. Dr. LaFosse testified at hearing on behalf of Respondents as an expert in neuropsychology. Regarding Dr. Perrillo's testing, he testified that Dr. Perrillo would have difficulty applying the appropriate tests for the applicable population group because Dr. Perrillo does not read or speak Spanish or know how to conduct the tests that were in Spanish. He opined that Dr. Perrillo should have referred Claimant to a Spanish-speaking neuropsychologist. Dr. LaFosse testified that the tests used by Dr. Perrillo were inappropriate for Claimant because they were English language tests developed in the United States for evaluating English speakers. Dr. Perrillo stated that, in contrast, the norms he used took into account Claimant's age, gender, level of education and were developed in the border region between Mexico and the United States. He testified that neuropsychology professional standards require that, when evaluating Spanish speaking individuals, that the evaluator be Spanish-speaking and appropriate Spanish norms be

used when testing, including testing conducted in Spanish and the test be created for Spanish speakers. He opine that Dr. Perrillo used a "completely inappropriate" battery of tests to evaluate Claimant, noting Claimant is from Mexico and had six years of education, whereas Dr. Perrillo's tests were more appropriate for someone from Spain with 13 years of education.

102. Dr. LaFosse testified that Claimant failed all seven of his tests of performance validity, explaining that Claimant did worse on the validity tests than people with dementia and severe brain injuries, which is unexpected for the nature of Claimant's injuries. He testified that Claimant failing all seven validity tests indicate that the likelihood of Claimant's tests being accurate indicators of her level of cognitive functioning is not trustworthy. He opined there was a high probability Claimant was not putting her best efforts forward on the tests. He explained that, generally, two failures indicate that the likelihood of an individual not putting in good effort is higher than 90%, and that three failures indicates about 99%. Dr. LaFosse testified that the kind of responses Claimant provided are scientifically extremely improbable. Dr. LaFosse testified that Dr. Perrillo applied standards from cognitive testing to validity testing.

103. Dr. LaFosse further testified that in one observation, Claimant on the first day of testing had normal cadence and speed of speech fluency, but on the second day she was – speaking much more slowly, much more deliberately, much more cautiously that represented a pretty significant departure from the way she communicated with him on the first day. In another observation of behavior Dr. Lafosse recounted that he and Claimant were walking from the parking lot to his office building – he approached her from behind and saw her walking normally. But then as he caught up to her and said hello, she suddenly started walking in a very awkward manner - suddenly appearing unstable in her gait.

104. Dr. LaFosse opined that Claimant not have a TBI or any cognitive impairment. He stated that there is a possibility Claimant may have had a concussion, but that there is not a significant amount of support for that in the records. On cross-examination, Dr. LaFosse testified that neuropsychological evaluation should come as early as possible in cases when there is a differential diagnosis. He agreed with Dr. Hammerberg that it is a good idea as a part of treatment to make referrals for neuropsychological evaluation when there's a question about diagnosis. Dr. LaFosse testified that he does not think there is a diagnosis of conversion disorder in this case and there is strong empirical basis for the possibility of malingering.

Testimony of Claimant's Lay Witnesses

Claimant

105. Claimant testified at hearing that her neck pain has resolved, but she continues to experience issues with balance. She testified that she uses a cane daily, except when at the grocery store, at which time she utilizes a shopping cart for balance. Claimant stated that she is able to walk straight but feels as though she is being pulled

back when she stops. She testified that her balance problem is better now than it was before. Claimant demonstrated walking to the Court – she was observed taking a few steps forward then lurching backwards. She walked with a cane. Claimant testified that her ongoing symptoms include aversion to light, blurry vision, burning pain on the right side of her head, and issues sleeping. Claimant testified that after the work injury she returned to work for two to three weeks but experienced pain in her head which made it difficult to perform her job duties. Claimant stated that she did not intend to stop working before the accident and that she wanted to work until age 65 or 66. She testified that prior to the work injury, was tired at the end of the day due to a lot of work at her job. Claimant testified she babysits her six year old grandchild on a daily basis.

Claimant's Daughter

106. Claimant's daughter testified at hearing that, prior to the work injury, her mother was more energetic, independent, and capable of doing things she is currently incapable of doing. She testified that her mother has exhibited physical and mental changes, noting that Claimant no empathy regarding her husband's death in January 2015. She testified that, prior to the injury, Claimant did not complain consistently about any physical problems and was not seeking medical care for the year prior for any serious mental or physical condition. She stated that, within a few weeks after the work injury, Claimant to walk with an altered gait, which has continued for several years but improved with PT Campbell's therapy. Her understanding is that her mother signed the resignation letter to receive accrued vacation time as a lump sum payment. She testified that her mother now has to be supervised and cannot be responsible for anything. She believes Claimant's condition was caused by the work injury.

Testimony of Respondents' Lay Witnesses

Heidi Hill

107. Ms. Hill was the Human Resources Manager for Employer. Ms. Hill testified that Claimant was offered modified duty after her work injury. She testified that on July 21, 2014, Claimant declined to return to modified duty, but was still considered an employee of Employer. Ms. Hill testified that, at that point, Claimant still had the option to return to work performing modified duty, or that Claimant could resign and receive a lump sum payment. She testified that on September 5, 2014, Claimant again declined to return to modified duty and voluntarily resigned from Employer.

Keith Doberstein

108. Mr. Doberstein has worked as an investigator for over 21 years and is licensed in California and Colorado. He authenticated that he took the surveillance video of Claimant on September 1-3, 2019. He testified that he personally observed Claimant taking care of a child; only once having her cane with her that she did not actually use; and not using a cane to walk in and out of the grocery store.

Ultimate Findings

109. The ALJ finds the testimony of Ms. Hill and Mr. Doberstein more credible and persuasive than the testimony of Claimant and Claimant's daughter.

110. The ALJ finds that the reports and testimony of Drs. Hammerberg, LaFosse, Moe, and Nyberg, as supported by the medical records and the opinions of Drs. Hughes, Burris, Ginsberg, Lipkin, and Sacha, are more credible and persuasive than the reports and testimony of Drs. Benson, Moses, and Perrillo, and PT Campbell.

111. The ALJ finds that Claimant failed to prove it is highly probable Dr. Hughes erred in his DIME determination regarding MMI and impairment.

112. The ALJ finds that Claimant failed to prove it is more probable than not further medical treatment is causally related to her work injury.

113. The ALJ finds that Claimant failed to prove it is more probable than not she is entitled to additional temporary indemnity benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals*

Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter

of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

The finding of a DIME physician concerning the claimant's whole person medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* WC 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. Deviations from the *AMA Guides* constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In re Goffinett,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Pursuant to WCRP 17-2(A) health care practitioners are to use the MTG when furnishing medical care under the Act *See* §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the MTG as an evidentiary tool. *Logiudice v. Siemans*

Westinghouse, W.C. 4-665-873 (ICAP, Jan. 25, 2011). Howeverm the ALJ is not required to grant or deny medical benefits based upon the MTG. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the MTG may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011).

Claimant argues Dr. Hughes committed the following errors in finding Claimant is at MMI with no permanent impairment:

1) Dr. Hughes failed to refer Claimant for a neuropsychological evaluation before placing Claimant at MMI. He further failed to mention that Dr. Ledezma consistently recommended a neuropsychological evaluation.

2) Dr. Hughes failed to order final vestibular reports/evaluation, which would have yielded objective evidence on which to base diagnosis, MMI and treatment.

3) Dr. Hughes improperly disregarded objective evidence which indicated Claimant has significant vestibular difficulties.

4) Dr. Hughes improperly disregarded or was not competent to appreciate objective evidence of altered gait and retropulsion in the surveillance video.

5) Dr. Hughes failed to rate the vestibular disorder/altered gait.

6) Dr. Hughes misdiagnosed a conversion disorder.

7) Dr. Hughes failed to rate “mental impairment.”

8) Dr. Hughes failed to send Claimant to a board certified psychiatrist for a psychiatric rating.

9) Dr. Hughes failed to rate Claimant’s cognitive difficulties.

As found, Claimant failed to prove it is highly probable Dr. Hughes erred in his DIME opinion regarding MMI and impairment. Dr. Hughes diagnosed Claimant with a closed head injury with symptoms consistent with a post-concussive syndrome, but without objective evidence of residuals of traumatic brain injury; a resolved cervical spine sprain/strain; and progressive balance problems of unclear etiology with psychiatric features that suggested to Dr. Moe that she had a conversion disorder. Regarding Dr. Hughes not noting recommendations for and referring Claimant for a neuropsychological evaluation, there is not clear and convincing evidence Dr. Hughes was in error because he determined that there was no objective evidence of residuals of a TBI. Dr. Hughes reviewed various medical records, including those of Dr. Ledezma and Dr. Moe. He specifically referred to and relied on Dr. Moe’s analysis, which determined that Claimant’s current complaints were unrelated to the work injury. Dr. Hughes specifically noted that Dr. Moe did not feel Claimant had sustained permanent psychological impairment. He noted that he agreed with Dr. Ledezma’s recommendation for continued counseling, but reiterated that such treatment was not related to the work injury. Accordingly, Dr. Hughes’

failure to specifically note Dr. Ledezma's recommendation for neuropsychological evaluation and failure to refer Claimant for such is not highly probable in error, considering Dr. Hughes did not attribute Claimant's psychological issues to the work injury. Dr. Hughes' opinion that Claimant's condition and symptoms are unrelated to the work injury are shared by Drs. Hammerberg, LaFosse, Moe, and Nyberg. While there is testimony from some of Respondents' expert witnesses that Dr. Hughes "could" have ordered additional testing if he so chose, the evidence does not establish it is highly likely Dr. Hughes erred in not doing so. As credibly testified to by Dr. Hammerberg, neuropsychological testing under the MTG would apply if Dr. Hughes determined that Claimant's psychological issues were a result of the work injury, which he did not.

The same analysis applies regarding Dr. Hughes' failure to refer Claimant for vestibular evaluation or wait for a final report from Dr. Lipkin. Claimant underwent vestibular testing and vestibular therapy prior to Dr. Hughes' evaluation. Dr. Hughes reviewed the records from this testing and treatment. He diagnosed Claimant was "progressive balance problems of unclear etiology with psychiatric features." Various physicians opined that Claimant had a non-organic/non-physiologic gait disturbance and presentation and that her balance problems were not the result of the work injury. Dr. Hughes himself remarked on inconsistencies in Claimant's presentation based on his personal observation of her at his clinic, in the clinic parking lot, and on surveillance video. Dr. Hughes' failure to obtain additional vestibular testing or information or failure to provide an impairment rating was not in error, as Dr. Hughes did not find any potential vestibular problems or balance issues work-related.

Regarding an alleged misdiagnosis of conversion disorder, Dr. Hughes did not actually diagnose Claimant with conversion disorder. He stated that Claimant's findings were "bizarre" and "perhaps consistent" with a conversion disorder. Moreover, even assuming arguendo, that Dr. Hughes did diagnose Claimant with conversion disorder, he did not opine that such condition or any psychological condition, was related to the work injury. To the extent he stated that he would leave it up to a board certified psychologist, Dr. Hughes relied on Dr. Moe's opinion that there was no permanent psychological impairment. Dr. Hammerberg credibly testified that Dr. Hughes should have deferred a finding of MMI for psychological evaluation *if* Dr. Hughes attributed Claimant's psychological symptoms to the work injury (emphasis added). Here, Dr. Hughes clearly concluded that Claimant's ongoing issues were not work related Dr. Moe credibly opined that Claimant did not sustain any psychological impairment as related to the work injury. Dr. Moe corroborated Dr. Hammerberg's explanation with his credible testimony that a mental condition is not rated if it is deemed not work-related. While Dr. Hughes could have referred out, not in error failing to do so. Dr. LaFosse credibly opined that Claimant does not have conversion disorder and is likely malingering.

Similarly, the evidence does not establish it is highly probable Dr. Hughes erred in failing to rate Claimant's alleged cognitive difficulties. Again, Dr. Hughes did not find any residual conditions related to the work injury. Dr. LaFosse credibly opined that Claimant's cognitive functioning is at within the normal limits and at least in the same range as her premorbid cognitive abilities.

The varied opinions of the multiple treating physicians and experts in this case, which support both the positions of Claimant and Respondents, emphasize the myriad differences of medical opinions that have been reached in this case, including that of DIME physician Dr. Hughes. There was extensive evidence offered regarding, *inter alia*, the use and efficacy of DTI imaging and the intricacies neuropsychological testing, with attacks from experts on both sides regarding everything from testing methods to formatting of reports. To the extent there is disagreement with Dr. Hughes' DIME opinion, the evidence indicates that these are differences of opinion that do not rise to the level of clear and convincing evidence. That Dr. Hughes "could have" taken a different approach or come to a different conclusion here does not establish, based on the totality of the evidence, that he clearly erred by finding Claimant MMI with no impairment.

The records indicate Claimant underwent extensive evaluation and treatment after her work injury and prior to being placed at MMI by Dr. Hughes, including CT scans, MRI scans, ENT evaluation, neurological evaluations, vestibular evaluations, vestibular therapy, physical therapy, and psychological evaluation and counseling. Dr. Hughes reviewed these medical records, and based on his review and evaluation, ultimately opined that Claimant reached MMI and that any ongoing issues and need for treatment was unrelated to the work injury. The need for deferring MMI for additional testing and treatment applies when there is a determination that conditions are work related. Similarly, the assignment of an impairment rating also necessitates a finding that the condition is work related. Here, Dr. Hughes found that there was no objective evidence of residuals of a TBI, that Claimant's cervical spine sprain/strain had resolved, and there were psychiatric features unrelated to the work injury. Dr. Hughes opinion is consistent with those of Drs. Hammerberg, Sacha, Burris, Moe, Nyberg and LaFosse. Drs. Hughes, Sacha, Burris, Moe and Hammerberg agree Claimant may need ongoing medical treatment that is unrelated to the work injury.

Based on the totality of the evidence, Claimant failed to overcome Dr. Hughes' DIME opinion on MMI and permanent impairment by clear and convincing evidence.

Medical Treatment

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, WC's 4-947-316-01 & 4-935-813-03 (ICAO, July 31, 2015) (where the claimant had not reached MMI, ALJ's

finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous).

As found, Claimant failed to prove by a preponderance of the evidence further medical treatment is reasonable, necessary or related to cure and relieve Claimant's effects or maintain Claimant's condition. Drs. Hughes, Sacha, Moe, Nyberg and Hammerberg have credibly opined that Claimant's ongoing condition is not related to the work injury. Accordingly, any need for ongoing treatment is not causally related to Claimant's industrial injury.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As Claimant failed to overcome Dr. Hughes' determination regarding MMI, she failed to prove by a preponderance of the evidence she is entitled to temporary indemnity benefits for any additional period of time.

ORDER

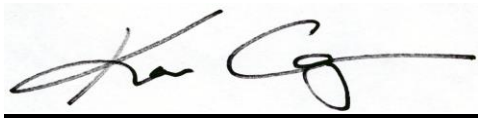
1. Claimant failed to overcome Dr. Hughes DIME opinion on MMI and permanent impairment by clear and convincing evidence.

2. Claimant's claim for medical maintenance benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment with Employer on October 15, 2019. (Ex. G).

2. Following the injury, Claimant received treatment through Concentra Medical Centers, where he saw Paula Pook, M.D., John Sacha, M.D., Lacie Esser, PA-C, and Jonathan Claasen, D.O., among others. (Ex. A & C).

3. On January 21, 2021, Dr. Claasen placed Claimant at MMI with a whole person impairment rating of 13%. On February 11, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for a 13% whole person impairment, and permanent partial disability (PPD) benefits of $51,327.86. Respondents also admitted to previously-paid temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits. (Ex. G).

4. Subsequently, Claimant requested a Division Independent Medical Examination (DIME). On July 21, 2021, Eric Shoemaker, M.D., performed the DIME and issued a report dated August 11, 2021. Dr. Shoemaker placed Claimant at MMI effective November 4, 2019. Dr. Shoemaker also determined that Claimant had no permanent impairment rating attributable to Claimant's work-related injuries. (Ex. A).

5. On September 8, 2021, Respondents filed an second FAL, consistent with Dr. Shoemaker's DIME opinions. Respondents admitted to an MMI date of November 4, 2019, with a 0% impairment rating. Respondents asserted an overpayment in the amount of $71,731.90, for TTD, TPD, and PPD benefits paid after November 4, 2019. (Ex. G).

6. Claimant filed an Application for Hearing on October 6, 2021, endorsing as issues compensability, medical benefits and "the alleged overpayment, compensability, and denial of maintenance care described in the Final Admission of Liability." Claimant did not endorse the issue of challenging Dr. Shoemaker's DIME opinion or otherwise contest the September 8, 2021 FAL. (Ex. J). The October 6, 2021 Application for Hearing was

designated as W.C. Case No. 5-128-511-001. Office of Administrative Courts' records indicate no further action was taken in W.C. 5-128-511-001, and the matter was closed.[1]

7. Insurer's claims adjuster, MR[Redacted], testified at hearing that Insurer paid Claimant $71,731.90 in combined indemnity benefits. Ms. MR[Redacted] credibly testified that Insurer's payment log, Exhibit I, is an accurate statement of the amounts Insurer paid to Claimant for PPD, TTD, and TPD benefits. For the period of January 20, 2020 through December 7, 2020, Insurer paid Claimant $42,937.52 in TTD benefits. Insurer paid Claimant $65.00 in TPD benefits for the period of October 26, 2020 through February 1, 2021, and $28,729.38 in PPD benefits for the period of January 21, 2021 through August 26, 2021. (Ex. I).

8. Claimant did not appear at hearing and did not present evidence in defense of Respondents' claims.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

[1] The ALJ takes judicial notice of the Office of Administrative Courts' files related to this claim, including the absence of entries. *See Habteghrigis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAO March 31, 2006) ("A court can take judicial notice of its own records and files.").

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERPAYMENT

Respondents' Entitlement to Repayment of Disability Benefits

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[2] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009).

Respondents have established by a preponderance of the evidence that Claimant received overpayments in the amount of $71,731.90, and that Respondents are entitled to repayment of that amount. Respondents initially paid Claimant's TTD and TPD benefits based on the date of MMI and work restrictions assigned by Dr. Claasen. Respondents initially admitted to the 13% impairment rating assigned by Dr. Claasen, filed an FAL consistent with that rating, and began paying PPD benefits in corresponding to the ATP's impairment rating. Claimant then requested a DIME. The DIME physician found that Claimant had no impairment rating attributable to his work injury, and was at MMI on

[2] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive " from the definition of "overpayment." However, the matter before the ALJ is based payments and events prior to January 1, 2022, consequently the applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities); *Martinez v. People*, 484 P.2d 792 (Colo 1971) (repealed statutory provisions remain in force as far as pending actions, suits and proceedings are concerned).

November 4, 2019. On September 8, 2021, Respondents filed a second FAL consistent with the DIME's opinions admitting for an MMI date of November 4, 2019 and a 0% impairment rating. Pursuant to § 8-43-203 (2)(b)(II)(A), C.R.S., Claimant had thirty days to contest the FAL and request a hearing seeking more compensation. Claimant failed to do so, consequently Claimant's claim automatically closed with respect to the admitted date of MMI and impairment rating on October 8, 2021. Because Claimant did not challenge the DIME's MMI date or impairment rating of the DIME, Claimants benefits are controlled by the DIME's impairment rating and MMI date. *See In re Claim of Mattorano,* W.C. No. 4-861-379-01 (ICAO July 25, 2013)

Pursuant to § 8-42-103, and 8-42-105, respondents are required to pay temporary disability benefits while a claimant is under a disability that prevents the claimant from earning his or her full average weekly wage. Such benefits continue until the claimant reaches maximum medical improvement. § 8-42-105 (3)(a), and § 8-42-106 (2)(a) C.R.S. Respondents paid Claimant TTD and TPD benefits for the period of January 20, 2020 through February 1, 2021, in the aggregate amount of $43,002.52. Because all of the Claimant's TTD and TPD benefits were paid after the date of MMI assigned by the DIME, the benefits exceeded the amounts should have been paid or were amounts Claimant was not entitled to receive. *See Wheeler, supra* ("respondents are allowed to recover as an overpayment the TTD benefits that were due and owing when paid but are later determined to be amounts the claimant was not entitled to receive).

Similarly, Claimant received $28,729.38 in PPD benefits based on a 13% whole person impairment, which is inconsistent with the DIME's assignment of a 0% impairment rating, which would result in no PPD benefits. Claimant therefore received PPD benefits exceeding the amount that should have been paid or which he was not entitled to receive.

As found, Respondents have established by a preponderance of the evidence that Claimant received $71,731.90 in disability benefits to which he was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $71,731.90.

OVERPAYMENT RECOVERY

Section 8-42-113.5, C.R.S. governs the recovery of overpayments. Where a claimant receives any payments from any source which requires the reduction of any disability benefit, § 8-42-113.5 provides for different methods of recovery for respondents. Under § 8-42-113.5 (a), a claimant is required to provide written notice of learning of such payment within twenty days, and any resulting overpayment "shall be recovered by the employer or insurer in installments at the same rate as, or at a lower rate than, the rate at which the overpayments were made." "Such recovery shall reduce the disability benefits … payable after all other applicable reductions have been made." *Id*. Where no written notice is provided, "the employer or insurer is authorized to cease all benefit payments immediately until the overpayments have been recovered in full." § 8-42-113.5(1)(b). If, however, recovery under § 8-42-113.5 (a) or (b) is "not practicable," respondents are authorized to seek an order for repayment. § 8-42-113.5(1)(c), C.R.S.

The term “practicable” refers to a respondent’s ability to recover the overpayment from ongoing or unpaid benefits.” *In re Martin*, W. C. No. 4-453-804 (ICAO, Oct. 4, 2004).

When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). No evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate or the terms of repayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay to Respondents $71,731.90 in overpaid benefits.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 18, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

1. If Claimant suffered residual medical issues because of opioid dependence, whether he requires continuing medical maintenance treatment to address his dependence.

2. If there are no remaining residual medical issues from opioid dependence, whether additional medical maintenance treatment is reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant is 62-year-old male who resides in Twain Harte, California. He has lived in California since July 16, 2017. Claimant previously lived in Denver, Colorado. Employer is a restaurant located in Sheridan, Colorado who hired Claimant as a Grill Cook on October 23, 2012.

2. On September 19, 2014 Claimant was injured while working for Employer. He specifically bent over to put away a grill scraper, stood up, twisted and felt a pop in his lower back. Claimant initially underwent medical treatment at Concentra Medical Centers. He received Percocet, physical therapy and a lumbar MRI. Claimant was subsequently referred to Authorized Treating Physician (ATP) John T. Sacha, M.D. for pain management.

3. Dr. Sacha is a Colorado licensed physician who is Board Certified in Physical Medicine and Rehabilitation, Electrodiagnostic Medicine, and Pain Management. He has been Level II accredited by the Colorado Division of Workers' Compensation (DOWC) for the past 25 years. Dr. Sacha is on the PDMP committee for opioids and the committee that develops guidelines for the safe use of opioids in the State of Colorado. He treats patients with acute and chronic complex spinal disorders and provides medication management as part of his regular practice.

4. Dr. Sacha first evaluated Claimant on November 21, 2014. He documented that Claimant's lumbar MRI revealed degenerative disc disease with facet spondylosis and bulging at L4-L5 and L5-S1 and left-sided foraminal narrowing. Dr. Sacha's initial plan included administration of left L5 and S1 transforaminal epidural steroid injections (TF ESIs)/spinal nerve blocks, immediate discontinuation of Percocet and utilization of Tramadol and Gabapentin.

5. Dr. Sacha subsequently administered left L5 and S1 TF ESIs/spinal nerve blocks. Claimant also underwent lower extremity EMG/NCV testing that confirmed S1 radiculopathy. Dr. Sacha referred Claimant to Andrew Castro, M.D., for a surgical consultation.

6. Dr. Castro evaluated Claimant on February 18, 2015 and recommended repeat ESIs prior to surgical consideration. Dr. Sacha administered additional injections. On March 27, 2015 Dr. Sacha reported that Claimant's pain had worsened, the injections had not relieved his symptoms and the only remaining options were surgery or placing him at Maximum Medical Improvement (MMI).

7. On May 7, 2015 Claimant underwent lower back surgery with Dr. Castro. The specific procedure consisted of a bilateral laminectomy and discectomy at L4-5 and a left-sided laminectomy and discectomy at L5-S1.

8. Claimant received opioids immediately following surgery, but was quickly weaned from the medications. His condition improved slightly but his symptoms waxed and waned. Claimant suffered constant lower back pain and intermittent left leg symptoms.

9. On September 28, 2015 Dr. Sacha concluded that Claimant had reached MMI because his symptoms had plateaued. Dr. Sacha determined that Claimant required medical maintenance care in the form of a medication maintenance program, a gym pass, a couple of psychological visits and medications over the next 12–24 months. He explained that the preceding recommendation constituted a standard maintenance care plan for patients who have undergone spinal surgery. On October 5, 2015 Dr. Sacha assigned 13% lumbar spine and 2% mental permanent impairment ratings.

10. On November 13, 2015 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Sacha's MMI and impairment determinations. The FAL also acknowledged medical maintenance care. Following the parties' stipulation to resolve residual issues, Respondents filed an Amended FAL on January 21, 2016. Claimant did not challenge the Amended FAL and his claim closed by operation of law on all issues other than medical maintenance benefits.

11. Claimant continued to receive maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. His maintenance care during the period included non-opioid medications, utilization of a TENS unit, chiropractic treatment, acupuncture, an additional lumbar MRI, further sets of TF ESIs, another EMG and a surgical reevaluation.

12. On July 14, 2017 Claimant visited Dr. Sacha for the final time before moving to California. Dr. Sacha noted that Claimant's condition remained unchanged, his symptoms were tolerable and he experienced good and bad days. Claimant's treatment involved continued medications for two months, a gym pass and a new ATP for maintenance management in California.

13. On November 8, 2017 ATP Tariq Mirza, M.D. located in Modesto, California, began treating Claimant. He noted that Claimant's symptoms included pain in his back

and legs as well as reactive depression. Dr. Mirza immediately prescribed medications, including Duragesic (Fentanyl) patches of 50 micrograms (mcg)/hour, Soma and Neurontin.

14. On November 22, 2017 Dr. Mirza conducted a physical examination that revealed findings virtually identical to Claimant's previous visit. He continued to prescribe the same medications. Dr. Mirza recommended repeat lumbar ESIs, continued utilization of the TENS unit and physical therapy.

15. On February 14, 2018 Claimant returned to Dr. Mirza for an examination. He reported "as long as I have medications in my system I am functional, without medication pain in my lumbar spine is 8-9 or even 10, however with the help of medication it [decreases] to 3-4 and it is manageable." Dr. Mirza increased Claimant's Fentanyl patches to 100 mcg/hour and continued the other medications.

16. On April 11, 2018 Dr. Mirza noted that Claimant had completed therapy but had not noticed any improvement in flexibility. Claimant remarked that his lower back pain was 7-8/10, but with medication it diminished to 3-4/10. Dr. Mirza continued to prescribe the same medications at the same dosages.

17. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha to determine whether his condition had worsened so that he was no longer at MMI. Dr. Sacha obtained an updated history from Claimant, reviewed Dr. Mirza's records and performed a physical examination. He was critical of Dr. Mirza's renewed prescription of opioids. Dr. Sacha detailed that Claimant "was opioid naïve and on non-opioid analgesics from this practitioner [and] is now on 100 mcg Fentanyl patches."

18. Dr. Sacha explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He emphasized that Fentanyl is a particularly dangerous drug and the State of Colorado recommends never exceeding 50 Morphine Milligram Equivalents (MMEs) per day. Notably, on July 5, 2018 Claimant was taking 240 MMEs/day or five times the recommended limit. Dr. Sacha further explained that opioid medications were 100% contraindicated for patients like Claimant who suffer lung issues.

19. Dr. Sacha testified at the hearing in this matter that during his July 5, 2018 evaluation Claimant acknowledged that his functioning had decreased while taking opioids. He explained that opioids increase a patient's pain receptors. Dr. Sacha attributed Claimant's decreased functioning to opioid dependence from taking high levels of Fentanyl prescribed by Dr. Mirza. Claimant's functional decline was thus no longer related to his original lumbar spine injury.

20. Dr. Sacha explained that when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance care plan to address Claimant's opioid dependence that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He further recommended a gym pass for 12 months, one further ESI and one to three visits with a physical medicine or pain management specialist. Dr. Sacha

emphasized that his 12-month maintenance care plan was not directed at a spinal issue, but at the problem of increased pain receptors caused by opioid analgesics. He testified:

> [Claimant] probably wouldn't have needed anymore maintenance care beyond that point, once the large offending agent, which was the opioid analgesics, was discontinued. And the danger was still the biggest problem, and I was of the opinion, and still am of the opinion, that the decline in function, the worsening symptoms were a direct result of using the fentanyl rather than the actual lumbar spine issues. So we were really treating the problem, which was the opioid analgesics, not his spine, when I made the recommendations for that year of maintenance care.

21. On August 30, 2018 the parties conducted a hearing before ALJ Goldman. He issued an order dated October 1, 2018 denying Claimant's petition to reopen based on a worsening of condition.

22. After the hearing, Dr. Mirza began decreasing Claimant's opioid analgesics. He gradually reduced Claimant's Fentanyl from 100 mcg/hour patches to 75 mcg/hour patches on October 24, 2018, then to 50 mcg/hour patches on November 28, 2018 and finally to 25 mcg/hour patches on May 17, 2019. Dr. Mirza stated that his goal was to discontinue opioid analgesics "in a few months." However, over the next 22 months between May 17, 2019 and March 24, 2021 Dr. Mirza continued Claimant on 25 mcg/hour Fentanyl patches without providing any other maintenance medical care.

23. On February 5, 2021 Claimant returned to Colorado to visit Dr. Sacha for an evaluation. Dr. Sacha reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant's continued use of Fentanyl was "surprising" because he was clearly not a candidate for opioids. Dr. Sacha explained that the 25 mcg/hour patch constituted 60 MMEs/day. The amount exceeded the State of Colorado recommended dosage of 50 MMEs/day. Dr. Sacha remarked that Claimant's continued Fentanyl usage placed him at high risk for opioid misuse and sudden respiratory depression. He proposed an updated maintenance treatment plan that included the following: (1) immediate discontinuation of Fentanyl; (2) three months of non-opioid analgesics; and (3) other treatment modalities including chiropractic care and acupuncture treatment for symptom control during the weaning period.

24. On February 25, 2021 Respondents applied for a hearing on the issue of medical benefits. Respondents specifically sought "an order compelling discontinuation of opioids (Fentanyl), with a weaning/tapering schedule, and then discontinuation of maintenance care under this claim as per Dr. Sacha."

25. On March 24, 2021 Dr. Mirza noted that he had a long discussion with Claimant about discontinuing Fentanyl patches and replacing them with Suboxone films. Claimant testified and the record reflects that he has not taken any Fentanyl since March 24, 2021.

26. On May 8, 2021 Dr. Sacha issued a report following his review of Dr. Mirza's March 24, 2021 report. He noted that Dr. Mirza had discontinued Fentanyl and started Claimant on Suboxone. Dr. Sacha commented that it was reasonable to provide Claimant with a one month supply of Suboxone before weaning him off the medication over a four-week timeframe. He explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury.

27. Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Dr. Sacha remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Specifically, the opioid medications caused an increase in Claimant's pain receptors. Dr. Sacha explained that, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Claimant thus required three months of Buprenorphine to wean him from Fentanyl.

28. Dr. Sacha remarked that treatment for Claimant's original lumbar spine injury was no longer required. He emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." Dr. Sacha thus remarked that, after the three-month period, no further maintenance care would be necessary for either Claimant's lumbar spine or opioid dependence. He emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean Claimant from pain medications. Dr. Sacha determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment was necessary for Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

29. Dr. Sacha testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's current problems were iatrogenic in nature because he became dependent on opioids. Claimant thus required additional treatment, beyond the original 24 months, to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment. Claimant's weaning from Fentanyl was thus covered as part of his Workers' Compensation claim. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Any continuing functional limitations are reflected in his impairment rating. Dr. Sacha summarized that a three month weaning period for opioid dependence is reasonable and allowing Claimant to receive additional medical maintenance care beyond the three-month weaning period will cause harm. He explained that Claimant will be better off functionally, mentally and from a pain standpoint if his care is discontinued and he stops visiting doctors.

30. Claimant testified at the hearing in this matter. He explained that he has suffered constant pain since his September 19, 2014 industrial injury. Although his

symptoms have waxed and waned over time, they have persisted. Nothing other than opioid medications have decreased his severe pain and improved his function.

31. Although Claimant suffered residual medical issues because of opioid dependence, Respondents have proven that it is more probably true than not that additional medical maintenance treatment for his dependence is no longer causally related, reasonable or necessary to address his symptoms or prevent further deterioration of his condition. Respondents have also established that additional medical maintenance treatment is no longer reasonable or necessary to relieve the effects of Claimant's original lumbar spine injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

32. Claimant initially injured his lower back on September 19, 2014 while working for Employer. He received conservative treatment and was referred to ATP Dr. Sacha for pain management. By May 7, 2015 Claimant underwent lower back surgery. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

33. On November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed Claimant opioid medications in the form of Fentanyl patches. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He emphasized that the maintenance care plan was not directed at Claimant's original lumbar spine injury, but at the increased pain receptors caused by opioid analgesics.

34. Dr. Sacha persuasively testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's medical problems were iatrogenic in nature and he became dependent on opioids. Claimant thus required additional treatment beyond the original 24 months to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment.

35. Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was still suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Dr. Sacha emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean

Claimant from pain medications. Therefore, removing the cause of Claimant's pain receptor increase by eliminating Fentanyl diminishes within three months and ameliorates the condition.

36. Dr. Sacha also remarked that treatment for Claimant's original lumbar spine injury was no longer required. He persuasively remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, Claimant's subsequent symptoms and functional limitations were caused by the medications. Referring to his February 5, 2021 report, Dr. Sacha emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." In his May 8, 2021 report Dr. Sacha explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury. The record thus reveals that Claimant does not require additional treatment for his original lumbar spine injury because his only remaining problems are related to opioid dependency. Dr. Sacha therefore persuasively determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment is necessary for either Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

37. The preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Claimant has received reasonable and necessary medical maintenance care for both his original lumbar spine injury and his subsequent development of opioid dependence. Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. By July 5, 2018 Claimant's maintenance care plan was no longer directed at his original lumbar spinal condition, but at the increased pain receptors caused by opioid analgesics. While Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Because the three-months period of opioid cessation began on March 24, 2021, the appropriate weaning period has now ended. Therefore, no further maintenance care is necessary to address Claimant's lumbar spine or opioid dependence. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012). Because Respondents seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's September 19, 2014 industrial injury or prevent further deterioration of his condition.

5. As found, although Claimant suffered residual medical issues because of opioid dependence, Respondents have proven by a preponderance of the evidence that additional medical maintenance treatment for his dependence is no longer causally related, reasonable or necessary to address his symptoms or prevent further deterioration of his condition. Respondents have also established that additional medical maintenance

treatment is no longer reasonable or necessary to relieve the effects of Claimant's original lumbar spine injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

6. As found, Claimant initially injured his lower back on September 19, 2014 while working for Employer. He received conservative treatment and was referred to ATP Dr. Sacha for pain management. By May 7, 2015 Claimant underwent lower back surgery. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

7. As found, on November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed Claimant opioid medications in the form of Fentanyl patches. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He emphasized that the maintenance care plan was not directed at Claimant's original lumbar spine injury, but at the increased pain receptors caused by opioid analgesics.

8. As found, Dr. Sacha persuasively testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's medical problems were iatrogenic in nature and he became dependent on opioids. Claimant thus required additional treatment beyond the original 24 months to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment.

9. As found, Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was still suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Dr. Sacha emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean Claimant from pain medications. Therefore, removing the cause of Claimant's pain receptor increase by eliminating Fentanyl diminishes within three months and ameliorates the condition.

10. As found, Dr. Sacha also remarked that treatment for Claimant's original lumbar spine injury was no longer required. He persuasively remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, Claimant's subsequent symptoms and functional limitations were caused by the medications.

Referring to his February 5, 2021 report, Dr. Sacha emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." In his May 8, 2021 report Dr. Sacha explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury. The record thus reveals that Claimant does not require additional treatment for his original lumbar spine injury because his only remaining problems are related to opioid dependency. Dr. Sacha therefore persuasively determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment is necessary for either Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

11. As found, the preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Claimant has received reasonable and necessary medical maintenance care for both his original lumbar spine injury and his subsequent development of opioid dependence. Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. By July 5, 2018 Claimant's maintenance care plan was no longer directed at his original lumbar spinal condition, but at the increased pain receptors caused by opioid analgesics. While Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Because the three-months period of opioid cessation began on March 24, 2021, the appropriate weaning period has now ended. Therefore, no further maintenance care is necessary to address Claimant's lumbar spine or opioid dependence. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Although Claimant suffered residual medical issues because of opioid dependence, he no longer requires continuing medical maintenance treatment to address his dependence.

2. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Respondents' request to terminate Claimant's medical maintenance benefits is thus granted.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: July 21, 2022.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the left wrist condition is causally related to the June 19, 2020 work accident?

II. Whether Claimant has proven by a preponderance of the evidence that surgery to Claimant's left wrist, which took place on August 2, 2021 as recommended by Dr. Scott, was reasonably necessary and related to the admitted June 19, 2020 work accident?

III. Whether Claimant has proven by a preponderance of the evidence that Claimant's migraines and headaches are causally related and is entitled to treatment under the admitted June 19, 2020 work accident?

PROCEDURAL ISSUES

The parties entered into a stipulation on September 4, 2020 specifically agreeing that Respondent's failed to provide a Designated Provider list (DPL); Claimant treated at Concentra, which was paid for by Respondents; the authorized treating provider (ATP) was to be Kristin Mason, who was immediately authorized; Claimant waived penalties associated with failure to provide a DPL; and temporary total disability benefits were to be terminated as of September 4, 2020. The Order approving the stipulation was issued by this ALJ on September 16, 2020 while employed by Division in her capacity as a PALJ.

Claimant filed an Application for Hearing dated October 15, 2021 on issues of medical benefits, including relatedness of body parts and authorization of Dr. Scott for left wrist surgery.

Respondents filed a Response to Application for Hearing on December 21, 2021 listing issues of preexisting condition, causation and relatedness.

FINDINGS OF FACT

Based on the evidence presented at hearing including exhibits, testimony and a deposition, the ALJ enters the following findings of fact:

1. At the time of this order, Claimant reached the age of 57. Claimant worked for Employer for a period of approximately three months at the time of the admitted work related injury of June 19, 2020. Claimant performed work activities for Employer which included work as a trainer, machine operator, boxing up and shipping parts and testing materials.

2. The medical records showed a long history of multiple sclerosis (MS) causing back, neck and shoulder pain as well as lower extremity pain beginning in 2009. Claimant's records show that she was taking narcotic medications and had a narcotics contract with her primary provider, Dr. Melanie Metcalf, who would frequently state that Claimant's pain and MS was adequately controlled. There was also a consistent pattern of headaches for many years, including in 2012 due to the secondary effects of taking Gylenya for her MS and in 2013 when she was having rebound headaches. She had multiple diagnostic tests that were consistent with MS. In early 2019 she was having sinus pain and headaches, which Dr. Metcalf treated with oral medications.

3. Claimant also had prior orthopedic complaints including a right knee condition for which was surgically repaired with a right knee arthroscopy in 2012. Medical records from University of Colorado Hospital (UCH) document Claimant's ongoing neck and back issues including steroid injections in 2012 and 2013. Claimant was diagnosed with occipital neuralgia as early as December 18, 2014 by Dr. Metcalf and December 4, 2012 by Dr. Jason Krutsch.[1] The UCH records show she was also previously diagnosed with tinnitus by Dr. Ronald Olsen on November 22, 2013, headaches on December 14, 2012 by Dr. Krutsch, and migraines variant by PAC Wall on March 19, 2014.

4. On February 14, 2013 Dr. Metcalf documented that Claimant had had recurrent headaches starting in September 2012, which were not improved with ibuprofen or tylenol or imitrex and had similar headaches which lasted for several months in their intensity. Headaches were again documented on March 14, 2013, including left eye feeling cold and blurry vision. She ordered a brain MRI at that time to rule out underlying process causing headaches. On April 24, 2013 Claimant reported to Dr. Metcalf that she had worsening headaches for the prior 72 hours. On October 15, 2014 Claimant reported to Dr. Metcalf that she had "daily headaches" and Dr. Metcalf ordered a sleep study.

5. On February 15, 2015 she reported headaches to Dr. Mathew Gerlach of Front Range Orthopedics. In fact, on March 31, 2015 Dr. Gerald Rupp documented that his neurological exam showed, speech and swallowing problems, changes in sensation, balance, dizziness, headaches, incoordination and tremors.

6. On June 6, 2016 Claimant was attended at the UCH Spine Center with a plethora of complaints, including headaches, for which she had received trigger point injections. On August 31, 2016 she reported headaches which were constant for the past week. Claimant was evaluated in 2016 at UCH for continued MS, frequent falls and muscle spasms. Diagnostic testing and exam at the neurology clinic were consistent with demyelination including dysesthesias, spasticity, dysphagia, and supported the diagnosis of multiple sclerosis, which was consistent with MRI. Claimant was also seen at the UCHospital Spine Center in 2016 for acute pain of left knee, lumbar pain, cervical radiculopathy, thoracic axial neck pain, bilateral hip pain, headaches, right shoulder pain, bilateral anterior knee pain, peripheral neuralgia, and chronic pain syndrome.

7. Claimant was further evaluated by UCHealth Hand Clinic for bilateral wrist pain due to infusions to treat her MS on February 13, 2018. Dr. Matthew Lorio stated that the infusion effects were temporarily caused symptoms. On April 3, 2018 Dr. Timothy

[1] See Dr. Timothy Vollmer report at UCHealth February 1, 2016, Exhibit C, bate 491.

Vollmer, her UCH Rocky Mountain MS Center Neurologist, documented that Claimant had a variety of problems including moderate recurring episode of depressive disorder, arthralgia of the knee, bilateral hip pain, MS, chronic pain, and peripheral neuralgia. Dr. Vollmer provided a history that Claimant's osteoarthritis pains were worsening with the rituximab infusions, causing both bilateral knee and hand pain and had also noted eye jerking for about 4 months. On May 1, 2019 Claimant also presented with headaches to Dr. Metcalf.

8. Claimant was seen by her primary provider on October 9, 2019 after having been treated in the emergency room following an assault by an individual at her employment. Claimant was complaining of headaches, neck and left forearm pain at that time. On exam Dr. Metcalf noted that Claimant had a bruise under her chin and normal range of motion of both her neck and left forearm. On October 15, 2019 Dr. Metcalf noted the left hand x-rays were negative. Claimant followed up with Dr. Metcalf on January 29, 2020 but made no mention of left wrist or hand problems other than generalized pain caused by her MS in her neck, back and lower back, which were being treated and symptoms controlled adequately with her narcotic pain treatment. On April 14, 2020 Claimant had a virtual checkup appointment with Dr. Metcalf regarding her medications. She noted no different symptoms and noted diagnosis of MS, hyperlipidemia and medial epicondylitis but there was no exam to corroborate ongoing epicondylitis symptoms.[2]

9. Claimant was seen by Dr. Jason Krutsch of Colorado Pain Care on March 3, 2020. Claimant reported to Dr. Krutsch that she had a history of headaches, as well as on April 2, 2020, April 30, May 14, May 28, and June 22, 2020. Dr. Krutsch documented a long history of multiple medial branch block (MBB) of the cervical spine related to her ongoing chronic pain, going back to 2015 with at least 11 with his office and another 7 with Aprima. On April 30, 2020 Claimant had another MBB for the cervical spine spondylosis and chronic pain followed up by another cervical spine MBB on May 28, 2020.

10. On June 19, 2020 Claimant was speaking to a coworker at work. When she was done with the conversation, she turned around and tripped over a pallet and as she was falling, she reacted by protecting her face with her left hand and arm. She fell on her knees and left wrist, with her head bouncing twice off of her left hand, causing a wrist injury. She also sustained a cut on the inside of her lip and cheek. Claimant testified that following the fall, her knees, her hand and her head hurt.

11. Claimant was seen on June 19, 2020 at UCHealth Longs Peak Hospital (LPH) Emergency Services by Physician Assistant Coleen August, who noted Claimant had tripped over a pallet, injuring her knees and catching herself with her left hand. She noted Claimant denied hitting her head and had no neck pain or back pain or other injuries. Ms. August ordered x-rays of the left wrist and bilateral knees, which showed a possible fracture of the left wrist but normal findings of the bilateral knees. Ms. August documented prior medical history that included depression, headaches, high cholesterol, multiple sclerosis, incontinence, right elbow surgery, hysterectomy, knee arthroplasty,

[2] This ALJ notes that April 14, 2020 was the height of the COVID-19 pandemic when the State of Colorado was in shut down.

pelvic laparoscopy, right shoulder surgery and prior right wrist surgery for a tendon repair in 2003.

12. Claimant was attended by Dr. Lori Long-Miller, of Concentra Medical Cetners-Longmont, on June 22, 2020 for the complaints of bilateral knee, left wrist, and a right-side lip contusion. The neck pain was described as dull, aching in nature and radiating to the occiput with associated headaches. The left wrist pain was located in the left dorsal wrist with weakness of the hand, wrist, decreased range of motion (ROM), stiffness, swelling and tenderness. On exam, Dr. Long-Miller documented that Claimant had left wrist swelling and anatomic snuff box swelling, diffuse dorsal and snuff box pain, and ROM was deferred due to pain. Dr. Long-Miller assessed a contusions of her bilateral knees, a left elbow contusion, left wrist injury and cervical strain. She stated that the objective findings were consistent with history and work related mechanism of injury. Dr. Long-Miller referred Claimant for an orthopedic evaluation, physical therapy at the Boulder Concentra Clinic, which Claimant attended from June 22, 2020 through July 25, 2020, and provided Claimant with a shoulder sling. Upon review of the multitude of records submitted in this matter, this ALJ finds that Dr. Long-Miller failed to document Claimant's significant prior history of cervical spine, chronic pain of the cervical spine, the long history of headaches as well as the occipital neuralgia or the cervical MBBs which were as recent as May 28, 2020.

13. On June 22, 2020 Claimant was again seen by Dr. Metcalf via telehealth. She noted that Claimant had fallen forward on both knees and left wrist at work and fractured her left wrist. She diagnosed MS and insomnia.

14. On June 23, 2020, the Claimant was evaluated by Peter D. Wood, M.D. of Front Range Orthopedic and Spine who requested an MRI of the left wrist and took a history that Claimant fell onto her outstretched left hand. She had swelling in her wrist and pain at the base of her thumb as well as an irregularity of the scaphoid area. He placed her in a short arm thumb Spica splint, and ordered an MRI scan.

15. Claimant was evaluated by Nurse Practitioner Keith Meier, of Concentra Medical Centers, on June 26, 2022, documenting that Claimant had been evaluated by the orthopedic surgeon and that he had requested an MRI of her left wrist. Nurse Meier's examination of the wrist revealed left wrist and radial wrist pain which was constant, moderate described as dull, with grip weakness, hand weakness, decreased ROM and tenderness in the scapholunate interval and the radial aspect as well as dorsal aspect at the scaphoid. Mr. Meier, continued to note ongoing cervical strain including muscle spasms with palpation and associated cervical headaches. He limited Claimant's use of her left upper extremity.

16. Respondents filed a General Admission of Liability on July 2, 2020 admitting for temporary disability benefits and medical benefits related to the June 19, 2020 work accident.

17. The MRI took place on July 10, 2020 and was read by Brian Cox, M.D., who noted that Claimant had active de Quervain's tenosynovitis, age indeterminate bone marrow edema surrounding the scapholunate interval, cystic changes in the proximal lunate with a small distal radioulnar joint effusion suggesting changes of ulnocarpal

abutment without ulnar variance, and a large dorsal ganglion cyst arising from the triscaphe articulation, deep to the second extensor compartment. Dr. Cox also noted thickening and increased signal within both first extensor compartment tendons extending from the radial styloid process to the level of the thumb CMC joint with regional tenosynovial fluid indicative of active tendinosis.

18. Dr. Wood documented on July 14, 2020 that symptoms had been gradually improving with moderate left wrist pain, characterized as a dull aching and sharp stabbing type of pain. Claimant described symptoms located in the radial aspect of the wrist, aggravated by any movement and relieved by rest, ice and modification of activity. Dr. Wood noted on exam that Claimant's left wrist showed significant tenderness over the first dorsal compartment with mild swelling and pain with resisted thumb extension and abduction, a positive Finkelstein's test[3], and limited range of motion of her wrist secondary to discomfort, but not her digits. Dr. Wood recommended proceeding with conservative treatment, following review of the MRI films, including providing a steroid injection into the 1st dorsal compartment to treat the De Quervain's tenosynovitis and prescribed physical therapy.

19. Nurse Meier saw Claimant on July 21, 2020 noting she presented for recheck of her knee, wrist and lip. Claimant reported that she hurt so bad that she was crying following the wrist injection and that it did not help. With regard to the neck, Mr. Meier noted that injury history was previously documented, that symptoms were unchanged with continuous right posterior neck and right trapezius pain.

20. Claimant was attended by Mr. Keith Meier at Concentra on July 23, 2020 for cervical spine x-rays, which Dr. William McCuskey read as showing degenerative changes, otherwise unremarkable. It is not apparent in the medical records submitted by the parties, that Claimant's workers' compensation Concentra providers were aware of her pre-existing neck and headache issues.

21. Claimant returned to Concentra on July 24, 2020 and was evaluated by Kevin Riedel, P.T., who reported Claimant continued having headaches and was in therapy for her hand. He stated that Claimant was not progressing with PT, reported she had no change with her neck pain. They provided functional dry needling and manual therapy, which she tolerated well, and suggested that she be progressed with work restrictions.

22. On September 4, 2020 the parties entered into a Stipulation. Respondents conceded they did not provide Claimant with a list of designated medical providers, but Claimant had been treated a Concentra, which was paid for by Respondents. The parties stipulated that Dr. Kristin Mason would immediately be authorized as Claimant's authorized treating physician, so long as Dr. Mason accepted Claimant as a patient.

23. Claimant was initially seen by Dr. Kristin Mason on September 28, 2020 who took a history of relapsing-remitting MS and an on the job injury on June 19, 2020 when she tripped over a pallet, falling on both knees, onto concrete, banging her right ankle and falling onto her left hand and wrist, hitting her face on her hand, causing a cut

[3] Finkelstein's test is a provocative test for diagnosis of De Quervain's disease.

inside her lip. Claimant complained that headaches increased by movement seemed to emanate from the occipital area. She complained of left hand and wrist pain, had an MRI which showed some bone edema but not a clear fracture of the scaphoid. She saw Dr. Wood, and he placed her in a thumb Spica splint. He prescribed hand therapy, but it never happened. Claimant denied previous trauma to the left wrist. She noted pain with turning her head while driving, walking, and picking anything up increased her left wrist and hand pain. On physical exam, Dr. Mason noted that Claimant was pleasant and cooperative with few pain behaviors. Dr. Mason noted Claimant did have decreased sensation in the median distribution of the left hand with a positive medial Tinel's, and a somewhat ratchety quality on manual muscle testing. On neck exam, Dr. Mason found tenderness over the upper cervical segments and to a lesser extent the suboccipital muscles. The left wrist showed some diffuse swelling, mild tenderness over the TFCC[4], and more significantly tender over the scaphoid. Finkelstein's test was also positive. She also found that flexion/extension were quite limited. Dr. Mason assed probable cervical sprain-strain, with likely cervicogenic headaches; left wrist sprain vs. occult scaphoid injury with some degree of underlying de Quervain's; left knee contusion; and right ankle contusion. Dr. Mason prescribed trial medications for the headaches, stating that it was often somewhat of a process to find the appropriate treatment for posttraumatic headaches. She provided restrictions of five lbs., including no lifting greater than five lbs., limited standing and walking, and no crawling, kneeling, squatting or climbing.

24. An x-ray report issued by Dr. William Wahl on September 30, 2020 showed advanced disc disease at the C5-C6 and C6-C7, reversal of normal cervical lordosis centered at C5, and no compression fractures.

25. Dr. Mason evaluated Claimant again on October 20, 2020. She changed Claimant's headache medication, prescribed an MRI of the cervical spine in order to not aggravate an underlying condition with physical therapy and continued restrictions.

26. Dr. Mason reviewed Claimant's left wrist MRI on November 9, 2020 and noted possible lunotriquetral ligament tear, edema in the lunate and a TFCC tear. She documented that following physical therapy Claimant was complaining of increased headaches and that Claimant denied having similar headaches before. Claimant described the headaches as left greater than right, occipital radiating to frontal, at times associated with visual changes and nausea. Claimant reported an incident where she fell against a wall after losing balance due to headaches. Dr. Mason continued to assess cervical strain, left wrist injury and post migraine headaches. She referred Claimant to Dr. Drewek, regarding her neck and changed her headache medication again.

27. On November 30, 2020 Dr. Mason conducted a telemedicine visit with Claimant, noting that Claimant had potentially been exposed to COVID. They discussed sending Claimant to Dr. Frank Scott, a hand orthopedist, as well as for a neurologic evaluation related to ongoing headache concerns, as Claimant had been seen by Dr. Drewek who opined that the headaches were an unlikely consequence of neck problems.

[4] The TFCC stand for triangular fibrocartilage complex, a structure in the wrist that supports the carpal bones on the wrist.

28. Claimant was evaluated at the UCH Hand Clinic on January 12, 2021 by Dr. Frank Scott and Dr. Thomas Ergen, who documented that Claimant's symptoms were consistent with left De Quervain's, left thumb CMC arthritis and left ulnar abutment syndrome. They ordered three x-ray views of her left thumb and confirmed that they showed left thumb CMC[5] arthritis that was moderate. They proceeded with corticosteroid injection for the left thumb CMC only, as Claimant reported she only had temporary relief with the De Quervain's injection.

29. Dr. Mason evaluated Claimant on February 25, 2021. Claimant reported feeling better after the left wrist injection with Dr. Scott, still having certain pain with movement. Dr. Mason documented a taut band in the upper cervical and middle paraspinals bilaterally. She noted that wrist ROM following the injections was better than on previous examinations, and Claimant had less left wrist swelling. Dr. Mason proceeded with trigger point injections into the cervical spine at that time.

30. Claimant had an independent medical evaluation, at Respondents' request, by Dr. Carlos Cebrian on February 25, 2021, who issued a report on March 17, 2021. He documented a mechanism of injury consistent with prior records wherein Claimant reported falling over a pallet, falling first on her knees and raising her left hand to protect her face, then falling on her left hand, hitting her face on her hand and causing a small cut on her upper lip. He completed a medical records review which spanned over ten years and was approximately 88 pages long. Dr. Cebrian opined that the work related June 19, 2020 claim diagnoses included the bilateral knee contusions, the left wrist sprain, de Quervain's tenosynovitis, and the lip abrasion. He provided a list of 25 non work related diagnosis including the headaches, vertigo, tinnitus, cervical spine, chronic pain and the occipital neuralgia based on the medical records reviewed.

31. On March 18, 2021 Dr. Mason documented that Claimant had followed up with Dr. Oyoung from Neurology, who had previously recommended discontinuation of medications for headaches. On examination Dr. Mason noted significant tenderness in the area of the snuffbox and lunotriquetral ligament area. On April 8, 2021, Dr. Mason noted she received the IME from Dr. Cebrian and discussed the results with Claimant. She found that Claimant continued to have tenderness in the snuffbox and lunotriquetral ligament area and to a lesser extent the scapholunate area as well as the TFCC. She continued to recommend follow up with Dr. Scott and Dr. Oyoung.

32. On April 26, 2021 Dr. Scott noted that Claimant had excellent short term results with her left thumb CMC osteoarthritis injection. They discussed treatment options and determined to perform repeat injection of the left thumb CMC.

33. Claimant was attended by Dr. Thomas France at the UCH Hand Clinic on June 14, 2021 who documented that Claimant's last left thumb CMC injection was not as effective as the first one. They discussed surgical options at that time. While there were indications of past medical history of chronic pain in the feet, arms, hands as well as depression, headaches and MS, they were not explained in the context of time or referenced a work injury. Dr. France noted Claimant was tender to palpation at the thumb

[5] Carpometacarpal joint.

CMC joint but had no pain with "A1 pulley of the thumb."[6] She also had pain along the TFCC and with ulnar deviation of the wrist.

34. Claimant's July 12, 2021 follow-up report with Dr. Mason noted that Claimant continued to have major problems with headaches that were constant left-sided hemi-cranial, which seemed to be constant and daily. She continued to diagnose posttraumatic headaches, changed her headache medication and discussed the upcoming surgery with Dr. Scott set for August 2, 2021.

35. On August 2, 2021 Claimant proceeded with the left wrist arthroplasty-LRTI (ligament reconstruction and tendon interposition), and left first dorsal compartment release-De Quervain's release by Dr. Frank Scott.

36. On August 17, 2021 Dr. Scott noted that Claimant was post left thumb CMC arthroplasty with left de Quervain's release on August 2, 2021. He noted that Claimant fell and landed on her wrist on her bed. He removed the splint and sutures, and stated she was stable.

37. The last record by Dr. Scott is dated September 27, 2021 and he continued to diagnose De Quervain's disease and localized primary osteoarthritis of the CMC joint of the left thumb. He documented that Claimant was approximately eight weeks post left thumb CMC arthroplasty and left first dorsal compartment release. Dr. Brady Williams coauthored the report. The exam of the left upper extremity documented that the incision was clean, dry, intact and well-healed, thumb was in good functional position and stable, Claimant had thumb opposition to the distal palmar crease of the small finger, persistent paresthesia on both the ulnar and radial aspect of the thumb. He noted that Claimant was progressing as expected.

38. Dr. Mason examined Claimant on January 3, 2022 noting that following surgery, she was doing much better with left wrist movement, with no swelling or deformity. She recommended Claimant continue with physical therapy for her wrist and change headache medications, though she had not been very successful with prior prescriptions.

39. Kristin Mason, M.D. testified by deposition on January 24, 2022, as Claimant's authorized treating physician. She is board certified in physical medicine and rehabilitation as well as electrodiagnostic and neuromuscular medicine. She has been Level II Accredited by the Division of Workers' Compensation since 2001. Dr. Mason is accepted an expert in physical medicine and rehabilitation, electrodiagnostic and neuromuscular medicine, as well as a Level II Accredited physician. Dr. Mason stated that Claimant was complaining of headaches increased by movement and associated with ringing in her ears, as well as some eye pain, nystigmus, left hand and wrist pain, soreness in her left knee and tenderness on the outside of her right ankle during her first evaluation. She opined that the surgery performed by Dr. Scott was reasonable, necessary and related to the June 19, 2020 work related injury. She specifically opined that Claimant sustained multiple insults to her left wrist including causing the aggravation of the left thumb CMC joint, and left first dorsal compartment injury or De Quervain's

[6] A test to identify trigger finger symptoms.

tenosynovitis. She stated that Claimant had undergone conservative care and required surgery, and in hindsight, she improved since the surgery with less swelling, tenderness, better capacity to use her hand and improved range of motion.

40. Claimant testified at hearing that she injured her left wrist when she fell causing pain. She stated that, she had some problems with her wrist before this injury, but the problems she had after the injury caused swelling, tenderness and loss of range of motion and had not experience that kind of pain in her wrist until this fall. She stated that she had had no other injuries between June 19, 2020 and the date of her surgery. She explained that the symptoms she had had prior to this injury into the left hand or wrist were resolved before this accident happened, including the tingling which was resolved by the MS medication. Claimant explained that the surgery helped relieve the pain in her wrist and thumb areas where she hurt herself during the fall. Claimant also testified that she had had headaches before the accident but that they were different after the accident but acknowledged that she did not remember about all the treatment she had received for headaches. She stated that she had given herself whiplash during the fall and that was what was causing the headaches.

41. Dr. Cebrian testified at hearing consistent with his report. Dr. Cebrian was accepted as an expert in occupational medicine and as a Level II Accredited physician by the Division since 2001. He opined that Claimant had sustained an injury to her left wrist but that only the surgical intervention for the first dorsal compartment release (de Quervain's disease) was related to work event and that the surgical intervention for the CMC arthroplasty was not a result of Claimant's work injuries. Dr. Cebrian explained that MS caused nerve pain that weakens the muscles and places more pressure on the joints for the body's support, in turn causing osteoarthritis to develop. Dr. Cebrian is persuasive with regard to the need for the first dorsal compartment surgery but not with regard to his opinion of the surgical intervention of the CMC joint.

42. Dr. Cebrian also testified regarding Claimant's headaches. He attributed the headaches partially to her preexisting cervical pathology, which was actively being treated, including shortly before the work related accident. He also opined that it was likely that the preexisting and diagnosed multiple sclerosis and nystagmus (eye jerking), previously diagnosed migraines, occipital neuralgia, and chronic opiod use were also contributing to Claimant's ongoing headache condition and need for medical care. He explained that these were preexisting conditions not related to the accident. Dr. Cebrian is found persuasive with regard to the headache condition.

43. As found, on June 19, 2020 Claimant injured her left wrist, causing de Quervain's tenosynovitis (first dorsal compartment) and aggravated the preexisting condition of the CMC joint and TFCC on June 19, 2020. While Claimant did suffer from aches and pains in her bilateral wrists due to her MS and arthritic or degenerative joints, the fall on her left wrist on June 19, 2020 aggravated her preexisting condition. Claimant was persuasive in her testimony that she had pain, swelling and loss of range of motion in her left wrist and hand as a consequence of her June 19, 2020 fall on her left wrist. As found, the fall caused an aggravation of her preexisting arthritic condition of her left wrist. As found, this was documented by the emergency room visit on June 19, 2020, on June 22, 2020 by Dr. Long-Miller and in subsequent reports issued by Dr. Mason. Dr. Mason

documents multiple times that claimant continued with pain at the base of the thumb, snuffbox area and swelling of the left wrist. As found, Dr. Wood credibly opined on July 14, 2020 that Claimant's left wrist showed significant tenderness over the first dorsal compartment with mild swelling and pain with resisted thumb extension and abduction, a positive Finkelstein's test, and limited range of motion of her wrist secondary to discomfort. As found, Dr. Frank Scot on January 12, 2021 opined that Claimant's symptoms were consistent with left De Quervain's, left thumb CMC arthritis and left ulnar abutment syndrome. As found, this is supported by Dr. Long-Miller's medical records, which go into extensive description of having had left wrist swelling and anatomic snuff box swelling, diffuse dorsal and snuff box pain. Nurse Meier's examination of the wrist revealed left wrist and radial wrist pain which was constant, moderate, with grip weakness, hand weakness, decreased ROM and tenderness in the scapholunate interval and the radial aspect as well as dorsal aspect at the scaphoid. These medical providers are found persuasive. Even Dr. Cebrian opined that the De Quervain's tenosynovitis was related to the injury. As found, Claimant has proven by a preponderance of the evidence that the left wrist De Quervain's disease, aggravation of the CMC joint are related to the June 19, 2020 work relate injury.

44. As found, the left wrist De Quervain's tenosynovitis and the aggravation of the arthritic CMC joint are found to be compensable and causally related to the June 19, 2020 work related injury. Dr. Wood and Dr. Scott performed injections in both sites and Claimant had only temporary relief with the injections. Claimant was also involved in physical therapy with little relief. As found, Dr. Scott complied with the requirements of the Division's Medical Treatment Guidelines in proceeding with applicable conservative care before recommending surgical repair. As found, Dr. Scott's opinion of Claimant's need for surgery of these conditions is found persuasive and therefore, the surgery is found to be reasonably necessary and related to the June 19, 2020 event. Dr. Scott performed the surgical intervention on August 2, 2021 including the left wrist arthroplasty with left de Quervain's release. Claimant has proven by a preponderance of the evidence that the surgery performed by Dr. Scott on August 2, 2021 was reasonably necessary and related to the admitted compensable workplace injury of June 19, 2020 and was performed in order to address the aggravated CMC joint and De Quervain's disease.

45. As found, Dr. Cebrian is persuasive that, in this matter, Claimant clearly had a long history of headaches. As found, as early as June 22, 2020 Claimant stated to Dr. Long-Miller that her headaches were in the occiput. Dr. Mason's testimony indicated that sleep apnea and occipital neuralgia can cause headaches. Claimant was diagnosed with both of these conditions as early as December 18, 2014 by Dr. Metcalf and December 4, 2012 by Dr. Jason Krutsch.[7] She was also previously diagnosed with tinnitus by Dr. Ronald Olsen on November 22, 2013, headaches on December 14, 2012 by Dr. Krutsch, and migraines variant by PAC Wall on March 19, 2014. As found, Dr. Mason stated in her initial report on September 28, 2020 that Claimant's headaches "seemed to emanate from the occipital area." Claimant had headaches affecting her occipital area for many years as documented in the medical records. As found, Claimant's need for continuing medical care for the headaches and migraines are not causally related to the June 19,

[7] See Dr. Timothy Vollmer report at UCHealth February 1, 2016, Exhibit C, bate 491.

2020 work related injury. Claimant has failed to prove causation of the migraines and headaches to the work related June 19, 2020 claim.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

B. Medical Benefits

The three issues to be determined in this case are intertwined in a claim for reasonably necessary medical benefits related to the admitted compensable work related injury of June 19, 2020.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

A claimant has a compensable injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produces a disability for which benefits are sought. § 8-41-301(1)(c), C.R.S. See *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff*, 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, Claimant must prove by a preponderance of the evidence that her symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant may have suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

When a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The finding of a compensable injury or a compensable disability does not require a finding that all medical treatment after the industrial injury is authorized or causally related to the industrial injury. *Briggs v. Williard Plumbing & Heating Inc.*, W.C. No. 4-526-000 (I.C.A.O. Nov. 26, 2003). This is true even where the there is an admission of liability as to medical care and medical care has been provided despite denial, and merely because there is an admitted injury it cannot be construed as a concession that all medical care which occurred after the injury were caused by the injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012).

Claimant's fall onto her left wrist did cause injury to Claimant's tendons in her first dorsal compartment in her left wrist, and aggravated her underlying arthritis in her wrist including the CMC joint, aggravation of the left ulnar abutment syndrome and the aggravation of the tendons of the TFCC. This is supported by Claimant's persuasive testimony in this matter as well as the opinions of Dr. Mason, and the medical records from Dr. Scott, Dr. Long-Miller, Dr. Wood, and Nurse Meier as stated above. This is supported by the orthopedic specialists' opinions above, Dr. Wood and Dr. Scott. It is also supported by the limited persuasive evidence by Dr. Cebrian regarding the first dorsal compartment or de Quervain's tenosynovitis. Claimant has shown that both the de Quervain's tenosynovitis and the aggravation of the preexisting osteoarthritis, which became symptomatic and which required medical care following the June 19, 2020 fall, were proximately caused by the June 19, 2020 workplace injury. Claimant has further shown that the need for the surgery performed by Dr. Frank Scott was reasonably necessary and related to the June 19, 2020 fall at work.

In this matter, Claimant has a long history of painful, unrelenting MS, cervical spine complaints, headaches, and occipital neuralgia, which caused ongoing headaches or migraines. None of these conditions were caused by her fall at work. None of these conditions were worsened by her June 19, 2020 work related fall despite the extensive medical care provided by authorized treating providers and paid for by Respondents. This is supported by the lengthy preexisting records of Dr. Metcalf as well as Dr. Cebrian's opinions regarding the headaches, which are persuasive in this matter. Claimant has failed to show the causal relationship between the work related injury and the ongoing headaches from which Claimant suffers. As found the ongoing headache condition and the need for medical care related to the ongoing headaches are not reasonably necessary and are not proximately caused by the June 19, 2020 workplace accident.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the left first dorsal compartment release (de Quervain's release) and the left CMC joint arthroplasty as completed by Dr. Scott in August 2021, and all costs associated with the reasonably necessary and related medical care, subject to the Colorado Workers' Compensation Fee Schedule.

2. Claimant's migraines and headaches are not causally related to the June 19, 2020 industrial accident, and thus, medical benefits for her migraines and headaches are denied and dismissed.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 21st day of July, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the C4 to C7 anterior cervical discectomy and fusion (ACDF) recommended by Dr. Ewell Nelson is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 17, 2020 work injury?

FINDINGS OF FACT

1. The claimant works at the employer's ranch as a ranch manager. His job duties include conditioning five to seven horses and overseeing other ranch employees.

2. On July 17, 2020, the claimant was operating a skid steer to move a 1,400 to 1,600 pound bale of hay. This bale of hay rolled off the skid steer forks, causing the skid steer to pitch forward and then back in a forceful manner. The claimant's initial symptoms included headaches, as well as pain in his neck, shoulders, and arms.

Medical Treatment Prior to July 17, 2020

3. The claimant has spent most of his life riding, breaking, and training horses. This included many years working as a jockey racing horses in the United States and Canada. During his lengthy horse related career, the claimant has been thrown from horses, resulting in injuries. Due to such injuries, the claimant has undergone surgery on both of his arms.

4. In 2007, the claimant was thrown from a horse and injured his left wrist, necessitating surgery. During that treatment, the claimant was diagnosed with carpal tunnel syndrome. The claimant also experienced neck pain following the 2007 incident. On June 18, 2007, he underwent magnetic resonance imaging (MRI) of his cervical spine. The MRI showed mild multilevel degenerative changes with stenosis.

5. In 2018, the claimant suffered a right wrist fracture while working as a gate trainer at a horse track. This injury also necessitated surgery. On April 16, 2019, the claimant's surgeon recommended carpal tunnel surgery. The claimant testified that he did not undergo carpal tunnel surgery because he was able to perform all of his job duties, at that time.

6. The claimant further testified that after recovering from these prior injuries and related surgeries, he was able to return to full duty work. The claimant testified that prior to July 17, 2020, he was never off a horse for more than a few days and did not have to take any medications.

Medical Treatment Beginning July 17, 2020

7. The claimant's authorized treating provider (ATP) for this claim is Concentra Medical Centers (CMC). On July 20, 2020, the claimant was seen at CMC by Dr. Felix Meza and Devin Jacobs PA-C. On that date, the claimant described his mechanism of injury and reported tightness and pain in his neck, intermittent headaches, tingling in his left fourth and fifth fingers, and pain in his right elbow. The claimant was diagnosed with a neck strain and right elbow contusion. He was referred to physical therapy.

8. Cervical spine x-rays taken on July 20, 2020 showed degenerative changes, with significant disc space narrowing in the lower cervical segments.

9. On July 24, 2020, the claimant returned to PA Jacobs and reported improved symptoms with physical therapy.

10. On August 7, 2020, the claimant reported to PA Jacobs that he continued to have neck tension and aching, with worsening right upper extremity aching. PA Jacobs ordered x-rays of the claimant's right elbow and right shoulder.

11. On August 10, 2020, the claimant was seen by PA Jacobs at the request of the claimant's physical therapist. The claimant reported continuing headaches and intermittent tingling and numbness in his hands. On this date, PA Jacobs added right cervical radiculopathy to the claimant's list of diagnoses and ordered an MRI of the claimant's cervical spine.

12. On August 22, 2020, the cervical spine MRI was reviewed by Dr. Elizabeth Carpenter. In her report, Dr. Carpenter identified moderate cervical spondylosis with multilevel thecal sac stenosis; an 8 mm AP thecal sac at the C3-C4 level; moderate multilevel facet arthropathy; a degenerative bone cyst on the left at the C3-C4 level; and severe foraminal stenosis on the left at C3-C4; right from C4 to C6, and bilaterally at C6-C7.

13. On August 31, 2020, the claimant was seen by Dr. Robert Kawasaki. At that time, the claimant reported pain in his upper cervical spine, headaches, and occasional numbness and tingling in his hands. On examination of the claimant's cervical spine, Dr. Kawasaki noted tenderness to palpation of the occipitoatlantal junction. He also noted that specific facet loading caused increased pain in that same area, and reproduced headaches. Dr. Kawasaki opined that the claimant's underlying cervical spondylosis was the result of the claimant's career as a jockey. He also opined that the July 17, 2020 "whiplash injury" created the claimant's cervicogenic headaches. Dr. Kawasaki recommended acupuncture and chiropractic treatment. He also discussed possible future treatment, concluding injections and medial branch blocks.

14. On September 18, 2020, the claimant was seen by PA Jacobs. At that time, the claimant reported worsening neck pain, with shooting pain from his neck down his right arm to his elbow, right hand numbness, and headaches.

15. On September 28, 2020, the claimant returned to Dr. Kawasaki and reported persistent neck pain, headaches, and pain in his bilateral shoulder girdles. The claimant also reported that he had been seen at the Orthopedic Center of Colorado by Maria Kaplan, PA, who referred him for an interlaminar epidural steroid injection (ESI). Dr. Kawasaki recommended ongoing conservative care, including chiropractic treatment and physical therapy.

16. On October 22, 2020, Dr. Kawasaki performed bilateral upper extremity electromyography (EMG) testing. These tests did not show evidence of cervical radiculopathy. In the medical record of that date, Dr. Kawasaki noted, "[a]lthough the patient's EMG did not show evidence of axonal losses, the patient can have radiculitis causing some nerve irritation with pain, numbness, and tingling in the upper extremities." Dr. Kawasaki opined that the claimant has some increased pain in his neck with potential radiculopathic symptomatology. Dr. Kawasaki recommended an interlaminar ESI at the C7-T1 level. This injection was administered on November 25, 2020.

17. On November 2, 2020, and November 30, 2020, the claimant was seen at CMC by Dr. Meza. The claimant continued to report persistent pain in his neck, right trapezius, and right shoulder.

18. On December 24, 2020, the claimant was seen by Dr. Kawasaki and reported some temporary relief from the injection. However, the claimant continued to report persistent neck pain and headaches. Dr. Kawasaki opined that the claimant's ongoing pain was related to the work injury. Dr. Kawasaki recommended bilateral C2-C3 and C3-C4 medial branch blocks. The recommended medial branch blocks were administered on January 29, 2021.

19. For a period of time in 2021, the claimant relocated with the employer to Florida. During that time, the claimant's treatment was transferred to CMC providers in that state. On March 5, 2021, the claimant was seen at CMC in Florida by Rosemarie Schanel, PA-C. The claimant described his work injury and reported headaches, pain in his neck, trapezius, right shoulder, and right arm. PA Schanel diagnosed the claimant with right cervical radiculopathy, made a referral for a neurological consultation, and prescribed cyclobenzaprine and gabapentin.

20. On April 6, 2021, the claimant returned to PA Schanel and reported that the medications were helping him sleep and reducing his pain. However, he also reported continued pain in the base of his skull and left hand numbness. Between April and June 2021, the claimant continued to report increased pain, numbness, and tingling in his bilateral upper extremities.

21. On June 14, 2021, the claimant returned to CMC in Colorado and was seen by Dr. Meza. The claimant continued to report persistent neck and right upper extremity symptoms.

22. On July 7, 2021, the claimant was seen by Dr. Kawasaki. At that time, Dr. Kawasaki noted that the claimant had increased symptoms with range of motion and referred the claimant to a neurosurgeon. Dr. Kawaski noted that if surgery was not recommended, the claimant would be a maximum medical improvement (MMI). Dr. Kawaski opined that it was unlikely that the claimant would need surgery.

23. On August 31, 2021, the claimant was seen at Boulder Neurological and Spine Associates by PA Michael Kiley. The claimant described his injury and reported bilateral hand weakness and numbness. He also reported bilateral shoulder and triceps pain. PA Kiley ordered x-rays and an MRI of the claimant's cervical spine.

24. On September 15, 2021, the cervical spine x-rays showed moderately severe diffuse cervical spondylosis, multilevel disc space narrowing, endplate sclerosis, degenerative spurring, and degenerative facet joint arthropathy. A cervical spine MRI was also performed on that date and showed findings similar to the prior MRI.

25. On October 12, 2021, the claimant returned to Boulder Neurological and Spine Associates and was seen by Dr. Ewell Nelson. At that time, the claimant reported persistent neck and upper extremity pain. Dr. Nelson reviewed the September 15, 2021 MRI and recommended a C4 to C7 anterior cervical discectomy and fusion (ACDF) to address the claimant's bilateral radicular symptoms. On October 21, 2021, a request for authorization of a C4 to C7 ACDF was sent from Dr. Nelson's practice to the insurer.

26. On October 25, 2021, the claimant attended an independent medical examination (IME) with Dr. B. Aaron Castro. In connection with the IME, Dr. Castro reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his November 7, 2021 IME report, Dr. Castro opined that the claimant's need for cervical surgery is not work related. Rather, it is Dr. Castro's opinion that the need for surgery is related to pre-existing degenerative changes in the claimant's cervical spine. In addition, it is possible that some of the claimant's symptoms are not coming from his cervical spine, but rather from carpal tunnel syndrome. Based upon Dr. Castro's report, the respondents denied authorization for the recommended spinal fusion surgery.

27. On June 1, 2022, Dr. Justin Green administered EMG testing of the claimant's bilateral upper extremities. In his report, Dr. Green noted that the claimant had moderate carpal tunnel syndrome in the right wrist, without ongoing denervation. The EMG also showed no evidence of ongoing right upper extremity radiculopathy.

28. Dr. Castro's testimony was consistent with his written report. Dr. Castro reiterated his opinion that the surgery is not reasonable or necessary medical treatment. In support of this opinion, Dr. Castro noted that the claimant does not have spine instability. Dr. Castro noted that it is unclear if the claimant's symptoms are coming from

his cervical spine. In addition, the EMG studies showed evidence of carpal tunnel syndrome, but did not show evidence of cervical radiculopathy. Dr. Castro opined that it is more likely that the claimant's hand related symptoms are due to carpal tunnel syndrome.

29. During Dr. Castro's testimony a clarification was made regarding two medical records he referenced in his IME report as occurring in 2017. Specifically, medical records identified as June 20, 2017 and September 21, 2017, were in fact records from those dates in 2007. Dr. Castro testified that this was a typographical error in his report, and it did not change his ultimate opinion regarding the claimant's cervical spine and the recommended surgery.

30. The claimant testified that his current symptoms differ from those he experienced from his prior injuries. His current symptoms are more severe and are constant. As a result, he has to take medications (including gabapentin). Prior to his 2020 injury, the claimant rode horses virtually every day. Since his injury, he now rides once or twice a month. The claimant explained that he rides at those times because he is not comfortable letting his boss, (a woman in her 70s), ride alone. The claimant wants to undergo the recommended surgery.

31. The ALJ credits the claimant's testimony regarding the nature and onset of his symptoms. The ALJ also credits the medical records and the opinions of PA Jacobs, PA Schanel, PA Kiley, and Dr. Nelson over the contrary opinions of Dr. Castro. The ALJ finds that the claimant has demonstrated that it is more likely than not that he suffered an injury to his cervical spine on July 17, 2020. Specifically, the ALJ finds that the claimant's pre-existing cervical spine condition was aggravated by the July 17, 2020 injury. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that the C4 to C7 ACDF recommended by Dr. Nelson is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the July 17, 2020 injury aggravated the pre-existing condition of the claimant's cervical spine, necessitating treatment. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the C4 to C7 anterior cervical discectomy and fusion (ACDF) recommended by Dr. Nelson is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 17, 2020 work injury. As found, the claimant's testimony, and the opinions of PA Jacobs, PA Schanel, PA Kiley, and Dr. Nelson are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the recommended C4 to C7 anterior cervical discectomy and fusion (ACDF), pursuant to the Colorado Medical Fee Schedule.

Dated July 22, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
Workers' Compensation No.: 4-956-021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In the Matter of the Workers' Compensation Claim of:

[REDACTED],
Claimant,

v.

[REDACTED],
Employer,

and

[REDACTED],
Insurer,
Respondents.

THIS MATTER has come before the undersigned on Respondents' Motion for Summary Judgment.

FINDINGS OF FACT

1. [Redacted] ("Claimant") sustained a work-related injury on July 7, 2014. Liability was admitted and claimant underwent medical treatment until he was placed at maximum medical improvement by Dr. Joseph Morreale on July 10, 2017 at a follow-up Division Independent Medical Examination ("DIME"). *Resps. Ex. A, pp. 6-11.* Pinnacol Assurance filed a Final Admission of Liability ("FAL") on September 5, 2017. *Id., pp. 1-5.*

2. Respondents admitted for maintenance medical treatment in the FAL. *Id.* However, claimant has not received medical treatment from any authorized medical providers of which respondents are aware since being placed at MMI on July 10, 2017. *See Resps. Ex B, pp. 12-13,* ¶3. The last payment made by Pinnacol Assurance for medical treatment rendered to Claimant was a payment made on May 4, 2017 to Concentra Medical Centers for an April 28, 2017 date of service. *Id.* No medical benefits have become due and payable since that time. *Id.* Two other later payments made to Concentra, one on November 3, 2017 for a listed date of service of October 16, 2017, and the second on January 26, 2018 for a listed date of service of January 5, 2018, were for reimbursement of time spent by treating providers responding to inquiries made by representatives

of respondents without corresponding medical treatment rendered to Claimant. *See Id.; see also Resps. Ex. C.* No payments of any kind have been made to Claimant's treating medical providers since that time, nor have any bills been submitted for payment. *Resps. Ex B, pp. 12-13, ¶3.*

3. Claimant filed an Application for Hearing on December 19, 2017, endorsing the issues of overcoming the DIME, permanent partial disability ("PPD") benefits, and challenging an offset respondents had taken against the PPD award. *Resps. Ex. D.* The parties resolved the issues by stipulation, which was granted on September 7, 2018. *Resps. Ex. E.* Pinnacol Assurance issued a check to claimant in the amount of $7,489.59 on September 12, 2018, representing the remaining balance of PPD benefits as per the resolution agreed upon by the parties. *See Id; see also Resps. Ex. B, p. 13, ¶4.*

4. Claimant filed a subsequent Application for Hearing on November 14, 2018, endorsing the issues of petition to reopen, permanent total disability benefits, "impairment rate," and medical benefits. *Resps. Ex. F.* The parties went to hearing on the issues of petition to reopen and medical benefits. Hearing occurred May 24, 2019. Administrative Law Judge Margot W. Jones presided. ALJ Jones issued her *Findings of Facts, Conclusions of Law, and Order* on July 31, 2019, served on the parties on August 2, 2019. *Resps. Ex. G.* ALJ Jones denied and dismissed claimant's request to reopen his claim and his request for medical benefits. *Id. at p. 11.*

5. This claim was thereafter dormant for nearly three years until Claimant filed an Application for Hearing on April 5, 2022, endorsing issues of compensability and permanent total disability benefits. *Resps. Ex. H.* Prehearing Administrative Law Judge Marcus J. Zarlengo struck the Application by Order dated April 25, 2022. *Resps. Ex. I.*

6. Claimant has now filed the instant Application for Hearing on May 10, 2022, endorsing issues of petition to reopen, compensability, and temporary partial disability benefits from July 9, 2014 ongoing. *Resps. Ex. J.* Respondents filed their Response to Application for Hearing on May 23, 2022, endorsing as a defense that Claimant's request to reopen his claim is time-barred by the applicable statute of limitations contained in C.R.S. §§ 8-43-303 (1)& (2). *Resps. Ex. K.*

CONCLUSIONS OF LAW

1. OACRP 17 provides for summary judgment when the pleadings and supporting documents demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to establish that no genuine issue of fact exists. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005).

2. C.R.C.P. 56 applies to motions for summary judgment filed with the Office of Administrative Courts to the extent it is consistent with OACRP 17. *Fera v. ICAO*, 169 P.3d 231 (Colo. App. 2007). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. C.R.C.P. 56; OACRP 17. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Ballesteros v. Westaff, Inc.*, W.C. No. 4-475-838 (ICAO Nov. 24, 2008).

3. A claim may be closed by a "final award" resulting from an admission or order after a contested hearing, and an "award" includes an order that grants or denies benefits. *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994). Unless an "award" of benefits expressly reserves other issues for future determination, the "award" closes the claim and requires the parties to satisfy the reopening requirements of § 8-43-303, C.R.S., before litigation of any further issues. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. 2003); *See Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780, 784 (Colo. App. 1991).

4. Pursuant to § 8-43-303(1), C.R.S., "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition…." Also, § 8-43-303(2)(a), C.R.S., allows an administrative law judge to reopen a claim on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition "at any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable…." Similarly, § 8-43-303(2)(b), C.R.S., allows an administrative law judge to reopen a claim for medical benefits only on the grounds of error, mistake or change in condition "at any time within two years after the date the last medical benefits become due and payable…."

5. Therefore, a petition to reopen a claim on the ground of fraud, overpayment, error, mistake, including mistakes of law, or change in condition is subject to time limitations and must be filed either within six years of the date of injury, or within two years of the last payment of benefits or compensation, on the ground of fraud, overpayment, error, mistake, including mistakes of law, or change in condition. *Eichstedt v. King Soopers*, W.C. No. 4-528-268 (ICAO May 27, 2011) (internal citations omitted). "The time limits set for in § 8-43-303, C.R.S. operate as a statute of limitations, and apply when complications develop directly from the original injury, even if the claimant attempts to classify the condition as a new disability." *Calvert v. Industrial Claim Appeals Office*, 155 P.3d 474, 476 (Colo. App. 2006).

6. Claimant's request to reopen his claim, inclusive of a request for temporary partial disability benefits, is time barred by the applicable statute of limitations in C.R.S. § 8-43-303. Respondents are entitled to a judgment as a matter of law dismissing Claimant's claim for benefits, because Claimant's request to reopen the claim falls outside of any of the permissible reopening timeframes.

7. The combined provisions of §§ 8-43-303(1) & (2), C.R.S., provide three separate timeframes in which a claim may be reopened: (1) within 6 years of the date of injury; (2) within 2 years after the date the last disability benefit becomes due or payable; and (3) within 2 years after the date the last medical benefits become due and payable.

8. Each of the three referenced events in this claim well exceed the permitted timeframe in which a claim can be reopened. The date of injury, July 10, 2014, is nearly 8 years from the date of the May 10, 2022 Application for Hearing in question.

9. The date the last disability benefits became due or payable was via the stipulation approved on September 7, 2018, with associated payment made on September 12, 2018, which is approximately 3 ½ years from the May 10, 2022 Application for Hearing.

10. The date the last medical benefit became due or payable was related to the April 28, 2017, date of service with Concentra Medical Centers, paid on May 4, 2017. No payments for the rendering of medical treatment to Claimant have come due and payable since, which is approximately 5 years from the May 10, 2022 Application for Hearing. Even using the date of the last payment to medical providers for costs unrelated to medical treatment rendered, January 26, 2018, Claimant's May 10, 2022 Application for Hearing and request to reopen the case is nearly 4 ½ years later.

11. Claimant's claim was closed by the FAL filed on September 5, 2017. Claimant must reopen his claim to obtain the pre-MMI benefits he is seeking. Claimant previously attempted to reopen his claim within the applicable limitations period. His claim was denied and dismissed. Three years after the hearing for Claimant's prior reopening attempt, and well after the expiration of the limitations period for reopening a claim, Claimant has filed a new Application for Hearing endorsing issues of petition to reopen and temporary partial disability benefits.[1] Claimant's request to reopen his claim and receive pre-MMI medical benefits is clearly time barred.

12. As found, Claimant's request to reopen his claim and receive pre-MMI medical benefits is time barred. The summary judgment evidence establishes that there is no genuine issue of material fact Claimant's request to reopen his claim is time barred by application of the statute of limitations in § 8-43-303, C.R.S. Respondents are therefore entitled to judgment as a matter of law dismissing Claimant's claim for benefits set forth in his May 10, 2022 Application for Hearing.

ORDER

1. Respondents' motion for summary judgment is hereby granted. Claimant's application for hearing dated May 10, 2022, on the remaining issues of petition to reopen, compensability, and temporary partial disability benefits is hereby denied and dismissed.

2. The hearing which has been set for September 6, 2022 at 1:30 p.m. in Denver is hereby vacated.

3. All other issues and defenses not addressed within this order are preserved for potential future determination.

DATED this 22nd day of July, 2022.

/s/ Glen Goldman

Administrative Law Judge

[1] The endorsement of "compensability" is moot due to the fact that liability has been admitted.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see Section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://colorado.gov/dpa/oac/forms-WC.htm**.

OFFICE OF ADMINISTRATIVE COURTS CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was served upon the following party by email on 7-22-22.

Jeff C. Staudenmayer, Esq.
rs3@rs3legal.com

Mr. Peter Anderson
andersonpeter64@gmail.com

/s/ Fabiola Mendez

ISSUES

I. Whether Claimant proved by a preponderance of the evidence Decedent's death proximately resulted from his industrial injury, entitling Decedent's dependents to death benefits under Section 8-42-115, C.R.S.

II. In the event Claimant proved entitlement to death benefits, determination of Decedent's average weekly wage ("AWW").

III. In the event Claimant proved entitlement to death benefits, whether Respondents are entitled to an offset for social security benefits for death benefits owed to Claimant.

PROCEDURAL MATTERS

1. Prior to the hearing, Respondents submitted a motion for summary judgment, and Claimant submitted a response. The ALJ did not rule on the motion prior to the hearing, and determined that she would address the motion in her Findings of Facts, Conclusions of Law, and Order.

2. The parties stipulated that Decedent never requested authorization for his third lumbar spine surgery, and Claimant has not requested payment of medical benefits.

The Parties stipulated that no medical treatment from the date of the arbitration (April of 2017) forward was paid for under the Decedent's workers' compensation claim. Moreover, the parties stipulated that the decedent made no request for authorization for any medical treatment after April of 2017.

FINDINGS OF FACT

1. Decedent sustained an admitted industrial injury to his low back on September 8, 2011.

2. Decedent underwent conservative treatment and was initially placed at maximum medical improvement ("MMI") on October 8, 2012 with a 10% whole person impairment rating.

3. Decedent continued to experience issues with his back and subsequently reopened his worker's compensation claim.

4. On February 26, 2014, Decedent underwent a L4-5, L5-S1 transforaminal lumbar interbody fusion and a posterior fusion at L4-5, L5-S1, performed by Donald S. Corenman, M.D. The surgery was to treat L4-5 and L5-S1 isolated disk resorption and radiculopathy. During this procedure Dr. Corenman placed a cage around the L4-5 and L5-S1 fusion. Decedent was removed from work completely and never returned to work.

5. Decedent experienced continued back and increased left leg pain after the February 2014 surgery. Imaging revealed continued compression of the nerve root.

6. Decedent subsequently underwent a second surgery with Dr. Corenman on January 30, 2015 to redo the decompression of the L5 and S1, as well as to remove a portion of the extruded cage.

7. Decedent's pain continued following the second surgery. Decedent underwent additional treatment, including medial branch blocks, injections, physical therapy and medication.

8. On July 8, 2015, Allison Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall noted Decedent continued to experience ongoing left lower extremity radicular complaints. She opined that Decedent was approaching MMI. Dr. Fall remarked that her only concern was Decedent's lack of a good pain management regimen, given that he did not have one provider providing pain management and was not on an opioid agreement with routine screening in accordance with the Medical Treatment Guidelines. Dr. Fall noted that Decedent reported he was obtaining opioid medications from multiple providers. Dr. Fall opined that Decedent was taking a significant amount of short-acting opioid medications, and that it would be preferable for him to be on long-acting medications.

9. On May 17, 2016, Michael Janssen, D.O. conducted a 24-month Division Independent Medical Examination ("DIME"). Dr. Janssen opined that Decedent reached MMI on April 30, 2015 with 16% whole person permanent impairment. He concluded that additional injections, facet blocks and diagnostic studies that had occurred since such date were considered maintenance care. Dr. Janssen noted that the Decedent was on a "substantial amount" of narcotics, including Oxycontin, oxycodone and Lyrica. He recommended Decedent detoxify from the narcotics, which Dr. Janssen stated did not appear to increase Decedent's overall function at the time. He recommended Decedent undergo maintenance care of injections and medication for three to five months. Dr. Janssen noted Decedent did continue to have some neuropathic pain and symptomatology secondary to the extruded cage that migrated and, at some point in the future, he may be considered a candidate for a spinal cord stimulator.

10. On June 22, 2016, Dr. Fall performed a medical record review, including Dr. Janssen's DIME report. Dr. Fall opined that Decedent was at MMI with no further indication for additional interventions. She remarked that Decedent remained on a high level of opioids.

11. On July 5, 2016, Respondents filed a Final Admission of Liability ("FAL") reflecting an AWW of $1,387.80. Claimant was paid temporary indemnity benefits and permanent partial disability benefits based on that AWW.

12. On April 7, 2017, then-counsel for Decedent and Respondents jointly filed an Arbitration Agreement and Stipulated Summary and Facts, agreeing to participate in binding arbitration pursuant to Section 8-43-206.5, C.R.S. The parties identified the issue for arbitration as "medical benefits, and specifically what past, present and future treatment is reasonable, necessary, and related to the work injury." (R. Ex. B, p. 8).

13. On April 3, 2017, Decedent presented to Bruce Lippman, M.D. at Glenwood Medical Associates, who noted Decedent entered into a short-term pain agreement with him, and was to undergo a urine screening. Dr. Lippman prescribed Lyrica 150mg, four times per day for thirty days, Cymbalta 60mg, once per day for 30 days, Oxycodone HCI ER 30mg, twice a day for thirty days, and Oxycodone HCI 5MG, 1 tab 4 times daily for thirty days.

14. The parties' attorneys attended an arbitration hearing before ALJ Thomas DeMarino on April 10, 2017. Decedent was not in attendance.

15. ALJ DeMarino issued an Amended Arbitration Order on May 1, 2017. ALJ DeMarino based his determinations on the Stipulated Findings of Fact presented by the parties, Dr. Janssen's DIME report, and Dr. Fall's IME reports. ALJ DeMarino concluded that Decedent reached MMI for his September 8, 2011 occupational injury on April 30, 2015, and that his maintenance care ended five months after his date of MMI, or on September 30, 2015. ALJ DeMarino ordered that all medical treatment after September 30, 2015 is not reasonable or necessary as a result of the occupational injury on September 8, 2011, nor is it related to the occupational injury occurring September 8, 2011. ALJ DeMarino further ordered that Respondents were not liable to pay any medical treatment expense after September 30, 2015; including, without limitation, OxyContin, oxycodone, and Lyrica, and any other opioid medication.

16. On August 1, 2017, Decedent and Respondents entered into a voluntary settlement agreement settling Decedent's worker's compensation claim on a full and final basis for $34,999. As part of this settlement, Decedent agreed that he "rejects, waives, and forever gives up the right to claim all compensation and benefits to which [Decedent] might be entitled for each injury . . . claimed here, including: . . . (h) Medical, surgical, hospital, and all other health care benefits . . ." (R. Ex. C, pp. 20-21).

17. The Division of Workers' Compensation approved the settlement on August 4, 2017.

18. At no time was Claimant or E.G. party to the arbitration or settlement.

19. Decedent continued to experience low back and left lower extremity symptoms related to his work injury for which he continued to treat with Dr. Lippman. Decedent did

not make any requests to Respondents for authorization of treatment after April 2017. All medical treatment from the date of the arbitration, April 10, 2017 forward, was not paid for under Decedent's workers' compensation claim.

20. On October 17, 2017, Dr. Lippman noted that Decedent's pain medications were taken over by a pain specialist in Denver. Decedent's medications included Oxycodone 5mg oral tablet 1 tab, 4 times per day for 30 days, and Oxycodone ER 30mg Oral Tablet ER 12 Hour abuse-deterrent twice a day for 30 days.

21. Decedent presented to Dr. Lippman on January 15, 2018, reporting that he can no longer see his pain management doctor in Denver, and that he needs a new referral as well as pain medication refills. Decedent was prescribed increased dosages of narcotics, including Oxycodone HCI 10mg, twice per day for 30 days and Oxycodone HCI ER 30mg, three times per day.

22. On January 19, 2018, Decedent returned to Dr. Lippman to discuss medications. Dr. Lippman noted he last prescribed Oxycodone 10mg, but that Decedent reported he had taken Percocet 10/325 and thought this worked better. Dr. Lippman opined that, because he already has a filled prescription for Oxycodone 10mg, he will continue with that and then in a month he can have Percocet filled rather than Oxycodone alone.

23. Decedent again saw Dr. Lippman on March 2, 2018, reporting that he was probably going to go off CIGNA and is going to have to find somebody other than Dr. Carley to prescribe his narcotics, and that he will need a referral for that in addition to short-term prescriptions pending the determination of a new pain management specialist.

24. On March 13, 2018, Decedent presented to Dr. Lippman to discuss symptoms and medications. Dr. Lippman noted that Decedent was on high doses of narcotics and that there is a trend toward moving down from high doses so that this may happen in the future.

25. Chad Prusmack, M.D. at Rocky Mountain Spine Clinic assumed care for Decedent from Dr. Corenman. Decedent first presented to Dr. Prusmack on May 21, 2018. Dr. Prusmack noted Decedent's back and left leg symptoms had not improved after undergoing two surgeries as a result of a work-related incident. Dr. Prusmack reviewed Decedent's CT scan and MRI, noting evidence of significant left-sided lateral recess ectopic bone overgrowth encroaching on the descending L5 nerve roots at L4-5, causing foraminal stenosis and significant excessive L5-S1 ectopic bone growth. He further noted good decompression posteriorly on the MRI but significant moderate foraminal stenosis at L4-5 and L5-S1, as well as significant encroachment on the L5 nerve roots. Dr. Prusmack further noted that inspection of the L5-S1 area showed that there is pseudarthrosis, most likely at L5-S1. Dr. Prusmack assessed Decedent with significant persistent stenosis due to ectopic bone formation; epidural scar causing severe left-sided dysfunction, radiculopathy and footdrop; and pseudoarthrosis potentially at L5-S1. Dr. Prusmack noted Decedent was on 55mg of Oxycodone per day. He recommended Decedent undergo surgery.

26. On August 14, 2018, Dr. Lippman stated,

> [Decedent] has a done a good job dropping by a large amount of mEq of morphine a day, and we will go ahead and hold him at the current dose of 90mEq of morphine a day, up his Lyrica to 50 milligrams twice a day, and follow up in two weeks with the intention of trying to taper him down a little bit further on his Oxycodone and possibly go up on his Lyrica dose.
>
> (Cl. Ex. 14, p.159).

27. Decedent presented to Dr. Lippman on August 29, 2018 to discuss pain management. Dr. Lippman noted that Decedent reported Oxycodone 30mg along with Percocet 10mg in the morning worked well, but that he did not get much release from Oxycodone 20mg extended release in the afternoon. Dr. Lippman noted that Decedent's current dose of oxycodone was 90mg equivalents of morphine, which he remarked was a "significant drop" from the 180mg equivalents Decedent was taking just two months prior. Decedent reported that he was a little leery of reducing medication any further at that point.

28. On October 24, 2018, Decedent presented to Elizabeth Jackson, PA, presenting for a prescription refill. PA Jackson only provided a one-week refill of medications due to a follow-up the following week. Decedent was to take Olanzapine 5mg, 1PO once a day for 30 days, Percocet 5-325mg tablet, once a day for 7 days, and there are two different 7 day prescriptions for Oxycodone HCI ER 20 and 30mg tablets, once a day for 7 days.

29. On October 29, 2018, Decedent returned to Dr. Lippman reporting worsening low back pain. Decedent reported that he felt he needed more oxycodone for break through pain. Dr. Lippman prescribed Decedent Oxycodone HCI ER 20mg, twice a day for 30 days, and Percocet 7.5-325mg, twice a day for 30 days.

30. Decedent returned to Dr. Prusmack on December 17, 2018. Dr. Prusmack noted that new CT scans, MRI and x-rays showed pseudoarthrosis at L5-S1, as well as ectopic bone causing stenosis with significant peridural fibrosis. He recommended Decedent undergo a left re-exploration, L5-S1 laminectomy with decompression of the L5 nerve roots, posterolateral fusion L5-S1 with re-instrumentation of L5-S1.

31. On January 17, 2019, Dr. Prusmack performed the following surgery on Decedent: (1) Re-exploration left L5-S1 laminectomy for decompression of nerve roots, stenosis, and ectopic bone; (2) left transfacet decompression of nerve roots, L5-S1; (3) posterolateral arthrodesis using BMP and iliac autograft, L4-5, L5-S1; (4) bilateral segmental instrumentation using Globus percutaneous pedicle screws and rods, L4-5; and (5) harvesting of iliac autograft.

32. On January 30, 2019, Decedent spoke via telephone with David Whatmore MMS, PAC, of Rocky Mountain Spine Clinic, P.C., for his first postoperative visit. Decedent's

medications at the time of this appointment included, *inter alia,* OxyContin 30mg three times a day and oxycodone 10mg three times a day. PAC Whatmore documented,

> We talked extensively about his pain control. This is a patient who has been on OxyContin and oxycodone for several years and does have chronic pain management up in Eagle. The patient feels though he has been getting a rash possibly due to some adverse reaction to the oxycodone although he has been on this for several years. He has also been taking Robaxin that we prescribed for him. . .
>
> PLAN: Based on the severity of the back pain being his primary complaint and difficulty sleeping, we will switch him to valium 5 mg with 1 tablet every 4 to 6 hours as needed for back pain and muscle spasms. We will attempt to switch him down to Norco although he understands that this may be a transition over time due to his current level of oxycodone use. We will also prescribe a course of oral steroids and see if this helps reduce the inflammation in the back to allow him to have better pain control. The patient will be recommended to start physical therapy next week once his pain is a little bit better controlled and he is sleeping better.

(Cl. Ex. 15, pp. 212-213).

33. On February 17, 2019, Claimant found Decedent unresponsive after Decedent went to take a nap. Eagle County Paramedic Services ("EMS") were called to the scene and attempted resuscitation, to no avail. Decedent was pronounced dead. The EMS report notes Decedent's family reported that Decedent had been using hydromorphone for pain control and had a "possible" history of prescription drug and alcohol abuse.

34. Claimant testified that Decedent did not drink and that she was unaware of anyone making such statement to the EMS. She further testified that she never saw Decedent take medication that he was not prescribed, nor in a non-prescribed amount.

35. Kelly C. Lear, M.D. performed an autopsy of Decedent on March 21, 2019. Dr. Lear concluded that Decedent died of mixed drug intoxication including the following: morphine, hydromorphone, and diazepam. She noted other significant conditions included chronic back pain and severe hypertensive cardiovascular disease. She stated,

> Toxicologic analyses of body fluid obtained at autopsy revealed a mildly elevated concentration of morphine, and hydromorphone and diazepam/nordiazepam within therapeutic ranges. Although he likely had some established tolerance to opioids, particularly oxycodone, he had not been on chronic morphine maintenance; this in combination with a new second opioid (hydromorphone) and benzodiazepine (diazepam) is therefore felt to be significant. His heart was also markedly enlarged, and therefore he was also susceptible to fatal cardia arrhythmia.

(R. Ex. E, p. 63).

36. Decedent's Certificate of Death issued on April 29, 2019 listed his cause of death as mixed drug intoxication. Chronic back pain and hypertensive cardiovascular disease were listed as other significant conditions contributing to but not resulting in the underlying cause of Decedent's death.

37. On September 30, 2020, Claimant filed a Dependent's Notice and Claim for Compensation, listing an injury date of September 8, 2011.

38. Dr. Prusmack performed a medical record review and issued a report on May 20, 2021. Dr. Prusmack opined that all medical care Decedent received subsequent to September 8, 2011 that was pain or neurologically-related (including back pain, leg pain, weakness and sensory loss) was medically necessary and related to Decedent's September 8, 2011 work injury, including the February 2014 and January 2015 surgeries, Dr. Prusmack's January 2019 surgery, and all non-surgical conservative medical treatment. He specifically opined that any surgical or medical complications sustained by Decedent during his treatment for his back condition after September 8, 2011 are related to the work injury, including the reoperation and the mixed drug intoxication that lead to Decedent's death.

39. Dr. Prusmack noted that Decedent developed severe low back and leg pain after the work injury and underwent extensive and appropriate conservative care that did not alleviate Decedent's back pain and underwent two surgeries medically necessary to relieve the effects caused by the injury. Dr. Prusmack explained that he proceeded with surgery in January 2019 because Decedent failed to improve from the 2015 surgery and continued to have severe back and left leg pain, as well as left leg weakness and numbness. He noted that findings on CT scans included excessive "ectopic bone" which is caused by the product used in the first surgery called BMP. This product can cause excessive delayed bone growth which surrounds and injures the nerve roots. He further explained that, a CT scan also suggested that the L5-S1 had not fused and Decedent developed pseudarthrosis. Dr. Prusmack noted that each of these issues are within the accepted complications of lumbar surgery and because the initial surgery was related to the injury, the treatments and complications are therefore related to the injury. Dr. Prusmack determined that all of the drugs in Decedent's system when he died, in accordance with the autopsy and toxicology reports, were prescribed as a part of relieving Decedent's pain following surgery, and that combination of drugs caused Decedent's death.

40. Dr. Prusmack provided testimony at a post-hearing deposition. Dr. Prusmack testified as an expert in neurosurgery on behalf of Claimant. Dr. Prusmack explained that "pseudarthrosis" means a lack of fusion, and that the lack of fusion seen on Decedent's CT was at L4-5 and L5-S1, which had, supposedly, been fused in Decedent's 2014 and 2015 surgeries. Dr. Prusmack further explained that approximately eight percent of fusion surgeries involving two levels run the risk of not fusing, which then results in continued pain, continued bone spur growth, and stenosis. Dr. Prusmack testified that Decedent

experienced these ramifications as a result of the his 2014 and 2015 surgeries. He testified that imaging his surgery revealed Decedent had not fused from the prior surgeries. Dr. Prusmack explained that items moving around that should be fused caused more bone to be grown around the nerves, which is called stenosis. Further, if the bone does not grow at the fusion, but rather grows on the nerves, that is called ectopic bone. He testified that both of these conditions could be Decedent's surgery and CT scan. He further testified that ectopic bone would cause pain or additional pain in the situation of a lack of a fusion.

41. Dr. Prusmack testified that, at the time Decedent presented to him in 2018, Decedent was on 30 milligrams of Oxycontin three times a day, and 10 milligrams of Percocet three times a day for his pain management. Dr. Prusmack stated that the dosages were not untypical for patients who had the type of pain Decedent had. Dr. Prusmack explained that one of the major elements of narcotics is that people grow a tolerance to them, which means they get less effective at higher doses as time goes on. There are a high-moderate range of patients that Dr. Prusmack sees that have chronic pain and have needed to be on the narcotics long enough to grow both a dependence and a tolerance. Dr. Prusmack explained that when there is a patient on a long-acting narcotic, Oxycontin, and a short-acting narcotic, Percocet, it means that the patient is tolerant-dependent and has been on the pain medications for a protracted period of time. Dr. Prusmack stated that "surprise" or "alarm" would not be appropriate terminology when seeing the doses that Decedent was taking but, rather, it provided him with context that Decedent had been in pain for a very long time. Dr. Prusmack testified that although Decedent was on a higher dose than most chronic pain patients, he has seen higher doses; more than anything, the doses showed Dr. Prusmack that Decedent was in a very difficult pain syndrome that obviously multiple doctors have failed to help. Dr. Prusmack testified that when seeing bone spur growth after an attempted fusion, the type of medication regimen that Decedent was on was appropriate, and that after the second failed surgery, Decedent would not have been able to address his pain without the narcotics.

42. Dr. Prusmack further testified that, per Dr. Lippman's August 14, 2018 medical note, Decedent was significantly reducing his narcotics. He explained that Lyrica is used for nerve pain and is not a narcotic. Based on this note, Dr. Prusmack determined that Dr. Lippman was doing an effective job of decreasing the narcotics, and exchanging them for medication less risk and less side effects. Dr. Prusmack testified that the CDC makes recommendations and suggestions, but does not take into consideration the context for this particular case. He stated that in an ideal world, everyone would detox off of narcotics, but that is not feasible.

43. Dr. Prusmack explained that his office changed Decedent's medication to a more effective anti-spasmatic drug (Valium) and tried to downgrade Decedent's narcotics to a milder morphine equivalent (Norco). He testified that the medications listed in Decedent's autopsy report were medications prescribed by doctors and consistent to his recently changed prescriptions. He testified that there was nothing out of the ordinary in the type of prescription or recommendation, and that the amounts and combinations used were

extremely common and that he would not have foresaw the eventual outcome. Dr. Prusmack further testified that all of the drugs prescribed to Decedent in his system at the time he died were the result of his prior failed surgeries and/or the surgery he performed. He explained CDC are guidelines that don't take into account every specific case. Ideal world would want everyone to detox off of narcotics, but just not feasible and is very hard to do. Dr. Prusmack explained the difference between short-acting and long-acting opioids. He testified that the long-acting medicines Decedent was on was indicated for chronic pain.

44. Dr. Fall testified by deposition on behalf of Respondents as expert in physical medicine and rehabilitation. She agreed with Dr. Janssen's determination in May 2016 that Decedent should consider detoxification as he was on a substantial amount of narcotics that did not appear to increase his overall function. Dr. Fall explained that opioid medication has inherent risks and that Decedent was on high doses without documented associated improvement or functional benefit. She testified that the risk outweighed the benefits in Decedent's case and medication should not have been continued. Dr. Fall stated that her opinion is consistent with CDC guidelines. She explained that in 2017 and 2018, the dose of OxyContin had gotten up to 30mg three times a day and 30 mgs from Percocet. As it got closer to surgery, Dr. Lippman decreased the meds to total of 55 mg of oxycodone per day up to time of surgery. She explained this went from 180 MME to 90 MME to 83 MME, which is above the CDC guidelines.

45. Dr. Fall testified that she did not review the lumbar x-rays or CT scan but would go by Dr. Prusmack's expertise regarding the failed fusion. She stated that the failed fusion did not mean Decedent was required to be on narcotics above what is recommended by the CDC because there is no direct correlation between anatomical pathology and the need for pain medications. Dr. Fall testified that she has seen patients with pseudarthrosis that did not have pain and did not take medications, while some have been on very high levels of opioid medications even in the case of no pathology. Dr. Fall opined that the narcotics Decedent was taking at time of death were in excess and not medically necessary. She testified that the medications were not indicated merely because Decedent had surgery and were not indicated for his chronic pain. Dr. Fall explained that certain medications like Benzodiazepine, Valium or Diazepam can interact with opioids and can have greater risk of respiratory failure and death when used together.

46. Dr. Fall testified that, at the time of her follow-up report, Decedent was set up with a pain management specialist, Dr. Sohn, and was having urine drug screens and being switched to a long-acting opioid medication. She stated that the ectopic bone growth that Decedent experienced was an ongoing process and could have started after the second surgery, or even as early as after the first surgery. She agreed with Dr. Prusmack that the pseudarthrosis was "possibly" the pain generator, and if the pseudarthrosis was the pain generator, then an additional revision surgery would be necessary.

47. Claimant testified that, at the time of the settlement, Decedent's pain was ongoing and subsequently worsened. Her belief was that Decedent required the medication to

have any quality of life. She testified that, by the end of 2017, there were days that Decedent could not function due to his symptoms.

48. At the time of death, Decedent left behind his wife, Claimant, who he had been married to since July 14, 2009; as well as four children. Only one of the children, E.G., was under 18 at the time of Decedent's passing. E.G.'s date of birth is August 11, 2001. On the date Decedent died, E.G. was 17 years old and living with Decedent and Claimant. E.G. continued to live with Claimant through the age of 18. He received social security benefits when he was 17 years old as a result of the death of his father. Decedent did not provide any substantial support to the three older children who were between the ages of 18 and 22 at his time of death.

49. Claimant proved by a preponderance of the evidence that Decedent's death was the proximate result of his September 2011 work injury.

50. Claimant and E.G. are found to be dependents of Decedent. E.G. was a dependent until he reached the age of 18 following Decedent's death.

51. Decedent's wage records indicate Decedent's earning varied by week based on the amount of overtime Decedent worked. The ALJ finds that a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,387.80, based on 51 weeks of pay leading up to the work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Summary Judgment

Respondents argue that Claimant should not be able to pursue this claim as Decedent settled his claim on a full and final basis in 2017.

It is undisputed Decedent entered into a full and final settlement of his workers' compensation claim in August 2017, which served to close his claim on a full and final basis. Pursuant to the settlement agreement and §8-42-204(1), C.R.S., such settlement shall not be reopened other than on the ground of fraud or mutual mistake of material fact. Here, Claimant is not alleging fraud or mutual mistake of material fact with respect to Decedent's claim. Claimant is also not attempting to reopen Decedent's claim or appeal ALJ DeMarino's Arbitration Order. Instead, Claimant has filed a separate claim for death benefits as a dependent.

Pursuant to the Rule of Independence and the Act, Decedent's actions in settlement, compromise, or release under the Act do not legally bar the rights of Decedent's dependents to bring and pursue a separate independent death claim. See In re Claim of Clubb, 033115 COWC, 4-952-696-01 (Colorado Workers' Compensation Decisions, 2015), Larson's Workers' Compensation Law, § 98.01 [2], "The settlement, compromise, or release by the deceased of his or her rights under the Act cannot bar the statutory rights of any dependents, since these rights are independently created by statute."

Section 8-41-504, C.R.S. provides, "No dependent of an injured employee, during the life of the employee, shall be deemed a party interest to any proceeding by said employee for the enforcement of any claim for compensation nor with respect to any settlement thereof by said employee."

"Disability benefits awarded to a worker and death benefits awarded a worker's dependents are entirely independent of one another." *Richards v. Richards & Richards*, 664 P.2d 254, 255 (Colo. App. 1983). "Under th[e] rule [of independence], death benefits provided to dependents, and wage loss and disability benefits provided to an injured

worker, are considered to create distinct rights and compensate for separate losses. *City of Loveland Police Dep't v. Indus. Claim Appeals Off.*, 141 P.3d 943, 954 (Colo. App. 2006). For the past fifty years, the Colorado courts have consistently held that the "the settlement, compromise, or release by the deceased of his rights under the Act does not bar the rights of the dependents since they are independently created by statute." *Richards*, 664 P.2d at 255 (emphasis added); *Hampton's Claimants v. Director of Division of Labor & Empl.,* 31 500 P.3 1186, 1188 (Colo. App. 1972); *Clubb v. Re Monks*, W.C. Nos. 4-952-696-01 & 3-850-643, *4 (ICAO Dec. 24, 2014) (claimant does not have standing to attack the settlement for the reason that she is not a party to the settlement agreement and that agreement does not affect her claim for death benefits).

Respondents further argue that Claimant's death benefits claim is subject to the arbitration between Decedent and Respondents, contending that ALJ DeMarino's definitively ordered that Respondents are not liable for any medical treatment after September 30, 2015, including OxyContin, oxycodone, and Lyrica, or any opioid medication, as he found such treatment not reasonable, necessary or related to Decedent's work injury. Respondents contend that ALJ DeMarino's binding Arbitration Order relating to reasonably necessary medical treatment absolves Respondents of any liability for the cause of the Deceased's death and entitles Respondents to judgment as a matter of law.

The ALJ disagrees, as the Act and the Rule of Independence again applies. C.R.S. § 8-43-206.5 provides that "Any arbitration award pursuant to this section shall be binding on the parties, and no other procedure . . . shall be available to the parties for the further review of such award." Claimant was not a party to the arbitration, thus, the arbitration is not binding on Claimant's claim for death benefits in this case.

Summary Judgment is a drastic remedy and is not warranted unless the moving party demonstrates that there is no genuine dispute to material fact and it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987).

Respondents failed to prove there is no genuine dispute to material fact and they are entitled to judgment as a matter of law.

Death Benefits

Respondents further contend that Claimant's claim fails because Decedent's death was the result of unauthorized medical treatment that was not reasonably necessary or related to his work injury, as determined by the Amended Arbitration Order and Settlement Agreement.

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question

of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

When a claim is denied and medical treatment is not offered by employer, the claimant may choose his own medical provider. After proving compensability the provider will be considered an authorized treating physician and his charges compensable. However, if the claimant changes to another physician for non-medical reasons before compensability has been determined, he is still required by §8-43-404(10) to notify the employer in writing so that the employer may designate a new treating physician. The failure of the claimant to provide notice renders the treatment by the subsequent physician unauthorized. *Rush v. Enterprise Leasing Company*, WC 5-081-615 (ICAO, Sept. 6, 2019).

As discussed above, pursuant to the Act and the Rule of Independence, Claimant's claim is a separate claim from that of Decedent. Thus, while the Amended Arbitration Order finding no further treatment reasonable, necessary or related to Decedent's work injury can be taken into consideration with respect to other evidence presented, it is not dispositive for purposes of Claimant's claim. Claimant is not requesting authorization or payment of treatment Decedent underwent after closure of his claim. More importantly, Section 8-42-115, C.R.S does not require that the injured worker, at the time of death, be treated by an authorized provider.

Section 8-42-115, C.R.S. provides that, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. For a death to proximately result from a compensable injury or occupational disease, there must be a nexus between the death and the injury or disease. *Subsequent Inj. Fund v. Indus. Claim Appeals Off.*, 131 P.3d 1224, 1228 (Colo. App. 2006). With regard to the sufficiency of a nexus between an injury and a disability, a division of this court has held that an injury must be "significant" and that there must be a direct causal relationship between the injury and the resulting disability. *Subsequent Inj. Fund v. Indus. Claim Appeals Off.*, supra; *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo.App.1986).

Although ALJ DeMarino previously determined no further treatment was reasonable, necessary and related to Decedent's work injury, his determination was based on the determinations of Dr. Janssen and Dr. Fall which were based on the circumstances and conditions that existed at the time. Although Decedent's condition continued and worsened after closure of his claim, he was unable to reopen his claim for additional treatment due to the Settlement Agreement. The medical records indicate that Decedent's ongoing and worsening symptoms and need for treatment was the result of result of his work injury and failed surgeries prior to being placed at MMI.

Prescription medication, including opioids, were prescribed to Decedent both during and after closure of his claim for pain management as a result of the work injury. Decedent was participating in chronic pain management and Decedent and his physicians were attempting to decrease his amount of narcotics after closure of his claim. In August 2018, Dr. Lippman noted there had been a significant drop in Decedent's amount of narcotics and that Decedent had been dropping his morphine dosage and attempting to taper on Oxycodone. Dr. Prusmack credibly opined that the high dose of long-acting narcotic of Oxycontin, and a short-acting narcotic of Percocet, were appropriate to help mitigate Decedent's pain.

It was subsequently determined, as credibly explained by Dr. Prusmack, that Decedent's spine did not fuse from the second surgery. This resulted in Decedent developing pseudarthrosis, ectopic bone growth, and stenosis with corresponding additional back and leg pain. Dr. Prusmack credibly opined that these conditions and symptoms were the result of Decedent's work injury and failed surgeries. Due to Claimant's condition, Dr. Prusmack determined a third surgery was required to relieve the effects of the failed fusion, with the goal of reducing Decedent's pain and allowing Decedent to wean of narcotic medications. As Dr. Prusmack performed the third surgery to treat the complications from the second lumbar surgery, the need for the third surgery was proximately caused by Decedent's initial work-related injury.

The medical records indicate Decedent experienced improvement in nerve pain after the third surgery. Dr. Prusmack credibly explained that, due to Decedent's lessened radicular symptoms and expected post-operative back pain, PA Whatmore began to wean Decedent off of opioid medication and transition him on to Valium, as well as Norco, which has a milder morphine equivalent, for his back pain and muscle spasms. Dr. Prusmack

credibly opined that the medications and doses Decedent was taking, as well as the combination of those medications, were common and appropriate. Decedent died one month after undergoing the third surgery. The coroner concluded that Decedent's death was the result of mixed drug intoxication. Dr. Prusmack credibly opined that the drugs present in Decedent's system at the time of death were drugs that were prescribed to Decedent as a result of the industrial injury and subsequent surgeries.

It is undisputed Decedent was on high doses of opioid medication. Dr. Prusmack credibly testified that, while Decedent's dosages were in excess of the CDC recommendations, they were appropriate for Decedent, as the CDC guidelines apply on a case-by-case basis. Here, the totality of the evidence establishes a significant nexus between Decedent's death and his work injury. Decedent underwent treatment specifically for conditions that resulted from his work injury and failed surgeries. Decedent was taking medication as prescribed as related to this treatment, which resulted in his death. There is no evidence of any intervening event or other direct cause of death to indicate Decedent's work injury was not a consequential causative factor in his death. The preponderant evidence establishes that Decedent's death proximately resulted from his September 8, 2011 work injury.

Dependents

A person is presumed to be wholly dependent if they are a widow or a minor child of the deceased under the age of eighteen years. § 8-41-501(1)(a)&(b), C.R.S.

Where one or more dependent is entitled to receive a decedent's benefits, the benefits are to be apportioned between such dependents in a "just and equitable" manner. § 8-42-121, C.R.S.

The preponderant evidence establishes that, at the time of Decedent's death, Claimant was married to Decedent and E.G. was a minor child for whom Decedent recognized and financially supported. As the widow and son of Decedent, Claimant and E.G., respectively, are dependents of Decedent and are entitled to Decedent's death benefits. As E.G. was a dependent of Decedent until he reached the age of eighteen (18) following Decedent's death, he is entitled to death benefits for such time period.

The ALJ apportions Decedent's death benefits 50% to Claimant and 50% to Decedent's son, E.G., until such time E.G. reached 18 years of age. Subsequently, the death benefits are apportioned 100% to Claimant.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a

fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Section 8-42-114, C.R.S. provides, that dependents entitled to death benefits shall receive sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

Claimant argues for an AWW of $1,518.29 (based on 12 weeks of pay periods from 6/11/2011-9/3/2011, while Respondents argue for an AWW of $1,361.10 (based on a 53 weeks of pay periods).

As found, the wage records indicate the number of hours of overtime Decedent worked varied weekly, thus resulting in varied weekly earnings. No evidence was offered indicating Decedent received a pay raise or some permanent increase in overtime hours around the time of the work injury. Accordingly, the ALJ concludes a fair approximation of Decedent's wage loss and diminished earning capacity is an AWW of $1,387.80, based on the 51-week pay period leading up to Decedent's work injury.

As E.G. received social security benefits when he was seventeen (17) years old, those benefits may be offset under 8-42-103(c)(II).

ORDER

1. Respondents' Motion for Summary Judgment is denied.

2. Decedent's death was the proximate result of his work injury.

3. Claimant and E.G. are dependents of Decedent and entitled to Decedent's death benefits.

4. Decedent's death benefits are apportioned 50% to Claimant and 50% to E.G., until such time E.G. reached 18 years of age and ceased being a dependent. After such time the death benefits are apportioned 100% to Claimant.

5. Respondents are entitled to an offset for social security benefits paid to E.G. out of the portion of death benefits paid to E.G. only.

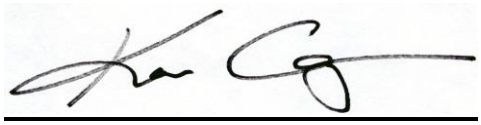
6. Decedent's AWW was $1,387.80.

7. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Is Claimant entitled to TTD benefits commencing November 6, 2020?
- Did Respondent prove TTD was properly terminated on November 5, 2020 because Claimant was put at MMI by an authorized treating physician?
- Did Respondent prove Claimant was released to regular employment by the attending physician?
- Did Claimant prove entitlement to a general award of reasonably necessary medical treatment for his compensable injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Corrections Officer.

2. In the first week of October 2020, Claimant began experiencing flu-like symptoms. He tested positive for COVID-19 on October 8, 2020.

3. Claimant quarantined at home for several weeks after receiving the positive test result.

4. Claimant's initial respiratory symptoms improved by the end of October 2020, but he continued to struggle with other symptoms including conjunctivitis, photophobia, and progressive "brain fog." He received ongoing treatment from his personal providers.

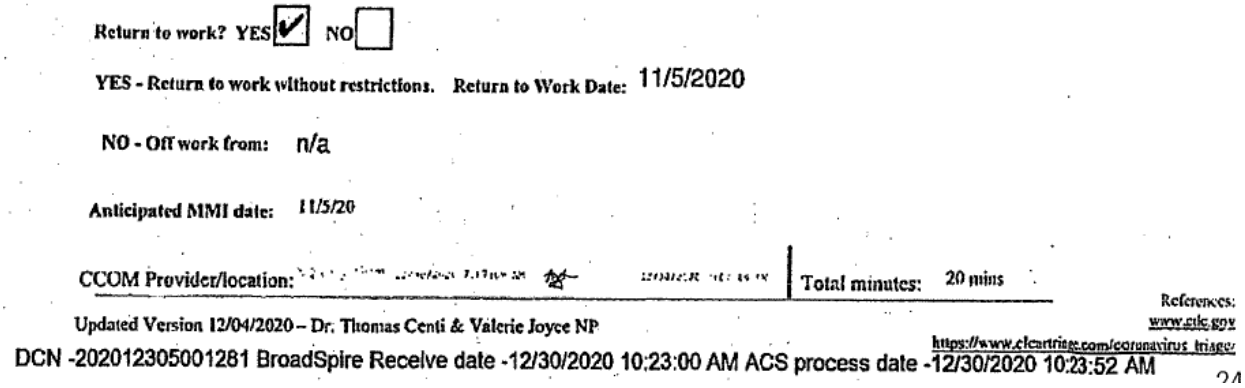
5. On December 15, 2020, Claimant requested an appointment with his PCP to discuss his residual symptoms and to complete paperwork for Short Term Disability (STD) benefits. Claimant described persistent "COVID brain fog," manifested by difficulties with attention, concentration, and memory.

6. Claimant saw PA Becky Kueter on December 17, 2020. Ms. Kueter documented multiple ongoing symptoms since contracting COVID, including headache, myalgias, conjunctivitis, and memory issues. Claimant told Ms. Kueter, "He does not feel safe going back to work" in a correctional setting. Ms. Kueter ordered blood work and a brainstem MRI, and referred Claimant for psychological and neurological evaluations.

7. On December 22, 2020, Claimant's wife (Ms. [Redacted, hereinafter Ms. M]) emailed Employer's HR department requesting assistance because Claimant was still having medical issues and "we don't know what to do."

8. There is no persuasive evidence Employer responded to Ms. M's email. However, on December 29, 2020, Claimant was contacted by Valerie Joyce, FNP at CCOM for a telehealth appointment. Claimant and Ms. M described Claimant's ongoing symptoms, treatment, and work status. Ms. Joyce provided no treatment recommendations and scheduled no follow up.

9. CCOM issued two reports based on the telehealth evaluation. The first report bears the heading "COVID-19 TELEHEALTH APPOINTMENT," and briefly documents the information provided by Claimant and Ms. M. The form also contains the following notations:



Return to work? YES ☑ NO ☐

YES - Return to work without restrictions. Return to Work Date: 11/5/2020

NO - Off work from: n/a

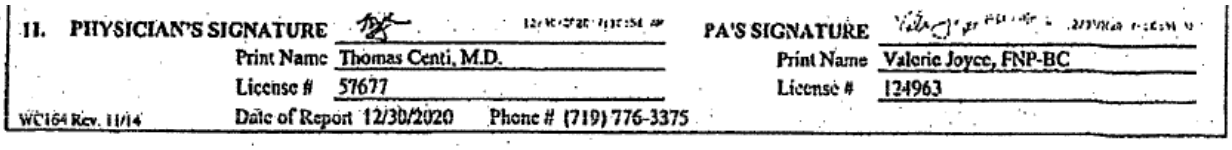
Anticipated MMI date: 11/5/20

CCOM Provider/location: Total minutes: 20 mins

References:
Updated Version 12/04/2020 – Dr. Thomas Centi & Valerie Joyce NP www.cdc.gov
https://www.cleartriage.com/coronavirus_triage/

DCN -202012305001281 BroadSpire Receive date -12/30/2020 10:23:00 AM ACS process date -12/30/2020 10:23:52 AM

10. The second document is a WC164 form dated December 30, 2020, stating Claimant was at MMI and released to regular duty as of November 5, 2020. The form also stated Claimant requires no maintenance care but should continue to follow up with his PCP "for personal health issues." The form contains the following signature block:



11. PHYSICIAN'S SIGNATURE — PA'S SIGNATURE

Print Name: Thomas Centi, M.D. — Print Name: Valerie Joyce, FNP-BC

License #: 57677 — License #: 124963

WC164 Rev. 11/14 Date of Report: 12/30/2020 Phone #: (719) 776-3375

11. Dr. Centi's signature on both documents is an electronic "stamped" signature, rather than handwritten. The signature dates and times are illegible on all versions of exhibits offered into evidence.

12. CCOM sent the forms to Broadspire on December 30, 2020 but gave no copies to Claimant. Claimant was unaware of the content of either report until he received them months later attached to a Final Admission of Liability.

13. On January 20, 2021, the Division issued a letter advising that a Notice of Contest had been filed and the claim was denied.

14. As instructed during the telehealth appointment with Ms. Joyce, Claimant pursued additional evaluation and treatment in 2021 under the direction of his PCP.

15. Claimant had an IME with Dr. Gary Zuehlsdorff at his counsel's request on January 10, 2022. Regarding the December 29, 2020 appointment at CCOM, neither Claimant nor Ms. M were told Claimant could return to work. They were advised to follow up with Claimant's personal physicians for any ongoing issues. Claimant and Ms. M confirmed they spoke only with Ms. Joyce and had no contact with Dr. Centi. Dr. Zuehlsdorff documented that Claimant was approved for short-term disability in November 2020, and started receiving benefits in January 2021. Dr. Zuehlsdorff opined Claimant probably contracted COVID from exposure at work. He diagnosed "long COVID syndrome" and opined Claimant is not at MMI because he requires additional treatment.

16. Claimant saw Dr. Allison Fall on April 14, 2022 for an IME at Respondent's request. Dr. Fall concluded Claimant probably contracted COVID at work. She opined the COVID resolved and none of Claimant's ongoing symptoms are work-related.

17. Respondent filed a Final Admission of Liability (FAL) on May 26, 2022. The FAL stated, "Pursuant to the enclosed medical report by Dr. Centi dated 12/29/2020, claimant has been placed at MMI as of 11/5/2020 with no impairment and no maintenance care requirement."

18. Respondent filed an Amended FAL on June 6, 2020, admitting for TTD benefits from October 8, 2020 through November 5, 2020. The admitted average weekly wage (AWW) is $1,289.19, with a corresponding TTD rate of $859.50. Claimant stipulated to the admitted AWW at the hearing.

19. Claimant has not worked in any capacity since October 8, 2020. Employer paid Claimant's salary through October 2020, but paid no wages thereafter. Employer terminated Claimant on September 24, 2021.

20. Respondent failed to prove Claimant was put at MMI on November 5, 2020 by "an authorized treating physician."

21. Respondent failed to prove "the attending physician" released Claimant to return to work on November 5, 2020.

22. No ATP has placed Claimant at MMI or released him to regular duty since his work injury.

23. Claimant is entitled to ongoing TTD benefits commencing November 6, 2020.

24. Claimant received STD benefits commencing in approximately January 2021. The parties presented no evidence regarding whether Claimant must repay any of the STD benefits based on a concurrent award of TTD. It cannot be determined on the present record whether Respondent make take an offset for STD benefits.

25. Claimant is entitled to a general award of medical treatment from authorized providers reasonably needed to cure and relieve the effects of his compensable injury.

CONCLUSIONS OF LAW

A. Preliminary issues

Although the claim was fully contested when Claimant filed his Application for Hearing, Respondent subsequently admitted liability in a FAL dated May 26, 2022. This resolved the threshold question of compensability.

Respondent filed an Amended FAL on June 6, 2022, admitting for a closed period of TTD from October 8, 2020 through November 5, 2020. Respondent made no request at hearing to withdraw its admission. By filing the admission, Respondent conceded that Claimant was entitled to temporary disability benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3) or (4).

Respondent denied TTD after November 5, 2020 on the theory that Claimant was put at MMI and released to full duty. Termination of TTD under § 8-42-105(3)(a) or 105(3)(c) are affirmative defenses that the Respondent must prove. Section 8-43-201(1); *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990); *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004). Accordingly, Claimant is entitled to reinstatement of TTD benefits effective November 6, 2020 unless Respondent proves a legally sufficient terminating event.

B. Is TTD after November 5, 2020 barred by a determination of MMI?

Entitlement to TTD terminates when the claimant reaches MMI. Section 8-42-105(3)(a). Under § 8-42-107(8)(b)(I), the initial determination of MMI must be made by "an authorized treating physician." Once an ATP declares a claimant at MMI, no additional TTD may be awarded unless a DIME is completed. Section 8-42-107(8)(b)(II); *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

Even though an ATP's determination of MMI cannot be questioned absent a completed DIME, the ALJ has jurisdiction to consider the threshold factual question of whether the claimant has been put at MMI by "an authorized treating physician." *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996), *Briley v. K-Mart Corporation*, W.C. No. 4-494-519 (March 12, 2003).

A handful of ICAO cases have addressed whether and under what circumstances a determination by a non-physician can substitute for that of an authorized treating "physician." In *Flake v. JE Dunn Construction Co*., W.C. No. 4-997-403-03 (September 19, 2017), the ICAO upheld an ALJ's finding that a declaration of MMI was valid even though it was initially made by a physician assistant ("PA"). The Panel noted that PAs are statutorily authorized to provide medical services "under the personal and responsible direction and supervision of a [licensed physician]." Sections 12-240-107(6)(a), (6)(b)(I), C.R.S. Because the ATP had later countersigned the WC164 form and stated in a report that he agreed with the PA's determination of MMI, the Panel concluded that substantial

evidence supported the ALJ's finding that the claimant had been put at MMI "by an authorized treating physician."

The Panel in *Flake* referenced several previous ICAO decisions for the proposition that "medical determinations made by physician assistants . . . *may be adopted by the physician* and relied upon as a decision of the physician himself." (Emphasis added). One case, *MacDougall v. Bridgestone Retail Tire Operations LLC*, W.C. No. 4-908-701-07 (April 12, 2016), involved a penalty claim against the insurer for filing an FAL based on an MMI determination from a PA. In *MacDougall*, Dr. Olson had previously evaluated the claimant and opined he would probably be at MMI at the next office visit. Dr. Olson was out of the office at the next appointment, so the claimant saw Dr. Olson's PA instead. The PA determined the claimant was at MMI "as per Dr. Olson's previous note." Dr. Olson later wrote a report stating he agreed the claimant was MMI as of the date determined by the PA. He explained that his electronic signature was placed on all WC164 forms completed by PAs in his office, and gave no indication the electronic signature had been applied to the form inappropriately. Dr. Olson. The ALJ interpreted Dr. Olson's subsequent report as ratifying the PA's declaration of MMI. In dicta, the Panel indicated these facts supported the ALJ's decision not to impose a penalty against the insurer for filing the FAL based on the PA's report.

The other cases cited in *Flake* involved issues other than determinations of MMI. In *Bassett v. Echo Canyon Rafting Expeditions*, W.C. No. 4-260-804 (April 3, 1997), the Panel held that the supervising ATP was "responsible" for work restrictions imposed by a PA because the PA's report was addressed to the ATP and stated, "we saw" the claimant and "we ordered x-some rays." And in *Terry v. Captain D's Seafood Restaurant*, W.C. No. 4-226-464 (December 9, 1997), the Panel held that a full-duty release by a PA could be ascribed to the ATP where the report stated the PA had "discussed" the examination findings with the ATP. The Panel determined that, "the ALJ could, and did, reasonably infer that [the ATP] authorized the physician's assistant to sign for him in releasing the claimant to regular employment."

The critical common element in these cases was persuasive evidence that the treating physician was involved in, adopted, or ratified the determination by the non-physician working under their supervision.

As found, Respondent failed to prove Claimant was put at MMI by an "authorized treating physician." Numerous factors lead the ALJ to conclude the December 30, 2020 pronouncement of MMI is invalid. First, the statute plainly requires that an MMI determination be made by a "physician." Because of this clear language, and considering the significant ramifications that can attend a declaration of MMI, it is highly doubtful this function be delegated to a non-physician. Although a PA or other medical support personnel may make a preliminary assessment, the ultimate decision must reflect some independent judgment by a treating physician.

This point seems even more salient where, as here, the MMI determination was made by a nurse rather than a PA. The ICAO decisions discussed earlier rested in part

on the statutory requirement that PAs be directly supervised by a physician.[1] But nurse practitioners are not subject to a similar requirement of physician oversight. See § 12-255-104(9)(c); 3 CCR 716-1 § 1.9.C.11. Although such supervision may occur in certain medical facilities, it cannot simply be presumed, as it can with PAs.

Most important, there is no persuasive evidence that Dr. Centi was contemporaneously or subsequently involved in the determination of MMI by Ms. Joyce. Dr. Centi's "stamped" electronic signature was probably applied by Ms. Joyce, by CCOM office staff, or by an automated process. There is no persuasive evidence Dr. Centi had any knowledge of Ms. Joyce's determination, much less approved, adopted, or ratified it. The persuasive evidence shows Claimant was put at MMI by a nurse rather than a physician.

C. Is TTD after November 5, 2020 barred by a full-duty release?

Section 8-42-105(3)(c) provides that TTD terminates when "the attending physician gives the employee a written release to return to regular employment." Whether the claimant was "given" a full-duty release by "the attending physician" are questions of fact for resolution by the ALJ. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

As found, Respondent failed to prove Claimant was given a full-duty release by "the attending physician." The prior finding that Dr. Centi was not involved in determining MMI is equally dispositive of whether the full-duty release can terminate TTD.

D. General Award of Medical Benefits

Respondent admitted Claimant suffered a compensable injury on October 11, 2020. As a matter of law, Claimant is entitled to a general award of medical treatment from authorized providers reasonably needed to cure and relieve the effects of his injury. Claimant neither requested nor tried any specific medical benefits. Consequently, no order regarding specific medical benefits is warranted or appropriate.

E. Short-term disability offset

Claimant received STD benefits commencing in January 2021 from a disability policy provided by Employer. Section 8-42-103(d)(I) provides a dollar-for-dollar offset against temporary disability benefits unless the claimant contributed to the premiums or must repay the STD carrier because he received a concurrent award of TTD benefits. The parties presented no evidence regarding the disability policy terms or whether Claimant contributed to the premiums. Accordingly, no specific order can be issued regarding whether or to what extent Respondent may be entitled to an offset.

[1] Section 12-240-107(6)(a) provides that a physician may "delegate to a physician assistant . . . the authority to perform . . . acts that physicians are authorized by law to perform." Section 12-240-107(6)(b)(I) requires that a physician assistant may only exercise delegated authority "under the personal and responsible direction and supervision" of a licensed physician.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant TTD benefits at the weekly rate of $859.50, commencing November 6, 2020 and continuing until terminated by law.

2. Respondent shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

3. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 22, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant established by a preponderance of the evidence that additional chiropractic and massage treatment are reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. On April 25, 2018, Claimant was sustained admitted injuries arising out of the course of his employment with Employer in a work-related motor vehicle accident. As a result of the accident, Claimant sustained extensive injuries, including a fracture of the left humerus, lung contusions, right acetabular fracture, thoracic rib fracture, closed head injury and ligamentous injuries to both knees. (Ex. 2). Claimant's injuries necessitated multiple surgeries between May 1, 2018 and December 8, 2020. (Ex. 1 & 2).

2. On June 9, 2020, Claimant's authorized treating physician (ATP), Brian Beatty, D.O., placed Claimant at MMI, and assigned impairment ratings for both lower extremities and Claimant's left elbow. Dr. Beatty also noted that Claimant would need additional maintenance care including follow up orthopedic care for anticipated bilateral knee arthroplasties, and follow-up medical care. Dr. Beatty did not provide an impairment of Claimant's thoracic spine or brain injury. (Ex. 1).

3. On July 13, 2020, Respondents filed a Final Admission of Liability (FAL). Claimant filed an objection to the FAL on August 11, 2020, and requested a Division Independent Medical Examination (DIME). (Ex. 9).

4. On September 17, 2020, Claimant returned to Dr. Beatty. Dr. Beatty performed osteopathic manipulations to the thoracic and lumbar spine, and noted that Claimant would continue with a home exercise and stretching program. (Ex. 1)

5. On January 26, 2021, Claimant had a Division independent medical examination (DIME) with David Yamamoto, M.D. Claimant reported his then-existing symptoms as thoracic spine pain, knee pain, mild depression. Dr. Yamamoto opined that as a result of his work-related accident, Claimant had a thoracic spine sprain/strain with ongoing stiffness, bilateral knee internal derangements requiring surgery, comminuted left humerus fracture requiring surgery, adjustment disorder, and mild traumatic brain injury (resolved). Dr. Yamamoto opined that Claimant was not at MMI, and that Claimant required a future right knee total arthroplasty. Dr. Yamamoto did not recommend or offer an opinion regarding Claimant's need for massage therapy or chiropractic treatment. (Ex. 2).

6. Following the DIME, Claimant continued to receive care, including physical therapy. On July 7, 2021, Dr. Beatty referred Claimant to Dr. Wolff for "a few sessions" of

chiropractic care, and indicated he would see Claimant back in two months for follow up. (Ex. E).

7. From September 10, 2021 to January 7, 2022, Claimant was seen at Green Mountain Chiropractic and Massage on nine dates. At each visit Claimant requested a "full body massage" and received massage therapy from Jessica Cain, CMT. At each massage therapy visit, Ms. Cain recorded Claimant's reported symptoms for six areas, including the left shoulder and arm (twice), upper back, neck, lower back, legs and thighs, and right knee. With the exception of Claimant's right knee and neck pain increasing from 4/10 to 5/10 at the November 12, 2021 visit, and Claimant's reported pain level in his legs increasing from a 3/10 to 4/10 on December 16, 2021, Claimant's reported pain levels were identical at each visit with Ms. Cain. Despite no documentation of Claimant reporting improvement in symptoms at any visit, Ms. Cain documented the following statement at each visit: "Patient is showing improvement since the prior visit. He is progressing as anticipated. Intensity is decreased since the prior visit." Claimant's only documented chiropractic treatment during this time was a November 12, 2021 visit with Dr. Wolff. At that visit, Claimant's only reported complaint was low back pain rating 5/10. (Ex. 3).

8. Claimant's next documented visit with Dr. Beatty was on December 28, 2021, when Claimant reported he was continuing to see a chiropractor for his back pain "which is not helping." Claimant also was attending physical therapy 3 times per week. At this visit, Dr. Beatty recommended Claimant continue physical therapy and follow up with Dr. Dayton. Dr. Beatty did not recommend or prescribe additional chiropractic care or massage. (Ex. 1).

9. The parties stipulated that Insurer denied authorization for chiropractic and massage treatment as of February 24, 2022.

10. Claimant returned to Dr. Beatty on March 15, 2022, reporting continued right knee pain with stiffness and swelling. Dr. Beatty noted that Claimant was receiving benefit from physical therapy, and that Claimant would follow up with Michael Dayton, M.D. Dr. Beatty did not recommend or prescribe additional chiropractic care or massage. (Ex. 1)

11. Claimant next saw Dr. Beatty on April 26, 2022. Claimant reported improvement in his symptoms, but that he had developed increasing low back pain over the last several days. Dr. Beatty diagnosed Claimant with a lumbosacral strain and performed osteopathic manipulation. He made no recommendations for chiropractic care or massage. (Ex. 1).

12. On May 31, 2022, Claimant saw orthopedist Dr. Dayton at UC Health. Referred Claimant for sixteen sessions of physical therapy. Dr. Dayton did not recommend or refer Claimant for chiropractic or massage. (Ex. 5).

13. Respondents requested that, Allison Fall, M.D., performed a record review and comment on the issue of whether chiropractic and massage care were reasonable and necessary to relieve the effects of Claimant's work injuries. Dr. Fall opined that the chiropractic care and massage therapy Claimant received from Green Mountain Chiropractic was not medically reasonable and necessary to relieve the effects of

Claimant's injury. Dr. Fall noted that Claimant's massage treatments were directed to multiple body parts, and was not specifically addressing the thoracic spine diagnosis provided by Dr. Yamamoto. She further opined that Claimant's records did not document a sustained long-term benefit from the massage therapy. (Ex. F).

14. With the exception of Dr. Beatty's referral for chiropractic care on July 7, 2021, the record contains no documentation of a referral or recommendation for chiropractic care or massage care from an ATP.

15. Claimant testified that he has been receiving weekly massages for at least six months, which he characterized as helpful. Claimant also testified that he continues to receive chiropractic care, which he believes is helpful to his overall recovery. Claimant testified he believed such treatment is reasonable and necessary. No records of either chiropractic or massage after January 7, 2022 were offered or admitted into evidence. Claimant also testified Dr. Beatty has performed spinal adjustments when he sees Claimant. Claimant also testified that Dr. Dayton has recommended massage, although no documented recommendation was offered or admitted into evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to

conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

An ALJ lacks jurisdiction to order an ATP to provide or recommend a particular form of treatment which has not been prescribed or recommended by the ATP. *See Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

Claimant has failed to establish by a preponderance of the evidence that additional chiropractic treatment or massage therapy is reasonably necessary to cure or relieve the effects of Claimant's industrial injuries. Claimant was last referred for chiropractic care on July 7, 2021, when Dr. Beatty referred Claimant for "a few sessions." Claimant was then seen at Green Mountain Chiropractic and Massage for nine massage therapy visits and one chiropractic treatment. The record contains no credible evidence that any ATP has recommended either massage therapy or chiropractic care for Claimant since July 7, 2021.

Claimant's massage and chiropractic records do not credibly document improvement in Claimant's symptoms resulting from such treatment between September 10, 2021 and January 7, 2022. Claimant's testimony that he is currently receiving chiropractic and massage that he finds helpful is not persuasive evidence of the reasonableness or necessity of such treatment.

Claimant contends his testimony that chiropractic and massage are reasonable and necessary is sufficient to permit authorization of treatment. In support of this position, Claimant cites *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) and *Gelco Courier v. Indus. Com. of Colo*., 702 P.2d 295 (Colo. App. 1985). In both *Lymburn* and *Gelco*, the Court of Appeals found that a combination of medical evidence and claimant testimony was sufficient to support an award of temporary disability benefits. Neither *Lymburn* nor *Gelco* stand for the proposition that an ALJ may authorize medical care based solely on a claimant's testimony. To the contrary, an ALJ lacks jurisdiction to order an ATP to provide or recommend a particular form of treatment which has not been prescribed or recommended by the ATP. *See Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). Because no credible, persuasive evidence was presented demonstrating a current, existing recommendation for massage therapy or chiropractic treatment from Claimant's ATPs, the ALJ lacks authority to order such treatment.

With respect to Claimant's position that Insurer improperly denied benefits, Claimant's Application For Hearing does not assert a rule violation, statutory violation, or penalty claim. As such, those issues are not properly before the ALJ. Claimant cites no authority, and the ALJ has found none, supporting the proposition that an ALJ has the authority to authorize treatment based solely on an insurer's alleged failure to follow WCRP standards for denial. To the extent Claimant asserts that Respondents' denial of chiropractic and massage constitutes "an act of bad faith claims adjusting," (as stated in Claimant's position statement) claims of bad faith are not within the ALJ's jurisdiction. *In re Claim of Horiagon*, W.C. No. 4-985-020 (ICAO Mar. 15, 2015).

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of massage therapy and chiropractic treatment is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to

review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-544-001

ISSUES

The issues set for determination included:

- Did Respondents overcome the conclusions of Stephen Lindenbaum, M.D., who performed the Division-sponsored Independent Medical Examination ("DIME"), by clear and convincing evidence?

- Whether Claimant proved by a preponderance of the evidence that she suffered compensable injuries to her right shoulder, cervical spine, and left hip?

- Is Claimant entitled to TTD benefits from July 15, 2019 to the present?

PROCEDURAL STATUS

A Summary Order was issued on April 11, 2022. As part of the Summary Order, the ALJ ordered that the hearing transcript be filed with the Court, as it was cited by the parties in their briefs. On April 12, 2022, Respondents submitted a Request for Specific Findings of Fact, Conclusions of Law and Order. Respondents filed an Amended Proposed Order on April 15, 2022. A hearing transcript was then lodged with the Court on May 13, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she sustained injuries in prior motor vehicle accidents which occurred in 1992 and the record had evidence of treatment for her low back in 2001 (at the emergency room of the Community Hospital (Munster, IN.) Claimant was treated for neck, right shoulder and low back pain after a MVA in 2004. There was also an indication Claimant was injured in an accident in 2010, however, those records were not admitted into evidence.

2. There was no evidence in the record that Claimant required treatment after approximately 2010, nor was there evidence she had permanent work restrictions as a result of those accidents/injuries.

3. Claimant worked for Employer as a delivery driver. She started working for Employer in April 2019. Her job duties include delivering sandwich orders as well as helping with various side work in the store, including cleaning and stocking products.

4. On June 24, 2019, Claimant suffered an admitted injury when she was injured in an MVA while working for Employer. This was a T-bone collision in which the

other vehicle struck the rear passenger side and spun Claimant's vehicle around. Claimant testified that the collision was severe and she felt pain in her neck, back and shoulder, as well as her arm.[1]

5. Claimant was treated later that day at the Emergency Department of UC Health-Green Valley Ranch. Claimant reported pain in her neck, lower back, arms and legs, along with tingling in her hands. She had underlying tight spasm-like quality with a sharp lancinating pain. Edward Cetaruk, M.D. evaluated Claimant and noted tenderness, pain and spasm in the cervical, thoracic and lumbar spine, but normal range of motion ("ROM"). Dr. Cetaruk noted the pain was localized to her lower lumbar area and spine, with some tingling to her fingers and toes.

6. Dr. Centaruk's assessment was: back strain, initial encounter. He opined her pain was due to soft tissue injury of the muscles and connective tissues of her spine and back. The ALJ found the Cr. Centaruk's findings supported the conclusion Claimant injured her back, including the lumbar spine.

7. Claimant was evaluated by Kartik Patel, M.D. at UC Health on July 2, 2019. Dr. Patel reviewed the imaging of Claimant's thoracic spine and lumbar spine. He ordered physical therapy ("PT") and pain management, as well as prescribing Celebrex.

8. TF[Redacted] is the General Manager for Employer. They worked in the same store. After taking one day off, Claimant returned to work and her normal job duties. Mr. TF[Redacted] testified he saw Claimant and talked to her daily. Mr. TF[Redacted] testified she did not ask for accommodations or do her job any differently than before the accident. He testified she was a hard worker and would run to her car from the store; and this continued after the accident.[2]

9. Claimant testified she returned to work, but felt pain doing her job duties and walked with a limp. She said had trouble completing all of duties and left work early. Claimant testified she felt severe pain in her back and hip on July 10, 2019 and was not been able to work. Claimant texted Mr. TF[Redacted] to advise that she had pinched her sciatica and the pain in her leg was so bad she could not work. Her pay records reflected that she last worked on July 11, 2019.[3]

10. Claimant was evaluated by Tom Ashar, M.D. at the UC Emergency Department on July 10, 2019. She reported standing at the counter at work and experienced severe pain in her left hip. Dr. Ashar administered an Ativan injection to Claimant's hip. Dr. Ashar noted Claimant was scheduled for a pain specialist and PT

[1] Hearing Transcript ("Hrg. Tr.") p. 72:10-13.

[2] The testimony of Mr. TF[Redacted] from the prior hearing as admitted as Exhibit Q.

[3] Exhibit 6, p. 280.

evaluation for her injuries. The PT notes from UC Health on July 17 and 31, 2019 reflected pain complaints in the cervical and lumbar spine, as well the left leg and right shoulder.

11. On July 30, 2019, Claimant filed a Worker's Claim for Compensation that listed several body parts injured in the work-related accident, including the neck and right shoulder.

12. On July 29, 2019, Claimant underwent an MRI of her cervical spine. The films were read by Joseph Ugorji, M.D., whose radiology summary included: C3-4: 3 mm posterior disc herniation protrusion with tiny posterior annular tear-disk material gently contacted ventral spinal cord contributing to low-grade spinal canal stenosis; C4-5: 2 mm chronic posterior disc osteophyte complex low-grade biforaminal stenosis; C5-6: 2.8 mm posterior disc bulge with superimposed shallow inferior disc extrusion and posterior radial-type annular tear and moderate spinal canal stenosis was present, as well as low grade interspinous ligament swelling. The ALJ noted the MRI documented objective findings with respect to Claimant's cervical spine.

13. An MRI of the lumbar spine was also performed on July 29, 2019. Dr. Ugorji noted there was a 7.5 mm right facet synovial cyst, bilateral facet hypertrophy and low grade right facet arthropathy present at L4-5. Dr. Ugorji also noted preserved disc morphology and hydration, with no spinal canal or foraminal stenosis present at T11-12, T12-L1, L1-2, L2-3, L3-4, and L5-S1.

14. On July 30, 2019, Claimant underwent an MRI on her left hip. Dr. Ugorji stated no fracture or dislocation was present involving the bony pelvis or either hip. A greater than 50% thickness intermediate signal at chondro-osseous junction posterior labrum and superior labrum, with no paralabral pseudocyst or swelling. The findings were longer than the expected for a paralabral sulcus. Dr. Ugorji said given the absence of fluid insinuating the labral tissue, the differential diagnosis favored labral scar although a recent tear would be difficult to exclude. The ALJ found this opinion raised the question of a recent injury and documented a potential pain generator.

15. On August 5, 2019, Claimant was evaluated by Ryan Mansholt, PA-C and the report was counter-signed by Usama Ghazi, D.O. At that time, Claimant had low back pain, with radiation to the left groin and lower extremity, as well as left buttock. She also had neck pain, which radiated to the right arm down to the wrist, along with sleep disturbance. The ALJ noted Claimant's report of symptoms corresponded to all body parts which were Claimant alleged were injured over the course of the claim. Myofascial pain and spasm was noted in the thoracic spine and Claimant's right shoulder had limitations in its ROM, with positive supraspinatus, Hawkins and Neer signs. Examination of the low back showed loss of lumbar lordosis and severe spasm. Tenderness was present in Claimant's left hip into the trochanteric region. The ALJ found the presence of spasms was objective evidence of injury.

16. The diagnoses were: muscle spasm, headache, post-concussive syndrome, cervical sprain/strain; lumbar sprain/strain, sacral sprain/strain; brachial neuritis/radiculitis, sciatica, left hip pain; sprain/strain left hip; cervical spondylosis without myelopathy; thoracic spondylosis without myelopathy; lumbar spondylosis without myopathy; lumbar radiculitis; right shoulder sprain/strain; cervical radiculitis. PA-C Mansholt and Dr. Ghazi noted there was a causal relationship between the accident and Claimant's complaints/diagnoses, based upon the available information. An orthopedic consult for the left hip was recommended, along with a MRI arthrogram for the right shoulder. Claimant was taken off work for two weeks.

17. Claimant was evaluated by various physicians at Advanced Orthopedic & Sports Medicine Specialists, starting with Michael Shen, M.D. on August 7, 2019. At that time, she complained of severe low back and left leg pain and hypoesthesia. On examination, Claimant had normal lower extremity strength, with an antalgic gait. She had moderate spasm and tenderness in the paraspinous area. Dr. Shen noted Claimant's lumbar MRI showed some early facet arthropathy, but was essentially normal. Some effusion was note in her SI joints. Dr. Shen stated he did not see indications for surgical intervention, as Claimant was mechanically stable and neurologically intact. He opined her pain was out of proportion and believed she would benefit from physiatry and pain management.

18. Similar findings were made in an evaluation on August 14, 2019 by Christopher D'Ambrosio, M.D., who evaluated Claimant for lumbar and left hip pain. Restrictions in Claimant's left hip ROM were documented by Dr. D'Ambrosio, who also opined Claimant's pain as out of proportion to her diagnostic testing. Dr. D'Ambrosio prescribed Diclofenac Sodium.

19. Claimant was evaluated by Barry Ogin, M.D. on August 16, 2019, at which time she complained of pain in her left buttock and radiating down her leg. She also had pain along the back of her head and her neck, which radiated along her right shoulder. Dr. Ogin's impression were: back and right leg pain, negative lumbar MRI, negative hip MRI, subjective complaints as noted; mild cervicothoracic strain; severe anxiety and probable depression; history of left sided hip and pelvis fractures in 2010.

20. Dr. Ogin discussed the results of the MRI-s with Claimant and believed her prognosis was good. He suspected there was a strong psychological basis to her pain. Dr. Ogin recommended PT and electrodiagnostic testing for the lower extremity.

21. Claimant was then seen for follow-up on September 11, 2019 by Teresa McDonald PA-C at Advanced Orthopedics for lumbar and right shoulder pain. The ALJ found the medical records from Advanced Orthopedics documented Claimant's report of pain in her low back, left hip/leg, cervical spine and right shoulder. An injection was administered for left hip and thigh pain.

22. The ALJ found there was evidence of psychological issues which impacted Claimant's report of symptoms and treatment. Claimant was evaluated on August 26, 2019 and diagnosed with an adjustment disorder by Aggie Poznanska, MA, LPCC, NCC.

Claimant received psychological treatment with Ms. Poznanska through November 8, 2019.

23. Claimant underwent an MRI on her right shoulder on August 27, 2019. Dr. Ugorji noted it showed a 4 mm. greater than partial thickness tear in the undersurface of the glenohumeral ligament and a 28 mm. greater than partial thickness tear of the superior labrum with extension into the biceps-labral anchor. The infraspinatus, teres minor, subscapularis and supraspinatus tendons were intact.

24. In a follow-up evaluation on September 20, 2019, Dr. Ogin's impression included lumbosacral strain; possible left sacroiliac joint strain; right shoulder strain, small labral tear identified; subjective complaints. Dr. Ogin administered a right shoulder injection and ordered a left SI joint injection for diagnostic and therapeutic purposes.

25. The ALJ concluded there were clinical indications in the form of pain in the, which led to request for the MRI-s made by the physicians treating Claimant. These physicians, including Dr. Ogin, recommended and oversaw treatment. The ALJ inferred that that the physicians who evaluated Claimant and ordered MRI-s of those areas were of the opinion these were injured on June 24, 2019.

26. On December 19, 2019, Claimant was evaluated by John S. Hughes, M.D. who performed an independent medical examination. Dr. Hughes recounted that Claimant suffered a motor vehicle accident on June 24, 2019. He explained that at her June 24, 2019 emergency room visit Claimant reported lower back pain. Claimant reported current symptoms of lower back, left hip and right shoulder pain. Dr. Hughes concluded that Claimant had received reasonable, necessary and related medical treatment for her June 24, 2019 injuries. He reasoned that Claimant had not reached MMI.

27. Also on December 19, 2019, Robert Messenbaugh, M.D. conducted an Independent Medical Evaluation of Claimant, at the request of Respondents. Claimant reported pain in her right shoulder, cervical spine, lumbar spine and left hip. Dr. Messenbaugh opined Claimant sustained some degree of injury to her left hip, lumbar spine, cervical spine and left shoulder in the June 24, 2019 accident. In the initial report, Dr. Messenbaugh found Claimant was not at MMI and opined she needed further evaluation.

28. On March 3, 2020, ALJ Cannici issued an Order which concluded that Claimant suffered a "compensable back strain" during the course and scope of her employment on June 24, 2019. This Order found Claimant did not sustain injuries to the cervical spine, thoracic spine, right shoulder or left hip.[4]

[4] Exhibit C, p. 11.

29. On March 12, 2020, Respondents filed a General Admission of Liability ("GAL") which admitted for medical benefits only.

30. Dr. Messenbaugh issued supplemental reports dated January 16 and March 13, 2020. In the January 16, 2020 report, Dr. Messenbaugh stated Claimant suffered a lumbar spine soft tissue myofascial strain and sprain, without associated neurological deficit. He opined Claimant did not suffer an injury to her cervical spine, shoulder or hip as a result of the MVA.

31. In the March 13, 2020 report, Dr. Messenbaugh said Claimant was at MMI and assigned a 0% impairment to her lumbar spine. Dr. Messenbaugh said Claimant was at MMI as of July 15, 2019. Dr. Messenbaugh opined that Claimant did not require maintenance treatment, including any treatment for her neck, shoulder or hip.

32. On March 25, 2020, Claimant was placed at MMI by Nathan Faulkner, M.D. and he agreed with Dr. Messenbaugh that the date of MMI was July 15, 2019. This was not a particularly credible conclusion since it was before the date Dr. Faulkner initially evaluated and provided treatment to Claimant (September 26, 2019).

33. On May 19, 2020, Respondents filed a Final Admission of Liability ("FAL"), based upon Dr. Faulkner's report.

34. On September 25, 2020, Claimant underwent a DIME, which was performed by Dr. Lindenbaum. At the time of the evaluation, Dr. Lindenbaum noted Claimant entered the room with an extremely antalgic gait and used a cane. Dr. Lindenbaum reviewed both the treatment records, as well as the IME reports from Dr. Messenbaugh and Dr. Hughes. Claimant reported pain in the cervical spine, lumbar spine and right shoulder.

35. On examination, no paracervical spasm was present in the cervical spine. ROM testing showed 44° of cervical flexion was present, 22° of extension, 40° of right lateral flexion, 39° of left lateral flexion, 60° of cervical rotation to the right and 59° to the left. Claimant reported severe hip pain during the examination. Dr. Lindenbaum was not able to examine Claimant's thoracic spine.

36. Examination of Claimant's right shoulder there was a questionable positive speed test, with mild pain on ROM in the areas of impingement. Claimant's ROM of the right shoulder showed 130° of flexion, 35° of extension, adduction of 40°, abduction of 90°, internal and external rotation of 80° and 70° respectively. The motor and sensory exam was essentially normal.

37. Dr. Lindenbaum expressed his concern that as a result of his examination as well as the opinions of multiple physicians that Claimant's pain was out of proportion to the examination and she had a significant functional disability related to psychological factors. Dr. Lindenbaum stated Claimant had findings from the MVA compatible with pain

related to an injury to the cervical spine and over six months with treatment that was not successful; with the associated MRI findings of some disc abnormalities, which would imply that an impairment rating was indicated. There was also a suggestion of right shoulder dysfunction, based upon the MRI and the physical exam would qualify for a rating. He concluded Claimant was not at MMI, as she needed to be evaluated by Dr. Ogin or another orthopedic surgeon with regard to her right shoulder. Dr. Lindenbaum said there was no evidence, based on the presence of Waddell findings for extreme hyperthesia, as well as complaints of severe pain that could warrant a rating for the thoracic or lumbar spine or left hip. However, Dr. Lindenbaum did not say that the lumbar and thoracic spine and hip were not injured in the accident.

38. Dr. Lindenbaum provided a provisional rating of 8% for ROM loss in the right shoulder, which would convert to a 5% whole person rating. Dr. Lindenbaum, while noting this was a very difficult case, found Claimant had an 11% impairment for loss of ROM in the cervical spine and 4% for a specific disorder for a total of a 15% whole person impairment. Dr. Lindenbaum stated there was no evidence for apportionment at that time. By the provision of a medical impairment rating to this area of the body, the ALJ concluded that Dr. Lindenbaum found Claimant's cervical spine and right shoulder were causally related her work injury. Dr. Lindenbaum assigned no impairment rating to Claimant's thoracic spine, hip, or lumbar spine. Dr. Lindenbaum's opinion was persuasive to the ALJ.

39. There was no evidence in the record that Claimant returned to her ATP-s and received additional treatment after the evaluation by Dr. Lindenbaum.

40. Dr. Messenbaugh testified at hearing as an expert in orthopedic surgery (the specialty in which he is board certified) and was Level-II accredited pursuant to the W.C.R.P. Dr. Messenbaugh testified he did not think Claimant injured her hip, neck, or shoulder in the MVA. This was because when she was evaluated at the emergency room at UC Health, her complaint was of low back pain. Dr. Messenbaugh stated there was no indication Claimant hit her head and he had not seen injuries involving the right shoulder in similar accidents where it was nontethered. He opined Claimant would have had much greater pain in the right shoulder had it been injured in the subject accident. Dr. Messenbaugh said Claimant did not suffer severe whiplash as a result of this accident.

41. Dr. Messenbaugh noted that Dr. Lindenbaum and four other physicians concluded Claimant's pain complaints were out of proportion to the physical and radiographic findings. Dr. Messenbaugh stated he disagreed with Dr. Lindenbaum that the shoulder should be rated, as he did not believe any shoulder issues were related to the June 24, 2019 accident. He also disagreed with the provisional rating to the cervical spine, as Claimant did not report head or neck pain in the Emergency Department after the accident.

42. The ALJ determined that Dr. Messenbaugh's reports and testimony did not establish Dr. Lindenbaum's conclusions were in error, but rather were an alternate opinion.

43. The ALJ found Claimant was evaluated by multiple physicians, who although they found symptom magnification and psychological issues, nonetheless ordered diagnostic testing and treatment. The referrals made by these physicians led the ALJ to conclude they believed Claimant required treatment for her neck, shoulder, low back and hip. The ALJ determined Claimant suffered an injury to each of those areas.

44. The ALJ found the March 3, 2020 Order issued by ALJ Cannici was issued prior to the DIME performed by Dr. Lindenbaum, who was able to review the evaluations/opinions of the physicians who examined Claimant before September 2020.

45. Claimant met her burden of proof and proved she was entitled to TTD benefits.

46. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). In the case at bench, there was conflicting medical evidence, including by the physicians who evaluated Claimant on the issue of MMI.

Compensability of Right Shoulder, Cervical Spine and Left Hip

As determined in Findings of Fact 3-4, Claimant suffered an admitted industrial injury when she was involved in a MVA on June 24, 2019 when she was working for Employer as a delivery driver. The ALJ found Claimant had previously injured her neck, low back and right shoulder in other MVA-s, however, there was no evidence in the record she had continuing treatment or work restrictions as a result. (Findings of Fact 1-2.)

Claimant required treatment as a result of the June 24, 2019 accident at the Emergency Department of UC Health, where x-rays were taken and medications were prescribed. (Finding of Fact 5).

Subsequently, Claimant required treatment when she returned to UC Health on July 2 and 10, at which time she was evaluated for thoracic spine, lumbar spine and hip pain. As found, Claimant's pain complaints in the cervical spine, right shoulder, lumbar spine and left hip prompted her ATP's to order MRI-s, which were taken of the cervical and lumbar spine, as well as left hip. (Findings of Fact 12-14). An MRI of the right shoulder was done on August 27, 2019. (Finding of Fact 23). The ALJ found Claimant's physicians made the referrals for diagnostic testing because of her pain complaints.

Claimant was evaluated by orthopedic specialists at Advanced Orthopedics in August and September, 2019. Concerns were raised by physicians that Claimant's report of pain was out of proportion to what was shown on diagnostic testing; nevertheless treatment was recommended and Claimant treated with ATP, Dr. Ogin. The ALJ found there were psychological issues, as referenced in the medical records, but the medical showed Claimant consistently reported symptoms in the neck, shoulder, low back and hip.

A dispute arose concerning the areas Claimant's body which were injured in the subject accident. A hearing was held and ALJ Cannici concluded Claimant suffered a compensable back strain. (Finding of Fact 28). ALJ Cannici concluded Claimant did not suffer compensable injuries to the cervical spine, thoracic spine, right shoulder or left hip. Respondents then filed a GAL on March 12, 2020 for the low back only. (Finding of Fact 29). On March 25, 2020, Claimant was placed at MMI by Dr. Faulkner, who said the date of MMI was July 15, 2019. After Claimant requested an DIME, which was performed by Dr. Lindenbaum, he concluded she was not at MMI. Respondents then disputed that conclusion.

At the outset of the hearing, there was a disagreement between the parties regarding the issue of compensability and allocation of burdens of proof on those body parts which had not been admitted. Respondents argued it was Claimant's burden of proof to establish compensability. They asserted a DIME physician's opinion was not entitled to special weight on the issue of compensability. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). Respondents argued that in *Faulkner,* the Court of Appeals held that *Qual-Med* was limited to a situation where the correctness of the DIME opinion was the sole issue, not an initial compensability or causation finding. *Faulkner v. ICAO* at 846. Therefore, *Faulkner* stood for the proposition that Claimant had the initial burden of proving entitlement to benefits by a preponderance of the evidence by demonstrating that the injury arose out of and in the course of employment.

Claimant argued she did not have the burden to prove that each body part affected by the admitted industrial injury is compensable prior to a DIME. Rather, she averred the DIME physician has the authority to determine what body parts are related to the claim and cited *Gray v. Dunning Construction*, W.C. No. 4-516-629 (ICAO 2005), Qual-Med v.

ICAO, 961 P.2d 590 (Colo. App. 1998). Claimant also cited *In re Claim of Sharpton*, W.C. No. 4-941-721-03 (November 29, 2016) for the principle that the DIME process contemplates the DIME physician will evaluate all components of Claimant's condition and determine the cause of the various medical components.

To determine which body parts were injured in the subject accident, the ALJ reviewed the medical records admitted at hearing. Based upon a totality of the evidence, the ALJ found that there was sufficient evidence to establish that Claimant suffered a compensable injury to the following body parts: right shoulder, cervical spine, and left hip. (Finding of Fact 43). This was found first in the medical records admitted at hearing where Claimant's evaluating physicians made treatment recommendations. (Finding of Fact 25). The ALJ also inferred that that the physicians who evaluated Claimant and ordered MRIS of those areas were of the opinion these were injured in the subject accident. *Id.*

Second, Dr. Lindenbaum specifically analyzed each of the body parts in question, as well as determining whether each had a permanent medical impairment. As found, Dr. Lindenbaum had the benefit of the previous medical providers, including the physicians who performed IME-s. (Finding of Fact 43). Therefore, based upon the medical records admitted into evidence, the ALJ concluded Claimant suffered a compensable injury/aggravation to her right shoulder, cervical spine, and left hip as a result of the June 24, 2019 accident.

Overcoming Dr. Lindenbaum's Opinions

The question of whether Respondents overcame Dr. Lindebaum's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Respondents had the burden of proof to overcome Dr. Lindenbaum's conclusion on MMI. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Respondents had the burden of proof to overcome Dr. Lindebaum's conclusion on MMI, as well as on causation/relatedness.

The ALJ also found Dr. Lindenbaum's report included an identification of areas of the body impacted by the accident, as well as an analysis of the findings on MRI. (Findings of Fact 34-37). As determined in Finding of Fact 37, Dr. Lindenbaum concluded Claimant was not at MMI with regard to her shoulder and noted there was evidence of pathology on the MRI. Dr. Lindenbaum likewise found there was evidence of pathology on the MRI of Claimant's cervical spine. *Id.* Dr. Lindenbaum specifically addressed the question of Claimant's exaggerated pain complaints *Id.* Dr. Lindenbaum provided a provisional rating for Claimant's cervical spine and shoulder. The ALJ concluded Dr. Lindenbaum was of the opinion that the injuries to those parts of the body were caused by the work injury and the ALJ found Dr. Lindenbaum's opinions persuasive. (Finding of Fact 38).

In summary, the ALJ determined that Dr. Lindenbaum addressed each of the body parts implicated by the work injury and provided an opinion on causation/relatedness. As found, Respondents did not meet their burden of proof to show that Dr. Lindenbaum's conclusions were more probably wrong. (Finding of Fact 42). The ALJ determined that what was offered into evidence was a differing expert opinion (Dr. Messenbaugh) that disagreed with Dr. Lindenbaum's opinion. (Finding of Fact 41). This difference between the opinions of Dr. Lindenbaum and Dr. Messenbaugh did not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*, WC-s 4-532-166 & 4-523-097.

TTD Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits.

The ALJ determined Claimant was entitled to TTD benefits based upon the opinion of the DIME physician, Dr. Lindenbaum. (Finding of Fact 44). This was also based on the fact there was no evidence in the record that Claimant worked after July 11, 2021 and she had work restrictions at various times while she was being treated. (Finding of Fact 9). Accordingly, Respondents will be ordered to pay TTD benefits from July 12, 2019 until terminated by law.

ORDER

It is therefore ordered:

1. Respondents shall provide medical benefits to Claimant, including the evaluation by Dr. Ogin (or other orthopedic surgeon) for her cervical spine, and right shoulder.

2. Since Clamant is not at MMI, Respondents shall pay TTD benefits from July 12, 2019 and continuing.

3. Respondents shall pay 8% interest on all benefits not paid when due.

4. All matters not determined herein are reserved for future determination.

DATED: July 25, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-161-807-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

FINDINGS OF FACT

1. Claimant was properly served with the Application for Hearing in this matter on April 1, 2022 by mail addressed to Claimant's home address and email address. Notice of Hearing was also sent to Claimant by mail and email to his address of record on April 22, 2022. Claimant has not filed any entry of appearance or response with the Office of Administrative Courts or otherwise participated in this matter.

2. On January 11, 2021, Claimant sustained an admitted lumbar spine injury arising out of the course of his employment with Employer. Following a course of treatment, Claimant's authorized treating physician (ATP) Jeffrey Baker, M.D., placed Claimant at maximum medical improvement (MMI) effective November 23, 2021. (Ex. 1).

3. Over the course of Claimant's claim, Insurer paid Claimant temporary partial disability (TPD) benefits through January 9, 2022. At hearing, KJ[Redacted], the claims adjuster Insurer assigned to Claimant's claim testified that Insurer paid Claimant a total of $4,033.28 in TPD benefits from November 23, 2021 until January 9, 2022.

4. On February 23, 2022, Respondents filed a Final Admission of Liability (FAL) asserting an overpayment of $4,033,28 in TPD benefits. (Ex. 1). This overpayment claim represents the TPD benefits Insurer paid Claimant after the date of MMI until January 9, 2022. (Ex. 1). Claimant did not object to the FAL, or request a hearing related to the FAL.

5. Based on the amendment to §8-40-201 (15.5), C.R.S., that modified the definition of "overpayment" effective January 1, 2022, Respondents limited their request for repayment to only those overpayments that occurred prior to January 1, 2022. Ms. KJ[Redacted] credibly testified that the total amount of TPD paid from November 23, 2021 to December 31, 2021 was $3,791.61.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERPAYMENT

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[1] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such

[1] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive," from the definition of "overpayment." As noted, Respondents have limited their claim to payments occurring before January 1, 2022, consequently the applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo. 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities).

recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); *See In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009).

Respondents have established by a preponderance of the evidence that Claimant received overpayments of temporary partial disability benefits in the amount of $3,791.61, and that Respondents are entitled to repayment of that amount. Pursuant to § 8-42-103, and 8-42-106, respondents are required to pay temporary disability benefits while a claimant is under a disability that prevents the claimant from earning his or her full average weekly wage. Such benefits continue until the claimant reaches maximum medical improvement. § 8-42-106 (2)(a) C.R.S. Respondents paid Claimant TPD benefits for the period of November 23, 2021 through December 31, 2021, in the amount of $3,791.61. Because these TPD benefits were paid after the date of MMI assigned by Claimant's ATP, the benefits exceeded the amounts should have been paid or were amounts Claimant was not entitled to receive. *See Wheeler, supra* ("respondents are allowed to recover as an overpayment the TTD benefits that were due and owing when paid but are later determined to be amounts the claimant was not entitled to receive. Respondents are, therefore, entitled to recover the overpayment.

OVERPAYMENT RECOVERY

Section 8-42-113.5, C.R.S. governs the recovery of overpayments. Where a claimant receives any payments from any source which requires the reduction of any disability benefit, § 8-42-113.5 provides for different methods of recovery for respondents. Under § 8-42-113.5 (a), a claimant is required to provide written notice of learning of such payment within twenty days, and any resulting overpayment "shall be recovered by the employer or insurer in installments at the same rate as, or at a lower rate than, the rate at which the overpayments were made." "Such recovery shall reduce the disability benefits … payable after all other applicable reductions have been made." *Id*. Where no written notice is provided, "the employer or insurer is authorized to cease all benefit payments immediately until the overpayments have been recovered in full." § 8-42-113.5(1)(b). If, however, recovery under § 8-42-113.5 (a) or (b) is "not practicable," respondents are authorized to seek an order for repayment. § 8-42-113.5(1)(c), C.R.S. The term "practicable" refers to a respondent's ability to recover the overpayment from ongoing or unpaid benefits." *In re Martin*, W. C. No. 4-453-804 (ICAO, Oct. 4, 2004).

When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the

authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). No evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate or the terms of repayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay to Respondents $3,791.61 in overpaid temporary disability benefits.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 26, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-909-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury on November 2, 2021, while in the course and scope of her employment?

2. If Claimant suffered a compensable injury, was the medical treatment Claimant received on January 24, 2022 from Dr. Romero reasonable, necessary and related to her injury on November 2, 2021?

3. Did Claimant prove by a preponderance of the evidence that she is entitled to TTD benefits and TPD benefits?

STIPULATIONS

1. Claimant's AWW is $1,219.00.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 31 year-old female. On November 2, 2021, Claimant was working in the course and scope of her employment as a registered nurse for Employer.

2. On November 2, 2021, CNA HL[Redacted] called Claimant at approximately 7:00 p.m., and asked her to come to a patient's room to assist with moving the patient (KW) to a recliner chair. KW was too weak to move on his own as he had dialysis earlier in the day.

3. Claimant had been KW's nurse that day, so she was familiar with KW and the care he was receiving at the hospital. Claimant had no issues with KW throughout the day. Claimant noted that KW had not ambulated all day because he was too weak.

4. When Claimant entered KW's room, he was sitting on the edge of the bed, and Ms. HL[Redacted] was standing to his side. Ms. HL[Redacted] moved so Claimant could talk to KW. KW was hunched over, so Claimant assessed his health status to see if he was in pain, nauseous, etc. before moving KW to the recliner with Ms. HL[Redacted] 's assistance. Before Claimant could move him, however, KW started getting agitated. (Tr. 22:1-18).

5. Claimant testified that KW started yelling at her and saying that it was his body and he could do what he wanted. She further testified that KW was waving his finger at her and tapping the tip of her nose. When she stepped back and asked him not to do that,

he grabbed her left arm to pull her forward, yanked her back and forth, to the point she was off balance. She further testified that KW's other hand brushed against her chest and hit her chin. Claimant testified that it was a quick interaction, maybe 10 to 30 seconds. She told KW he could not treat staff that way, and she called security. (Tr. 24:2–25:21).

6. According to the incident report, when security arrived, KW was sitting up in bed and staff was trying to verbally de-escalate him. Security was told that Claimant "was grabbed by the patient, pushed, then hit by the patient." It is not clear from the incident report who made this statement. KW told security he was a grown man and was tired of being told what to do. KW felt disrespected by being told he could not do certain things. The report further states that KW's wife was very apologetic towards the staff for the incident. (Ex. 5).

7. Claimant completed a written statement that was included with the incident report. In her statement, Claimant explained that after she was called into the room and had checked on KW, he got verbally aggressive and said it was his body and he could do what he wanted. Claimant tried to explain that they were trying to keep him safe so he did not fall. KW got more agitated and aggressive. When Claimant tried to back away, KW grabbed her left arm, shoved her backwards, and pulled her forward. Claimant lost her balance, and KW struck her across the chest into her left arm with his other hand, and then struck her chin when he let go of her left arm. The narrative section of the incident report concluded with, "[f]urther review with CNA that witnessed event confirmed RN Stephanie's statement." (Ex. 5)

8. The following day, November 3, 2021, the Parker Police Department came to the hospital to investigate the report of an assault. The police interviewed Claimant. Her statement to the police was consistent with the written statement she provided to Parker Security the day before. (Ex. 6). Officer LM[Redacted] testified that Claimant had no visible redness, no bruising, swelling, abrasions, or cuts approximately 18 hours after the incident. (Tr. 62:10-19).

9. Officer LM[Redacted] also interviewed Ms. HL[Redacted] . She told Officer LM[Redacted] that she called Claimant for assistance because KW tried to stand up, but he was too weak and tired to stand on his own. Ms. HL[Redacted] said she was preparing the recliner when she overheard Claimant and KW arguing, and when she turned around to look at them she saw KW pointing at Claimant. Ms. HL[Redacted] said that she went back to preparing the recliner, as KW and Claimant continued to argue. When she turned around again, Ms. HL[Redacted] saw KW push Claimant with his right hand on her left shoulder, and this is when Claimant called a security alert. (Ex. 6).

10. Lastly, the police interviewed KW and his wife. KW's wife was not in the room on November 2, 2021, when the incident occurred. KW told the police that he did not remember anything about what happened the prior evening. According to the police report, Claimant was confused and easily distracted throughout the interview. (Ex. 6).

11. Officer LM[Redacted] completed the police report and concluded that "[a]fter speaking to [KW], I do not feel he had the mental culpability required for assault." (Ex. 6).

12. Ms. HL[Redacted] was the only other person in KW's room, in addition to KW, during the incident. Ms. HL[Redacted] testified at the hearing that as she was preparing the recliner, she was not facing KW or Claimant. She turned around when she heard them arguing, and specifically heard Claimant say something to the effect "you are not going to do this to me again." Ms. HL[Redacted] testified that she saw KW pointing at Claimant, but she did not see him push, pull or strike Claimant. (Tr. 72:2-21). The ALJ finds that Ms. HL[Redacted] had her back turned for the majority of the time Claimant was in KW's room.

13. Per the Hospital's Midas Statements, Ms. HL[Redacted] told her supervisor that KW pushed Claimant with his fingertips on the left side of her chest two times. Ms. HL[Redacted] said that KW never hit Claimant in the face, nor did he ever grab her arm. (Ex. H).

14. Ms. HL[Redacted]'s testimony at the hearing was inconsistent with her past statements regarding the events of November 2, 2021. At the hearing, Ms. HL[Redacted] testified that she did ***not*** see KW push, pull or strike Claimant. (Tr. 72:11-21). But shortly after the incident, Ms. HL[Redacted] told security that she witnessed the incident and agreed with Claimant's statement regarding the attack. (Ex. 5). The next day, November 3, 2021, she told her supervisor, DB[Redacted], that KW pushed Claimant with his fingertips on the left side of her chest, twice. (Ex. H). That same day, Ms. HL[Redacted] told the police that KW pushed Claimant with his right hand on her left shoulder. (Ex. 6/Ex. I). The ALJ discredits Ms. HL[Redacted] 's testimony and does not find her credible.

15. In contrast, Claimant's testimony regarding the events on November 2, 2021, was generally consistent with the statement she drafted after the incident and with what she told the police the following day. The ALJ notes that Claimant's statement varied as to which arm KW used to grab her left arm. The ALJ does not find this inconsistency to be significant, nor does it affect Claimant's credibility. The ALJ finds Claimant's testimony credible.

16. The ALJ finds that KW was too weak to stand on his own, but he became agitated when Claimant tried to help prevent him from falling. KW grabbed Claimant's left arm, he pushed and pulled on it, and he struck Claimant's chest and chin. Claimant did not have any visible bruising or redness the day after the incident.

17. Two years prior, on December 10, 2019, Claimant suffered a compensable work injury to her left shoulder when a patient attacked her. (Ex. N). Claimant had two MRIs, one shortly after the injury and another in August 2020. Both MRIs were negative for labrum or rotator cuff tears. Claimant had two surgeries on her left shoulder, one in October 2020 and the second in February 2021. (Tr. 48: 9-13).

18. Claimant was placed at MMI on January 29, 2021, with a zero percent (0%) impairment rating. She was released to work at full duty with no work restrictions, and a Final Admission of Liability was filed reflecting the same. (Ex. N).

19. Claimant testified that prior the incident on November 2, 2021, she had full range of motion and was able to do all of her duties at work with no issue. Claimant testified she "still had pain here and there . . . but overall it was doing great." (Tr. 27:2-9).

20. Ajay Vellore, M.D., evaluated Claimant on August 5, 2021. At this appointment, three months prior to her injury, Claimant noted that things had been fairly stable, and overall her shoulder was feeling better. She complained of "significant biceps tendon pain" which was quite "annoying." (Ex. E). The ALJ finds Claimant's testimony regarding the condition of her left shoulder prior to the November 2, 2021 injury is not inconsistent with what she reported to Dr. Vellore as Respondents allege.

21. On November 4, 2021, two days after her injury, Claimant went to Concentra and was treated by ATP, Jonathan Claassen, D.O. She reported pain with left elbow extension in the bicep and deltoid areas. She had pain trying to raise her left arm up and when getting dressed. Claimant's pain was an 8/10. Dr. Claassen diagnosed Claimant with a left shoulder strain, left biceps strain, and cervical strain. He ordered a left shoulder MRI. Dr. Claassen noted Claimant's history of left shoulder surgeries in October 2020 and February 2021. (Ex. 10).

22. Claimant had a left shoulder MRI on November 11, 2021. The impression read "[f]indings suspicious for a delamination type partial tear involving the anterior infraspinatus tendon."

23. The ALJ finds that Claimant reinjured her left shoulder in the course and scope of her employment on November 2, 2021.

24. On November 15, 2021, Claimant saw Landon Fine, D.O., who had treated her previously. Dr. Fine evaluated Claimant and reviewed her MRI. He noted that the "MRI is difficult to interpret and it is unknown if this tear is acute or chronic and it does not appear that there is a significant retraction and minimal other intra-articluar pathology." Dr. Fine recommended that Claimant begin with conservative treatment consisting of NSAIDs, injections, and physical therapy. (Ex. F).

25. On January 24, 2022, Alex Romero, M.D., evaluated Claimant and reviewed her November 2021 MRI. He noted that Claimant's shoulder findings were a bit inconsistent. According to Dr. Romero, Claimant had a small intrasubstance tear of her supraspinatus, but on examination her symptoms were very significant. He diagnosed her with chronic left shoulder pain and an incomplete tear of her left rotator cuff, unspecified whether traumatic. (Ex. F).

26. The ALJ finds that Claimant's appointment with Dr. Romero on January 24, 2022 was reasonable, necessary and related to her work injury on November 2, 2021.

27. Claimant was given work restrictions, and Employer gave Claimant a light-duty job that accommodated her work restrictions. (Tr. 32:22-33:3).

28. Claimant testified that sometime in December 2021, Employer informed her that her modified light-duty job could not be accommodated for a period of time. (Tr. 33:1-11). Claimant did not work from sometime between December 2021 and mid-January 2022. (Tr. 33:20-34:5).

29. Claimant testified that sometime in January 2022, Employer gave Claimant a modified job working in the corporate office of her Employer that accommodated her work restrictions. (Tr. 33:20-34:5).

30. Claimant testified that her current work restrictions include no lifting, no pushing and no pulling. (Tr. 35:4-7).

31. Claimant testified that prior to November 2, 2021, she worked approximately 36 hours a week. Currently, Claimant is working 20-30 hours per work in her modified position. Claimant's wages have been affected by a reduction in the overall hours she is working per week. (Tr. 35:8-23). This testimony in uncontroverted.

32. The ALJ finds that Claimant is entitled to TTD benefits and TPD benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936);

Bodensieck v. Indus. Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *Triad Painting Co. V. Blair,* 812 P.2d 638 (Colo. 1991). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. F*aulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846. A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *Univ. Park Care Ctr. v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

As found, the only three people in KW's room at the time of the incident on November 2, 2021, were Claimant, KW, and Ms. HL[Redacted] . KW was confused and did not recall anything regarding what happened in the hospital. Ms. HL[Redacted] had her back turned for most of the events that occurred. Moreover, Ms. HL[Redacted] 's version of what occurred was inconsistent. Ms. HL[Redacted] 's testimony was neither persuasive nor credible. (Findings of Fact ¶14).

In contrast, Claimant was credible and her testimony was persuasive. The ALJ credits the testimony of Claimant and her description of the events that occurred on November 2, 2021. As found, Claimant proved by a preponderance of the evidence that she suffered a work injury arising out of, and in the course and scope of her employment on November 2, 2021. The evidence demonstrated that even though KW was weak, he became agitated and grabbed Claimant left arm, and yanked it back and forth, causing

Claimant to reinjure her left shoulder. (Findings of Fact ¶ 16). While Claimant has a history of left shoulder issues, including two surgeries, Claimant credibly testified that she was able to work full duty without any restrictions, prior to the injury she sustained on November 2, 2021. (Findings of Fact ¶¶ 19-20). Claimant established by a preponderance of the evidence, that she suffered a compensable injury to her left shoulder on November 2, 2021. (Findings of Fact ¶ 23).

For an insurer to be liable for the payment of medical bills, the employee must have suffered a compensable injury arising out of and in the course of employment. Section 8-42-101, C.R.S. If the injury is compensable and the medical services are reasonable and necessary, then the insurer is responsible for the expenses incurred by the employee for the treatment of the injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant establish that a compensable injury occurred on November 2, 2021. As such, payment for the medical bill from Claimant's treatment with Dr. Romero on January 24, 2022 is reasonable, necessary, and related to her compensable injury. (Findings of Fact ¶ 26).

TTD and TPD Benefits

To qualify for TTD benefits under § 8-42-105, a claimant must establish three conditions: (1) the industrial injury caused the disability; (2) the injured employee left work as a result of the injury; and (3) the temporary disability is total and lasts for more than three working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo.1995).

Once a claimant establishes that the industrial injury is causing a temporary wage loss, that claimant is entitled to receive TTD benefits until: (1) the claimant reaches MMI; (2) the treating physician releases the claimant to return to regular employment; (3) the claimant actually returns to regular or modified employment; or (4) the treating physician authorizes a return to modified employment, the employer offers such employment to the claimant, but the claimant fails to begin that employment. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637, 639 (Colo. App. 1997).

As found, prior to November 2, 2021, Claimant was working full duty, without restrictions. Claimant was subsequently given work restrictions. Employer gave Claimant a modified job that accommodated her work restrictions. Sometime in December 2021, Employer was not able to accommodate these restrictions, and there was no work for Claimant until January 2022. In mid-January 2022, Employer gave Claimant a modified job in the corporate office of Employer that accommodated her restrictions. Claimant is still restricted from lifting, pushing and pulling, and she has not returned to full duty work. As found, Claimant's wages have been affected by a reduction in the overall hours that she is working per week. Claimant is entitled to TTD benefits and TPD benefits. (Findings of Fact ¶¶ 27-32).

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury while in the course and scope of her employment on November 2, 2021.

2. The medical treatment Claimant received on January 24, 2022 with Dr. Romero was reasonable, necessary and related to her injury on November 2, 2021.

3. Claimant is entitled to TTD benefits and TPD benefits from November 2, 2021 forward.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 7-26-22

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw their December 14, 2021 and April 25, 2022 General Admissions of Liability pursuant to Sec. 8-43-201(1), C.R.S. (Cum. Supp. 2021).

II. Whether Claimant proved by a preponderance of the evident that he is entitled to a change of physician in accordance with Sec. 8-43-404(5)(a)(III), C.R.S. and W.C.R.P. Rule 8, 7 CCR 1101-3.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 53 year-old man with some college education. Claimant worked for Employer as an assistant manager. Claimant was hired on November 2, 2021. His responsibilities included learning every facet of the Employer's day to day business, waiting on customers, learning how to make every item on the menu, unloading supplies, training employees, learning the responsibilities of the store manager.

2. Claimant testified that, when hired, he was not aware that the assistant store manager's duties would involve heavy lifting and did not disclose any information related to his preexisting low back condition.

3. Claimant has an extensive, longstanding prior low back condition for which he was actively treating prior to this incident. Claimant testified he was already experiencing back pain on the day that he reported for work on November 12, 2021, prior to any work activity, and his left lower back, left leg, and left foot were bothering him on a daily basis prior to this incident. Claimant testified his back pain never fully resolved after his 2016 surgery, and he was routinely treating with gabapentin prescribed by Dr. Ludwig and Dr. Whittier for back pain since the 2016 surgery.

4. The medical records list a history that Claimant had back pain and left leg symptoms initially in 1991, when they performed an MRI but Claimant improved with conservative treatment. Approximately six years later he developed recurrent pain and was seen in Illinois where they obtained another MRI.

5. On December 8, 2015 Claimant's MRI, as read by Dr. Eric Lynders, showed a large, caudally directed left paracentral disc extrusion a the L5-S1, that contacted and impinged at the left S1 nerve root in the lateral recess, with disc material contacting the ventral surface of the left S2 nerve root, and moderate to severe central spinal canal stenosis and foraminal narrowing. He also noted fissuring of the L3-4 and L4-5 on the MRI.

6. Claimant was evaluated by neurosurgeon Stephen Johnson, M.D. on

December 30, 2015. Dr. Johnson took a history and noted Claimant's complaint of sharp pain in his left low back with radiation to his left buttock, posterior left thigh, posterior left calf and lateral and bottom of the left foot. He was able to walk fairly comfortably though had increased pain with sitting. Claimant revealed that he had significant weakness of the plantar flexion of the left ankle for the previous three weeks, with persistent numbness of the lateral and bottom of his left foot and numbness of his left saddle area. Claimant also reported some slowing of urination. On exam, Dr. Johnson noted an abnormal gait, not able to push off with plantar flexion of the left ankle and inability to toe walk. Claimant had positive straight leg raise on the left, diminished pin sensation over the dorsum of the lateral aspect of the foot and big toe as well as the saddle area on the left extending laterally from the midline and inferiorly along the medial left thigh suggesting an S1-S2 hypesthesia. Dr. Johnson recommended proceeding with surgery in light of the findings.

7. On January 12, 2016 Claimant was attended by Dr. Johnson, who documented a history as follows:

> [Claimant] was doing reasonably well until a car trip to Estes Park in early November, which brought on pain involving his left low back and left leg. The symptoms worsened in early December. He has had persistent radicular left leg pain. He had an epidural steroid injection, which did not significantly help his pan. He describes a sharp pain in the left low back radiating to the left buttock, posterior left thigh, posterior left calf, and into the later and bottom of the left foot.
>
> Pertinent findings at the time of the hospital admission include ability to toe walk on the left. His gait is abnormal because of the decreased strength with plantar flexion of the left ankle. Straight leg raising is positive on the left. There is significant weakness of plantar flexion of the left ankle. The left ankle reflex is absent. Pin sensation is diminished over the dorsum and lateral aspect of the left food as well as the plantar surface of the left foot.

8. Claimant proceeded with a semi-hemilaminectomy of the L5-S1 with excision of the disk herniation on January 12, 2016 performed by Dr. Johnson at SCLH. The postoperative diagnosis was herniated disc, L5-S1, left. During the surgery, Dr. Johnson identified the left S1 nerve root and performed a foraminotomy. He also identified a large disk herniation contained by the posterior longitudinal ligament. He made an incision in the ligament and discectomy was performed removing the extruded disk material as well as fragments within the disk that had migrated inferiorly to the disk and the additional fragments close to the midline. Dr. Johnson observed that the common dural sack and proximal S1 and S2 nerve roots then appeared decompressed.

9. On discharge on January 13, 2016 Dr. Johnson noted that Claimant, following surgery, was allowed to gradually progress his activities and made progress with ambulation. He was discharged home with plans for a follow-up visit.

10. Dr. Sean O. Bryant noted that the MRI of March 14, 2016 showed good decompression at the L5-S1 level, some post-surgical scarring around the nerve root, no recurrent herniation and the disc space was narrowed at L5-S1 with degenerative findings otherwise stable and no prevertebral mass or fluid collection. The same fissuring of the L3-4 and L4-5 was also seen on this MRI.

11. Claimant was seen by Dr. Johnson on March 16, 2016. He noted that

Claimant was doing well until one week prior, when he awoke with numbness involving his left foot. He was seen at Presbyterian/St. Luke's Medical Center, where they ordered X-Rays and an MRI. The X-Rays showed a lumbar spine partial laminectomy at L5-S1 on the left. Dr. Johnson was hopeful that sensation would improve with walking, physical therapy and time.

12. On April 8, 2016 Dr. Eric Whittier of SCLH Medical Group recommended gabapentin twice daily for nerve pain, as well as clonazepam three times a day and citalopram daily because of the insomnia and general anxiety. On April 12, 2016 Dr. Johnson agreed with Claimant's primary treating physician to start him on gabapentin twice daily.

13. On May 20, 2016 Claimant was admitted to the hospital with a generalized anxiety disorder, insomnia, and a severe episode of recurrent major depressive disorder and post-traumatic stress disorder (PTSD). Dr. Whittier noted that the PTSD was from childhood trauma and ongoing chronic anxiety. Upon discharge he recommended establishing therapy and psychiatric consult for medication control.

14. On June 20, 2016 Claimant continued with PTSD, generalized anxiety, insomnia and had an exacerbation of his back pain with left sided radiculopathy due to lifting in physical therapy. Dr. Whittier increased his gabapentin to four pills a day TID (three times daily), bupropion and tramadol every six hours for pain.

15. On January 16, 2017 Claimant reported to Dr. Whittier that he was having back pain and radicular symptoms that was likely worsening his PTSD as his mood was visibly worse. He increased his antidepressant and sleep medications. He was taking four tablets of gabapentin per day in addition to the tramadol as needed. He also made a referral to neurosurgeon Dr. Wong as Claimant declined to return to Dr. Johnson for his worsening lumbar spine pain and radiculopathy with muscle weakness. On February 17, 2017 Dr. Stephen Carmel also documented ongoing low back and left sided radiculopathy.

16. On July 25, 2017 Dr. Whittier again mentioned a referral to a second opinion neurosurgeon for the low back and radicular problems on the left. Claimant continued to have PTSD, generalized anxiety and insomnia. Claimant had an annual exam on October 24, 2017, with Dr. Whittier who noted that Claimant only taking one to two dozes of gabapentin at nighttime and had stopped most of his antidepressants but continued to see a therapist for depression. On physical exam he found mild tenderness in the low back and recommended that Claimant continue on gabapentin. This was also the recommendation on May 15, 2018 and December 10, 2018.

17. On January 10, 2019 Claimant had significant low back pain with radiculopathy and evidence of distal weakness on the lower extremity. Dr. Whittier recommended orthopedic evaluation with Western Orthopedics. On June 13, 2019 Claimant continued to have problems with anxiety, medications were restarted, and referrals to both therapy and a gastroenterologist were placed. On August 7, 2019 he continued to have insomnia, anxiety. Medications were changed. On September 16, 2019 he had continued low back and radicular symptoms despite continued use of two gabapentin pills per night, with some subtle weakness and pain when sleeping. On musculoskeletal exam, Dr. Whittier found chronic low back pain, positive for tenderness to palpation, with left leg radiculopathy and left leg numbness as well as deep tendon reflex

(DTR) on neurologic exam. He also noted depressed mood with tearfulness. Dr. Whittier referred Claimant to Denver Back Pain Specialists and recommended Claimant continue to take the gabapentin.

18. Dr. Whittier again evaluated Claimant on October 1, 2020. Claimant continued with anxiety, depression, insomnia and lumbar spine chronic pain and radiculopathy. He continued to take gabapentin. On October 15, 2020 he placed a prescription for gabapentin, two tablets per night. On November 19, 2020 Claimant continued with the same medications and same diagnosis of generalized anxiety, insomnia, PTSD. Claimant continued with gabapentin for the chronic pain.

19. Claimant was seen by Dr. Jacob Ludwig for the first time on March 25, 2021 and diagnosed chronic bronchitis, insomnia, generalized anxiety, hypertension, and Dr. Ludwig referred Claimant to a new therapist. On August 27, 2021 Claimant was seen by Dr. Ludwig and diagnosed with the same issues of generalized anxiety, PTSD, hypertension, insomnia, back pain with left sided radiculopathy with associated neuropathy controlled with gabapentin, and mild intermittent reactive airway disease. Dr. Ludwig noted that "He is in real distress related to the above situation and especially struggling without access to gabapentin, clonazepam, Lisinopril, doxepin and albuterol inhaler."

20. Just two months prior to this claim Claimant reported he was helping his cousin move boxes and felt increased back pain and left-sided sciatica. Claimant testified he helped his cousin lift and carry a variety of many items at a garage sale, and he felt back pain with pain into his left leg and left foot.

21. Claimant saw his primary care physician, Dr. Jacob Ludwig, at SCL Health Medical group on September 10, 2021, who recommended he change his gabapentin intake to three times a day. Dr. Ludwig documented that Claimant reported he was in a physically, mentally, and emotionally abusive relationship at that time. Claimant requested removal of the history that was recorded during the visit regarding his relationship. The report notes Claimant was hospitalized in the past for these (presumed harmful mental health) thoughts, and did not want to go back to the hospital. Claimant also reported his father was abusive as well. Claimant complained to Dr. Ludwig the sciatica was constant, and went down to the toes. Dr. Ludwig gave Claimant the suicide hotline information, and recommended he continue his medications including clonazepam and Lexapro and continue therapy.

22. Claimant reported he had chronic low back pain for years, and Claimant himself requested a referral for sports medicine and an MRI, and they offered him both. Dr. Ludwig noted Claimant had acute on chronic low back pain with severe left-sided sciatica symptoms and neuropathy. Dr. Ludwig reported that Claimant increased his gabapentin dosage to "TID" which means three per day from his regular dosage of twice per day. On exam, Dr. Ludwig found Claimant had tenderness in the back, and a positive straight leg raise ("SLR") test on the left. Given the neurologic symptoms in setting of prior laminectomy, Dr. Ludwig recommended an MRI to evaluate recurrent nerve compression. Dr. Ludwig recommended Claimant establish care with a sports medicine physician and a physical medicine rehabilitation specialist/physiatrist.

23. Claimant stated that his symptoms continued at that level for less than two weeks and then he went back to taking one to two pill at bedtime. Claimant testified the

back pain he experienced in September 2021 was new and different than what he experienced immediately before that incident in September 2021.

24. On November 12, 2021 Claimant reported to his Employer a low back injury while lifting boxes of dairy products. Claimant's manager was pushing the boxes towards him and he would rotate, lift them and then rotate to the opposite side to stack them. When lifting the last one, Claimant felt a pop in his low back. He felt immediate increasing pain in his low back going down his left leg and into his foot.

25. Claimant's manager, testified that she did not witness any incident or injury. She stated she worked alongside Claimant on November 12, 2021 putting away the mix in the walk-in. Although Claimant testified he was unable to continue working after the incident, the manager testified Claimant was able to complete the task of putting the frozen mix away, and after the frozen mix was put away, she and Claimant continued working on other tasks including putting away paper, dilly bars, and queso. Although Claimant testified he experienced "excruciating" pain while putting the mix away, the manager contradicted Claimant, stating she never witnessed Claimant cry out in pain, or exhibit any signs of an injury or pain. The manager stood next to Claimant to hand him the products, but did not hear his back pop or observe anything to indicate that Claimant hurt himself. The manager testified Claimant never told her about his prior back injury, any lifting restrictions, or any physical limitations when they went over the job duties.

26. When the manager was about to leave for the day, she let Claimant know he could stay and work or he could go home. Claimant looked at her funny, but did not report any injury at that time. After Claimant continued to look at her in a funny way, the manager asked Claimant to come with her to the office. She and Claimant spoke for a lengthy time, but Claimant did not tell her what happened. Ultimately, she was the first one to ask if he was hurt. Claimant then told her he felt a twinge while putting the supplies away, but felt a pop when he lifted the queso. Claimant initially declined to seek medical treatment, but the manager insisted.

27. Prior to working for Employer, Claimant had not worked since 2009 at a formal job. Claimant testified he listed employers on his job application, and misrepresented his work history through 2019. Claimant testified he did this as he wanted to work with the manager of Employer, whom he had previously met and with whom he had discussed a possible job.

28. On November 12, 2021, Dr. Brian Cooper of UCHealth – Harmony Emergency, noted a history that Claimant was lifting while at work and felt a pop in his left lower back. Before going to the emergency, he had been resting in bed, arriving at the ED via Uber. Claimant reported symptoms of low back pain with some weakness to his left leg. Dr. Cooper evaluated Claimant and found him to be in acute distress. Claimant was provided with prednisone (Medrol Dospak), flexeril and lidocaine patches. Dr. Cooper opined the evaluation showed a lumbar series with no acute findings other than degenerative changes at the L5-S1 level. Dr. Cooper recommended Claimant follow-up closely with his primary doctor to arrange further follow-up. His discharge medications were oxycodone (Percocet), Medrol Dospak, Lidoderm patches and cyclobenzaprine (flexeril).

29. Claimant received the designated provider list from Employer on November 12, 2021 by text message, and from Pinnacol on November 16, 2021. The designated

provider list included Concentra in Fort Collins, Workwell Occupational Medicine in Loveland, Workwell Occupational Medicine in Fort Collins, and UC Health Occupational Medicine in Fort Collins. Claimant chose to treat at Workwell Occupational Medicine in Loveland with Dr. Dupper.

30. Claimant was first seen by Dr. Robert Dupper at Workwell, Longmont. He took a history that Claimant was lifting crates and stacking them on November 12, 2021, which required Claimant to lift and twist repeatedly. As he lifted and twisted, he heard his low back pop. Then he developed significant left leg radiation that went into the foot with some numbness and tingling. He noted that in addition to using the flexeril and lidocaine patches received from the emergency room, Claimant was also taking Tylenol and ibuprofen as well as using ice packs. Dr. Dupper took a history from Claimant of back pain and treatment going back to 1991. Dr. Dupper listed Claimant's current medication as Gabapentin, Lisinopril, Clonazepam, vitamins, Tylenol, ibuprofen. On exam he noted that there was tenderness present in the lumbosacral area but no edema in the back or lower extremities. There was also an absent reflex at the ankles, altered sensation along the left lateral calf, a shuffling gait, absent toe and heel walking on the left, some hesitancy with urination, moderate limited range of motion and a positive SLR on the left. Dr. Dupper ordered a "STAT"[1] MRI and prescribed Tramadol for pain. While Dr. Dupper provided an opinion that the objective findings were consistent with the mechanism of injury, the record is devoid of notes stating that he had reviewed medical records or requested any prior records.

31. Dr. Virginia Scroggins Young read the November 15, 2021 MRI and observed post-operative changes and disc bulges with high signal annular fissuring at L3-4 and L4-5. Claimant already had annular fissuring with disc protrusions in his December 8, 2015 MRI at L3-4 and L4-5.

32. Claimant was seen by Dr. Dupper on November 18, 2021. He noted that Claimant was in severe distress and had weakness of the left calf when attempted to stand on his toes. Claimant reported this last symptom as new. Dr. Dupper refilled the cyclobenzaprine and diagnosed strain of the low back with radiculopathy. He referred Claimant to Dr. Shoemaker, a physiatrist as well as physical therapy.

33. After Claimant began treatment, he moved to Aurora, Colorado. Before he moved to Aurora, he spoke with Insurer to find out if there was a possibility of being treated in Denver or another areas. The Insurer's adjuster advised that a change in location does not result in a change of doctor. Insurer advised that the list of designated providers did not have any providers outside the Fort Collins/Loveland area but that there were many providers in Denver that could attend him and that the adjuster could provide a couple.

34. On November 22, 2021, Claimant sent his new address to the adjuster and asked when a list of clinics and/or doctors around his area could be emailed to him. On November 23, 2021 Insurer sent Claimant a list in his area and recommended calling them to find out if they would accept transfer of his care and then set up with whichever was easiest for Claimant. The list included Workwell in Aurora; CareNow in Denver and SCL in Denver.

[1] STAT is a medical abbreviation for urgent or rush, from the Latin word statim, meaning "immediately."

35. Claimant scheduled an appointment with Workwell in Aurora with Dr. Matus. Claimant testified that he wanted to maintain continuity of care. Claimant acknowledged in discovery that Dr. Matus was his treating provider, and testified SCL Health was not on the initial Employer's designated provider list in the Fort Collins/Loveland areas.

36. Claimant was first seen by Dr. Brenden Matus on December 3, 2021. He noted he was seeing Claimant as a transfer patient from another clinic. He reviewed the history and personal history as well as the MRI. He opined that the post-surgical findings were not acute and did not require a surgical consult. He agreed with the physical therapy and physiatrist referrals. He refilled the flexeril, ibuprofen and the patches.

37. After Claimant moved to Aurora and started seeing Dr. Matus at Workwell in Aurora, Claimant filed a Notice of "One-Time" Change of Physician form on February 2, 2022 requesting SCL Health Medical Group ("SCL") be his authorized treating physician. The objection by Respondents was that SCL was not a provider listed on the Employer's initial designated provider list in the Fort Collins/Loveland areas.

38. Claimant saw Dr. Shoemaker, a physical medicine and rehabilitation doctor/physiatrist, on December 14, 2021. Dr. Shoemaker reported there were no acute findings on MRI to indicate a new disc injury. Dr. Shoemaker documented a "challenging" conversation with Claimant regarding causation. Dr. Shoemaker noted Claimant "certainly openly disagreed" with Dr. Shoemaker's medical assessment that the annular fissures at the L3-L4 and L4-5 were incidental, known to be present in asymptomatic individuals, and that it was "highly unlikely" that Claimant simultaneously injured four separate structures during the discrete work-event. Dr. Shoemaker opined the annular fissures were probably incidental, asymptomatic, and unrelated to the work incident. However, he opined that Claimant likely had an aggravation of the previously existing chronic condition at the L-5 S1 level as well as hip injury, which was minor compared to the aggravation of the spine condition. Dr. Raschbacher agreed with this finding regarding the annular fissures. Dr. Shoemaker also noted Claimant "initially ramped up his usage [neuropathic pain medications] to 3 times a day, though as symptoms have been recently improving, he is back down to his normal gabapentin usage." Dr. Shoemaker opined Claimant's condition had not yet returned to his chronic baseline. Dr. Shoemaker recommended a pain psychology evaluation on December 14, 2021, and documented multiple times that Claimant "denied pain psychology." Dr. Shoemaker increased Claimant's gabapentin, cyclobenzaprine p.r.n., and a 10-day course of meloxicam. Nothing in this record shows that Dr. Shoemaker had Claimant prior treatment records.

39. On December 14, 2021 Respondents filed an Admission of Liability, admitting to reasonably necessary medical benefits and temporary total disability benefits.

40. On February 9, 2022, Dr. Shoemaker wrote "as per previous notes, I recommended pain psychology, and he declined." Dr. Shoemaker reported that the Claimant's pain disability score was 143 out of a highest possible score of 150, which would be extreme disability. Dr. Shoemaker opined Claimant's score was inconsistent with a patient who was capable of their own self-care, and was highly inconsistent with objective findings, including Claimant's physical function during their encounters. Dr. Shoemaker opined this indicated that Claimant was "not a reliable reporter of his degree of functional ability."

41. Dr. Jeffrey Raschbacher performed an IME on March 25, 2022. Dr. Raschbacher opined Claimant had a long history of prior similar problems, that there was no clear evidence that the reported history produced any change in symptomatology over and above his baseline, and there is no clear evidence radiologically or documented by physical examination that Claimant sustained a new injury or aggravation on November 12, 2021.

42. Claimant was ultimately placed at MMI by Dr. Brenden Matus on April 19, 2022 without impairment or maintenance care. Dr. Matus admitted it was "difficult to compare to his pre-injury baseline with a dearth of objective functional evidence from pre-injury."

43. Claimant was evaluated by Dr. Sander Orent, at Claimant's request on May 12, 2022. Dr. Orent took a history that Claimant was moving bulk soft serve ice cream on a platform. They were approximately 40 lbs. boxes. On the last lift, he felt a pop in the low back and severe pain. He reported he dropped the last crate while stocking. He went to pick up another box and had a sharp pain immediately going down the left leg. He noticed immediate weakness and started to limp. Dr. Orent opined that Claimant sustained an aggravation of his preexisting on November 12, 2021 based on the classic radicular findings that have worsened as a result of the lifting incident. He stated that Claimant required further care, including reimaging, an EMG nerve conduction study, antidepressants, counselling, and cognitive behavioral therapy.

44. Claimant testified he had moved from Denver to Windsor prior to being hired with Employer, but he had help and did not do much of the moving. Presumably, Claimant was unable to lift items and needed help because of his ongoing back injury and re-injury from September 10, 2021. Claimant testified that after this incident, he engaged in another activity that aggravated his low back pain while moving from one home to another in late November 2021 (from Winsor to Aurora), and testified this was not work-related. Claimant testified the pain from this aggravation was to his left lower back, left leg, and left foot, which is the same location that his pain has been consistently since before 2016. Claimant immediately tried to deny his testimony on cross examination, but ultimately agreed he aggravated his back while moving in November 2021. Claimant testified on re-direct he had a temporary worsening while moving, and also testified that activities of daily life aggravated his pain such as cleaning the bathtub, cleaning the toilet, and lifting more than he should and believed he lifted beyond what his capabilities were.

45. Dr. Raschbacher testified at hearing and opined that it was unlikely Claimant's condition was the result of a work injury, as his current condition was the same condition Claimant has treated for over many years prior to this claim. Dr. Raschbacher opined there was no objective basis to support a new injury or an aggravation on November 12, 2021, due to the lack of objective findings, and failure to provide physicians with a complete history of his prior physical and psychological condition. Dr. Raschbacher reviewed the MRI and opined it showed old post-operative changes, old scarring, no acute herniated discs, and nothing new or acute on it. Dr. Raschbacher testified if Claimant was in pain, it was the same pain he had experienced all along related to his prior condition. Dr. Raschbacher testified it was improbable that Claimant sustained a new injury, and that his symptoms were more likely the persistence of his pre-existing condition. Dr. Raschbacher testified Claimant was probably no different than his baseline condition.

46. Dr. Raschbacher testified Claimant's medical history showed a longstanding pattern of aggravation and reinjury, with a persistence of low back and left lower extremity complaints dating back to 2015, and the low back condition never resolved. Dr. Raschbacher testified there is nothing in the treating records showing Claimant's treating providers had access to his prior medical records or performed a prior medical record review. This ALJ agrees with the latter after having reviewed the exhibits provided.

47. Dr. Raschbacher testified Dr. Orent's opinion that Claimant's persistent low back pain since 2015 spontaneously resolved in September 2021 after 2 weeks does not make sense medically, and it would be quite unusual for a patient with longstanding pre-existing symptoms for years, with a severe new injury, to have a spontaneous resolution of the symptoms within 2 weeks. Finally, Dr. Raschbacher opined that, when performing a causation evaluations, it was important to analyze correlation of subjective and objective findings, and, in this case, there were no objective signs of injury.

48. As found, Dr. Raschbacher testified credibly that Claimant did not sustain a new work injury or an aggravation of his pre-existing condition as there were no acute findings of an acute injury, Claimant's complaints were the same as his pre-existing complaints, and there was no clear objective evidence Claimant was worse than his baseline condition.

49. As found, Dr. Raschbacher's opinion that there were no objective findings of a new, acute back injury related to a November 12, 2021 incident is credible and more persuasive than the contrary opinion of Dr. Orent. As found, while Dr. Shoemaker opined Claimant's condition had not yet returned to his chronic baseline, Dr. Shoemaker was not in receipt of the full medical history related to Claimant's longstanding prior complaints when he gave his opinion.

50. As found, although Dr. Orent and Claimant contended his psychological issues were not addressed in this case, Dr. Shoemaker recommended a pain psychology evaluation on December 14, 2021, and documented multiple times that Claimant "denied pain psychology." On February 9, 2022, Dr. Shoemaker wrote "as per previous notes, I recommended pain psychology, and he declined." As found, Dr. Raschbacher was persuasive in his assessment that Claimant already had delayed recovery and psychological issues which he was actively treating for prior to this claim related to chronic pain, PTSD, anxiety, abuse, generalized anxiety disorder, distressed marriage, which are unrelated to this claim.

51. As found, Dr. Orent's report lacks credibility. Dr. Orent's account of the mechanism of injury was not consistent with the Claimant's testimony, reports of mechanism of injury in the other medical records, or testimony of the manager.

52. As found, the manager testified credibly that there was no specific incident or accident at work, and she did not witness any accident or injury. As further found, she testified credibly that Claimant did not report a work injury until she suggested he may have been in pain.

53. As found, Claimant testified he experienced increased pain from this incident, and that he had not experienced pain like this, but this testimony is inconsistent with the medical records from September 2021 documenting "severe" pain, as well as the initial

hospital records showing that Claimant appeared uncomfortable, but was able to walk to the room without assistance.

54. As found, Claimant's testimony lacks credibility. Claimant testified inconsistently multiple times, and admitted to falsifying employment history to obtain an outcome he wanted and Claimant changed his testimony multiple times on the stand. As found, Claimant reported that he felt a pop when he lifted the queso on November 12, 2021. As found, some of the medical records indicate Claimant reported he injured himself while moving frozen mix.

55. As found, Claimant also told Dr. Raschbacher that he worked at a Thai restaurant before being hired with Employer, which is inconsistent with his testimony at hearing. As found, although Claimant had not worked for over 10 years, he testified he had an active lifestyle of backpacking through Europe, hiking, playing basketball, tennis, swimming, and skiing, which is inconsistent with his medical history of continual chronic low back pain and radiculopathy since 2015.

56. As found, the prior medical records from SCL Health showed a long-standing, chronic, pre-existing low back condition which never resolved after his back surgery in 2016, including on April 8, 2016 a recurrence of radicular pain to the left leg and foot numbness as well as increased anxiety and depression; on May 20, 2016 reports of continuing radicular symptoms as well as ongoing mood problems related to childhood PTSD and the pain from his back surgery, which brought his psych issues to the forefront; and multiple other instances of complaints of low back, left lower extremity radicular pain, anxiety, depression, PTSD related to childhood events and marital abuse, and insomnia. As found, Claimant continued to treat for the whole period of 2016 through 2021 for anxiety disorder, PTSD, insomnia, and back pain with left-sided radiculopathy as stated above. For example, on June 20, 2016 Claimant continued with PTSD, generalized anxiety, insomnia and had an exacerbation of his back pain with left sided radiculopathy due to lifting in physical therapy. Dr. Whittier increased his gabapentin to four pills a day TID (three times daily), bupropion and tramadol every six hours for pain. As found, Claimant was being treated on September 10, 2021 with the same dosage of gabapentin that Claimant testified he was told to increase his dosage to after the November 12, 2021 incident. He was on the increased dosage of gabapentin multiple times following his 2015 surgery.

57. The treatment plan recommended by Dr. Ludwig on September 10, 2021 was the same as the treatment plan Claimant had for November 12, 2021 as well as he was recommended on January 16, 2017, July 25, 2017, January 10, 2019, and September 16, 2019, with which Claimant failed to follow up to see specialists. As found, the September 10, 2021 mechanism of injury is similar to the mechanism of injury in this case- they both involve lifting incidents.

58. As found, Claimant reported symptoms of low back pain with some weakness to his left leg on November 12, 2021 to Dr. Brian Cooper, which were identical symptoms than those he complained of during his September 2021 incident and other prior lifting incidents. Further, as found, the X-rays of the lumbar spine which were taken at UCHealth showed no acute osseous or acute alignment abnormality of the lumbar spine and Dr. Cooper did not recommend follow-up with workers' compensation, but recommended Claimant work closely with his primary doctor to arrange further follow-up. This ALJ infers

from the information that Dr. Cooper did not opine that Claimant had an aggravation of his preexisting condition but an ongoing preexisting problem. Supporting this inference are the records that reflected Claimant did not have an impaired gait, and that he walked into his room without assistance. It is also supported by the fact that Claimant's MRI from November 15, 2021 had similar findings as the MRIs from December 8, 2015 taken before his surgery (with the exception of the subsequent surgical changes) and March 14, 2016 following the surgery.

59. As found, Claimant had a longstanding prior history of mental health issues as well, either affecting his chronic lumbar spine condition with radiculopathy or the lumbar spine chronic issues affecting his mental status.

60. As found, Claimant also reported to Dr. Orent that he began to limp, but the manager testified she did not witness any limping, and the UC Health records documented no limp.

61. As found, Dr. Shoemaker's opined that Claimant was not a reliable reporter of his own degree of functional ability is in accord with this ALJ's findings that Claimant was inconsistent in both his testimony and reporting of symptoms to his medical providers.

62. As found, Respondents have shown by a preponderance of the evidence that Claimant did not have a compensable event on November 12, 2021 that aggravated his preexisting condition and may withdraw their admission.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition

for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Are Respondents entitled to withdraw their General Admissions of Liability

Respondents are bound by a General Admission of liability and are required to continue paying until the law permits them to terminate benefits, or they obtain an order from an ALJ. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Once an admission has been filed, the employer may not unilaterally modify that admission if the employer comes to believe an injury is not compensable. Sec. 8-43-203(2)(d); Sec. 8-43-303, C.R.S. Rather, the employer must request a hearing before an ALJ and continue to make benefits payments until the ALJ enters an order allowing modification of the admission, in full or in part. Sec. 8-43-203(2)(d); Sec. 8-43-303; *Rocky Mtn. Cardiology v. ICAO*, 94 P.3d 1182 at 1185 (Colo. App. 2004) (" An employer is required to continue paying pursuant to an admission of liability and may not unilaterally withhold payment until a hearing is held to determine whether there is sufficient evidence to permit withdrawal of the admission.") The party seeking to withdraw an admission carries the burden by a preponderance of the evidence. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Section 8-43-201(1), C.R.S., places the burden of proof on Respondents and to withdraw is the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-

754-838 (ICAO, Oct. 1, 2013); *Munoz vs. JBS Swift & Co.,* WC, 4-780-871-03 (October 7, 2014). Therefore, Respondents' attempt to withdraw their admission of liability becomes an analysis of compensability of the previously admitted injury. *Kelly v. Insta Flap*, W.C. No. 5-120-413, (ICAO, Mar. 30, 2022).

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory, supra.* However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities. Based upon the credible evidence in the record in this case, Claimant merely experienced symptoms of his pre-existing condition while at work which was the natural progression of his disease, in this case continuing low back and left lower extremity radiculopathy, which would produces symptoms any time Claimant lifted something beyond his capabilities. This happened multiple times after Claimant's surgical procedure and November 12, 2021, including on June 20, 2016, January 16, 2017, July 25, 2017, January 10, 2019, and September 16, 2019, and September 10, 2021.

There is a difference between an accident and an injury at work. *Wherry v. City & County of Denver*, W.C. No. 4-475-818 (ICAO March 7, 2002). Just because an accident may have occurred at work, does not necessarily mean Claimant suffered a compensable injury. *Id.* The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or un-designed occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." In *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO 2020), the Industrial Claim Appeals Office upheld the ALJ's order denying and dismissing Claimant's claim for compensation where Claimant had proven an accident occurred, but where

Claimant failed to prove the injury was causally related to the accident. In *Washburn*, Claimant had video evidence of a slip and fall at work, and it was clear there was an accident or incident at work. *Id*. However, the ALJ found Claimant failed to prove she sustained a work-related injury as a result of the fall, and dismissed the claim. *Id.*

The court examined a similar case in *Kelly v. Insta Flap*, W.C. 5-120-413 (ICAO March 30, 2022). In *Kelly*, Claimant alleged an injury at work while moving a rolling rack, when the pipe rack began to fall off the hook and Claimant reached for the pipe to catch it and hurt his back. Claimant described the pain as instant and shocking. Claimant went home after the incident and sought medical treatment the next day. Claimant had a history of longstanding back complaints. The ALJ allowed respondents to withdraw their admission, and found that Claimant did not sustain a work injury that necessitated treatment, and that the Claimant's pre-existing or chronic low back condition was not aggravated or accelerated by the incident at work.

Here, Respondents have proven by a preponderance of the evidence that Claimant's back condition was pre-existing. The preexisting medical records and subsequent independent medical examination and opinions showed that the preexisting condition was symptomatic, disabling, and required treatment before the work incident of November 12, 2021. Claimant's testimony to the contrary is not credible. Complaints described by him show him to have been in significant or severe pain with multiple recommendations and requests for treatment before the work incident. The opinions of medical providers reliant upon Claimant's representations after he brought a workers' compensation claim are not persuasive. Claimant's pre-existing condition was not caused, aggravated, or accelerated by the November 12, 2021 work event. It is found that Claimant did not experience a compensable work injury in the course and scope of his employment and that any low back and radicular symptoms, including weakness were the natural progression of the underlying preexisting condition.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Sec. 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). As found, Claimant's need for treatment pre-existed any work incident on November 12, 2021 as his treatment plan was the same as recommended by his primary care physician on September 10, 2021 and at other times following his 2016 surgery as stated above. It is found and concluded that Claimant did not sustain a compensable work injury.

C. Is Claimant entitled to a change of physician

"Section 8-43-404(5)(a)(I)(A) requires an employer to 'provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, from which list an injured employee may select the physician who attends the injured employee.'"

Under Workers' Compensation Rule of Procedure 8, such list must be provided to an injured worker within seven business days following the date the employer has notice of the injury. W.C.R.P. Rule 8-2(A)(1).

Substantial evidence in the record establishes that Claimant timely received the designated provider list, listing four providers in the Fort Collins/Loveland area. Claimant initially chose Workwell in Loveland and Dr. Dupper as his attending physician. Claimant then moved to Aurora, Colorado and requested a relocation of his treating provider. After consultation with the Insurer's adjuster, who provided a list of providers in the Denver/Aurora Area, Claimant was transferred to Dr. Matus at Workwell in Aurora. It was after this transfer of care, on February 8, 2022 (which is 88 days after November 12, 2021) that Claimant requested a change of physician by filing the appropriate form. The form designated one of the providers listed by Insurer, SCL Group, after he relocated to Aurora. Respondents argue that Claimant was not entitled to designate a "new" provider and that he was prohibited from listing a provider that was not on the "original" list of providers from Fort Collins/Longmont.

An employee may obtain a one-time change in the designated authorized treating physician pursuant to Section 8-43-404 (5)(a)III, C.R.S., after certain conditions are met, including that the notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement; the notice is in writing and submitted on a form designated by the director; the notice is directed to the insurance carrier and to the initially authorized treating physician; the new physician is on the employer's designated list; and the transfer of medical care does not pose a threat to the health or safety of the injured worker.

Sec. 8-43-404(5)(a)(III) allows for a one time change of physician by providing notice that meets multiple requirements. One of the requirements is Sec. 8-43-404(5)(a)(III)(D), which states that "the new physician is on the employer's designated provider list or provides medical services for a designated corporate medical provider on the list."

This statutory right is further explained in Rule 8, Colorado Workers' Compensation Rules of Procedure which includes the following procedural rules in Section 8-5(C) as follows:

> If the insurer or employer believes the notice provided pursuant to this rule does not meet statutory requirements and does not accept the change of physicians, it must provide written objection to the injured worker within seven (7) business days following receipt of the form referenced in paragraph (B). The written objection shall set out the reason(s) for the belief that the notice does not meet statutory requirements.
>
> > (1) If the employer or insurer does not provide timely objection as set out in this paragraph (C), the injured worker's request to change physicians must be processed and the new physician considered an authorized treating physician as of the time of the injured worker's initial visit with the new physician.
> >
> > (2) If written objection is provided and the dispute continues, any party may file a motion or, if there is a factual dispute requiring a hearing, any party may request that the hearing be set on an expedited basis.

The record shows that Respondent sent both Claimant and his counsel a letter stating that the Insurer would not authorize a change of physician and that Dr. Felix Meza

(one of the providers at Workwell Aurora) would remain Claimant's treating physician on February 10, 2022. This ALJ infers from this letter that Insurer was objecting to the change of physician. Despite the timely noticed objection, the objection does not set out the reason for the belief that the notice did not meet the statutory requirements as required by Rule 8-5(C). Therefore Claimant would be entitled to the change of physician in this case. However, the issue of change of physician is really made moot by the determination that Respondents have shown by a preponderance of the evidence that they are allowed to withdraw their admissions of liability as no compensable event occurred on November 12, 2021.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents have proven by a preponderance of the evidence that there was not a compensable work injury that occurred on November 12, 2021. Respondents' request to withdraw the general admission of liability is granted. Claimant's claim for compensation is *denied and dismissed* prospectively.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 26th day of July, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the medial branch block recommended by authorized treating physician ("ATP") Bradley Duhon, M.D. is reasonable, necessary and related to his industrial injury.

FINDINGS OF FACT

1. Claimant has worked for Employer since August 2000. Claimant sustained an admitted industrial injury on June 21, 2019 when he was struck by a moving forklift.

2. Claimant underwent treatment with authorized treating providers Annu Ramaswamy, M.D. and Bradley Duhon, M.D. He was diagnosed with left lumbar radiculopathy, lumbar lateral recess stenosis, protruding lumbar disc, lumbar foraminal stenosis, and lumbar stenosis without neurogenic claudication.

3. On April 26, 2021 Claimant underwent minimally invasive left L4-5 laminotomy with bilateral sublaminar decompression and minimally invasive left L5-S1 foraminotomies, performed by Dr. Duhon.

4. Post-operatively Claimant complained of low back pain as well as pain, numbness and tingling in his bilateral lower extremities.

5. On June 9, 2021, Claimant saw Dr. Duhon via a telemedicine visit. Dr. Duhon noted that Claimant's left-sided pain had resolved, but that he continued to have issues on his right side. Dr. Duhon noted L5 post-operative radiculitis of unknown etiology.

6. Claimant subsequently saw Dr. Duhon for a telemedicine visit on July 14, 2021 and an in-person evaluation on July 15, 2021. Claimant complained of low back pain, stabbing pain in the legs, and alternating leg symptoms. Dr. Duhon noted that Claimant's surgery did not result in "excellent decompression" and believed Claimant's ongoing pain was likely facetogenic in nature. Dr. Duhon further noted that Claimant's symptoms were different than his preoperative symptoms. Dr. Duhon remarked, "While the facet pain was not really much of an issue preoperatively, decompression requires partial facet resection and secondarily could have developed facetogenic pain." (Cl. Ex. 3, p. 20). He commented that he strongly believed Claimant needed medial branch blocks L4-S1 to identify his L4-S1 facets as the source of pain. Dr. Duhon also recommended an EMG of Claimant's bilateral lower extremities and a lumbar MRI. The lumbar MRI and EMG were performed on August 18, 2021 and December 15, 2021, respectively.

7. Claimant underwent additional physical therapy beginning on October 14, 2021 and continued in physical therapy throughout the remainder of 2021.

8. On September 23, 2021, Siva Ayyar, M.D. issued a peer review report regarding the recommendation for L4-S1 medial branch blocks. Dr. Ayyar reviewed the medical records and spoke with Dr. Duhon. He noted that Dr. Duhon stated the medial branch blocks and EMG testing are recommended to confirm the levels of involvement and to determined whether a spinal fusion will be beneficial. Dr. Ayyar concluded that the recommended L4-S1 medial branch blocks are not medically necessary. He explained that the MTG regarding the low back notes that medial branch blocks are probably not helpful to determine the likelihood of success for spinal fusion and, thus, not indicated in Claimant's case.

9. On October 20, 2021, Leo Lombardo, M.D. issued a peer review report regarding the recommended medial branch blocks. Dr. Lombardo also opined that the medical branch blocks are not medically necessary. Like Dr. Ayyar, he noted that, per the low back MTG, medial branch blocks are probably not helpful to determine the likelihood of success for spinal fusion. Dr. Lombardo further wrote that, while the recommended injections are generally accepted diagnostic injections used to determine whether a patient is a candidate for a facet rhizotomy, here a facet rhizotomy is not planned. He stated that a negative response to prior medial branch blocks was also noted.

10. On February 2, 2022, Dr. Duhon opined that Claimant could benefit from medial branch blocks focusing on the lumbosacral spine at L4-S1. He explained that the blocks are medically necessary because Claimant has facet-mediated pain emanating from these levels. Dr. Duhon further explained that the medial branch blocks are primarily diagnostic and will assist in confirming the source of Claimant's axial back pain and would allow to proceed with more therapeutic options such as dorsal rhizotomies.

11. On February 16, 2022, Dr. Duhon continued to note Claimant's persistent mechanical low back pain, pain in the left buttock and lateral hip, and numbness and tingling in the feet. He noted that Claimant's December 2021 EMG revealed moderate to severe chronic right L4-5 radiculopathy and mild left L4-5 chronic radiculopathy without apparent active/ongoing denervation. Claimant's August 2018 lumbar MRI revealed prior decompression at L4-5 but secondary to broad-based disc bulge and facet arthropathy, with significant stenosis at L4-5. Dr. Duhon further noted that he reviewed the February 11, 2021 medical of a Dr. Drew, and that such note indicated that the L5 selective nerve root block gave excellent relief during the anesthetic window. He remarked that bilateral L4-S1 medial branch blocks performed in October 2020 gave partial response during the anesthetic window. Dr. Duhon continued to opine that medial branch blocks are necessary, with possible dorsal rhizotomies to follow.

12. The ALJ finds the opinion of Dr. Duhon, as supported by the medical records, more credible and persuasive than the opinions of Drs. Ayyar and Lombardo.

13. Claimant proved that it is more probable than not the medial branch block recommended by Dr. Duhon is related to his industrial injury and reasonably necessary to cure and relieve Claimant of its effects.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant met his burden to prove he is entitled to undergo the medial branch block recommended by Dr. Duhon. Dr. Duhon recommended that Claimant undergo the medial branch block to identify and treat ongoing pain Claimant has

experienced as a result of his work injury and related surgery. Dr. Duhon credibly explained that the surgery did not result in excellent decompression, and that he suspects Claimant now has facetogenic pain. Dr. Duhon further credibly explained that the medial branch block is needed for diagnostic purposes to identify Claimant's source of pain and determine how to proceed regarding treatment. As Claimant's treating provider, Dr. Duhon is familiar with Claimant's condition and presentation. Dr. Duhon is also apprised of Claimant's medical records, including imaging.

Dr. Lombardo acknowledged that the recommended medical branch blocks are generally accepted as diagnostic injections to determine if a patient is a candidate for facet rhizotomies. Dr. Duhon specifically noted that, depending on the results of the medial branch blocks, a rhizotomy may be a consideration. Based on the totality of the evidence, Claimant has proven it is more likely than not the recommended medial branch block is related to his work injury and reasonably necessary to cure or relieve the effects of the injury. Accordingly, Respondents are liable for such treatment.

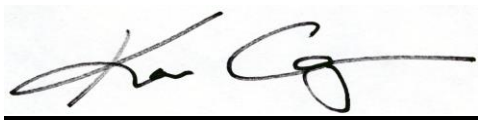
ORDER

1. Claimant proved by a preponderance of the evidence the medial branch block recommended by Dr. Duhon is reasonably necessary and related. Respondents shall authorize and pay for the medial branch block recommended by Dr. Duhon.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Did Claimant prove an evaluation by an ATP is reasonably necessary medical treatment after MMI?

FINDINGS OF FACT

1. Claimant works for Employer as an automatic door repair technician. The job is physically demanding and routinely requires lifting heavy doors, motors, and other parts. It also requires extensive driving to perform on-site repairs at commercial establishments across Colorado.

2. Claimant suffered an admitted low back injury on December 1, 2020 while repairing an automatic door at a retail drug store.

3. Claimant received treatment at Concentra under the direction of Dr. J. Douglas Bradley and NP Jennifer Livingston. He was primarily treated for pain and muscle spasms around the lumbar spine and intermittent leg pain.

4. Claimant was initially prescribed NSAIDs, muscle relaxers, chiropractic treatment, and physical therapy.

5. By February 24, 2021, Claimant had completed chiropractic treatment but remained symptomatic. His pain was exacerbated by long drives and moving "wrong." He was prescribed a course of steroids and referred for massage therapy.

6. On March 17, 2021, Dr. Bradley documented that Claimant was slowly improving but he still "has to be careful" about his activities because he had "increased pain with working hard."

7. Claimant ultimately received the most benefit from a combination of dry needling, massage, and PT. On July 9, 2021, Ms. Livingston noted Claimant was "feeling significantly better" and "dry needling seems to be what turned his pain around." He had discontinued the muscle relaxers and was only using ibuprofen occasionally.

8. Claimant was released from therapy on August 2, 2021. The report noted he could perform his regular work with pain typically 3/10 or less.

9. Dr. Bradley put Claimant at MMI on August 23, 2021. Claimant had improved but reported, "If over work, get cramps or aches." His pain level that day was 1-2/10. Dr. Bradley released Claimant with no impairment and no restrictions. Dr. Bradley also wrote prescriptions for diclofenac gel and 800 mg ibuprofen, each with three refills.

Confusingly, despite writing two prescriptions, Dr. Bradley checked a box on the WC164 form stating Claimant required no maintenance care.

10. The prescriptions were transmitted to Claimant's pharmacy and he picked them up after the appointment with Dr. Bradley. Claimant found the diclofenac helpful with the muscle spasms, but tried to minimize use of the ibuprofen because it bothered his stomach. He used both medications sparingly for a couple of months until he "ran out." Claimant did not refill the medications because he did not realize he had refills available.

11. Claimant has worked his regular job continuously since being put at MMI. His back pain is generally well controlled but occasionally flares when working long shifts or driving long distances. Claimant's pain has increased recently because he has been "working a lot." Claimant credibly testified he would like to refill the diclofenac and discuss other maintenance care options with an ATP.

12. Claimant proved his ongoing back pain remains causally related to his admitted work accident.

13. Claimant proved entitlement to general award of medical treatment after MMI to relieve the effects of his injury, maintain function, and prevent deterioration of his condition.

14. Claimant proved an evaluation with an ATP to evaluate maintenance care options is reasonably necessary.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of his compensable injury and prevent deterioration of his condition. Although Claimant's condition improved, he remained symptomatic when he reached MMI. Dr. Bradley reasonably prescribed diclofenac gel and ibuprofen to allow Claimant to manage expected recurrences of his pain. Waxing and waning is to be expected given the demanding nature of Claimant's work. The "checkbox" on the WC164 stating Claimant

requires no maintenance care is unpersuasive and probably a mistake, given that Dr. Bradley wrote two prescriptions with three refills on the same date.

Having found that Claimant is entitled to a general award of post-MMI medical benefits, it naturally follows he must have the option to follow up with an authorized provider occasionally. Claimant's request for an evaluation with an ATP to discuss his maintenance options is reasonable at this time, particularly considering Respondents retain the right to contest the reasonable necessity or relatedness of any specific treatment that may be recommended.

ORDER

It is therefore ordered that:

1. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's compensable injury and prevent deterioration of his condition.

2. Insurer shall cover an evaluation with Dr. Bradley or other ATP at Concentra to evaluate maintenance care options.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 27, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-053-442-004

ISSUES

The issues set for determination included:

- Did Claimant establish by a preponderance of the evidence that he is permanently and totally disabled ("PTD") as a result of his work injury?

- Did Claimant establish by a preponderance of the evidence that he is entitled to post-MMI maintenance medical benefits.

PROCEDURAL STATUS

A Summary Order was issued on April 15, 2022 and served on April 19, 2022. On May 2, 2022, Claimant submitted a Request for Specific Findings of Fact, Conclusions of Law and Order. Respondents filed amended Findings of Fact, Conclusions of Law and Order on May 3, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant was fifty-three years old (D.O.B. October 7, 1967) as of the second day of hearing. Claimant testified he was born in Mexico and went to school (primary) for six years. He immigrated to the United States in 1985 and has no additional education since coming to the U.S. He said he can read and write Spanish. Claimant testified he cannot read/write English, but understands some English.

2. Claimant testified worked in the fields doing farm work. He also worked as a dishwasher, sewing, assembling cabinets and operated a forklift. He began working for Employer in June 2013. Claimant testified that his principal work duties involved driving an operating a water truck at construction sites. The ALJ inferred these jobs were physical in nature.

3. On March 1, 2017, Claimant was working in a trench, removing soil around a pipe. There was machinery operating and the accident occurred when nearby soil and rocks fell and struck Claimant, burying him in debris. His coworkers rescued him from the trench.

4. Claimant testified he did not initially think his injuries were serious, but he experienced pain when driving home. He was evaluated the next day at UC Health Harmony. Claimant complained of low back pain without radiation, but he denied neck pain. Mark Breen, M.D. evaluated Claimant and described the evaluation of the cervical spine as normal. Dr. Breen ordered X-rays, which were negative for acute fracture or acute osseous process. Claimant was to follow up with a workers' compensation physician.

5. Claimant received treatment from Ryan Otten, M.D. at US Healthworks Medical Group in Longmont starting on March 2, 2017. Claimant was initially diagnosed with lumbar and thoracic strain. Over the initial course of his treatment, Claimant also reported right shoulder pain and was diagnosed with right shoulder sprain/strain.

6. Claimant received physical therapy ("PT"), medications and other treatment, including chiropractic manipulation. Dr. Otten assigned work restrictions from the time he began treating Claimant, starting with a five (5) lb. restrictions for lifting, repetitive lifting, carrying, pushing/pulling, reaching overhead, repetitive motion, which was increased to fifteen (15) lbs. in each of those categories. These restrictions continued.

7. On May 31, 2017, Roberta Anderson-Oeser, M.D. evaluated Claimant. At that time, he was complaining of cervical and lumbar pain, right shoulder pain and right lower extremity numbness and weakness. Claimant reported physical therapy had not been helpful. The examination of the lumbar spine revealed palpable spasms in the lower lumbar paraspinals. Claimant had tenderness over the lower lumbar intradisk spaces, bilateral lower lumbar facet joints and bilateral PSIS.

8. Dr. Anderson-Oeser's impression was: cervical strain; right acromioclavicular joint sprain; lumbar strain; right lower extremity paresthesias. Claimatn was to continue taking Ibuprofen and work modified duty.[1]

9. The MRI of Claimant's lumbar spine on June 5, 2017 showed no disc herniation or spinal stenosis in the lumbar spine. Hypertrophic degenerative arthropathy was present from L2-L3 and L5-S1.

10. Claimant experienced continued right shoulder and scapular pain. He received conservative treatment including physical therapy and was referred to orthopedic surgeon, Robert Fitzgibbons, M.D.

11. Claimant underwent a right shoulder MRI arthrogram on June 22, 2017. The MRI which showed tendinosis of the infraspinatus tendon, mild tendinosis of the subscapularis tendon with minimal interstitial tearing, and acromioclavicular degenerative joint disease.

12. On June 22, 2017, Claimant underwent a right shoulder MRI, which showed tendinosis of the infraspinatus tendon, mild tendinosis of the subscapularis tendon with minimal interstitial tearing, and acromioclavicular degenerative joint disease.

13. Claimant returned to Dr. Fitzgibbons on July 17, 2017. The surgeon reviewed the MRI with Claimant and advised him that he was suffering from arthralgia of the right acromioclavicular joint. Treatment options, including arthroscopic repair, were discussed with Claimant.

[1] Exhibit J, pp. 210-212.

14. Dr. Fitzgibbons performed arthroscopic shoulder surgery on August 31, 2017, which included a distal clavicle resection, decompression and debridement. The pre-operative diagnosis was: right AC arthritis and post-operative diagnoses were: right AC arthritis; partial undersurface rotator cuff tear, supraspinatus; impingement.

15. Post-surgery, Claimant underwent treatment for his shoulder as documented in the medical reports admitted at hearing, as well as treatment for his cervical and lumbar spine. In particular, Peter Mars, M.D. evaluated Claimant October 3, 2017. At that time, Claimant reported pain in his right shoulder and back, with some improvement. Claimant was not working at that time and Dr. Mars kept Claimant off work through October 17, 2017. Dr. Mars opined Claimant's lumbar MRI showed "age appropriate facet arthritis" and his diagnoses were: complete tear of right rotator cuff; facet joint disease of lumbosacral region. Dr. Mars referred Claimant for PT and he was to continue with chiropractic treatments.

16. On October 27, 2017, Claimant returned to Dr. Fitzgibbons, who noted mild right shoulder pain. Dr. Fitzgibbons released Claimant to return to work with no restrictions and noted he needed four more weeks of PT. The ALJ inferred that this assessment of restrictions was for Claimant's shoulder only, as there was no indication Dr. Fitzgibbons evaluated Claimant's cervical and lumbar spine.[2]

17. Claimant returned to Dr. Anderson-Oeser on November 15, 2017, at which time Claimant reported symptoms of low back pain. Dr. Anderson-Oeser's impression was: cervical strain; right rotator cuff tear, status post repair; lumbar strain; lumbar facet arthropathy; right lower extremity intermittent paresthesias; muscle spasms. She recommended Claimant continue with PT, chiropractic treatment, osteopathic manipulation and dry needling. Claimant was to continue on modified duty.

18. The ALJ found Claimant had work restrictions issued by his ATP-s through May 2018. Claimant was able to work light duty for Employer.

19. Aaron Ontiveros testified at hearing. He works for the Employer as the HR Manager and assigned Claimant's light work duties. Mr. Ontiveros testified he does not speak Spanish and would speak with Claimant in English. Mr. Ontiveros said he would talk with Claimant in English of up to 30-45 minutes regarding his job duties and personal life. Mr. Ontiveros testified instructions were provided in English and Claimant was able to completed assigned tasks in accordance with those instructions.

20. On March 13, 2018, Claimant was evaluated by Ricardo Esparza, PhD, PLLC. Dr. Esparza diagnosed Claimant with adjustment disorder with anxiety and depression. He recommended six psychological counseling sessions with the focus on pain management, stress resiliency, mood improvement and anxiety reduction.

21. On May 8, 2018, Claimant underwent a FCE at WorkWell Occupational Medicine. Claimant reported bending forward exacerbated his pain and caused dizziness,

[2] Ex. I, p. 209.

blurred vision, and seeing spots. The FCE was not completed due to Claimant's symptoms.

22. On June 18, 2018, Dr. Otten placed Claimant at MMI. Dr. Otten assigned a permanent medical impairment rating, including a 10% whole person impairment of the lumbar spine, which included loss of range of motion ("ROM"), as well as a 22% scheduled impairment for the right shoulder.

23. Dr. Otten noted that because the FCE was terminated prematurely, it did not provide any useful objective measurements to inform permanent restrictions. Dr. Otten stated Claimant had a fifteen (15) lb. max lifting restriction. He said Claimant could continue to see Dr. Anderson-Oeser for medication management.

24. Surveillance video of Claimant taken on June 18 & 26, July 20, August 23 & 26, 2018 was admitted into evidence. The ALJ reviewed the videos. The ALJ found the videos showed Claimant was able to move and use his right upper extremity in several of these sequences. He also was able to stand for periods of time and could bend at the waist. The videos showed Claimant was able to do those activities on the days when the videos were taken. The ALJ inferred Claimant would be able to perambulate without difficulty and use his right arm in a job.

25. Claimant was terminated by Employer on or about August 30, 2018.

26. There was no evidence in the record that Claimant worked and earned wages after this time.

27. On September 18, 2018, Jeffrey Raschbacher, M.D. performed an IME, at the request of Respondents. Claimant reported 6/10 pain in his shoulders, neck, and low back, which had not improved from any treatment. Claimant said moving his neck hurt and he only "moves a little" due to his back pain. On examination, Claimant had negative impingement tests and full strength in his shoulders. No spasms were present in his low back. Claimant had non-physiologic findings. [3]

28. Dr. Raschbacher reviewed the surveillance video and noted Claimant did not appear to have residual pain or limitations. After reviewing the video, Dr. Raschbacher said Claimant's complaints made his subjective reports not a true indicator of his functional abilities. He did not believe Claimant required restrictions except for avoidance of repetitive strenuous overhead use of the right shoulder. He did not believe Claimant required maintenance medical treatment.

29. On December 14, 2018, Claimant was evaluated by Anjmun Sharma, M.D. for a Division-sponsored Independent Medical Examination ("DIME"). At that time, Claimant had pain in his neck, shoulder and back. Dr. Sharma concurred with Dr. Otten's MMI date of June 18, 2018. He assigned permanent medical impairment ratings to Claimant's right shoulder and lumbar spine. Specifically, Dr. Sharma found Claimant's

[3] Exhibit D, pp. 23-30.

right shoulder had a 10% specific disorder impairment and 8% ROM impairment, which gave a final and combined right upper extremity impairment of 17%, which converted to a 10% whole person impairment. Claimant's lumbar spine had a specific disorder impairment of 5% and a ROM impairment of 8% percent, which gave a combined impairment of 13%.

30. Dr. Sharma opined Claimant had permanent work restrictions of: maximum lift, repetitive lift, carry, push, pull no more than 40 pounds and no overhead lifting more than 10 pounds, as he had rotator cuff repair on the right shoulder. Dr. Sharma said Claimant did not require maintenance medical treatment.

31. Dr. Sharma testified as an expert in occupational medicine and family practice in connection with a prior hearing and the transcript was admitted into evidence. (Exhibit R). Dr. Sharma has been licensed since 2005, 2007 in Colorado. He estimated 50% of his practice was devoted to occupational medicine. He testified regarding his findings when he conducted the DIME of Claimant.

32. Dr. Sharma reviewed the videos of Claimant's activity. He described Claimant as being more active in the videos than what he observed in the DIME. Dr. Sharma testified that he believed the 40 lb. lifting restriction was still accurate along with a 15 lb. lifting restriction for overhead lifting. Dr. Sharma stated Claimant had no restrictions with regard to driving. Dr. Sharma's opinion regarding Claimant's restrictions was persuasive to the ALJ.

33. Claimant returned to Dr. Anderson-Oeser on May 2, 2019, at which time he reported pain in the posterior head and frontal region, as well as burning/aching sensations in the lower lumbar region, burning, pins and needles sensation in the posterior aspect of the right leg. He graded his pain as 7/10. On examination, Claimant had no evidence of swelling in the upper lower extremities. Increased tone with palpable spasms were found in the right cervical paraspinals, along with tenderness over the right occipital ridge and muscles. Cervical ROM was mildly restricted on extension.

34. Dr. Anderson-Oeser's impression was: cervical strain; right rotator cuff tear, status post repair; lumbar strain; lumbar facet arthropathy; lumbar facet pain and dysfunction; muscle spasm; adjustment disorder with depression and anxiety. Dr. Anderson noted Claimant should continue with the cyclobenzaprine for muscle spasms, lidocaine 5% topical ointment, Diclofenac for chronic pain, gabapentin for neuropathic pain and Topamax for headaches. Dr. Anderson-Oeser also recommended Claimant continue his program of stretching and home exercises.

35. The ALJ found Dr. Anderson-Oeser has treated Claimant since 2017 and her opinions regarding his need for maintenance medical treatment were credible.

36. Claimant underwent a psychological assessment on her about May 3, 2019, which was performed by Jesus Sanchez, Ph.D. to whom he had been referred by Dr. Anderson-Oeser. At that time, Dr. Sanchez noted Claimant's presentation was

remarkable for depressed, anxious mood and diminished self worth concept, as well as perceived loss of personal value. Dr. Sanchez' diagnostic impression was: adjustment disorder, with anxiety and depressed mood. Dr. Sanchez recommended 8 to 10 sessions of individual psychological counseling. The record was unclear whether Claimant completed this treatment. There was no evidence in the record that indicated claimant had restrictions based upon his psychological diagnoses.

37. A vocational assessment was conducted on behalf of Claimant by Gail Pickett, MA, QRC, ABDA, who authored a report dated August 11, 2019. Ms. Pickett noted Claimant completed six years of school and was able to read and write in Spanish. He was able to speak some basic work-related English and understood more English than he spoke. Claimant told Ms. Pickett that in order to complete job applications he required the assistance of his children. Ms. Pickett also noted Claimant had no computer skills and his work restrictions placed him within the light category. Ms. Pickett noted Claimant can operate a forklift and had skill in driving vehicles.

38. Ms. Pickett identified unskilled positions with the McLean Company for a Warehouse Candy Selector II position which required a GED, which Claimant did not have. In addition, BASF Corporation was looking for a packaging lead, which also required a GED. Emerson was looking for an assembler, which also required a high school diploma or GED.

39. Based upon the interview with Claimant, a review of medical records and labor market analysis, Ms. Pickett concluded Claimant was not able to return to the workforce. This was based on the fact the Claimant did not have English speaking, reading or writing skills on a competitive level and had only six years of education. All of his work history had been in jobs that were labor-intensive and this work experience did not provide him with transferable skills to lead to any employment within his work restrictions. Ms. Pickett concluded the Claimant was unable to earn any wages in any occupation.

40. On April 13, 2020, a Final Admission of Liability ("FAL") was filed on behalf of Respondents based upon a Stipulation of the parties and Order approving the Stipulation. Respondents admitted for a 13% whole person impairment and a 15% scheduled impairment. Liability for medical benefits after MMI were denied.

41. Dr. Raschbacher performed a follow-up IME of Claimant on June 5, 2020. Claimant reported pain levels of 5-7/10 for his "whole body in general". He reported not being able to lift more than 5 lbs. and not being able to reach up past his eye with his right arm. Claimant stated he had pain every day, could walk two blocks, drive for 20 minutes and said he had not functioned well in the prior 2-3 years. On examination, Claimant had with significant pain behaviors and lack of objective findings.

42. Dr. Raschbacher reiterated Claimant did not require restrictions other than avoidance of repetitive strenuous overhead work with the right arm. He stated Claimant did not require further maintenance care if he was to be believed that all of his medications

were of no help to him. The ALJ found this conclusion left open the possibility that some medications could help Claimant.

43. Roger Ryan performed a vocational evaluation on behalf of Respondents and issued an initial report on June 18, 2020. Mr. Ryan noted medical opinions of Claimant's capabilities were varied, but the surveillance videos indicated he was able to do physically more than he subjectively reported. He noted Claimant's physical capacities in surveillance appeared more in line with those reported by Dr. Sharma and Dr. Raschbacher.

44. Mr. Ryan issued a subsequent report on July 15, 2020. Mr. Ryan concluded he would use a "conservative approach," of correlating the varying opinions on restrictions to limiting his search to jobs requiring up to a 30 lb. lifting limit, and a 10 lb. overhead lifting limit for the right arm.

45. In his report, Mr. Ryan detailed that he contacted numerous employers for various positions, including fast food worker, driver, presser, office cleaner, and assembler/entry-level production jobs; these employers had job types were available to Claimant. These employers had open jobs at the time Mr. Ryan contacted them.[4] He noted if Claimant had some English skills, he could also work as a cashier, pizza delivery driver or automobile auction driver.[5]

46. Mr. Ryan compiled a list of 25 separate types of jobs, which Dr. Raschbacher reviewed and approved stating that Claimant could perform these within his restrictions. Mr. Ryan concluded Claimant could earn wages.

47. On July 15, 2020, Claimant underwent a FCE at Colorado In Motion. The testing was performed by Dona Leonard, MS, OTR, CEAS II. The testing was valid and Ms. Leonard indicated Claimant's maximum weight from waist height on the right side was 17.85 lbs; left-side 19.41 lbs. Claimant met the demand for material handling in the light demand category.

48. At the FCE, Claimant's other limitations were identified: occasional sitting with the opportunity to change positions and extend right leg and slightly recline; sitting with use of external support–either for bilateral light dexterity tasks leaning one or both arms, forceful gripping and pinching on an occasional basis. Claimant was not able to safely perform the task of looking upward to perform prolonged overhead work. The ALJ noted the particular restrictions with respect to sitting were not previously identified by Claimant's ATP-s

49. Dr. Raschbacher testified as an expert in Occupational and Family Medicine. Dr. Raschbacher agreed with Dr. Fitzgibbons' release of Claimant to work

[4] Exhibit E, pp. 70-72.

[5] *Id.*

without restrictions for the shoulder and opined there was no objective reason for Claimant's ongoing pain complaints in his shoulder.

50. Ms. Pickett testified as a vocational expert at hearing and said she used Dr. Otten's 15 lb. lifting restriction.[6] She also relied upon findings from the July 2020 FCE that found Claimant displayed additional limitations, such as requiring a cane and inability to maintain positions. Ms. Pickett testified that utilizing these restrictions limited Claimant's access to the labor market. She opined Claimant could not earn wages with his permanent restrictions and his work experience.

51. On cross-examination, Ms. Pickett agreed that if the 19.41 pounds listed as Claimant's max unilateral lift at the Colorado in Motion FCE was a bilateral lifting recommendation, he would have access to all light duty jobs and could probably find employment. [7] She also admitted Claimant would be able to work if he was functional in English, even if he required positional restrictions. Ms. Pickett noted her entire labor market research consisted of looking at job postings on Indeed.com.

52. Mr. Ryan also testified as a vocational expert at hearing. His testimony was consistent with his reports. More particularly, he identified specific employers who were hiring entry level employees. Mr. Ryan testified there were companies hiring within the light job classification and this included both full and part-time positions. There were two companies which had light assembly positions (no experience required), a part-time pizza delivery driver, office cleaner, and an automobile auction driver. Some of these positons did not require a G.E.D. In this last position, little to no English proficiency was required. Mr. Ryan also said that the positon at Emerson required a high school diploma or GED. Mr. Ryan noted entry level positions had openings with some frequency. Mr. Ryan's testimony about the availability of entry-level jobs was more persuasive to the ALJ.

53. Based upon the testimony of Mr. Ryan as a vocational rehabilitation and analysis expert, his report and the evidence in the record, the ALJ concluded there are jobs available in the Denver labor market within Claimant's restrictions in which he can earn wages.

54. Claimant testified he could not do some of the jobs identified by Mr. Ryan, including the light assembly jobs, as he still had consistent pain. Claimant's testimony did not refute Mr. Ryan's conclusions. Mr. Ryan opined there were assembly jobs available in the Denver labor market. Mr. Ryan testified Claimant was able to earn wages, despite his work injury. The ALJ found Mr. Ryan's opinions on Claimant's ability to earn wages were persuasive.

55. The ALJ found Claimant had permanent work restrictions that were attributable to his industrial injury. Based upon the available information, the ALJ found Claimant could not return to his former job and was limited to the light job category.

[6] Pickett deposition, p. 7:2-7; p. 37: 23-25; p. 61:1–14.

[7] Pickett deposition, p. 46:4-14; p. 47:24-48:4.

56. Claimant's work restrictions limited his access to the labor market and his ability to earn wages.

57. The ALJ concluded there were jobs within the Denver labor market within Claimant's restrictions.

58. The ALJ concluded Claimant was able to earn wages.

59. The ALJ determined Claimant failed to prove he was permanently and totally disabled as a result of the injury.

60. Claimant proved he was entitled to maintenance medical benefits.

61. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2020). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2020). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). In the case at bench, there was conflicting expert testimony on the issue of Claimant's ability to earn wages.

Permanent Total Disability

As determined in Findings of Fact 3-7, Claimant suffered an admitted industrial injury on March 1, 2017 when soil collapsed on him when he was working in a trench. Claimant injured his neck, right shoulder and lumbar spine. Claimant required treatment at the Emergency Department and then received treatment from ATP's, Dr. Otten and Dr. Anderson-Oeser. *Id.* Claimant required surgery on his right shoulder, which was performed by Dr. Fitzpatrick on August 31, 2017. (Finding of Fact 14).

Claimant reached MMI on June 18, 2018 and was assigned by a permanent medical impairment by both Dr. Otten, as well as the DIME physician, Dr. Sharma. (Findings of Fact 22-23, 32). As found, Claimant had permanent restrictions as a result

of his work injury. (Finding of Fact 55). Claimant initially worked light duty following his injury, but left his employment with employer on August 30, 2018. (Findings of Fact 18, 25). Claimant has not worked since that time and alleged he was no longer able to earn wages as result of his work injury. Respondents, while conceding Claimant had permanent work restrictions, averred he could earn wages in the Denver labor market.

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2020). Claimant must also prove the industrial injury was a significant causative factor in the PTD claim by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997). In determining whether Claimant is permanently and totally disabled, the ALJ may consider “human factors”. *See Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). “Human factors” include such elements as Claimant’s “education, ability, and former employment”. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 703 (Colo. App. 1999). In the case at bar, Claimant argued his restrictions, as well as lack of transferable skills prevented him from earning wages. Respondents averred Claimant could earn wages, as there were open jobs in the Denver labor market within his restrictions.

In the case at bench, the ALJ considered various “human factors” vis a vis Claimant to determine the issue of whether he could earn wages. As found, Claimant’s highest level of education was sixth grade. (Finding of Fact 1). Claimant could speak some English and could read/write Spanish. *Id.* Claimant’s vocational expert agreed Claimant had obtained some proficiency in English based on his work. (Finding of Fact 51). Mr. Ontiveros testimony also confirmed Claimant had some English proficiency. (Finding of Fact 19). Claimant’s employment experience was in labor-intensive positions. (Finding of Fact 2).

The ALJ found Claimant had permanent work restrictions as a result of his industrial injury and this limited his access to the labor market. There was a dispute regarding these restrictions. The ALJ determined Claimant’s restrictions, as identified by his physicians, were:

- Dr. Otten-15 pounds lifting;
- Dr. Sharma-maximum lift, repetitive lift, carry, push, pull of 40 lbs, 15 lbs overhead work;
- Ms. Leonard- lifting: right side was 17.85 lbs; left-side 19.41 lbs., light work category;
- Dr. Raschbacher-avoidance of repetitive strenuous overhead use of the right shoulder.

The ALJ concluded Claimant could not return to his prior position with Employer. (Finding of Fact 55). In addition, physically intensive positions beyond the light category were most probably beyond his restrictions. However, the ALJ credited Respondents' expert, Mr. Ryan and determined there were jobs within the local labor market (Denver). (Findings of Fact 43-46, 52-54). These potential employers had available openings and were within Claimant's permanent physical restrictions. *Id.* Ms. Pickett's expert testimony was also considered as part of this analysis (Findings of Fact 50-51), including her agreement that Claimant would have access to jobs if he was within the light category. The ALJ found Mr. Ryan's testimony that Claimant could earn wages to be more persuasive. (Finding of Fact 52). Based upon this evidence in the record, the ALJ determined Claimant could obtain and maintain employment. Accordingly, the ALJ found Claimant can earn wages and is not entitled to permanent total disability benefits.

When coming to this conclusion, the ALJ specifically considered Claimant's testimony that he could not perform specific jobs identified by Mr. Ryan. The ALJ determined some of Claimant's belief that he could not perform these jobs was subjective and not based upon work restrictions issued by his treating physicians. As found, Claimant is still able to drive and had other transferable job skills which supported the conclusion that he was employable and could earn wages, as confirmed by Mr. Ryan. (Finding of Fact 52). Utilizing the range of work restrictions of lifting from 15 pounds to 40 pounds (Dr. Sharma), as well as avoiding repetitive use of the right upper extremity, the ALJ determined Claimant could obtain and maintain employment, as identified by Mr. Ryan, perform the job and maintain such employment. *Id.* There were employers with these open positions available in the Denver labor market. Therefore, Claimant did not meet his burden of proof to show he was entitled to permanent total disability benefits.

Grover **Medical Benefits**

In the case at bench, there was conflicting medical evidence on the issue of maintenance medical treatment. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Comm'n of Colorado,* 759 P.2d 705, 711-712 (Colo. 1988). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ concluded Claimant met his burden of proof and is entitled to maintenance medical benefits. (Finding of Fact 60). As found, Dr. Anderson-Oeser evaluated Claimant at regular intervals since 2017 and the ALJ credited her opinions with regard Claimant's need for maintenance treatment, including medications. (Finding of Fact 35).

ORDER

IT IS HEREBY ORDERED:

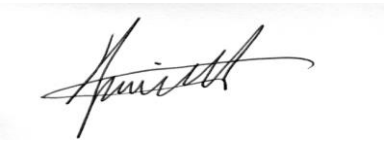
1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. Respondents shall provide *Grover* medical benefits to Claimant, including an evaluation by Dr. Anderson-Oeser for medication management.

3. All matters not determined herein are reserved for future determination.

DATED: July 27, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

STIPULATIONS

Prior to commencement of the hearing, Respondents raised the following procedural matters and the parties reached the following stipulations:

I. The parties stipulated to withdraw, without prejudice, the issue of temporary total and/or temporary partial disability benefits.

II. In the event that the claim is determined to be compensable, the parties stipulated that Claimant's average weekly wage (AWW) is $833.67.

These stipulations were approved and accepted by the ALJ.

REMAINING ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that he suffered injuries to his low back and right knee while in the course and scope of his employment with Respondent-Employer on July 8, 2021.

II. If Claimant established that he sustained compensable injuries to his low back and right knee, whether he also established his entitlement to all reasonable, necessary and related care to cure and relieve him from the effects of these injuries, including, but not limited to treatment directed to the low back and arthroscopic surgery directed to the right knee as proposed by Dr. Michael Simpson.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. D'Angelo, the ALJ enters the following findings of fact:

Claimant's Alleged July 8, 2021 Injuries

1. The record in this matter is voluminous and the testimony presented is substantially conflicting. Indeed, the parties submitted in excess of 800 pages of exhibits and the statements of Dr. Simpson and the testimony of Dr. Rook can aptly be described as being at odds with that of Drs. O'Brien and D'Angelo.

2. Claimant was employed by Respondent-Employer on July 8, 2021 as a commercial auto parts manager. As part of his duties, Claimant would pull auto parts from storage to fill orders and prepare the order for delivery. This occasionally required Claimant to climb a ladder to reach parts on the upper shelving.

3. Claimant testified that on July 8, 2021, he was using a three-step ladder to collect parts for an order. Claimant testified that as he was descending the ladder the bottom step, which was approximately 12 inches above the floor, broke causing him to fall backwards. According to Claimant, his right foot wedged between the ladder frame and the step causing him to twist and fall backward into some shelving and then onto the floor injuring his low back and right knee. The incident was unwitnessed. Nonetheless, Claimant testified that his fall created noise and a co-worker heard it but did not check on him.

4. Claimant testified that after he got up from the floor, he reported the incident to the store's Assistant Manager, Adam P[Redated]. He testified that approximately 10 minutes elapsed from the time of his fall to the time he reported his the incident to Mr. P[Redated]. Claimant admitted that he told Mr. P[Redated] that he did not think he needed medical treatment at the time of his alleged injury. (Hrg. Tr. 48:13-17).

5. Claimant testified that he showed the broken ladder to Mr. P[Redated] and subsequently completed an incident report around 4:00 p.m. He testified that his scheduled shift ended at 5:30 p.m. but he was sent home for the evening at around 5:00 p.m.

6. Claimant returned to work the next morning (July 9, 2021) reporting that he was "hurting" and "still in pain." Claimant testified that he was instructed to contact "HR" (human resources) and set a medical appointment. Claimant contacted HR in an effort to set a medical appointment. (Hrg. Tr. 25:19-23; 26:1-11)).

7. Claimant testified that during his phone call with HR on Friday July 9, 2021 he was instructed to go home and apply ice/heat to his injuries and rest. According to Claimant, he was off work Saturday, Sunday and Monday, returning to work on Tuesday (July 13, 2021). Upon his return to work on Tuesday, Claimant testified that he was instructed by Mr. P[Redated] and the store manager Rob H[Redated] to call UCHealth to schedule a doctor's appointment. According to Claimant, he was informed that he could not been seen until that coming Friday. (July 16, 2021). (Hrg. Tr. 27:1-19).

8. Between July 13, 2021 and July 16, 2021, Claimant testified that he worked full duty with low back and right knee pain. Moreover, he testified that he did not receive any medical treatment for eight days following the July 8, 2021 incident.

Claimant's Prior Low Back Injury, Prior Low Back Treatment and Lost Time

9. During the course of this case, Claimant has repeatedly told those involved in the process (including his medical providers) that he never had any prior back problems. Claimant specifically told all the medical providers (including his own IME physician) involved in this claim that he had no prior treatment for his back or any previous low back injuries. Based on the evidence presented, the ALJ finds that Claimant misrepresented his prior medical history as he actually filed and pursued a claimed injury to his low back occurring October 22, 2008.

10. The medical records from this prior undisclosed back injury demonstrate a consistent history of non-organic symptoms, inconsistent and varying presentations and provider concern for secondary gain issues. (RHE A, D & F).

11. Claimant presented to Dr. Suzanne Malis at Concentra on February 17, 2009 for a recheck related to his October 22, 2008 date of injury. (RHE D, p. 161). During this encounter, Dr. Malis reported that Claimant was observed to be standing upright and smoking outside the clinic but later in the exam room appeared to have difficulty standing up straight. (Id.) As a result, Dr. Malis was concerned that Claimant was intentionally faking or exaggerating his physical presentation.

12. Claimant also treated with Dr. Daniel Peterson in connection with his 2008 date of injury. Dr. Peterson too expressed concerns about the legitimacy of the case and specifically recommended that surveillance be performed. (RHE D, p. 163).

13. Dr. John Sacha also evaluated Claimant following the 2008 injury and expressed "serious doubts of the validity" of the claim. (RHE D, p. 154).

14. In short, Dr. Peterson, Dr. Malis, Dr. Sacha, Dr. John Ogrodnick, and Bernard Condevaux, PT all expressed concerns regarding the validity of Claimant's presentation and symptomology. (See generally, RHE A, p. 008, RHE D, pp. 154, 161, 163, 166, 180, Exhibit F, p. 198).

15. Claimant testified that he forgot about this prior injury and did not try to mislead anyone about it. (Hrg. Tr. 31:1-7). He did not recall any of the treating medical providers involved with the 2008 injury expressing any concern over the validity of his claim. He also testified that he did not remember missing 4-5 months of work as a result of this injury or settling this claim. (Hrg. Tr. 44:8-11; RHE N, p. 459).

16. The ALJ finds it unlikely that Claimant simply forgot about his prior 2008 injury. Here, the evidence presented supports a finding that the 2008 claim was highly disputed and that Claimant was represented by counsel. (RHE A & N). Retention of counsel to litigate a decidedly contested claim is not something that occurs every day. Accordingly, the ALJ finds it improbable that the claim would be easily forgotten. The evidence also supports a conclusion that Claimant was "very leery" of the doctors involved in the 2008 claim. He accused Dr. Sacha of turning him into a "pincushion" and complained that the doctors ignored his neck pain and reportedly told him that his symptoms were "all in his head." (RHE A, p. 4). During a Division Independent Medical Examination (DIME), Claimant informed Dr. Ogrodnick that he was told he was a surgical candidate. (Id.). He also reported that he had "endured" over 40 injections. (Id.). Claimant's frustration and distrust of the physicians assigned to the case coupled with his report of being a surgical candidate who had undergone in excess of 40 injections, whether he actually underwent that many injections or not, are not feelings and events one probably easily forgets about. Concerning this prior claim, the evidence presented also supports a finding that Claimant lost substantial time from work because of his 2008 low back injury and that he ultimately settled his 2008 claim. The ALJ finds the probable financial stress associated with losing months of time from work coupled

with Claimant's conscious decision to settle this significantly disputed claim, which involved events he once described as "all very ridiculous"[1], likely to serve as a constant reminder regarding the very existence of the claim itself. Accordingly, the ALJ is not convinced that Claimant simply forgot about the 2008 claim. Instead, the ALJ finds that Claimant probably intentionally failed to disclose this prior low back injury, due in part to the fact that the current claim involves a low back injury and the medical providers involved in the 2008 claim generally questioned his credibility and validity of that claim.

The Testimony of Adam P[Redated]

17. Mr. P[Redated] testified as Respondent-Employer's Assistant Manager. He was present at the store when Claimant fell but did not witness the incident. (Hrg. Tr. 106:1-5). Mr. P[Redated] testified that during the time Claimant reported the incident, he did not request medical care. According to Mr. P[Redated], Claimant requested medical care the day after the incident occurred. (Id. at 106:20-24).

18. Mr. P[Redated] testified that Claimant was upset when he reported the incident because a co-employee was laughing about the incident taking place. (Hrg. Tr. 107:10-13).

19. During cross-examination, Mr. P[Redated] testified he saw the ladder that Claimant testified had broken. (Hrg. Tr. 108:3-5). According to Mr. P[Redated], the ladder step had not "snapped in half" as Claimant suggested. Rather, the bolts attaching the step to the frame had slipped out of the step. (Hrg. Tr. 109:4-11).

Claimant's Initial Medical Care Following the July 8, 2021 Incident

20. Claimant presented to UC Health on July 16, 2021 for an initial evaluation with Dr. Kathryn Murray. (RHE H, p. 362). Dr. Murray's medical report indicates that Claimant reported that he did not have any previous trauma to his back or right knee and that Claimant was working full duty. (RHE H, p. 362). Dr. Murray's physical examination revealed no joint effusion in the right knee. (RHE H, p. 363). Indeed, there were no outward signs that Claimant had injured his knee. At the time of this evaluation, Claimant presented slightly hunched forward and leaning to the right side with 7-8/10 pain in his sacrum, buttocks and right knee. (RHE H, p. 359). The ALJ finds Claimant's presentation during this appointment concerning since he had been working full duty and exhibited no obvious signs of being injured or having limitations for more than a week before his first medical evaluation. Based upon the evidence presented, Claimant's symptoms appeared to worsen over the week prior to his initial medical evaluation.

21. On August 16, 2021, Claimant completed a pain diagram at UC Health. This diagram only depicts pain in the low back and buttock region. No complaints of pain are depicted as being present in the right knee. (RHE H, p. 331). During cross-examination, Claimant testified that he did not indicate that he had pain in the right knee because he did not know how to fill out the pain diagram. (Hrg. Tr. 55:15-17).

[1] See Ex. A, p. 4.

Interestingly and inconsistent with this claim, the medical record contains a pain diagram Claimant completed at the time of his initial evaluation on July 16, 2021. This diagram clearly depicts Claimant as indicating he was having pain in the right knee. (RHE H, p. 359). Based upon the evidence presented, the ALJ finds that contrary to his claim, Claimant probably knew how to fill out the pain diagram.

22. Claimant underwent an MRI of the right knee on August 25, 2021. This MRI demonstrated a "[d]egenerated medial meniscus" with a "nondisplaced tear involving the body and posterior horn of the medial meniscus. In addition to this degenerative tearing, the MRI revealed "edema superficial and deep to the medial collateral ligament", which in the "appropriate" clinical setting raised the potential for a "possible MCL strain." (RHE E, pp. 194-195).

23. Claimant also underwent MRI of the lumbar spine on August 25, 2021. The impression of the findings from this imaging was "moderate degenerative changes including mild-moderate T11-T12 and mild L3-L4 central canal stenosis and multilevel mild-moderate neural foraminal narrowing." No comparison to earlier imaging was done. (RHE E, pp. 196-197). Prior MR imaging of Claimant's lumbar spine was completed November 11, 2008, following Claimant's October 22, 2008 low back injury. This imaging revealed an L5-S1 disc protrusion and multilevel spondylosis and disc bulges at L1-L2, L2-L3, L3-L4, and L4-L5. Also identified was a sacral fracture at S3. (RHE E, p. 191-192). A follow-up CT scan obtained February 12, 2009 revealed no discrete fractures. Nonetheless, Claimant was noted to have L5-S1 degenerative disc disease. (Id. at p. 193).

24. Based upon the evidence presented, the ALJ finds that Claimant was likely suffering from pre-existing degenerative pathology in his low back and right knee prior to the July 8, 2021 incident. Moreover, although not disclosed to any treatment provider associated with the current claim, a medical report from Claimant's primary care provider (PCP) raises concern that Claimant continued to have trouble with his low back following the 2008 injury. Indeed, Dr. William Wilcox noted that during an appointment to establish care on May 3, 2021, Claimant advised that his back "bothers" him. (RHE G, p. 221). Claimant testified that that the report is inaccurate, that he had no back pain in May 2021 and he does not recall telling Dr. Wilcox that he did. (Hrg. Tr. 45:3-25; 46:1-16).

25. On September 20, 2021, Claimant presented to Centura Orthopedics for an examination with Dr. Michael Simpson. (RHE J, 437). Dr. Simpson's note from this date of visit reflects that Claimant's August 25, 2021 right knee MRI demonstrated a degenerative medial meniscus with a tear of the body in the posterior horn. (RHE J, 442). On September 23, 2021, Dr. Simpson requested authorization to perform a partial right sided medial meniscectomy. (RHE J, p. 436). The request would be denied based upon the opinions expressed by Dr. O'Brien following a September 30, 2021 medical record review. (RHE B, pp. 10-31).

The Medical Record Review Opinions and Subsequent Testimony of Dr. O'Brien

26. As noted above, Dr. O'Brien performed a records review on September 30, 2021. RHE B, 010. Following his review of Claimant's medical records, Dr. O'Brien opined that while Claimant suffered a mild, "self-limiting, self-healing", right knee sprain/strain, the July 8, 2021 incident did not cause an acute medial meniscus tear. According to Dr. O'Brien, Claimant's right medial meniscus tear was degenerative and pre-existing at the time of the July 8, 2021 incident. Per Dr. O'Brien, Dr. Simpson's indication that there is a causal relationship between the July 8, 2021 incident and Claimant's pre-existing degenerative tear and his recommendation to proceed with arthroscopic surgery was erroneous and should be rejected to two reasons. First, there is nothing on Claimant's MRI or in the clinical evidence to indicate that an arthroscopic surgery is warranted. Second, arthroscopic surgeries are not utilized to treat minor knee sprains/strains, which is the only injury causally related to the July 8, 2021 incident.

27. According to Dr. O'Brien, the meniscal tear revealed by MRI on August 25, 2021, is degenerative in nature and due to "attritional wear and tear over the course of many years, and is due to age-related desiccation and nicotine abuse." Dr. O'Brien supported this opinion by noting that because acute meniscal tears are always associated with bleeding and/or increased accumulation of post-traumatic joint fluid, (effusion), and Claimant had no visible effusion on his July 16, 2021 clinical examination, (eight days after the incident) and only minimal fluid accumulation[2] by MRI on August 25, 2021, the visualized tear is neither acute nor the result of a traumatic aggravation or acceleration of a pre-existing meniscus tear. (RHE B, pp. 13-14). Accordingly, the July 8, 2021, "work incident did not produce a meniscal injury." (Id. at p. 15).

28. Dr. O'Brien opined further that the recommended surgery would fail and expose Claimant to potential harm by accelerating arthritic changes and symptomology resulting in a premature need for a total knee arthroplasty. (RHE B, p. 15). He referred to scientific studies involving arthroscopic surgery in expanding on his opinion that the surgery proposed by Dr. Simpson was contraindicated and would only introduce additional trauma to the knee, which will create an intractable synovitis, which would likely aggravate Claimant's underlying mild osteoarthritis and increase his pain complaints. (Id.).

29. The ALJ interprets Dr. O'Brien's September 30, 2021, Medical Records Review report to indicate that not only is the need for the proposed surgery unrelated to the July 8, 2021 incident but also, based upon scientific and empirical evidence, the risk of proceeding with surgery outweighs any perceived/expected benefit of the procedure. Consequently, Dr. O'Brien's report can be read to indicate that the recommended surgery is contraindicated, i.e. it is unreasonable and unnecessary.

30. Dr. Simpson responded to Dr. O'Brien's records review report on November 15, 2021. (RHE J, p. 377). Dr. Simpson seemingly does not contest the conclusion of Dr. O'Brien that Claimant's right medial meniscus tear is degenerative in

[2] Which Dr. O'Brien attributed to mild underlying tricompartmental arthritis.

nature. Rather, Dr. Simpson notes that whether there is a degenerative component to Claimant's meniscal tear or not does not negate the fact that Claimant would be entitled to surgical treatment for a pre-existing condition if the condition became symptomatic after an industrial incident, as is the asserted case here. (Id. at p. 378). The ALJ infers from Dr. Simpson's November 15, 2021 record, that he believes Claimant's right knee was asymptomatic until the July 8, 2021 incident. Because the July 8, 2021 incident aggravated the underlying pre-existing degenerative meniscus tear causing the right knee to become symptomatic, Dr. Simpson concludes that Claimant is entitled to treatment, including surgery, for the right knee under the principals outlined in the medical treatment guidelines. (See RHE J, at p. 378). Careful review of Dr. Simpson's November 15, 2021 report fails to establish that he responded to Dr. O'Brien's concerns about the reasonableness/necessity of proceeding to surgery. Indeed, Dr. Simpson simply argued that Claimant's need for treatment (surgery) was causally related to the July 8, 2021 incident because this incident aggravated his underlying pre-existing condition resulting in his current symptoms.

31. Dr. O'Brien testified as a board certified, Level II accredited expert in orthopedics and orthopedic surgery. Dr. O'Brien testified that the August 25, 2021 MRI of Claimant's right knee showed myxoid degeneration of the lateral meniscus, which is a degenerative and chronic condition. (Hrg. Tr. 112:9 – 113:10). Dr. O'Brien further reiterated his opinions that Claimant's MRI showed a degenerative medial meniscus tear and that if this tear were acute, there would be an accumulation of blood in the knee joint. (Hrg. Tr. 113:11-25). The lack of hemarthrosis or bleeding indicates that Claimant simply had a chronic condition, not an acute tear. (Hrg. Tr. 115: 15-22). As set out in his medical records review report, Dr. O'Brien testified that an acute medial meniscus tear would cause immediate symptomology, but Claimant's report that he did not have a lot of symptoms in the knee and was able to work without limitation demonstrates that he did not sustain an acute medial meniscus tear. (Hrg. Tr.117:9-17).

32. Dr. O'Brien testified that on July 26, 2021, that Claimant had full range of motion in the right knee without pain. (Hrg. Tr. 118:2-12). Dr. O'Brien further testified that on August 16, 2021 Claimant had no complaints of pain in the right knee, which "is not consistent with a meniscus tear of that size that occurs acutely." (Hrg. Tr. 118:13-18). Dr. O'Brien then repeated his opinion that the surgery recommended by Dr. Simpson is not work related. (Hrg. Tr. 125:4-9). According to Dr. O'Brien, Claimant requires no further curative medical care or treatment related to the July 8, 2021 incident for his right knee. (Hrg. Tr. 128:17-19).

33. The ALJ has carefully considered Dr. O'Brien's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. O'Brien's opinions credible and persuasive.

34. The evidence presented, persuades the ALJ that Claimant failed to prove that he suffered an acute tear of the medial meniscus as a direct consequence of stepping awkwardly on his right foot/leg after a step broke while he was descending a

short ladder on July 8, 2021. To the contrary, the evidence presented persuades the ALJ that Claimant's meniscal tear is, more probably than not, degenerative in nature and probably pre-existed the July 8, 2021 incident.

35. The ALJ also credits the opinions and testimony of Dr. O'Brien to find that the surgery recommended by Dr. Simpson is not reasonable or necessary. Indeed, Dr. O'Brien's report and testimony demonstrate convincingly that the proposed surgery is contraindicated, as it would likely introduce additional trauma to the joint, which would aggravate the underlying condition of the knee and increase Claimant's pain complaints.

The Opinions and Testimony of Dr. D'Angelo

36. Dr. Kathleen D'Angelo performed an independent medical examination (IME) of Claimant at Respondents' request on December 6, 2021. As with the treating providers, Claimant denied having any prior workers' compensation treatment or having had other significant disabling problems or accidents Dr. D'Angelo. (Dep. Tr. 7:8-11, RHE C, p. 34).

37. Dr. D'Angelo testified that Claimant is an unreliable historian. (Dep. Tr. 7:19-21). She testified that due to Claimant's unreliability, his subjective complaints cannot be depended on and must be verified through objective evidence. (Dep. Tr. 10:11-15).

38. Dr. D'Angelo testified that during Claimant's 2008 injury, at least four doctors noted that he was not a reliable historian. (Dep. Tr. 15:4-6). She also noted that Claimant demonstrated self-limiting behaviors during his April 7, 2009 functional capacity evaluation (FCE) and did not demonstrate the expected increased heart rate during dynamic lift testing. (Dep. Tr. 15:21-24, RHE F, p. 198). According to Dr. D'Angelo, Claimant's FCE exam results would not be considered valid due to false representation and Claimant's exaggerated pain levels. (Dep. Tr. 17:20-25).

39. Dr. D'Angelo testified that Claimant's presentation to Dr. Murray on July 16, 2021 does not make sense and is inconsistent with blunt trauma because Claimant testified that he was able to work full duty following his injury without hunching over (but then later presented hunched over and in significant pain for the first time during his initial medical examination). (Dep. Tr. 21:5-17). Dr. D'Angelo testified that if Claimant had sustained an acute injury it would be acutely symptomatic and she would not expect the pain symptoms to be worsening one week later for the first time. (Dep. Tr. 21:5-14).

40. Dr. D'Angelo opined that objective evidence; including medical imaging did not exist to substantiate the finding/conclusion that Claimant suffered an acute traumatic injury to either the lumbar spine nor the right meniscus or knee condition. (RHE C, pp. 51, 56). She also rejected any suggestion that Claimant's current low back pain is due to an aggravation of his underlying pre-existing degenerative disc disease and non-work related facet arthropathy. (Id. at pp. 55-56).

41. Dr. D'Angelo testified that Claimant's subjective complaints could not be relied upon to establish a compensable injury due to Claimant's unreliability. (Dep. Tr. 23:13 – 24:10). Dr. D'Angelo testified that given Claimant's history of being unable to recall any of his prior injuries it would be wrong to accept his subjective complaints without support from objective findings. (Dep. Tr. 24:2-20).

42. Dr. D'Angelo testified that if Claimant's right medial meniscal tear were acute, then there would be swelling and bleeding and that this swelling would continue after the bleeding stopped given the size of the tear revealed on MRI. (Dep. Tr. 25:7-24). Dr. D'Angelo testified that there was no objective medical findings to support the presence of an acute injury to the right knee. (Dep. Tr. 26:12-17).

43. Dr. D'Angelo testified that Claimant did not sustain an injury requiring medical care. (Dep. Tr. 31:4-15). She testified that this conclusion is supported by Claimant's forgetting about his prior injury, the fact that he has continued to work the same position since his alleged injury, and that his pre-injury and post-injury functional capacity remains the same. (Dep. Tr. 31:16 – 32:9). According to Dr. D'Angelo, an acute injury requires acute treatment. (Dep. Tr. 32:13-14).

44. Dr. D'Angelo testified that regardless of whether the step broke and Claimant fell to the ground from several inches above, he did not sustain an injury that required treatment. (Dep. Tr. 40:19 – 41:4).

The Opinions and Testimony of Dr. Rook

45. At Claimant's request, Dr. Rook performed an IME on December 9, 2021. Following his evaluation, Dr. Rook authored the December 9, 2021 report contained at Claimant's Hearing Exhibit 7. In his report, Dr. Rook notes that Claimant had "no prior history of any problems with his right knee or lumbar spine and that he "never received any treatment for a low back injury prior to July 8, 2021. (CHE 7, p. 329). At hearing Dr. Rook conceded that Claimant did not inform him of his prior 2008 back injury and he (Claimant) admitted as much in his testimony to the court. (Hrg. Tr. 83:6-11). Accordingly, the ALJ finds that Dr. Rook wrote his report and reached opinions concerning Claimant's injuries with an inaccurate and incomplete understanding of Claimant's prior medical history.

46. After his evaluation, Dr. Rook concluded that Claimant had suffered acute injuries to his medial meniscus tear and low back as a consequence of the July 8, 2021 incident "because of the way he fell." (CHE 7, p. 328). In his report, Dr. Rook noted, "When the step of his ladder broke, [Claimant] fell to the floor landing with his entire body weight on his right foot. His right foot was planted as his body rotated and he fell backwards. His truck twisted acutely and he developed low back and right knee pain." According to Dr. Rook, 'rotational force on a fixed knee joint with the weight of the body bearing down on that joint is a common cause of meniscal injury. (CHE 7, p. 328). Concerning the low back, Dr. Rook opined, ". . . the patient sustained a compression injury to his lumbar structures at a time when he was acutely twisting. This resulted in

stretching and microscopic tearing of low back structures including muscles, ligaments, facet joint capsules, and potentially the intervertebral discs."

47. Dr. Rook testified as a Level II accredited specialist in physical medicine and rehabilitation (PM&R) and pain management. Dr. Rook testified that Claimant has a subjective presentation of pain superimposed over degenerative findings. (Hrg. Tr. 90:18-21). Dr. Rook also testified that Claimant's medial meniscus tear was degenerative. (Hrg. Tr. 96:7-11). Based upon the evidence presented, the ALJ agrees with Respondents that Dr. Rook generally had to admit that there were no acute structural injures to the lumbar spine or the right knee and instead that the validity of the current claim was dependent on whether Claimant's subjective presentation was credible and in keeping with the objective medical findings.

48. As detailed above, there are significant concerns regarding Claimant's credibility based on his failure to disclose his prior medical history to any of the medical providers, including his own IME in this case. Inconsistencies also exist between Claimant's reported history/complaints and the objective medical evidence.

49. The ALJ credits the opinions/testimony of Dr. D'Angelo and Dr. O'Brien to find that Claimant has failed to prove, by a preponderance of the evidence, that the workplace incident on July 8, 2021 caused Claimant's current right knee or low back pathology/symptoms and need for treatment. Accordingly, Claimant has failed to establish the he sustained compensable injuries and his claim must be denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which

leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Credibility

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found here, the opinions of Dr. D'Angelo and O'Brien are credible and more persuasive than the contrary opinions of Drs. Simpson and Rook. Indeed, the opinions of Drs. Rook and Simpson regarding the cause of Claimant's symptoms and need for treatment are substantially outweighed by the more persuasive objective medical evidence which convincingly demonstrates that Claimant's low back complaints are probably emanating from the natural progression of his pre-existing degenerative disc disease and that his medial meniscus tear is degenerative in nature. Furthermore, the evidence presented, specifically the testimony of Dr. O'Brien and journal articles cited in his September 30, 2021 report supports a conclusion that the surgery recommended by Dr. Simpson is contraindicated and unlikely to relieve Claimant of his pain or improve his function. Finally, for the reasons outlined above, Claimant's testimony that he did not remember his prior low back injury lacks credibility. His suggestion that he needs treatment for ongoing right knee and low back pain as a consequence of the July 8, 2021 incident is unpersuasive. Here, the persuasive evidence contradicts Claimant's

implication and establishes that he currently working in a physical job without restriction associated with either his low back or right knee. Consequently, the ALJ agrees with Dr. D'Angelo and Dr. O'Brien that there is no need for additional treatment directed to the low back or right knee for what has been convincingly established to be a self-limiting, self-healing right knee/low back sprain/strain.

Compensability

E. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Based upon the evidence presented, the ALJ finds ample evidence to conclude that Claimant's alleged right knee/low back injuries may have occurred in the course of his employment after stepping down awkwardly from a ladder and falling backward to the floor while pulling parts to fill an order. Nonetheless, the question of whether Claimant's current low back/right knee symptoms and need for treatment, including arthroscopic surgery arose out of his employment must be answered before the claim can be determined compensable.

G. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and need for treatment and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract.

Popovich v. Irlando supra. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury." An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury. This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). In this case, the following evidence supports a conclusion that Claimant failed to prove he suffered a compensable injury.

- Claimant attempted to hide the fact that he had suffered a significant prior low back injury in 2008. Indeed, Claimant failed to disclose this prior injury to any medical provider involved in the current claim, including his own IME.

- The medical history associated with this prior low back claim is concerning for secondary gain. Nearly every medical provider involved in the 2008 claim raised concern for symptom exaggeration, prompting at least one physician to recommend that respondents obtain surveillance to ascertain the validity of the claim.

- Claimant's inconsistent presentation in the prior claim is similar to that in the instant case. Specifically, in the 2008 claim, Claimant was observed outside the doctor's office standing upright without any signs of pain but then minutes later presented bent over acting as if he was experiencing significant symptoms. Similarly, in the instant claim, Claimant was able to engage in restricted work without sings of pain/limitation for days but presented for his initial medical appointment hunched over and purportedly in 7-8/10 pain. These actions coupled with concerns over what the FCE provider under the prior claim felt were attempts by Claimant to manipulate his range of motion and Claimant's purported failure to remember anything about the 2008

claim are cause for concern and shed light on Claimant's credibility and his behavior in the current claim.

- There were no outward signs that Claimant suffered any injuries as a consequence of the July 8, 2021 incident. Indeed, there was no observable swelling (effusion) of the knee as would be expected if Claimant has sustained an acute injury on July 8, 2021. As noted by Dr. O'Brien, if Claimant had actually suffered an acute meniscal tear, he would have had immediate swelling, would have had difficulty walking, and would not have been able to perform the full range of his job duties.

- There is a paucity of objective medical evidence, including MR imaging that would support a conclusion that Claimant sustained an acute injury to either his right knee or low back. Indeed, all of the doctors, including Dr. Simpson and Dr. Rook agree that the meniscal tear and the changes noted throughout the lumbar spine are degenerative in nature. More importantly, that is the radiologists' reading of that MRI scans as well.

- The medical providers, including Dr. Rook, have generally admitted that there is no evidence of an acute structural injury. As a result, the controlling issue is whether Claimant's subjective reports of pain can be trusted and adopted in the context of failing to report his prior injuries and condition, the nature of his prior secondary gain issues, the minor reported mechanism of injury, his inconsistent presentation since the alleged work injury and the lack of objective findings of acute injury on examination and diagnostic testing.

J. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury in question is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident that merely elicits pain symptoms without a causal connection to the alleged injured workers employment activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. In fact, the panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation

exists between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. As presented, the evidence in the instant claim does not support that Claimant sustained a work related injury to his right knee or low back.

K. Rather, the evidence presented supports a conclusion that Claimant's alleged injuries occurring July 8, 2021 did not require medical treatment or cause him to lose time from work. Moreover, Claimant's presentation eight days after the alleged injury does not match the expected physiologic response if the pathology visualized on MRI were caused by an acute traumatic event. In this case, the medical providers essentially agree that Claimant's MRI scan demonstrate pathology that is objectively inconsistent with an acute injury to the knee or back. Rather, Claimant has a degenerative tear in the medical meniscus of the right knee and significant degenerative disc disease in the lumbar spine. While Claimant may need treatment for these conditions, the evidence presented, including the medical opinions of Dr. O'Brien and D'Angelo persuades the ALJ that Claimant's need for such treatment is unrelated to the July 8, 2021 incident occurring at work. Based upon the evidence presented, the ALJ concludes that Dr. O'Brien and D'Angelo's opinions concerning the cause of Claimant's right knee and low back pathology and the need for treatment are credible and more persuasive than Claimant, Dr. Simpson's and Dr. Rook's assertions to the contrary.

L. In addition to supporting a conclusion that no acute "injury", as defined above, occurred because of the July 8, 2021 incident, the evidence presented persuades the ALJ that the alleged MOI did not aggravate, accelerate or combine with a pre-existing right knee/low back condition to give rise to Claimant's need for treatment. Rather, the evidence presented supports a conclusion that Claimant's current pain and need for treatment, including any recommended surgery is, more probably than not, related to the natural progression of his chronic pre-existing degenerative condition in the right knee and low back.

M. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

N. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated

any pre-existing condition. Rather, as asserted by Respondents, Claimant's current symptoms may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment or the incident occurring July 8, 2021. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found here, the ALJ is not convinced that Claimant's right knee pain is a consequence of the July 8, 2021 incident. Even if Claimant had established that the July 8, 2021 incident aggravated his pre-existing degenerative medial meniscus tear, the evidence presented supports a conclusion that the surgery recommended by Dr. Simpson is neither reasonable nor necessary. Here, the ALJ credits the opinions of Dr. O'Brien to find and conclude that Claimant may have suffered a mild right knee strain that was self-limiting and self-healing. Moreover, the evidence presented, supports a conclusion that Claimant's low back pain is probably related to and emanating from the natural progression of his pre-existing degenerative disc disease rather than any acute injury alleged to have arisen out of the July 8, 2021 incident. There simply is a dearth of forensic evidence to connect Claimant's current symptoms and right knee/low-back pathology to the incident occurring on July 8, 2021. Accordingly, Claimant has failed to establish the requisite causal connection between his alleged July 8, 2021 injuries and his work activities that day. Because Claimant has failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed. Consequently, his remaining claim for additional medical benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: July 28, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you

mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she sustained a compensable industrial injury on July 16, 2021.

- Whether Claimant proved by a preponderance of evidence that she is entitled to medical benefits resulting from a compensable injury sustained July 16, 2021.

- Whether Claimant proved by a preponderance of evidence that she is entitled to temporary disability benefits resulting from a compensable injury sustained July 16, 2021, and whether those benefits are subject to reduction based on applicable law.

- Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant worked for Employer from January 2020 to July 2021 as an inventory supervisor. Claimant's job duties included preparing stores for inventory, tagging merchandise, preparing reports and managing employees.

2. Claimant sustained a work injury on July 16, 2021 while taking inventory. Claimant testified that a stack of boxes collapsed onto her back while she was kneeling down scanning boxes. Claimant testified that she did not know how many boxes fell on her nor the weight of the boxes, but that they felt "heavy." The boxes were made of cardboard and contained merchandise. Claimant testified she felt soreness, throbbing, and pressure in her back after being struck by the boxes. Claimant subsequently reported the incident to her District Manager, EJ[Redacted], and sought treatment the following day.

3. Claimant sought treatment at North Suburban Medical Center on July 18, 2021 with complaints of back pain after several boxes fell onto her back while at work. Physical exam revealed no external evidence of trauma. Muscle spasm to the trapezius muscle as well as paraspinal tenderness to palpation of the thoracic and lumbar spine were noted. X-rays of the lumbar and thoracic spines revealed no acute abnormalities. Claimant was prescribed medication and instructed to follow up with her primary care physician.

4. Claimant subsequently sought treatment with authorized provider Concentra on July 21, 2021. Lacie Esser, PA-C noted that Claimant reported multiple boxes weighing between 5-50 pounds each fell on her back at work. At hearing, Claimant denied that she specified the weight of the boxes to PA Esser. On examination, PA Esser noted tenderness to the thoracic spine with limited range of motion, tenderness in the lumbar spine with limited range of motion, and that Claimant was unable to stand fully erect.

Bilateral straight leg raise was negative and there were no significant radiologic findings. PA Esser assessed Claimant with a back contusion, prescribed medication and referred Claimant for physical therapy. Claimant was placed on work restrictions.

5. Claimant underwent MRIs of the lumbar and thoracic spine on August 13, 2021. The lumbar spine MRI revealed mild diffuse disc bulging and mild bilateral facet arthropathy at L3-4, L4-5 and L5-S1. The radiologist's impression was mild degenerative changes without central canal stenosis or significant neural foraminal narrowing. The thoracic spine MRI was unremarkable.

6. On August 16, 2021 Claimant saw Brittany Lain, NP at Concentra with complaints of 10/10 pain in her thoracic and low back. Claimant also reported right arm numbness and tingling, which NP Lain noted was of relatively new onset. She noted that the MRI results were unremarkable. NP Lain referred Claimant for an orthopedic evaluation.

7. On August 25, 2021 Claimant presented to Nicholas K. Olsen, M.D. for an orthopedic evaluation. Claimant reported the same mechanism of injury to Dr. Olsen as she did to her other providers. On examination, Dr. Olsen noted Claimant was unable to heel or toe walk due to increased pain, but that she was able to complete 10 repetitive heel raises. He further noted increased lumbar lordosis, decreased range of motion, and that facet loading was markedly positive on the right and left. Sitting and supine straight leg raise was negative. He noted that Claimant's August 13, 2021 lumbar MRI demonstrated mild diffuse disc bulge with mild facet arthrosis. Dr. Olsen gave an assessment of persistent thoracolumbar sprain and strain and mild facet arthrosis at L3-4, L4-5 and L5-S1. He recommended Claimant undergo bilateral L4-5, L5-S1 facet injections.

8. Claimant continued to follow-up with PA Esser, who on August 27, 2021 and September 10, 2021 noted severe global tenderness to light touch of the thoracic spine and lumbar spine and that Claimant refused range of motion for both. Straight leg raise was negative bilaterally.

9. On November 3, 2021, Claimant saw Wendy Carle, M.D. at Concentra. Claimant reported numbness radiating from her buttocks down into her thighs and legs down to her ankles, sometimes going into her toes. Claimant reported this occurred all of the time with her right lower extremity and also into her left lower extremity about one-third of the time. On physical exam, Dr. Carle noted global severe tenderness to light touch to the thoracic spine and global severe tenderness to palpation to the lumbosacral spine. Claimant refused range of motion. Straight leg raise was negative bilaterally. Dr. Carle assessed Claimant with a back contusion, myofascial pain syndrome of the lumbar and thoracic spine, acute adjustment order with depressed mood, and sleep disturbance. She noted that the trial facet injections performed by Dr. Olsen did not help, and that Dr. Olsen was recommending a trial of SI joint injections. Dr. Carle noted she thought the trial of SI joint injections might help Claimant's back pain and ambulation and intermittent left extremity symptoms. She further noted she believed Claimant has diffuse myofascial syndrome

lower thoracic to lower lumbar/upper sacrum, with hypersensitivity of skin, as well as bilateral SI joint pain and possible dysfunction.

10. On November 17, 2021, Claimant returned to PA Esser reporting severe pain in her back and an inability to move, sit, or stand straight. PA Esser noted that Claimant did not want to do physical therapy, and that Claimant felt massage therapy would be too painful. Claimant reported that nothing Concentra had done thus far had helped.

11. On December 15, 2021 PA Esser explained to Claimant that physical therapy can cause increased discomfort in the beginning, but that it takes more than two visits to improve. PA Esser noted that Claimant became upset with her, again stating Concentra was doing nothing for her. On physical examination, PA Esser noted tenderness throughout all levels of the lumbar spine, that Claimant pulled away to light palpation, and limited lumbar range of motion.

12. On December 17, 2021, Claimant presented to Mackenzie Kigin, D.O. at Clinica Campesina for evaluation of water therapy. Claimant reported 10/10 pain that caused leg numbness. On examination, Dr. Kigin noted lumbar midline and paraspinal tenderness with full range of motion. Neurological exam was normal. Dr. Kigin gave an assessment of lumbar back pain with radiculopathy affecting lower extremity. She referred Claimant for water therapy.

13. On January 17, 2022, Lawrence Lesnak, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Claimant reported that several boxes stacked approximately 6-feet high fell and struck her directly on her lower back region. Claimant complained of constant diffuse lower lumbar/superior buttock pain. Dr. Lesnak reviewed Claimant's medical records and physically examined Claimant. He noted Claimant exhibited numerous pain behaviors and nonphysiologic findings on his examination. He opined that Claimant's subjective complaints were without any reproducible objective findings. He noted that there were no reproducible objective findings on Claimant's initial examination, including no external evidence of trauma to the back, and no abnormalities on x-ray. Dr. Lesnak further noted that Claimant's thoracic MRI revealed no abnormalities and the lumbar MRI revealed mild facet arthropathy in Claimant's mid to lower lumbar spine, which was normal considering Claimant's age and body habitus. Dr. Lesnak opined that the injections performed by Dr. Olsen were nondiagnostic and nontherapeutic. He noted that Dr. Olsen's initial evaluation did not note any reproducible objective findings or even diagnoses involving either of her SI joints. Dr. Lesnak explained that the reported mechanism of injury was not one that would cause or aggravate preexisting SI joint pathology. He opined that, although there was a work incident, it did not result in any work injury. He further opined that Claimant is not a candidate for additional treatment, including the bilateral SI joint injections recommended by Dr. Olsen. Dr. Lesnak remarked that, based on a psychosocial screening test he completed, Claimant reported high levels of somatic complaints.

14. Claimant returned to Dr. Carle for a follow-up evaluation on January 18, 2022. She reported bilateral blower back pain, with radiating pain down her thighs mostly on the

anterior area, but also new pain in the upper thoracic area after her IME the previous day. Claimant reported that the doctor had her lying supine on the examination table, stating that this is already very painful for her, then that the doctor performed passive external rotation of each hip with her knees in a flexed position. Claimant stated that when she sat up after that part of the examination she felt pain in her bilateral upper/mid thoracic area. Dr. Carle noted that Claimant's ongoing pain in the lumbar and thoracic areas seemed to be myofascial, but that she did have SI joint tenderness on bilateral examination.

15. Claimant testified at hearing that she ceased participating in physical therapy at Concentra because she felt it agitated her symptoms and increased her pain. Claimant testified that, as a result, she has undergone pool therapy outside of the workers' compensation system. Claimant testified that her current symptoms include constant pain and pressure in the low back. She testified that she is unable to stand flat on both feet, she is unable to lay down flat on her stomach, or back, and must lay on her side, and she feels as though she must lean to either side while seated. She testified that these posture changes seem to concentrate the pain, and primarily affect her lower back. Claimant testified she did not experience similar symptoms leading up to the work injury. Claimant described having 10 out of 10 pain throughout her treatment, and testified that she understood 10 out of 10 pain as pain that she could not tolerate without medication. She further testified that no one told her that this scale was to be used objectively, nor was she given examples of the different levels of pain.

16. Dr. Lesnak testified by pre-hearing and post-hearing deposition on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Regarding Claimant's reported mechanism of injury, Dr. Lesnak opined that if a 50-pound box had struck Claimant on her back, then there would have been a soft tissue contusion, bruising, or evidence of trauma to the soft tissues. Dr. Lesnak testified that if a 5-pound box struck Claimant's back it would be very unlikely to cause any sort of injury. Dr. Lesnak testified that when Claimant presented to North Suburban Medical Center on July 17, 2021 there was no evidence of any external trauma or injury to Claimant's back and that Claimant merely had subjective complaints. He further testified that there was no objective evidence of an injury at Claimant's July 26, 2021 evaluation with PA Esser. Dr. Lesnak testified that Claimant had no reproducible objective findings on examination, merely tenderness, which is a subjective complaint.

17. Dr. Lesnak opined that, based on his review of medical records, there was no documented evidence of any specific signs of injury or trauma that would in any way be related to the reported July 16, 2021 incident. Dr. Lesnak testified that he performed a physical examination of Claimant during his IME, during which Claimant complained of diffuse pain. He testified that just touching Claimant's skin, as in brushing her skin in her low back region caused her to moan and groan, which he explained is a non-physiologic finding. Dr. Lesnak opined that his physical examination of Claimant indicated no evidence that Claimant sustained any injury and, in fact, he found no diagnosis that would correlate with her pain complaints on examination. Dr. Lesnak testified that muscle spasm, as described by Claimant during her July 18, 2021, emergency room appointment, are subjective, not objective, complaints.

18. Dr. Lesnak opined that there is no causal connection between the need for medical care and Claimant's reported incident, and that she is not a candidate for any SI joint injections as recommended by Dr. Olsen. Resp. Ex. A: 012. 3-7. Dr. Lesnak testified that SI joint issues arise from instances such as pregnancy, a car accident, and injury, or a fall. Dr. Lesnak testified that a striking incident, a direct blow to the back does not cause an SI joint injury, that it does not cause pathology in the SI joint, and that it is physically impossible. Dr. Lesnak testified that SI joint pain is neither exacerbated by posture, nor is it caused by posture. Dr. Lesnak testified that there is no objective evidence in the medical records or indicated during his physical examination that would indicate Claimant requires any sort of functional work restrictions from the date of her incident onward.

19. Dr. Olsen testified at hearing on behalf of Claimant as a Level II accredited expert in physical medicine and rehabilitation. Dr. Olsen testified that he initially recommended lumbar facet joint injections for Claimant due to the location of Claimant's pain and her MRI results. He testified that the lumbar facet joint injections were nondiagnostic, but that Claimant reported some relief from the steroidal medication that was injected, which caused him to suspect that there may be another source of inflammation. Dr. Olsen then focused his treatment on the SI joint. He testified that he performed provocative maneuvers of SI joint on examination, which were positive, and that Claimant reported pain with direct palpation of the joints. He opined that the SI joint is the most likely source of Claimant's pain, which he stated is consistent with Claimant's reports and mechanism of injury. Dr. Olsen explained that he did not perform SI examination at his initial evaluation of Claimant because at the time the MRI showed pain consistent with facet joint arthropathy.

20. Dr. Olsen testified that Claimant never displayed any Waddell signs at any of his examinations. Dr. Olsen disagreed with Dr. Lesnak's opinion that there are no objective symptoms upon which to recommend treatment, and that a SI joint injection should not be used for diagnostic purposes. He testified that such treatment is reasonably necessary, and a common tool to assess and evaluate the source of a patient's pain. Dr. Olsen testified that determining a positive finding of SI joint pain is difficult to assess with provocative maneuvers alone, and that one of the best diagnostic tools is to perform the SI joint injection. He testified that he believes the SI joint injection will resolve Claimant's pain complaints and that it is reasonably necessary to perform the SI injection as related to Claimant's work injury.

21. Dr. Lesnak testified at a post-hearing deposition after reviewing Dr. Olsen's testimony. Dr. Olsen reiterated that the lumbar facet injections were non-diagnostic and nontherapeutic, and testified that Claimant's reports of some relief after the facet injections did not make sense. He testified consistent with his IME report and prior testimony, reiterating his opinion that the mechanism of injury would not cause SI joint issues and the medical records do not indicate an injury was sustained.

22. Subsequent to the work injury, Claimant worked modified duty for Employer performing a desk job until November 2021. Claimant last worked for Employer during

the pay period ending October 28, 2021. She ceased working for Employer because Employer was no longer able to accommodate her restrictions. Claimant subsequently began employment with a different employer at an assisted living home in approximately late January 2022. Claimant testified she has been working within her restrictions performing medical filing.

23. Claimant's hours and earnings varied by week. Claimant earned $16.50 per hour until receiving a pay raise to $17.77 per hour as of the pay period ending 6/3/2021. Claimant wage records indicate she earned the following gross wages from pay period ending 4/1/2021 through 7/15/2021:

Pay Period Ending	Gross Wages
4/1/21	$966.42
4/8/21	$1,202.11
4/15/21	$1,063.29
4/22/21	$1,274.67
4/29/21	$1,497.74
5/6/21	$576.09
5/13/21	$932.15
5/20/21	$1,496.01
5/27/21	$1,109.89
6/3/21	$612.38
6/10/21	$1,665.95
6/17/21	$1,339.52
6/24/21	$1,147.72
7/1/21	$724.57
7/8/21	$560.44
7/15/21	$964.00

24. As Claimant received a pay raise approximately seven weeks prior to her industrial injury, the ALJ deems it fair to consider Claimant's gross wages for the 9 weeks leading up to her pay raise, divided by her hourly rate at the time, and then multiply this unit by her wage increase. Using this method, Claimant's gross wages from pay period ending 4/1/2021 through 05/27/2021 were $9,055.08. Dividing this number by her hourly rate of $16.50, gives a total of 548.79 units. Multiplying this number by her increased wage of $17.77, results in a total of $9,752.00 Adding this together with the gross wages earned of $7,014.58, for the pay period ending 6/3/2021 through 07/15/2021, equals $16,766.58. Dividing this number by the number of weeks represented by the period ending of 4/1/2021 through 07/15/2021 (16 weeks), equals an AWW of $1,047.91. The ALJ finds that this AWW is a fair approximation of Claimant's wage loss and diminished earning capacity.

25. The wage records reflect that after Claimant was placed on modified duty with Employer as a result of the work injury, she worked fewer hours in certain weeks and thus earned less than her AWW.

26. For the weeks ending July 24, 2021 – September 4, 2021, Claimant received unemployment benefits at a weekly rate of $904.00 per week. For the weeks ending September 11, 2021 – January 1, 2022, Claimant received unemployment benefits at a weekly rate of $604.00 per week. For the week ending January 8, 2021, Claimant received an unemployment payment amount of $293.00.

27. The ALJ finds the opinion and testimony of Dr. Olsen, as supported by the medical records, Dr. Carle's opinion, and Claimant's credible testimony, more credible and persuasive than the opinion and testimony of Dr. Lesnak.

28. Claimant proved it is more probable than not she sustained a work injury arising out of and in the course of her employment, which caused disability and the need for medical treatment.

29. Claimant proved it is more probable than not additional medical treatment, including the recommended SI injections, are causally related to her work injury and reasonably necessary to cure and relieve its effects.

30. Claimant proved it is more probable than not she is entitled to TPD benefits for the weeks between July 16, 2021 through October 28, 2021 that she sustained partial wage loss and earned less than her AWW.

31. Claimant proved it is more probable than not she missed more than three work shifts due to a disability caused by the work injury, resulting in actual wage loss and is entitled to TTD benefits from October 29, 2021 through January 22, 2021.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The

compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The preponderant evidence establishes that Claimant sustained a work injury arising out of and in the course of her work duties, resulting in disability and the need for medical treatment. Claimant is credible with respect to her reports of the work incident and has been consistent regarding her description of the incident to each physician. Claimant reported the incident to Employer not long after it occurred, and shortly thereafter sought medical treatment. Claimant credibly testified she continues to experience symptoms. Dr. Olsen, who has seen Claimant over multiple evaluations and is familiar with her presentation, is more credible and persuasive than Dr. Lesnak, who evaluated Claimant on one occasion over the course of approximately seven minutes. Contrary to Dr. Lesnak's opinion that Claimant exhibited pain behaviors and nonphysiologic findings, Dr. Olsen credibly testified Claimant did not exhibit Waddell signs on his examination.

Dr. Olsen credibly explained that there are objective findings supporting the conclusion that Claimant sustained a work injury. Dr. Olsen further credibly explained that he initially attributed Claimant's pain to the lumbar facets, but that he later confirmed, via his examination and injections, the SI joint is the likely source of Claimant's pain. Dr. Olsen is aware of the reported mechanism of injury and Claimant's presentation over the course of treatment, and continues to opine that Claimant sustained a work injury for which she requires additional care to further identify a diagnosis and treat her condition. Accordingly, Claimant met her burden to prove she sustained a compensable work injury.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As Claimant proved she sustained a compensable work injury, she is reasonably necessary and causally related medical treatment. Dr. Olsen credibly opined that SI injections are reasonably necessary for diagnostic and therapeutic purposes in Claimant's case as a result of the work injury. Dr. Olsen's opinion is supported by that of Dr. Carle, who also opined that a trial of SI joint injections might help Claimant's back pain and ambulation and intermittent left extremity symptoms. Claimant has proven it is more probable than not the recommended SI joint injections are reasonably necessary and causally related to the work injury.

Temporary Indemnity Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Section 8-42-103(1)(f) provides that temporary disability benefits shall be reduced by the amount of unemployment benefits received by a claimant for the applicable time period.

Claimant sustained partial wage loss due to working modified duty as a result of her work injury. Accordingly, Claimant proved she is entitled to TPD benefits for the weeks between July 16, 2021 through October 28, 2021 that she earned less than her AWW. Claimant ceased working for Employer because Employer could no longer accommodate

her work restrictions, which were in place due to the work injury. Claimant sustained actual wage loss as a result. Claimant proved she is entitled to TTD benefits from October 29, 2021 through January 22, 2021. Respondents are entitled to an offset in temporary disability benefits based on Claimant's receipt of unemployment benefits from July 24, 2021 through January 8, 2022.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,047.91. This AWW takes into consideration Claimant's pay raise and the average earnings she received for several weeks prior to the work injury.

ORDER

1. Claimant proved by a preponderance of the evidence she sustained a compensable industrial injury on July 16, 2021.

2. Respondents shall authorize and pay for reasonably necessary treatment related to the industrial injury, including the SI injections recommended by Dr. Olsen.

3. Respondents shall pay Claimant TPD benefits for the weeks she earned less than her AWW from July 16, 2021 through October 28, 2021.

4. Respondents shall pay Claimant TTD benefits from October 29, 2021 through January 22, 2021.

5. Respondents are entitled to offset of temporary disability benefits from July 24, 2021 through January 8, 2022 due to Claimant's receipt of unemployment benefits.

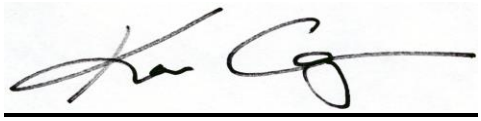
6. Claimant's AWW is $1,047.91.

7. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable occupational disease to her right shoulder.

II. Whether Claimant proved by a preponderance of the evidence the recommended medical treatment is reasonable, necessary, and work related.

III. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary partial disability benefits from May 27, 2020, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is 56 years of age. Claimant has worked for Employer since August 2008. She began working in her current position as a bone puller in 2014. Claimant's job as a bone puller involves Claimant using her hands or a long hook to pull and transfer bones, weighing approximately four pounds, from one conveyor belt to another. Claimant testified her job involves repetitively pulling items off a fast-running conveyor belt.

2. Employer's Physical Job Demands Summary for Claimant's position indicates the position requires constant (6-8 hours) lifting, carrying, pushing and pulling of 0-10 pounds of weight or force, with an average pull force of no more than five pounds. The summary indicates the employee picks product off the line between 10-15 times within a one-minute cycle, and the approximate time between new cycles is 2-5 seconds. The position requires constant forward reaching shoulder posture, never over shoulder level.

3. On April 3, 2010, Claimant sustained a work injury to her right upper extremity for which she was placed at maximum medical improvement ("MMI") on November 19, 2010. Claimant was placed on permanent restrictions, including: a) no use of a knife in her right hand; b) limit lifting to 30 pounds occasionally, floor to shoulder height (medium labor); c) shoulder to overhead, maximum occasional lift up to 10 pounds; d) right hand solo lift and carry occasionally up to 10 pounds; e) left hand solo lift and carry up to 23 pounds; and f) push/pull force of 30-50 pounds.

4. Prior medical records document Claimant's intermittent complaints of, *inter alia*, pain in her right hand, right ring finger, right elbow, right arm, left shoulder, left elbow and left ring finger from November 2008 through February 27, 2018. Right shoulder complaints are specifically noted on September 2010 and November 7, 2014.

Additionally, Claimant wrote on a May 1, 2013 patient questionnaire that she had a previous work-related injury of her right arm, elbow and shoulder in 2009 and checked "Yes" indicating she was experiencing current problems from that injury. A pain chart completed by Claimant on September 30, 2015 reflects pain complaints in the right upper extremity from Claimant's hand to shoulder.

5. Claimant testified that her right shoulder pain began in 2014 when she began working in her current position. She testified that she would intermittently seek treatment at Employer's health services clinic for the pain and undergo some icing and physical therapy. Claimant testified that, despite this intermittent pain, she was able to continue working and performing her same job duties.

6. Claimant testified that beginning in April 2020, she began performing additional work as fewer co-workers appeared for work due to COVID-19. Claimant testified she and one other co-worker were performing the work of approximately 7-8 individuals. Claimant testified she began experiencing right shoulder, right elbow and right hand pain. Employer's plant subsequently shutdown due to COVID-19 for two weeks in April 2020, during which time Claimant did not work.

7. On April 22, 2020 Claimant saw her primary care physician, William Oligmueller, M.D. at UC Health with concerns of a possible sinus infection or exposure to COVID-19. Claimant complained of a headache radiating along the back of her neck and into her shoulders. The medical report does not contain any indication Claimant reported to Dr. Oligmueller that she felt her shoulder pain could be work-related. On examination, Dr. Oligmueller noted Claimant was positive for neck pain and headaches. No mention was made of any shoulder abnormalities. Dr. Oligmueller noted diffuse neck and shoulder girdle myalgias associated with upper respiratory infection symptoms. Claimant's COVID-19 test was negative.

8. Claimant subsequently returned to work and sought treatment for her right shoulder at Employer's health services clinic on April 29, 2020. Claimant reported having right shoulder pain that radiated up the lateral side of her neck. Claimant attributed the pain to her increased work duties. No objective findings were noted. She was referred for physical therapy.

9. Claimant returned to Employer's health services clinic on May 16, 2020 with continued right shoulder complaints. Claimant subsequently underwent evaluation and treatment with authorized treating physician ("ATP") Oscar Sanders, M.D. at UC Health.

10. On May 27, 2020, Claimant first presented to Michael Dietz, PA-C under the supervision of Dr. Sanders. She reported developing progressive pain over the last several weeks, with increasing pain in her right shoulder, biceps, trapezius area, rotator cuff area and neck. Claimant reported no significant injuries to her right shoulder, arm or neck. Dr. Sanders noted Claimant's job for the past seven years involved constant tugging and pulling on meat of different sizes with a meat hook. On examination of the right shoulder, Dr. Sanders noted decreased range of motion, tenderness, spasm and

decreased strength without swelling, effusion, or crepitus. Impingement and apprehension tests were positive. His initial assessment was a right shoulder strain with impingement. He prescribed medication, referred Claimant for physical therapy and placed her on restrictions for the right upper extremity of no lifting, carrying, pushing, pulling, pinching, gripping, reaching overhead, reaching away from body, or repetitive motion.

11. Claimant began performing light duty work on May 28, 2020, which involved pulling trim with her left hand.

12. Claimant underwent MRIs of her right shoulder and cervical spine on July 25, 2020. The right shoulder MRI revealed: 1) full-thickness tear of the supraspinatus tendon anteriorly at the insertion with mild partial-thickness articular surface tearing of the rest of the supraspinatus tendon and the anterior infraspinatus tendon fibers at the insertion; 2) mild right subscapularis tendinosis; and 3) suspicion for a tear of the superior/posterior superior labrum.

13. Claimant returned to Dr. Sanders on July 29, 2020. Dr. Sanders noted Claimant's cervical MRI demonstrated mild spondylosis with minimal foraminal stenosis and the right shoulder MRI revealed full-thickness rotator cuff tearing. He diagnosed Claimant with impingement syndrome of the right shoulder and non-traumatic incomplete tear of the right rotator cuff. Dr. Sanders referred Claimant to Joshua Snyder, M.D. for an orthopedic surgery evaluation.

14. Claimant presented to Dr. Snyder on July 31, 2020 reporting an increase in right shoulder pain on May 16, 2020. Dr. Snyder noted Claimant reported having a prior injury and dealing with intermittent shoulder pain for quite some time. Right shoulder x-rays obtained that same day revealed minor AC joint osteoarthritis. Dr. Snyder reviewed the July 25, 2020 right shoulder MRI, noting full-thickness rotator cuff tearing, early osteoarthritis and a likely labral detachment more chronic in nature. Dr. Snyder's diagnosed Claimant with right shoulder pain with evidence of full-thickness rotator cuff tearing as well as inferior glenoid wear. Dr. Snyder referred Claimant for further evaluation with Christopher Stockburger, M.D.

15. Claimant presented to Dr. Stockburger on August 12, 2020. Claimant reported having an onset of right shoulder pain on May 16, 2020 with some cervical spine issues and occipital headaches radiating to her neck and shoulder. Dr. Stockburger reviewed Claimant's cervical and right shoulder MRIs, noting the former was "relatively clear" while the latter demonstrated a full-thickness tear of the supraspinatus. He noted Claimant had significant intraarticular pain and pain with loading of the rotator cuff on examination. He opined that the rotator cuff represented the majority of Claimant's pain generators and recommended a surgical repair of the rotator cuff. He requested scheduling for the right shoulder arthroscopic rotator cuff repair with a subacromial decompression.

16. On August 19, 2020, Lawrence Lesnak, D.O. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported to Dr. Lesnak she began experiencing right shoulder and right-sided clavicle pains and headaches in February/early March 2020. Claimant reenacted her work activities for Dr. Lesnak using her left hand, demonstrating pulling pieces of meat from a conveyor belt to a nearby conveyor belt or bin. Dr. Lesnak noted Claimant demonstrated movement only at waist level. Claimant reported having chronic persistent right forearm, hand and wrist symptoms since an occupational injury in April 2010. Dr. Lesnak noted Claimant denied having any specific right shoulder symptoms or prior right shoulder injuries. Dr. Lesnak reviewed Claimant's records dating back to November 2008, as well as a physical job demands assessment and a video of employees performing Claimant's job duties. He noted the July 25, 2020 cervical MRI revealed mild to moderate degenerative changes at C3-C5 and the right shoulder MRI showed evidence of significant degenerative changes including what appeared to be a degenerative full-thickness rotator cuff tear with underlying subchondral bone marrow edema/cystic changes involving the inferior aspect of the glenoid and a chronic labral tear. Dr. Lesnak concluded that the right shoulder MRI findings were completely chronic in nature and unrelated to any acute injury or trauma-related pathology.

17. Dr. Lesnak opined that Claimant's right upper extremity complaints are not causally related to her employment. He noted Claimant has had chronic right upper extremity symptoms since at least 2010 and, although Claimant reported to him never having any shoulder or upper extremity symptomatology prior to February/March 2020, the medical records reflect diffuse right upper extremity symptoms predating February/March 2020. He concluded there is no medical evidence Claimant's right shoulder MRI pathology is related to her job duties and no medical evidence Claimant sustained an occupational disease.

18. At a follow-up evaluation with Dr. Sanders on August 21, 2020, Dr. Sanders noted Claimant reported a history of previous right neck and shoulder pain periodically during her time working for Employer. Claimant reported that she had previously successfully treated at Employer's onsite health clinic. Dr. Sanders reviewed the reports of Drs. Snyder and Stockburger. He referred Claimant for ongoing care with Dr. Stockburger and continued Claimant's work restrictions.

19. On February 16, 2021, Dr. Sanders issued a letter in response to an inquiry from Respondents' counsel. Dr. Sanders opined that Claimant had not reached MMI and required the open rotator cuff repair recommended by Dr. Snyder and Dr. Stockburger. Dr. Sanders opined that Claimant sustained, at minimum, work-related myofascial strains of the cervical/thoracic and right upper extremity. He further opined that it was also likely Claimant sustained tearing of the rotator cuff secondary to performing her routine duties over the course of eight years of employment with Employer. Dr. Sanders referred to the risk factors for shoulder tendon related pathology outlined in MTG, noting Claimant did not meet the risk factor of overheard work consisting of additive time per day of at least 30 minutes/day for a minimum of five years. However, he opined that, per his review of Claimant's job demands analysis, Claimant appeared to potentially meet

the risk factors for repetitive shoulder movement with minimal pauses using 10% or greater maximum voluntary force.

20. Dr. Lesnak offered deposition testimony on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report and continued to opine Claimant did not sustain an industrial injury or occupational disease. Dr. Lesnak explained that there is no evidence indicating the full-thickness rotator cuff tear revealed on MRI is related to Claimant's employment. Dr. Lesnak addressed Dr. Sanders' February 16, 2021 letter and agreed with Dr. Sanders that Claimant did not meet the risk factors under the MTG for overhead activities. He acknowledged that, per the MTG, there is some evidence that some of Claimant's other work activities may potentially cause an increased risk for shoulder pathology. However, Dr. Lesnak emphasized that medical literature shows that up to 75% of people over the age of 50 have significant rotator cuff tendon pathology regardless of the type of work they do, noting Claimant was 56 years old at the time of his evaluation. Dr. Lesnak testified that the most important activity that can cause shoulder pathology involve activities above shoulder height, which Claimant's job did not involve. Dr. Lesnak opined that Claimant has chronic pain, that she did not sustain an aggravation, and that the recommended shoulder surgery is not causally related to Claimant's employment. Dr. Lesnak further testified that it has yet to be clearly determined if the proposed surgery is reasonable and necessary, as all full-thickness rotator cuffs do not require repair, and it is unclear if the MRI pathology is responsible for Claimant's symptoms.

21. Claimant testified at hearing that her work duties did not include activity above shoulder level. Claimant testified she did not inform Dr. Sanders and Dr. Lesnak of the extent of her pre-existing conditions because they did not ask. When asked if the pain after May 16, 2020 was the same, worse, or better than the pain she had in 2014 and 2015, Claimant initially testified it was the same pain and same intensity. She later testified that it was more pain than she had previously experienced. Claimant testified that she does not perform any activities outside of work that would cause her symptoms. She further testified that, with her prior injuries, she was always able to return to same job; however, since her most recent injury, she has not been able to perform her same job.

22. The ALJ finds the opinions of Drs. Sanders, PA Dietz, Dr. Snyder and Dr. Stockberger, as supported by the medical records and Claimant's credible testimony, more credible and persuasive and testimony of Dr. Lesnak.

23. Claimant proved it is more probable than not she suffered an occupational disease with a date of onset of May 27, 2020, when she was placed on work restrictions.

24. Claimant proved she is entitled to reasonable necessary and causally related treatment for the occupational disease, including the recommended right shoulder surgery.

25. Claimant earned $16.15 per hour with time-and-a-half for overtime. Claimant testified she was working about 54 hours per week at the onset of her injury in May 2020. Claimant testified that after she was placed on light duty, was placed on light duty, she only worked 8 hours a day, 40 hours per week with no overtime.

26. Claimant's wage records reflect Claimant earned the following wages, including regular pay and overtime pay, for the specified pay periods in 2020:

Pay Period End (2020)	Regular Pay	Overtime Pay	Total Wages
5-Jan	$446.87	$56.46	$503.33
12-Jan	$646.00	$110.24	$756.24
19-Jan	$646.00	$106.13	$752.13
26-Jan	$387.00	$58.87	$445.87
2-Feb	$646.00	$37.55	$683.55
9-Feb	$516.80	$58.15	$574.95
16-Feb	$646.00	$218.07	$864.07
23-Feb	$387.60	$14.52	$402.12
1-Mar	$646.00	$23.23	$669.23
8-Mar	$646.00	$24.23	$670.23
15-Mar	$646.00	$236.73	$882.73
22-Mar	$646.00	$24.23	$670.23
29-Mar	$646.00	$115.09	$761.09
5-Apr	$646.00	$121.15	$767.15
12-Apr	$646.00	$121.50	$767.50
3-May	$528.11	$0.00	$528.11
10-May	$603.69	$194.88	$798.57
17-May	$617.25	$173.64	$790.89
24-May	$629.85	$0.00	$629.85
31-May	$504.36	$204.59	$708.95
7-Jun	$629.85	$191.42	$821.27
14-Jun	$516.80	$9.69	$526.49
21-Jun	$621.45	$9.69	$631.14
28-Jun	$646.00	$9.69	$655.69
5-Jul	$646.00	$12.12	$658.12
12-Jul	$629.85	$9.69	$639.54
19-Jul	$633.56	$7.27	$640.83
26-Jul	$702.54	$9.45	$711.99
2-Aug	$695.16	$13.50	$708.66
9-Aug	$432.00	$8.10	$440.10
16-Aug	$576.00	$18.36	$594.36

30-Aug	$702.54	$21.60	$724.14
6-Sep	$720.00	$27.00	$747.00

27. The pay records reveal that Claimant continued to work at least some overtime subsequent to May 2020 while on modified duty. However, the records also indicate the amount of overtime Claimant worked decreased due to being placed on modified duty in May 2020. Claimant is entitled to temporary partial disability benefits for the time period in which she earned less than her AWW subsequent to May 27, 2020 as a result of the occupational disease.

28. For the pay periods listed above ending January 5, 2020 through May 24, 2020 Claimant earned a total of $12,187.99 in earnings, resulting in an AWW of $682.66. The ALJ finds this AWW a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the

claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

When evaluating the issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

W.C.R.P. Rule 17, Exhibit 5, which sets forth the Medical Treatment Guidelines for cumulative trauma conditions with regard to the upper extremity, does not specifically address cumulative trauma conditions of the shoulder. W.C.R.P. Rule 17, Exhibit 4, sets forth the Medical Treatment Guidelines for shoulder injuries.

Rule 17, Exhibit 4(C)(2) discusses principles of causation of occupational shoulder diagnoses, noting some evidence exists for the following causative risk factors for shoulder tendon related pathology: (1) overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of five years; (2) work that requires shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; (3) work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no two second pauses for 80% of the work cycle; and (4) jobs requiring daily heavy lifting (20kg or greater) at least 10 times per day over the years.

As found, Claimant proved it is more probable than not she sustained a compensable occupational disease with a date of onset of May 16, 2020. The medical records indicate Claimant does have a history of prior right shoulder/upper extremity injuries and symptoms. She credibly testified that she intermittently sought treatment at Employer's health services clinic for the pain, would undergo some conservative treatment, and was able to continue performing her same job duties. Claimant's symptoms subsequently became more severe in April 2020 and May 2020 after being required to meet increased production needs in the absence of co-workers. Claimant was then placed on restrictions preventing her from performing her regular job duties. Here, the nature of Claimant's work required hazards that caused, intensified, or aggravated Claimant's right shoulder condition. There is no evidence that such hazards and similar repetitive right shoulder/upper extremity movements existed in Claimant's everyday life.

Dr. Sanders described the work Claimant was performing as of May 2020 as repetitive shoulder movement with minimal pauses using 10% or greater of maximum voluntary force. He reviewed Claimant's job description and concluded she possibly met

the risk factors contained in the MTG except for overhead lifting. Dr. Sanders opined that Claimant's condition and need for treatment, including surgery, is a result of her work activities. Dr. Lesnak acknowledged that, per the MTG, there is some evidence that some of Claimant's other work activities may potentially cause an increased risk for shoulder pathology. Based on the totality of the evidence, the preponderant evidence establishes that Claimant sustained a compensable occupational disease to her right shoulder.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As Claimant proved she sustained a compensable occupational disease, Claimant is entitled to reasonable, necessary and related treatment to cure and relieve the effects of the occupational disease. Claimant has received medical treatment from her ATP, Dr. Sanders, who then referred claimant to Dr. Snyder. Dr. Snyder indicated Claimant needs surgery based on the MRI results. Dr. Stockberger believed that the surgery would likely alleviate Claimant's symptoms and pain from the shoulder. Dr. Sanders credibly opined that that the need for surgery most likely developed over the eight years that Claimant had been performing her job for Employer. The preponderant evidence establishes that the right shoulder treatment, including the recommended surgery, is reasonable, necessary and causally related.

Temporary Partial Disability

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury)

Claimant suffered partial wage loss as a result of the work injury. Accordingly, Claimant is entitled to TPD benefits for the weeks in which she earned less than her AWW subsequent to May 27, 2020 and ongoing.

Average Weekly Wage

As found a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $682.66, which takes into account Claimant's wages for several weeks prior to the onset of the occupational disease.

ORDER

1. Claimant proved she sustained a compensable occupational disease to her right shoulder.

2. Respondents shall authorize and pay for reasonably necessary treatment related to the occupational disease, including the surgery recommended by Dr. Stockberger.

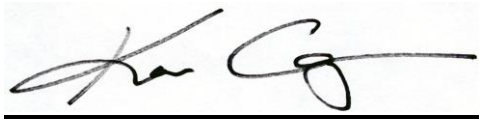
3. Respondents shall pay Claimant TPD benefits beginning May 27, 2020 and ongoing, until terminated by operation of law.

4. Claimant's AWW is $682.66.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have established by a preponderance of the evidence that continuing medical maintenance treatment in the form of prescriptions as recommended by Authorized Treating Physician (ATP) Benjamin Savage, M.D. is no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant worked for Employer as an airplane mechanic. On November 26, 2001 he was inspecting landing gear when he hit his head on a landing gear door. Claimant immediately experienced pain but was able to complete his shift. Over time however, Claimant began to experience severe headaches that were treated with medications.

2. On February 27, 2002 Claimant visited J. Glen House, M.D. for an evaluation. Dr. House recounted that on August 19, 1999 Claimant had suffered a prior serious head injury to his left frontal lobe. The injury involved a subdural hematoma and left hemiparesis. Dr. House reported that Claimant specifically suffered three skull fractures from falling off of a ladder at home. On physical examination for the November 26, 2001 work injury, Dr. House noted tenderness in the frontalis muscle and "desensitization over the VI cranial nerve supplying the frontal region." He diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization." Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

3. On May 22, 2006 Claimant visited Thomas Van Sistine, M.D. for an examination. At that time, Claimant was taking Effexor, Lunesta, Lyrica, Naproxen, Fentanyl, and Lidoderm for his continued symptoms. Dr. Van Sistine noted that the medications helped, but once they wore off, Claimant experienced stabbing and throbbing pain on the left side of his forehead, "which radiates across the head, then has burning discomfort with numbness in the left torso/mid back." He diagnosed Claimant with Chronic Regional Pain Syndrome (CRPS), neuropathic head pain and left hemidysestheia/parathesisas that were caused by the November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches.

4. On April 13, 2006 Claimant visited L. Barton Goldman, M.D. for an independent medical examination. Claimant reported headaches, left arm pain, left leg pain, and pain on the left side of his upper body. Dr. Goldman concluded Claimant suffered a blunt trauma injury on November 26, 2001 that resulted in several diagnoses including post-traumatic headaches and CRPS. He recommended treatment in the form of regular medication monitoring.

5. On April 13, 2006 Claimant reached Maximum Medical Improvement (MMI) with a 25% whole person impairment rating. In the June 13, 2008 Final Admission of Liability (FAL) Respondents acknowledged that Claimant was entitled to receive Permanent Total Disability benefits (PTD) and medical maintenance benefits for his November 26, 2001 work injury. In the FAL Respondents specifically noted "[c]arrier admits for reasonable, necessary and related medical benefits after MMI."

6. On January 31, 2007 Claimant visited John S. Hughes, M.D. for an independent medical examination. Dr. Hughes determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the optimal way to manage Claimant's symptoms.

7. On June 9, 2012 Claimant visited Gerald J. Bannasch, M.D. for an evaluation. At the time, Claimant was taking Keppra, Celebrex, Baclofen, Lunesta, and Lyrica. Dr. Bannasch conducted an EEG study in which he noted abnormal findings "most indicative of a focal cerebral dysfunction over the left frontal region of the brain which is potentially epileptogenic."

8. Scott Hompland, D.O. completed an evaluation of Claimant and authored a report dated October 24, 2014. Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland remarked that Claimant's findings were "consistent with the clinical findings of a central pain syndrome." He further stated that the MRI exhibited "evidence of significant central nervous system abnormalities." Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Finally, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury.

9. On March 1, 2018 Claimant visited Susan G. Hibbs, M.D. for an evaluation. Dr. Hibbs noted that Claimant suffered from CRPS as a result of his November 26, 2001 industrial injury. She commented that Claimant continued good tolerance of Baclofen, Lyrica, and Tramadol.

10. On November 13, 2018 Dr. Hibbs authored a letter stating that she was a neurologist treating Claimant for CRPS. Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head emanating from his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results." She further commented that Claimant required the preceding medications to control the effects of his 2001 work injury.

11. On April 9, 2019 Dr. Hibbs noted that Claimant continued to benefit from Baclofen, Lyrica, Tramadol, and Keppra (for seizure prevention). After Claimant reported tremors, Dr. Hibbs also prescribed Primidone. On May 22, 2019 Dr. Hibbs stated that Claimant's tremors were "due to CRPS which is due to an injury sustained in [a] work related accident on November 26, 2001."

12. In 2020 Claimant began receiving treatment from ATP Benjamin G. Savage, D.O. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy.

13. At the hearing in this matter Claimant stated that, if he does not take medications, he experiences intolerable pain. Claimant also remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues. Claimant also remarked that he did not begin taking any medications until after his 2001 work injury.

14. On August 26, 2021 Lawrence A. Lesnak conducted a records review of Claimant's claim. After considering extensive medical records, Dr. Lesnak noted that Claimant sustained a traumatic brain injury in August 1999 that "resulted in apparently left hemiparesis." In contrast, as a result of Claimant's November 26, 2001 industrial injury he was diagnosed with a left-sided scalp contusion. Dr. Lesnak noted that a March 2, 2005 MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Moreover, Claimant's diagnoses of left median neuropathy at the wrist and left ulnar motor neuropathy at the elbow were also unrelated to the work injury claim of November 26, 2001. Furthermore, Claimant's diagnoses of mild cardiomegaly, prior urosepsis, lumbar degenerative disc disease, lumbar spondylosis and sleep apnea were also unrelated to the November 26, 2001 accident. Finally, Dr. Lesnak reasoned that, although Claimant has been diagnosed with "essential tremors," there have been no reproducible objective findings for other diagnoses including posttraumatic epilepsy or CRPS. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

15. On December 13, 2021 Respondents filed an Application for Hearing in the present matter. Respondents specifically contested the reasonableness and necessity of continuing medical benefits for Claimant's November 26, 2001 industrial injury.

16. Respondents have failed to establish that it is more probably true than not that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage are no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Initially, on November 26, 2001 Claimant

struck his head on a landing gear door at work and was diagnosed with severe headaches. On February 27, 2002 Dr. House acknowledged that Claimant had suffered a prior serious head injury to his left frontal lobe on August 19, 1999 at home. Nevertheless, he diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization" as a result of the November 26, 2001 work incident. Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

17. The record is replete with opinions from multiple medical providers that Claimant's 2001 work injury caused CRPS, seizures, tremors and severe cognitive dysfunction. Moreover, providers have agreed that the optimal way to manage Claimant's medical maintenance treatment is through medications. Notably, on May 22, 2006 Dr. Van Sistine diagnosed Claimant with CRPS, neuropathic head pain and left hemidysestheia/parathesisas as a result of his November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches. Furthermore, on January 31, 2007 Dr. Hughes persuasively determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the best way to manage Claimant's symptoms. Finally, in a November 13, 2018 letter Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head that was caused by his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results."

18. In 2020 Claimant began receiving treatment from ATP Dr. Savage. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy. Claimant's credible testimony was consistent with Dr. Savage's treatment. Claimant remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues.

19. In contrast, in a report dated October 24, 2014, Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Furthermore, Dr. Lesnak attributed Claimant's current symptoms to his traumatic brain injury in August 1999 based on his review of a March 2, 2005 MRI. Specifically, the MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Dr. Lesnak also reasoned that Claimant's other diagnoses were unrelated to the November 26, 2001 work incident. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

20. Despite the opinions of Drs. Hompland and Lesnak, the record reveals that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage is causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Furthermore, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury. Moreover, Dr. Lesnak's opinion is contrary to multiple medical providers who have treated Claimant for many years. Although Claimant's providers were aware of his 1999 head injury, they nevertheless determined that he developed symptoms subsequent to the November 26, 2001 work event. Finally, Claimant's credible testimony reveals that he had recovered from the 1999 incident and did not suffer left lower extremity CRPS, essential tremors and post-traumatic epilepsy until after the November 26, 2001 work accident. ATP Dr. Savage thus prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions. Respondents have thus failed to demonstrate that the preceding treatment is no longer causally related, reasonable and necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when the respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when the respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, the respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012). Here, Respondents filed a FAL acknowledging liability for continuing medical maintenance benefits and now seek to terminate all of Claimant's maintenance treatment. They thus bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition.

5. As found, Respondents have failed to establish by a preponderance of the evidence that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage are no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Initially, on November 26, 2001 Claimant struck his head on a landing gear door at work and was diagnosed with severe headaches. On February 27, 2002 Dr. House acknowledged that Claimant had suffered a prior serious head injury to his left frontal lobe on August 19, 1999 at home. Nevertheless, he diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization" as a result of the November 26, 2001 work incident. Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

6. As found, the record is replete with opinions from multiple medical providers that Claimant's 2001 work injury caused CRPS, seizures, tremors and severe cognitive dysfunction. Moreover, providers have agreed that the optimal way to manage Claimant's medical maintenance treatment is through medications. Notably, on May 22, 2006 Dr. Van Sistine diagnosed Claimant with CRPS, neuropathic head pain and left

hemidysestheia/parathesisas as a result of his November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches. Furthermore, on January 31, 2007 Dr. Hughes persuasively determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the best way to manage Claimant's symptoms. Finally, in a November 13, 2018 letter Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head that was caused by his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results."

7. As found, in 2020 Claimant began receiving treatment from ATP Dr. Savage. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy. Claimant's credible testimony was consistent with Dr. Savage's treatment. Claimant remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues.

8. As found, in contrast, in a report dated October 24, 2014, Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Furthermore, Dr. Lesnak attributed Claimant's current symptoms to his traumatic brain injury in August 1999 based on his review of a March 2, 2005 MRI. Specifically, the MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Dr. Lesnak also reasoned that Claimant's other diagnoses were unrelated to the November 26, 2001 work incident. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

9. As found, despite the opinions of Drs. Hompland and Lesnak, the record reveals that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage is causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Furthermore, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury. Moreover, Dr. Lesnak's opinion is contrary to multiple medical providers who have treated Claimant for many years. Although Claimant's providers were aware of his 1999 head injury, they nevertheless determined

that he developed symptoms subsequent to the November 26, 2001 work event. Finally, Claimant's credible testimony reveals that he had recovered from the 1999 incident and did not suffer left lower extremity CRPS, essential tremors and post-traumatic epilepsy until after the November 26, 2001 work accident. ATP Dr. Savage thus prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions. Respondents have thus failed to demonstrate that the preceding treatment is no longer causally related, reasonable and necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at* [*https://oac.colorado.gov/resources/oac-forms*](https://oac.colorado.gov/resources/oac-forms).

DATED: July 29, 2022.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-149-193-001

ISSUES

The issues set for determination included:

- Is Claimant entitled to *Grover* medical benefits?

FINDINGS OF FACT

1. Claimant worked for Employer as an operations manager in charge of the plant.

2. There was no evidence in the record that prior to September 20, 2016, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

3. Claimant suffered an admitted industrial injury on September 20, 2016. Claimant testified he was stepping on a forklift and felt a twinge in his low back. The pain increased to the point where he could not get up.

4. Claimant was evaluated that same day by ATP Jonathan Bloch, D.O. at Concentra. At that time, Claimant reported he could not stand or walk due to intolerable pain in his low back, which radiated to the waist line and to both sides. On examination, Dr. Bloch noted a loss of normal lordosis and tenderness in the lumbar spine. Bilateral muscle spasms were present.

5. Dr. Bloch's assessment was: lumbar strain and sacroiliac sprain. Claimant was prescribed Celebrex, tizanidine and referred to physical therapy ("PT").

6. On October 11, 2016, Claimant was evaluated by with John Sacha M.D. at Concentra. Claimant's symptoms were localized to the low back, with radiation into the right anterior thigh with numbness and tingling. On examination, Dr. Sacha noted Claimant had paraspinal spasm, as well as flattening of the lumbar lordosis and lumbar shift.

7. Dr. Sacha's impression was: lumbosacral radiculopathy consistent with an L4 radiculopathy. Dr. Sacha noted an MRI was requested but had been denied, but was required. Claimant's prescription for Celebrex and to tizanidine were discontinued and Dr. Sacha renewed the prescription for tramadol, as well as dispensing Lyrica for neuropathic pain and Robaxin.[1]

[1] Elsewhere in the record, Robaxin and Methocarbamol were noted to be the same medication. See Exhibit 6, p. 171. [Dr. Cava's report.]

8. Claimant returned to Dr. Sacha on November 2, 2016. Dr. Sacha noted Claimant's MRI showed evidence of this protrusion at the L4–5 level and right-sided foraminal narrowing. Mild degenerative disc disease and facet spondylosis was noted at the other levels. Dr. Sacha's impression was: lumbar radiculopathy; opioid use, uncomplicated. Dr. Sacha stated his plan was maintenance of medication and provision of an epidural steroid block.

9. On December 8, 2016, Claimant underwent a bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation, which were administered by Dr. Sacha.
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10. Claimant returned to Dr. Sacha on January 10, 2017, at which time continued low back symptoms were noted. Dr. Sacha's diagnoses were the same as the prior evaluation and he ordered a EMG nerve conduction study. Claimant was evaluated by Dr. Sacha on March 8, 2017 and he was having right leg numbness and tingling. The EMG showed evidence of acute L5 and S1 radiculopathy. Dr. Sacha noted Claimant had a diagnostic response and symptom relief with the bilateral L5 transforaminal epidural injection.

11. On March 31, 2017, Claimant underwent repeat bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation. Claimant also received an interlaminar C7-T1 epidural. The injections were administered by Dr. Sacha.

12. Claimant testified Dr. Sacha prescribed medications, including Methocarbamol and Tramadol.

13. Claimant was evaluated on September 9, 2017 by Jennifer Latey, PA at US Healthworks in Saugus, California. By way of history, it was noted Claimant had injured his back a year ago in Colorado and was managed medically with Methocarbamol and Lyrica. Claimant moved to California, ran out of medication and suffered an exacerbation of his pain. On examination, Claimant had a normal gait, with no loss of lumbosacral lordosis. Spasms and tenderness were noted at the thoracolumbar spine and paravertebral musculature.

14. PA Latey's diagnoses were: lumbar disc disease; strain, lumbosacral, chronic or old. Claimant's Methocarbamol and Lyrica prescriptions were refilled. The report was cosigned by Larry Barnhart, M.D. (supervising physician).

15. A follow-up evaluation on December 2, 2017 with PA Latey documented Claimant continued to have lumbar symptoms. Claimant's prescriptions for Methocarbamol, Lyrica and meloxicam were filled. The report was also cosigned by Dr. Barnhart.

16. On March 11, 2019, Claimant was evaluated by Amanda Cava, M.D. at Concentra. It was noted Claimant had moved to California in April 2017 and moved back to Colorado in December 2018. Claimant complained of pain in the center of the lower lumbar area, usually rating adding across the left low back to the left buttock down to the left posterior knee. On examination, tenderness was present in the lumbar spine (L4, L5 and S1) and (spinal region. He had limited range of motion ("ROM"). Dr. Cava's assessment was lumbar strain; lumbar disc disease with radiculopathy. Dr. Cava prescribed Methocarbamol and referred Claimant back to Dr. Sacha.

17. Claimant was reevaluated by Dr. Sacha on March 27, 2019. Dr. Sacha documented Claimant's prior treatment and noted he had been evaluated by three different practitioners, received medications, PT, chiropractic and an additional epidural in the intervening period of time (two years). At that time, Claimant reported constant pain localized to low back and bilateral legs, with numbness and tingling in both feet. On examination, Claimant had lumbar paraspinal spasm, long with pain on straight leg raise and neural tension testing bilaterally. Claimant had pain with extension and external rotation localized to the back only.

18. Dr. Sacha's impression was lumbosacral radiculopathy; opioid use, uncomplicated. Dr. Sacha was to attend the EMG test and depending on the findings, noted Claimant might be approaching MMI, with case closure and maintenance care. Dr. Sacha prescribed Lyrica and renewed his Robaxin (methocarbamol). The ALJ credited Dr. Sacha's opinion with regard to Claimant's need for maintenance care.

19. In the follow-up evaluation on May 13, 2019, Dr. Sacha ordered a left L5 and S1 transforaminal epidural injection/spinal nerve block to be diagnostic and therapeutic. On July 25, 2019, Claimant underwent a bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation, which were administered by Dr. Sacha.

20. On February 21, 2020, B. Andrew Castro, M.D. performed an independent medical evaluation ("IME"). Claimant had been discharged from PT and the most recent injections were not effective. Dr. Castro opined that surgical intervention was not the best option for Claimant and his prognosis was good.

21. Dr. Castro performed a follow up IME on March 13, 2020, at which time Dr. Castro noted Claimant responded to the first epidural injection, with the second injections providing little to no relief. On examination, Claimant had very little ROM with regards to extension and lateral bending. Straight leg raise was mildly positive, with a pulling sensation.

22. Dr. Castro described the examination as "somewhat" nonphysiologic, but noted the initial MRI showed disc bulging at L4-L5 and L5-S1. The L4-L5 herniation seemed to be worse initially with a left-sided disc bulge/protrusion projecting into a congenitally narrow canal. Dr. Castro noted the repeat MRI showed that the right–sided

disc bulge was improved. The EMG showed L5 and S1 radiculopathy on the right side. The ALJ found that the MRI-s and the EMG showed objective evidence of pathology in Claimant's lumbar spine.

23. Dr. Castro assigned a 5% whole person impairment rating under Table 53 of the *AMA Guides* to Claimant's lumbar spine. He opined Claimant could not be rated for loss of ROM.

24. Dr. Castro reiterated surgical intervention would not benefit or functionally improve Mr. Clark. Dr. Castro concluded Claimant qualified for a 5% whole person impairment due to the disc herniation at L4-L5. Dr. Castro recommended Methocarbamol, as needed for maintenance treatment. The ALJ credited Dr. Castro's opinion with regard to Claimant's need for maintenance care.

25. On May 8, 2020, Claimant was evaluated by Randall Dryer, M.D. in Austin Texas. Dr. Dryer's notes stated Claimant suffered an injury on September 20, 2016 and he received three epidural steroid injections which gave him limited relief. Claimant was noted to have been on Robaxin, Lyrica and received PT. At the time of evaluation, Claimant rated his pain as 5/10. On examination, Claimant was unable to bend normally. Straight leg raising was negative bilaterally, with tenderness to palpation over the lumbar spine midline and paraspinal musculature noted. Dr. Dryer's assessment was: lumbar radiculopathy; low back pain. Claimant was set up for an L4-5 ESI.

26. In a follow-up appointment with Dr. Dryer on August 24, 2020, an additional course of PT was ordered. Claimant was prescribed Tramadol and, Skelaxin and a Medrol pak. The ALJ concluded Dr. Dryer ordered PT and prescribed medications because of Claimant's need for treatment.

27. On September 22, 2020, Claimant was evaluated by John Obermiller, M.D., who performed an impairment rating examination. The examination was performed in Austin Texas. On examination, Claimant's lumbar spine was tender to the touch and mild spasm was noted. There were no positive Waddell's signs. Dr. Obermiller concluded Claimant sustained a permanent medical impairment as a result of his work injury. Dr. Obermiller assigned 7% for a Table 53 disorder under the *AMA Guides*, with 7% assigned for ROM loss. Dr. Obermiller did not make recommendations regarding maintenance treatment, but noted Claimant was taking a muscle relaxer and recently underwent MDP.

28. A report from Anly Joseph, M.D. (Texas) dated November 6, 2020 was admitted into evidence.[2] (Dr. Joseph had issued another WCM 164 sometime in March 2020 reiterating the same opinions, but it was not dated.) It was not clear that Dr. Joseph evaluated Claimant, as the Date of Exam part of the WCM 164 form was blank. Dr. Joseph concluded Claimant was able to return to full duty and reached MMI on March 2, 2020. Dr. Joseph adopted Dr. Obermiller's 14% medical impairment and stated Claimant did not require maintenance treatment. The ALJ noted Dr. Joseph did not comment about

[2] Exhibit-D, pp. 20-21. It was not clear from the report whether Dr. Joseph had a full set of Claimant's treatment records.

Claimant's prescription for Methocarbamol (Robaxin) over the course of his treatment. The ALJ gave more weight to the opinions of Drs. Sacha and Castro than those of Dr. Joseph.

29. On December 3, 2020, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for the 14% medical impairment rating issued by Dr. Obermiller. The FAL denied liability for Grover medical benefits.

30. On January 11, 2021, an amended GAL was filed on behalf of Respondents, which admitted for maintenance medical benefits.

31. Claimant was evaluated by Alicia Feldman, M.D. on December 11, 2021, who performed an IME at the request of Respondents. At that time, Claimant had a mildly antalgic gait and exhibited multiple pain behaviors throughout the examination, including frequent changes of position. No significant tenderness to palpation was noted over the lumbar spine. Claimant's ROM measurements of the lumbar spine included true lumbar flexion at 5°, lumbar extension 0°, maximum straight leg raise on the right of 15°, maximum straight leg raise on left and 15°, maximum lumbar right lateral flexion of 10°, maximum lumbar a left lateral flexion of 5°. The ALJ noted these measurements showed restrictions in Claimant's lumbar ROM.

32. Dr. Feldman stated Claimant had somebody inconsistent migratory pain complaints since the injury of September 20, 2016. At times the pain was bilateral and now it was predominantly on the left side. Dr. Feldman opined Claimant's current complaints were related to the September 20, 2016 injury, as he had acute onset of low back pain that day and she was not aware of any pre-existing low back pain or intervening events. Dr. Feldman also said Claimant did not appear to be a surgical candidate and Dr. Feldman agreed he was at MMI. Dr. Feldman (utilizing Dr. Obermiller's ROM measurements) concluded Claimant sustained a 7% medical impairment rating per Table 53 of the *AMA Guides*, with an additional 7% attributable to loss of ROM.

33. With regard to medications, Dr. Feldman stated Claimant had taken tramadol and Methocarbamol, as well as an anti-inflammatory (Celebrex) and a neuropathic pain medication (Lyrica). Dr. Feldman said Claimant had titrated down off all of his medications and was not taking any medications. Dr. Feldman opined Claimant did not require medical maintenance.

34. Dr. Feldman's assumption regarding Claimant's medications appeared to be in error.

35. Claimant testified that he did not recall telling Dr. Feldman that he had weaned off all of his medications. He stated that he has consistently taken Methocarbamol since 2016 and this medication helped reduce his symptoms.

36. On January 13, 2022, an FAL was filed on behalf of Respondents, based upon Dr. Feldman's report. The FAL admitted for the 14% medical impairment rating. Liability for medical maintenance was denied.

37. Claimant testified that he continues to have pain and the Methocarbamol helped his symptoms. Claimant was credible witness.

38. Claimant met his burden of proof and established he needs maintenance medical treatment to maintain MMI and/or prevent deterioration.

39. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Grover Medical Benefits

§ 8-42-101(1), C.R.S. requires Employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness

or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When Respondents challenge Claimant's request for specific medical treatment Claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012).

Once Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999). Respondents argued Claimant did not show he was entitled to Grover medical benefits. Claimant asserted that his testimony and Dr. Castro's recommendation established that the prescription for Methocarbamol was reasonable medical maintenance care. In addition, Claimant averred that Tramadol and Medrol provided relief for emergency situations related to his lower back. Respondents disputed Claimant required maintenance treatment. Respondents relied on the opinions of Dr. Joseph who opined Claimant did not require maintenance medical treatment on September 18, 2020 and November 6, 2020, as well as Dr. Feldman.

The ALJ concluded Claimant met his burden to show he was entitled to Grover medical benefits. (Finding of Fact 38). As determined in Findings of Fact 2–7, Claimant sustained an admitted industrial injury on September 20, 2016. Claimant required treatment that same day, which was provided by Dr. Bloch, an ATP at Concentra. *Id.* Claimant was diagnosed with lumbar radiculopathy and treated by Dr. Sacha, also an ATP. *Id.* Dr. Sacha administered a series of injections to Claimant's lumbar spine. (Findings of Fact 9, 11, 19). Dr. Sacha also prescribed Methocarbamol. (Findings of Fact 7, 12, 18). Other physicians prescribed this medication, including ATP Dr. Cava and an

IME physician Dr. Castro; both of whom prescribed it for Claimant's low back symptoms. (Findings of Fact 16, 24).

In addition, Claimant received a prescription for this medication after he moved to California. (Findings of Fact 14-15). Claimant also was prescribed Tramadol, Skelaxin and a Medrol pak when he relocated to Texas. (Findings of Fact 26). The ALJ found Claimant to be credible when he testified that the medication helped his symptoms. (Findings of Fact 37). His testimony that he took medications (including Methocarbomal) after leaving Colorado was corroborated by the medical records from Texas and California.

Based upon the totality of medical evidence in the record, as well as Claimant's testimony, the ALJ concluded Claimant required maintenance medical treatment. In this regard, the ALJ credited Claimant's ATP-s (Dr. Sacha and Dr. Cava), along with IME physician (Dr. Castro) regarding Claimant's need for the medications. (Findings of Fact 16, 18, 24). The physicians who evaluated Claimant in Texas and California also recommended prescriptions, which was persuasive to the ALJ. These physicians were in the best position to assess Claimant need for continuing treatment. Accordingly, Respondents will be ordered to provide maintenance treatment, pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

ORDER

It is therefore ordered:

1. Claimant met his burden and established he was entitled to maintenance medical benefits.

2. Respondents shall pay for *Grover* medical benefits, including physician evaluation(s), Methocarbomal and other prescriptions. Payment shall be made Colorado Workers' Compensation Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may

access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

End of 2022 July Redacted Orders

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the admitted 19% scheduled impairment of his left upper extremity should be converted to an 11% whole person impairment rating.

II. Whether Claimant proved he sustained a serious and permanent disfigurement as a result of his work injury entitling him to a disfigurement award.

FINDINGS OF FACT

1. Claimant, a 55-year-old left-hand dominant male, sustained an admitted industrial injury on January 4, 2020 when he felt a pop in his left shoulder while grabbing and pulling a pallet. Claimant reported the incident to Employer but was able to finish the one hour remaining of his shift.

2. Claimant sought treatment at the emergency department of St. Joseph's Hospital on January 6, 2020 and underwent x-rays of the left shoulder, which showed no acute findings. Later that day Claimant also saw Jennifer Pula, M.D. at Employer's Employee Health and Wellness Center. Claimant reported feeling and hearing a pop in his left shoulder that extended to his elbow. He complained of severe pain and limited range of motion in the left shoulder. He denied neck or back pain. Examination of the spine was normal. Dr. Pula referred Claimant for MRIs of the left shoulder and elbow.

3. Claimant underwent the recommended MRIs on January 11, 2020. Scot E. Campbell, M.D. documented the following impression of the left shoulder MRI:

1. Full-thickness tears of the supraspinatus and subscapularis tendons.
2. Larger articular surface partial tear of the supraspinatus tendon as well.
3. Medial dislocation of the long head biceps tendon from the bicipital groove.
4. SLAP tear with extension into the biceps/labral anchor and the posterior labrum with paralabral cysts.
5. Moderate arthrosis of the acromioclavicular joint.

(Cl. Ex. p. 3)

4. Dr. Pula reviewed the MRIs with Claimant on January 13, 2021 and referred him to Patrick McNair, M.D. for an orthopedic shoulder evaluation.

5. Claimant first presented to Dr. McNair on January 14, 2020. Dr. McNair examined Claimant and reviewed his imaging studies. He recommended surgical intervention with

arthroscopic left supraspinatus tendon repair, arthroscopic left subscapular tendon repair, subacromial decompression and potential biceps tenotomy.

6. On February 24, 2020 Claimant underwent surgery of the left shoulder performed by Dr. McNair. The procedures noted in the operative report included arthroscopic subcapularis repair, arthroscopic supraspinatus tendon repair and arthroscopic subacromial decompression to include acromioplasty. Findings during surgery included: a high-grade partial-thickness tear of the subscapularis; complete disruption of the supraspinatus; thick subacromial bursitis; and stability of the post rotator cuff repair. Dr. McNair noted, "[t]he articular surface of the humeral head and glenoid were pristine. The bicipital labral anchor was pristine; The circumferential labrum was without injury" and "the inferior glenohumeral pouch demonstrated no loose bodies. The glenohumeral ligaments were without injury." (Cl. Ex. p. 4). No complications were noted.

7. Claimant subsequently underwent several sessions of post-operative physical therapy at Rocky Mountain Spine and Sport Physical Therapy. On March 11, 2020 Claimant reported pain throughout his left shoulder girdle and down his biceps and lateral upper arm. He complained of difficulty sleeping due to pain. The physical therapist noted tenderness throughout Claimant's shoulder and upper trapezius. Claimant was treated with some neuromuscular reeducation in the scapular area.

8. On May 7, 2020 Claimant reported to Dr. Pula that he could move his left shoulder above his head and his range of motion was continuing to improve. He reported continued achy burning pain in the left shoulder.

9. As of May 11, 2020 Claimant had attended 26 physical therapy sessions. At this session, the physical therapist noted improved range of motion but lack of strength.

10. Claimant attended a follow-up evaluation with Dr. McNair on June 23, 2020. Claimant reported experiencing pain with range of motion, shoulder stiffness, and pain and difficulty with overhead activities. Dr. McNair noted that there was not a guarantee the rotator cuff had healed but there were positive indications it had. Due to persistent post-injury and post-surgical inflammation, Dr. McNair administered a corticosteroid injection in Claimant's left subacromial space. He released Claimant to work with restrictions of no lifting, pushing or pulling greater than five pounds and no lifting, pushing or pulling above the shoulder.

11. Dr. McNair reevaluated Claimant on July 29, 2020. Claimant reported that the injection did not provide him any significant benefit. Dr. McNair noted that Claimant was doing well overall and that most of the significant injury to Claimant's shoulder had healed. He noted, however, that Claimant did not have all of his range of motion nor normal body mechanics and strength for his normal work activities involving heavy lifting, pushing and pulling. He recommended Claimant undergo a work performance, work hardening and strengthening program.

12. Claimant continued to participate in physical therapy with noted continued difficulty with external rotation, adduction and overhead movement. On September 29, 2020, the physical therapist noted significant spasms and tissue restrictions in the rotator cuff, latissimus biceps, and pectorals. On October 1, 2020, Claimant reported that he had been getting headaches 3-4 times a week for several months. The physical therapist felt that Claimant's headaches were related to muscle tension. Claimant's headache resolved with treatment. The physical therapist recommended more treatment to the muscles of the shoulder girdle, scapulothoracic joint, chest and mid-back.

13. On October 26, 2020, Claimant filled out a pain diagram which reflected 1/10 pain and 8/10 function. Claimant indicated on the diagram that he was experiencing symptoms of aching in the anterior and posterior shoulder at approximately the glenohumeral region as well as the posterior arm in the triceps region.

14. On October 29, 2020, Dr. Pula placed Claimant at maximum medical improvement ("MMI") with a 4% scheduled impairment of the upper extremity (2% whole person) for loss of range of motion. At the time of Dr. Pula's examination, Claimant reported 1/10 pain and 8-9/10 level of function. On examination, Dr. Pula noted adduction, abduction, extension and external rotation were within normal functional ranges. Flexion and internal rotation were 157 degrees and 39 degrees, respectively. She noted Claimant was able to perform all of the functions of his current position as a blow mold operator, which did not require more than five pounds of overhead lifting. Claimant was discharged from care with no permanent work restrictions.

15. On February 19, 2021, Anjmun Sharma, M.D. performed a Division Independent Medical Examination ("DIME"). Claimant reported that he was working full duty to the best of his ability with no restrictions. He complained of shoulder tightness and decreased range of motion. The medical record from this evaluation contains no documented complaints into the neck or back. On examination, Dr. Sharma noted decreased left shoulder range of motion and mild impingement sign of positive Hawkins-Kennedy sign.

16. Dr. Sharma's diagnoses included: left shoulder subscapularis tear; left shoulder supraspinatus tear; left shoulder diagnostic arthroscopy; left shoulder subacromial decompression; left shoulder acromioplasty; left shoulder labral tear repair; and left shoulder biceps tenodesis. Based on his review of the medical records, Dr. Sharma determined that the "pertinent medical issue" was confined to Claimant's left shoulder only.

17. Dr. Sharma assigned Claimant a combined 19% scheduled rating of the upper extremity (11% whole person). The rating consisted of 10% impairment for range of motion deficits as well as 10% scheduled impairment for subacromial decompression. Regarding work restrictions, Dr. Sharma wrote both that "the only work restriction for the patient will be maximum overhead lifting, no more than 10 pounds," and "the patient can return back to work full duty, no restriction without the need for any maintenance care." (R. Ex. C, p. 44).

18. On March 10, 2021, Respondents filed a Final Admission of Liability ("FAL") admitting for a 19% scheduled upper extremity rating per Dr. Sharma's DIME report. Claimant objected to the FAL and filed an Application for Hearing.

19. On June 24, 2021, Carlos Cebrian, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Cebrian issued an IME report dated July 8, 2021. Claimant reported left shoulder pain and limited range of motion, some neck pain into the right shoulder, as well as numbness and tingling in the first through third digits of left hand since surgery. He further reported that he was not doing any overhead activity with his left side and waking up throughout the night. Dr. Cebrian noted normal examinations of the cervical, thoracic and lumbar spine. There was tenderness to palpation of the left AC joint and decreased left shoulder range of motion. There was no pain to palpation to the left shoulder posteriorly or into the trapezius. Dr. Cebrian agreed Claimant reached MMI as of October 29, 2020. He disagreed with Dr. Sharma's opinion that Claimant qualified for a 10% impairment for subacromial decompression, noting the procedure was minor, did not remove any portion of the distal clavicle, and was performed for the purpose of removing osteophytes. Dr. Cebrian opined that Claimant did not sustain any functional impairment extending beyond the glenohumeral joint. He explained that the situs of functional impairment is in the left rotator cuff tendon, which is in the left upper extremity. He opined that impairment did not extend into Claimant's neck or trunk and that Claimant's functional impairment is the result of decreased range of motion. Dr. Cebrian concluded that Claimant could return to work full duty with no restrictions.

20. The ALJ viewed surveillance footage of Claimant obtained on July 23, 2021. The footage shows Claimant exiting his pickup truck at a convenience store and opening the bed of the truck, which was approximately the height of Claimant's waist. Claimant is observed briefly reaching above shoulder level to open a large cooler to inspect its contents. Claimant then retrieves three bags of ice from the store, holding two bags in the left hand below waist level and one bag in the right hand. Claimant estimated each bag of ice weighed approximately eight pounds. Claimant placed two bags of ice onto the truck bed with his left arm and then reached at shoulder level with both arms to pour each bag ice into the cooler and secure the top of the cooler. Claimant enters and exits his vehicle without any visible issue. He performed these activities without any signs of visible pain.

21. Dr. Cebrian testified at hearing on behalf of Respondents as a Level II accredited expert in family medicine and occupational medicine. Dr. Cebrian testified consistent with his IME report. He explained that the surgery performed by Dr. McNair involved repairing the supraspinatus and subscapularis where they attach to the humeral head. Dr. McNair smoothed out osteophytes that were present under the acromion in the subacromial space to recreate and restore the normal subacromial geometry. He explained that although the original MRI showed some labral pathology, Dr. McNair's operative report noted the labrum looked normal at the time of surgery; thus, no labral repair was performed. Dr. Cebrian testified that the purpose of the subacromial decompression was to create additional space for the rotator cuff mechanism to function and there was no impairment due to this procedure. He continued to opine Claimant did not suffer any

impairment beyond the glenohumeral joints. Dr. Cebrian testified that the functional impairments indicated by Claimant are secondary to decreased motion of the shoulder which impacts the arm, and there are no functional issues or limitations above the glenohumeral head or into the neck or trunk region. He noted that the pain complaints based on the October 26, 2020 pain diagram did not reflect pain above the glenohumeral joint. He explained that his review of surveillance footage showed Claimant lifting above 90 degrees with his left arm with good function and the absence of any functional limitations.

22. Claimant credibly testified at hearing. Claimant testified that he has been working full duty in a different position, as a blow molder machine operator, for approximately one year. He explained that the position involves making plastic bottles. Claimant testified that he has been able to perform all of the functions of his job without accommodation since being released to full duty, but that he experiences difficulties emptying the preforms out of the bag, which entails lifting and dumping the bag upside down. He testified that he uses his right hand more to compensate. Claimant testified that his job requires occasionally driving a forklift, which he steers with his left hand. He stated that if he makes too many quick let turns his left shoulder begins to strain and burn. Claimant testified that he has slowed in his performance due to his limitations. He opens heavy doors with his right hand and mostly pulls pallet jacks with his right hand, although he occasionally uses his left hand. Claimant testified he has not participated in bowling or archery since his work injury, and that he learned to shoot right-handed and can no longer do overhand throwing. Claimant further testified he can no longer do certain work on vehicles as he cannot hold up his left arm. Claimant stated that he wakes up two to three times throughout the night in pain, which did not occur prior to the work injury. He testified that if he does something strenuous the pain runs up his shoulder into his neck.

23. The ALJ credits the testimony of Claimant, as supported by the medical records, over the testimony of Dr. Cebrian and finds that Claimant proved it is more probable than not he sustained functional impairment beyond the arm at the shoulder and is entitled to whole person conversion.

24. As a result of his industrial injury and related surgery, Claimant has a visible disfigurement to the body consisting of two visible arthroscopic scars on his left shoulder. Each scar measures approximately one centimeter in length. One scar is discolored, while the other scar is well-healed without significant discoloration or texture. Claimant proved by a preponderance of the evidence he is entitled to an award for disfigurement in the amount of $300.00.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Conversion of Impairment Rating

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not on the schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S. The schedule includes the loss of the "arm at the shoulder." but the "shoulder" is not listed on the schedule of impairments. *See* §8-42-107(2)(a), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical

impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* WC 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, WC 4-868-996-01 (ICAO, Feb. 1, 2016). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, WC 4-536-198 (ICAO, June 20, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007).

In *Newton v. Broadcom, Inc.*, WC 5-095-589 (ICAO, July 8, 2021), the Panel upheld an ALJ's determination that the claimant's right upper extremity rating should be converted to a whole person impairment. The claimant in *Newton* suffered rotator cuff tears of his right shoulder, including full thickness tears of the infraspinatus and supraspinatus tendons, for which he underwent surgical repair. The claimant subsequently reported issues with pain in the shoulder, scapular, trapezius and chest regions with limited shoulder range of motion, including issues with overhead motion. The ALJ relied on testimony of the claimant's medical expert, who explained that the dispositive scheduled body part is limited to the arm where it first meets the shoulder, which is anatomically the glenohumeral joint. The Panel reasoned,

> We agree that this joint becomes the dividing point, or marker, between what is limited to the arm at the shoulder, and if not so limited, requires conversion to whole person impairment. When a rotator cuff tendon (or muscle) is torn, the tendon and its attached muscle are partially or fully severed from the "arm," read humeral head. The tears are the situs of the functional impairment and this situs is proximal to the torso from the glenohumeral joint.
>
> In our view, the findings of the ALJ regarding pain, physical limitations, problems with range of motion, protective carriage of the limb, and difficulty with activities of daily living are not factors that determine the "situs of functional impairments." Rather, they are manifestations of functional impairments. As an example, loss of range of motion is an effect of an impairment but not the underlying impairment itself. As another example, pain may be debilitating but it is not a specific medical impairment (in other words—pain resulting from the rotator cuff tear is not the bodily impairment; rather the damage to the rotator cuff is where the body is impaired). Difficulty with certain aspects of daily living, such as sleeping, putting on clothes, pushing and pulling objects are limitations of activity (disability) but are not medical impairments. We are not persuaded by Respondents'

> suggestion that unless there is pain in the neck or the back, no conversion is proper.

(Id.)

Claimant suffered a shoulder injury which entailed, *inter alia*, complete disruption of the supraspinatus and partial thickness tear of the subcapularis and underwent shoulder surgery. Claimant subsequently participated in multiple sessions of physical therapy which included treatment in the scapular and pectoral area. The medical records reflect consistent issues with shoulder range of motion and reports of limitations with overhead use. Claimant credibly testified he continues to experience pain in the shoulder, limitations with overhead use, and issues sleeping due to shoulder pain. Due to his functional limitations, Claimant has made adjustments in the performance of his work and outside activities, using his right extremity to compensate for limitations of the left shoulder.

Here, as in *Newton*, the functional impairment arises from an anatomical disruption of the tissues of the rotator cuff tendons and the muscles attached thereto, which is the shoulder complex proximal to the torso from the glenohumeral joint. The preponderant evidence demonstrates that Claimant is functionally limited beyond the arm at the shoulder, and thus entitled to conversion of his upper extremity impairment to whole person impairment.

Disfigurement

Section 8-42-108 (1), C.R.S. provides that at claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

As found, as a result of the work injury and related surgeries, Claimant sustained a serious permanent disfigurement in an area of the body normally exposed to public view entitling him to an award of $300.00.

ORDER

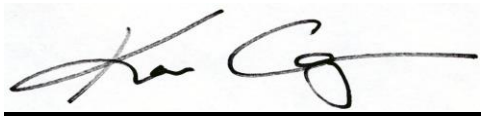
1. Claimant suffered functional impairment beyond the arm at the shoulder and off the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is entitled to permanent partial disability benefits based upon a whole person impairment rating of 11%.

2. Respondents shall pay claimant $300.00 for his disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 2, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment to her neck and bilateral wrists is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

3. If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment to her neck and bilateral wrists is authorized.

FINDINGS OF FACT

1. The claimant has worked for the employer as a grocery checker/cashier since 2014[1]. The claimant's job duties include scanning and bagging customer grocery items. This involves reaching with her right hand to scan the item, then moving it with her left hand to the bagging area. In addition, she uses a monitor with a touch screen to type in various codes, as needed. At times, the claimant bags the groceries by herself and there are times when she has help. If she is bagging by herself, the claimant lifts the full bags and places them in the customer's grocery cart.

2. The claimant testified that she believes that over time she injured her neck and wrists because of the nature of her repetitive work. The claimant further testified that in 2017 she began to notice an increase in her neck and wrist pain. The claimant testified that she works 32 hours per week and then she has three days off. During her days off, she feels better.

3. The claimant has a prior history of wrist injuries dating back to 2003. At that time, she was employed with a different grocery store. In 2003, the claimant underwent a right carpal tunnel release. The claimant testified that following that surgery, she had a full recovery.

4. The claimant also has a prior history of neck pain. The claimant has undergone chiropractic treatment for her neck and bilateral wrists with Dr. Donald Cannon, since 2016. The claimant continues to treat with Dr. Cannon.

[1] At that time, the claimant was hired at an Albertsons store, and now works at a Safeway location.

5. On May 6, 2021, the claimant was seen by her personal medical provider, Tephi Mannlein, PA-C. On that date, the claimant reported that she was experiencing increased neck pain with pain and numbness in her hands. as the result of a work related injury.The claimant could not identify a specific injury. PA Mannlein recommended the use of wrist braces and referred the claimant to physical therapy.

6. Also on May 6, 2021, the claimant reported her symptoms to her supervisor. The claimant was not provided with a list of medical providers by her employer.

7. Subsequently, PA Mannlein made referrals to occupational therapy, and surgeon Dr. James Rose.

8. The claimant was first seen by Dr. Rose on November 8, 2021. At that time, the claimant reported bilateral wrist pain that started in May 2022, without an acute injury. The claimant identified her symptoms as pain, numbness, and tingling. The claimant also reported cervical pain. Dr. Rose opined that the claimant had left carpal tunnel syndrome, trigger fingers in her right long and right index fingers, and potential cervical nerve root impingement. Dr. Rose ordered magnetic resonance imaging (MRI) of the claimant's cervical spine. In addition, he recommended left carpal tunnel release surgery.

9. On February 18, 2022, an MRI of the claimant's cervical spine showed moderate foraminal stenosis at the C3-C4 level, mild to moderate right foraminal stenosis at the C4-C5 level, and moderate central and bilateral foraminal stenosis at the C5-C6 level.

10. On March 2, 2022, Dr. Rose authored a letter in which he stated his opinion that it is plausible that repetitive wrist extension and grip could contribute to an exacerbation of carpal tunnel and cervical nerve compression.

11. On April 7, 2022, the claimant was seen in Dr. Rose's practice by Dr. Peter Shorten. At that time, Dr. Shorten reviewed the claimant's MRI and noted that the claimant did not have clear radiculopathy. Dr. Shorten recommended the claimant undergo electromyography (EMG) testing of her upper extremities to confirm bilateral carpal tunnel syndrome.

12. At the request of the respondent, on April 11, 2022, the claimant attended an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his April 29, 2022 IME report, Dr. Cebrain identified the claimant's diagnoses as bilateral wrist pain (with a differential diagnosis of carpal tunnel versus wrist tendonitis) and chronic neck pain. It is Dr. Cebrian's opinion that these diagnoses are not work related. In support of his opinion, Dr. Cebrian engaged in a formal causation analysis as identified by the Colorado Medical Treatment Guidelines (MTG). In performing this analysis, Dr. Cebrian noted that the claimant's work activities include no primary or secondary risk factors. Dr. Cebrian

opined that the claimant did not have significant enough work related exposures to establish a causal connection between her symptoms and her work activities. Dr. Cebrain further explained that even given the claimant's pre-existing wrist and neck conditions, any repetitive work activities did not aggravate those conditions.

13. Dr. Cebrian's testimony was consistent with his written report. Dr. Cebrian reiterated his opinion that the claimant did not have any work-related exposures that would cause a work-related cervical spine condition. Dr. Cebrian testified that his opinion was based, in part, upon the claimant working less than full-time. Dr. Cebrain also testified that even considering the claimant worked 32 hours per week, (as indicated by her testimony), the risk factors of force, repetition, and activities do not amount to the required potential exposure to cause or aggravate her wrist and neck symptoms.

14. On May 27, 2022, a job demand analysis (JDA) was performed by Sara Nowotny, CRC, CCM, CEAS. The JDA involved an interview of the claimant as well as observations of the claimant performing her normal job duties. In her May 28, 2022 report, Ms. Nowotny noted that the position of cashier/checker falls within the light to medium physical demand category. Ms. Nowotny also noted that the claimant works three to four eight hours shifts each week (24 to 32 hours per week). Ms. Nowotny found that no primary or secondary risk factors exist in the claimant's performance of her job duties.

15. On May 31, 2022, the claimant returned to Dr. Shorten. In the medical record of that date, Dr. Shorten opined that if the EMG testing showed bilateral carpal tunnel syndrome, then "the repetitive motion from {the claimant's] daily job requirements may have, indeed, exacerbated her symptoms."

16. The claimant testified that her current neck symptoms include constant pain and stiffness. The claimant's current bilateral wrist symptoms include pain, numbness, and tingling.

17. The respondents have filed a Notice of Contest in this case. The claimant's medical treatment has been paid for by the claimant and by her private insurance, UMR.

18. The ALJ credits the medical records, the JDA, and the opinions of Dr. Cebrain over the contrary opinions of Drs. Rose and Shorten. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that her work activities led to an occupational disease in her wrists. The ALJ likewise finds that the claimant has failed to demonstrate that it is more likely than not that her work activities led to an occupational disease in her neck/cervical spine. The ALJ finds that the claimant's work activities were not sufficient to cause an occupational disease or an aggravation of her pre-existing conditions.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306,592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. **App.** 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vico,y, supra.*

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate

> cause and which does not come from a hazard to which the work.er would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-S(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

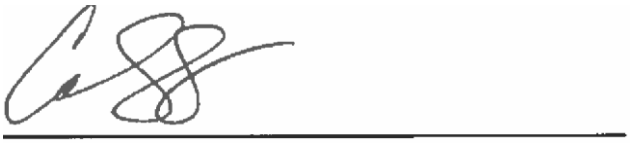
9. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease while working for the employer. The claimant's work activities did not rise to the level of sufficient exposure to result in an occupational disease. In addition, the claimant's work activities did not rise to the

level of sufficient exposure to aggravate or accelerate her pre-existing wrist and neck conditions. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's claim is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated August 3, 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-135-393-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her scheduled impairment rating for her left upper extremity should be converted to a whole person rating.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a disfigurement award pursuant to § 8-42-108, C.R.S.

FINDINGS OF FACT

1. On March 20, 2020, Claimant sustained an admitted injury arising out of the course of her employment with Employer when she was sweeping snow and fell on her outstretched left arm. Claimant sustained a left wrist fracture and injured her left shoulder.

2. On March 20, 2020, Claimant was seen at UC Health, where her left wrist was placed in a cast. (Ex. F).

3. Claimant then began treatment at Aurora Comp where she saw Martin Kalevik, D.O. At her first visit on April 7, 2020, Claimant reported symptoms related to her left wrist fracture and mild stiffness in her left shoulder. (Ex. G). Dr. Kalevik diagnosed Claimant with a Colles' fracture of the left radius, and a sprain of the left shoulder joint. (Ex. G).

4. On May 20, 2020, Claimant saw Thanh (Tom) Chau, P.A., at Aurora Comp. Mr. Chau is the physician assistant for Matthew Lugliani, M.D., who served as Claimant's authorized treating physician (ATP) after May 20, 2020. Claimant saw Mr. Chau five additional times through September 11, 2020. During these visits, Claimant reported stiffness and limited range of motion in her left shoulder. Claimant also received physical therapy for her shoulder and wrist, although physical therapy records were not offered or admitted into evidence. (Ex. G).

5. By June 10, 2020, Claimant's left shoulder had not improved, and she was referred for a left shoulder MRI. The MRI, performed on June 19, 2020, showed a moderate partial-thickness interstitial and bursal sided tear of the infraspinatus in Claimant's left shoulder, with underlying tendinosis, bursal fraying, an interstitial tear of the cranial subscapularis insertion, thickening of the inferior glenohumeral ligament, and joint capsulitis. (Ex. 8). Based on the results of the MRI, Mr. Chau referred Claimant to Sean Griggs, M.D., for an orthopedic evaluation. (Ex. G).

6. Claimant saw Dr. Griggs on July 7, 2020, for evaluation of her left shoulder. Based on his examination, Dr. Griggs diagnosed Claimant with a left shoulder sprain with partial-thickness rotator cuff tearing and early adhesive capsulitis. He recommended a

subacromial injection and continued therapy to regain shoulder motion. Dr. Griggs performed the shoulder injection on July 7, 2020. (Ex. H).

7. Claimant returned to Dr. Griggs on August 6, 2020, reporting some improvement in her symptoms, but with continued tightness in the left shoulder and pain radiating to the biceps area. Dr. Griggs noted that Claimant's shoulder range of motion had improved significantly, and recommended that she continue therapy. (Ex. H).

8. On September 3, 2020, Claimant returned to Dr. Griggs, who noted she had some evidence of adhesive capsulitis in the left shoulder which was improving with therapy. (Ex. H).

9. On October 1, 2020, Dr. Griggs indicated that Claimant's left shoulder was much improved, with some ongoing weakness that had gradually improved. Claimant continued to have mild pain with impingement maneuvers and with external rotation of the left shoulder. (Ex. H).

10. On October 8, 2020, Dr. Lugliani, performed an impairment evaluation, placed Claimant at MMI on that date, and assigned permanent impairment for her left wrist and shoulder. For Claimant's left wrist, Dr. Lugliani assigned a 7% impairment rating for range of motion deficits, and an impairment rating of 8% for claimant's left shoulder. Combined, the impairment rating yields a 14% left upper extremity impairment, which corresponds to an 8% whole person impairment pursuant to table 3, page 16 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised ("AMA Guides"). Dr. Lugliani recommended a permanent restriction of no snow-removal duties and a 6 month follow up with orthopedics for flareups and surgery of the left shoulder if needed. (Ex. 5).

11. On November 3, 2020, Respondents filed a Final Admission of Liability (FAL), admitting for a 14% left upper extremity permanent impairment rating. (Ex. 5).

12. Claimant testified at hearing that she has no prior history of injuries to her left wrist or shoulder. Claimant testified that her left wrist is now crooked, and that it was not that way before her injury. Photographs submitted as Exhibit 11 show a visible lump on the lateral aspect of her left wrist. The lump is visibly distinct when compared to Claimant's right wrist. (Ex. 11). The lump on Claimant's left is a disfigurement sustained as a direct and proximate result of her March 20, 2020 injury.

13. Claimant testified that she has difficulty and pain lifting her left arm above shoulder, and that she has pain in the shoulder joint and her neck when raising her left arm. Claimant also testified that she cannot lay on her left side due to her shoulder and neck pain. She further testified that her shoulder has neither improved nor worsened over the past year.

14. On February 24, 2021, Sander Orent, M.D., performed an independent medical examination (IME) at Claimant's request. The IME was conducted virtually. In conjunction with the IME, Claimant had a "Functional Abilities Evaluation" performed by Kristine Couch, OTR, during which Ms. Couch performed range of motion measurements of Claimant's left wrist and shoulder. (Ex. 10). Dr. Orent relied upon Ms. Couch's

measurement for his opinion regarding impairment. Based on Ms. Couch's measurements, Dr. Orent concluded Claimant' has a 16% impairment rating of the left wrist, and a 21% impairment of the left shoulder, which resulted in a 34% upper extremity impairment. The 34% upper extremity impairment converts to a 20% whole person impairment. (Ex. 9). Given the significant discrepancy between Dr. Orent's assigned impairment rating and Dr. Lugliani's impairment rating four months earlier, the fact that Dr. Orent did not personally conduct a physical examination, and Claimant's testimony that her left shoulder has neither improved or worsened over the past year, Dr. Orent's assigned impairment rating is neither credible nor persuasive.

15. On July 8, 2021, Claimant underwent an independent medical examination (IME) at Respondents request performed by Lawrence Lesnak, D.O. Dr. Lesnak opined that Claimant sustained no work-related injury to her left shoulder and has no work-related impairment related to her left shoulder. (Ex. A). Dr. Lesnak's opinions are inconsistent with Claimant's treating providers, and are neither credible nor persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole-person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO Dec. 28, 2006).

In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002.) Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO April 24, 2020).

Where an accident has caused measurable impairment to more than one part of the body, a claimant may have more than one "injury" for purposes of § 8-42-107(7)(b)(II), C.R.S. *Warthen v. Indus. Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004). Section 8-42-107(8)(b)(II), C.R.S., "precludes conversion of a scheduled disability to a whole person impairment rating for the purposes of combining a scheduled disability with a whole person impairment where the claimant sustains both scheduled and nonscheduled

injuries." *Guzman v. KBP Coil Coaters*, (W.C. No. 4-444-246 (January 10, 2003); *see also Jesmer v. Portercare Hosp.*, W.C. No. 4-442-706 (March 27, 2002).

Claimant sustained two injuries as a result of her March 20, 2020 work accident: a left wrist fracture, and a left shoulder injury. Neither Claimant nor Respondent has established by a preponderance of the evidence that Dr. Lugliani's assigned impairment ratings are incorrect. The ALJ therefore finds the impairment ratings assigned by Dr. Lugliani to be the appropriate impairment ratings for both the left wrist and shoulder.

Claimant has failed to establish any impairment related to her wrist extending beyond the arm at the shoulder. Consequently, Claimant's 7% scheduled impairment for her left wrist is not converted to a whole person impairment.

With respect to her left shoulder, Claimant has established by a preponderance of the evidence an impairment of anatomical structures beyond the arm at the shoulder. Claimant's MRI and diagnosis from Dr. Griggs demonstrate that Claimant has sustained injuries to the shoulder joint, which is beyond the arm. The injury has resulted in decreased range of motion of the shoulder joint, which limits Claimant's ability to raise her left arm, and limits Claimant's ability to sleep. These functional limitations are more probable than not, manifestations of a functional impairment of her shoulder joint, beyond the arm.

Accordingly, Claimant's 8% left upper extremity impairment rating related to her shoulder range of motion is converted from an 8% scheduled impairment to a whole person impairment. The ALJ takes judicial notice of the AMA Guides, which provide for the appropriate conversion of scheduled impairment to whole person impairment. *See In re Claim of Serena*, 120115 W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015). Pursuant to Table 3, p. 16 of the AMA Guides, entitled "Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person," an 8% upper extremity impairment converts to a 5% whole person impairment. Claimant's upper extremity impairment for her left shoulder range of motion deficits is therefore converted to a 5% whole person impairment.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her March 20, 2020 injury. Claimant is awarded $600.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's 8% scheduled upper extremity impairment for range of motion deficits for her left shoulder is converted to a 5% whole person impairment.

2. Claimant's impairment rating of 7% for her left wrist is not converted, and shall be paid as a scheduled impairment.

3. Respondents shall pay Claimant $600.00 for disfigurement of her left wrist.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-091-590-001

ISSUES

The issues set for determination included:

- Did Respondents overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [Brian Shea, M.D.] regarding permanent medical impairment by clear and convincing evidence?

- If Respondents overcame Dr. Shea's opinions, what was Claimant's medical impairment rating?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on December 9, 2021, which was served on December 12, 2021. Respondent requested a full Order on December 12, 2021. This Order follows.

FINDINGS OF FACT

1. Claimant was employed as nurse for Employer. In this position, Claimant was a supervisor and conducted home visits.

2. There was no evidence in the record that prior to October 2018, Claimant suffered an injury to her cervical or lumbar spine or required treatment for those areas of the body.

3. On October 3, 2018, Claimant was injured in a motor vehicle accident while in the course and scope of her employment. The car she was driving was rear-ended by another vehicle.

4. Claimant treated with Thomas Corson, M.D. at Concentra on October 5, 2018, who was the ATP designated by Employer. Claimant complained of right sided neck and back pain. On exam, Dr. Corson described full range of motion ("ROM") in her cervical spine, although the record had no indication that the ROM was measured by Dr. Corson. Dr. Corson diagnosed Claimant with multiple ligament and muscle strains, as well as issuing work restrictions. Claimant was referred for physical therapy ("PT").

5. On October 11, 2018, Claimant began PT at Select Physical Therapy in Castle Rock. The records documented Claimant had restricted ROM in the cervical spine and thoracic spine.

6. Dr. Corson oversaw Claimant's treatment and the treatment notes reflected that she continued to have pain in her cervical and lumbar spine. On October 18, 2018, Dr. Corson noted Claimant reported neck and back stiffness. Dr. Corson documented spasms the cervical and thoracic spine, along with ROM restrictions in the lumbosacral spine. Dr. Corson's assessment on October 31, 2018 was: cervicalgia; MVA; sprain of thoracic region; lumbar strain.

7. On November 15, 2018, Claimant underwent an MRI of her thoracic and lumbar spine. The films were read by Matthew Hudkins, M.D. At T10-11, there was a 3 mm posterior right paracentral focal broad-based disc protrusion, moderately narrowing the right lateral recess and mildly narrowing the right neural foramina. The lumbar spine had a mildly degenerated disc at L5-S1. The ALJ inferred that Claimant's symptoms in the thoracic spine and lumbar spine prompted Claimant's ATP-s to order the MRI-s.

8. Claimant was evaluated by John Sacha, M.D. on December 5, 2018, at which time she reported neck pain, periscapular headaches, bilateral low back and bilateral buttocks pain, as well as increased anxiety. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome, post-traumatic in nature; whiplash-associated disorder; occipital neuralgia. Dr. Sacha ordered chiropractic treatment and acupuncture, as well as PT and a L5-S1 transforaminal injection.

9. On December 10, 2018, Claimant returned to Dr. Corson and the diagnoses were the same as on October 31, 2018. Claimant received chiropractic manipulation from Don Aspergren, D.C starting on December 18, 2018.

10. Dr. Sacha re-evaluated Claimant on December 31, 2018 and noted she had a diagnostic response to the injection. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome, post-traumatic in nature; whiplash-associated disorder. Dr. Sacha ordered an MRI of the cervical spine and continued chiropractic and acupuncture treatments.

11. Dr. Aspegren's assessment on January 4, 2019 mirrored Dr. Sacha's: lumbosacral radiculopathy; cervical facet syndrome; whiplash; headaches. Claimant also received additional PT in February 2019. Dr. Corson noted continued tenderness in Claimant's cervical spine and lumbosacral spine on February 11, 2019. Dr. Corson's assessment was: cervicalgia; sprain of thoracic region; lumbar strain.

12. On February 14, 2019, Claimant received a second set of bilateral L5-S1 transforaminal epidural injections, which were administered by Dr. Sacha. The injections provided a diagnostic response and longer lasting relief than the previous injections.[1]

13. Claimant returned to Dr. Sacha on February 27, 2019, at which time he noted Claimant had a good response to the injections. Claimant had lumbar paraspinal spasm and cervical paraspinal spasm, along with segmental dysfunction. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome; whiplash-associated disorder; opioid use, uncomplicated. He recommended physical therapy and

[1] Exhibit 2, pp. 116-117, 121.

IMS needling for the neck and lower back. The ALJ found this report documented continued symptoms in the cervical and lumbar spine.

14. Dr. Corson evaluated Claimant on March 4, 20219 and noted continued tenderness in Claimant's thoracic spine and lumbosacral spine on February 11, 2019. Dr. Corson's assessment was: cervicalgia; sprain of thoracic region; lumbar strain. Dr. Corson referred Claimant for chiropractic treatment, which was provided by Dr. Aspegren.

15. On March 20, 2019, Dr. Sacha evaluated Claimant and noted she was doing better after completing several physical therapy and IMS needling sessions, but still had lumbar paraspinal spasm and cervical paraspinal spasm. Claimant completed chiropractic treatments with Dr. Aspegren on March 29, 2019.

16. On May 6, 2019, Claimant returned to Dr. Sacha. Claimant report she was still having bilateral low back pain, bilateral buttocks pain and posterior thigh pain. Her neck symptoms had essentially resolved at that point. On examination, Claimant had lumbar paraspinal spasm, along with pain on straight leg raise and neural tension testing. Pain was present with extension and external rotation. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome; whiplash associated disorder. The ALJ noted Dr. Sacha's findings of spasm were more than six months after the subject accident.

17. Dr. Sacha concluded Claimant was at MMI and noted she was performing full duty work. Dr. Sacha assigned a medical impairment rating pursuant to the *AMA Guides.* He stated Claimant sustained a 7% whole person impairment due to the lumbar displaced disc. She received an additional 4% for loss of ROM of the lumbar spine. Dr. Sacha did not assign a permanent impairment to Claimant's cervical spine. Claimant's total medical impairment was an 11% whole person. For maintenance treatment, Dr. Sacha said Claimant should be allowed medications and follow-up appointments, as well as chiropractic treatment and acupuncture (8 to 12 visits over the next 12-24 months).

18. Dr. Corson evaluated Claimant on May 8, 20219, at which time he released her form care at MMI. His diagnoses were: cervicalgia; lumbar strain; MVA; sprain of thoracic region. He recommended maintenance treatment in the form of follow-up evaluations, chiropractic treatment and acupuncture.

19. Based upon the treatment records of the ATP-s, the ALJ concluded Claimant required treatment for injuries to her cervical, thoracic and lumbar spine in the October 3, 2018 MVA.

20. On January 27, 2020, Claimant underwent a DIME that was performed by Dr. Shea. At that time, she complained of low back pain; bilateral pain in the back of the legs; right neck pain and periodic episodes of left restless leg syndrome. On examination, no gross motor or sensory neurological deficits were noted. There were no thoracic outlet syndrome signs or symptoms. Tenderness was found in the trapezius, rhomboid, lumbar and sacral musculature.

21. Dr. Shea found Claimant's ROM in her lumbar spine was as follows: 55° of flexion, 20° of extension, 45° of right leg raise, 50° of left straight leg raise, 30° of right lateral flexion and 31° of left lateral flexion. Her cervical ROM was: 59° of flexion, 61° of extension, 42° of right lateral flexion, 36° of left lateral flexion, 60° of right rotation and 50° of left rotation. The ALJ noted the ROM measurements showed a loss of ROM in the cervical spine and lumbar spine, pursuant to the *AMA Guides*.

22. Dr. Shea's diagnoses were: lumbar strain; cervical strain; motor vehicle accident while driving for work; myofascial pain syndrome of the cervical, upper thoracic and left lumbar sacral region; T10 -11 disc herniation per MRI. Dr. Shea assigned a 4% whole person cervical impairment rating for specific disorder and 4% for loss of ROM. Dr. Shea assigned 5% whole person lumbar impairment rating pursuant to Table 53, along with 6% for loss of lumbar ROM. These ratings combined for a total 18% impairment rating. The ALJ found the findings made with regard to the cervical and lumbar spine, including ROM measurements were valid. The ALJ credited Dr. Shea's opinions regarding Claimant's permanent medical impairment.

23. Dr. Shea recommended another set of lumbar injections for maintenance care, along with over-the-counter use of Tylenol or Advil as needed. Claimant also should be able to use chiropractic care for 8 to 12 visits over the next 1 to 2 years, along with a home exercise program that Dr. Shea felt would be facilitated by a gym membership.

24. On July 9, 2020, Lawrence Lesnak, M.D. examined Claimant at the request of Respondents. Claimant reported neck and back pain. On examination, Dr. Lesnak stated Claimant did not have any clinical findings of cervical or thoracic injury, radiculitis, or facet joint arthropathy.

25. Dr. Lesnak opined Claimant did not qualify for a Table 53 impairment for the cervical spine. Based on his evaluation and records review, Dr. Lesnak determined Claimant qualified for a 7% impairment rating of the lumbar spine based on Table 53 and ROM measurements. Dr. Lesnak noted that Claimant's lumbar flexion measurements were not valid. Dr. Lesnak testified Claimant did not qualify for a cervical impairment and that Dr. Shea did not explain the discrepancies between his ROM measurements and those of Dr. Sacha and his own.

26. Dr. Lesnak testified as an expert via deposition. Dr. Lesnak is Level II certified by the Division of Workers' Compensation. Dr. Lesnak testified that there was no medical evidence of impairment to the cervical spine. He opined the medical records indicated that Claimant's cervical condition had resolved at the time of MMI and she had subjective complaints of pain, which were insufficient to form the basis for an impairment rating. Dr. Lesnak disagreed with Dr. Shea's cervical impairment rating. He pointed out that Dr. Sacha found no cervical symptoms at the time of MMI and there was no ROM deficit. He opined Dr. Shea erred by failing to address the inconsistencies between range of motion measurements. Dr. Lesnak testified that the treatment Claimant received for her cervical spine did not equate to a ratable condition.

27. Dr. John Sacha testified as an expert at hearing. Dr. Sacha is Level II certified by the Division of Workers' Compensation. Dr. Sacha testified that Claimant did not qualify for a cervical impairment rating based on her range of motion and complete resolution of symptoms at the time of MMI. That was why he did not assign permanent impairment for her cervical spine. Dr. Sacha also testified that pursuant to Division of Workers' Compensation Level II requirements, all DIME physicians are required to address inconsistencies between a treating physician's range of motion measurements and the DIME physician's own measurements.

28. The opinions of Dr. Lesnak and Dr. Sacha regarding Claimant's permanent impairment differed from those of Dr. Shea.

29. Respondents did not prove that it was highly probable that the conclusions of Dr. Shea were incorrect.

30. Based upon the medical evidence in the record, the ALJ determined Claimant suffered a permanent medical impairment to her cervical and lumbar spine as a result of her October 3, 2018 work injury.

31. The ALJ determined Respondents failed to overcome the opinions of DIME physician, Dr. Shea.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, there were conflicting expert opinions regarding Claimant's medical impairment.

Overcoming the DIME

As determined in Findings of Fact 3-9, Claimant was injured in an admitted work injury on October 13, 2018. Claimant's ATP-s Dr. Corson and Dr. Sacha prescribed treatment for symptoms in Claimant's cervical, thoracic and lumbar spine. *Id.* As Claimant's treatment progressed, most of her pain complaints were in the cervical and lumbar spine. However, Claimant reported symptoms and both Drs. Sacha and Corson continued to provide diagnoses related to the cervical and lumbar spine. (Findings of Fact 11-15).

On May 6, 2019, Dr. Sacha concluded Claimant was at MMI. He assigned permanent impairment to Claimant's lumbar spine. After performing the DIME, Dr. Shea concluded Claimant sustained a permitted impairment to both the cervical and lumbar spine. This hearing concerned the dispute over the rating assigned to Claimant's lumbar spine. In this regard, Respondents argued that Dr. Shea's conclusions were overcome by clear and convincing evidence. Claimant averred that Respondents did not meet their burden of proof.

To resolve this issue, the ALJ noted the question of whether Respondents overcame Dr. Shea's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician*. Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In the case at bar, the ALJ determined Respondents did not meet their burden of proof. (Finding of Fact 29). The ALJ's rationale was twofold; first, there was no evidence that Dr. Shea's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. *Id.* In this regard, Dr. Shea's conclusions that Claimant had a

permanent medical impairment in her cervical and lumbar spine were supported by the fact that she had pain and qualified for such an impairment under the *AMA Guides*. (Finding of Fact 21). The ALJ found that Dr. Shea's ROM measurements were valid at the time he performed the evaluation and Respondents did not refute this fact. (Finding of Fact 22).

Second, the evidence adduced by Respondents to contravene Dr. Shea's opinion simply constituted a difference of opinion. (Finding of Fact 28). Dr. Sacha disagreed that Claimant had a medical impairment to her cervical spine, but did not provide an opinion that Dr. Shea was more probably wrong. *Id.* The ALJ found, Claimant continued to have cervical spine symptoms and these were documented in the Concentra records (including Dr. Sacha's). (Finding of Fact 12-16). Dr. Lesnak opined Claimant did not have a cervical impairment and did not have impairment based upon a loss of lumbar ROM, which the ALJ determined was also a difference of opinion.[2] The ALJ found neither of these opinions overcame Dr. Shea's conclusions by clear and convincing evidence. (Finding of Fact 31). Claimant is therefore entitled to PPD benefits based upon Dr. Shea's rating.

ORDER

It is therefore ordered:

1. Respondents did not meet their burden to overcome the DIME physician's findings with regard to permanent impairment by clear and convincing evidence.

2. Claimant sustained an 18% whole person impairment of her cervical and lumbar spine as a result of her industrial injury.

3. Respondents shall pay PPD benefits based upon Dr. Shea's medical impairment rating. Respondents are entitled to a credit for PPD benefits previously paid.

4. Respondents shall pay 8% statutory interest on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

[2] Dr. Shea's evaluation was conducted six months before Dr. Lesnak's, which could account for the differences in the ROM findings.

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondent prove this claim is closed because Claimant did not timely contest the January 10, 2022 Final Admission of Liability?

- If the claim is closed, did Claimant prove the claim should be reopened based on error or mistake?

- If the claim is reopened, did Claimant prove entitlement to additional medical benefits?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to her left ankle on February 8, 2021 when she missed a step while descending a ladder.

2. Claimant was referred to Concentra for authorized treatment. Her care was primarily managed by Dr. George Johnson and PA Mendy Peterson.

3. She was initially diagnosed with a left ankle sprain and prescribed medications, a walking boot, and physical therapy.

4. The ankle did not heal as quickly as expected, so Claimant was referred for an MRI on March 11, 2021. The MRI showed a deltoid ligament sprain and mild osteoedema consistent with a contusion or stress injury.

5. Claimant was referred to Dr. Michael Simpson for an orthopedic evaluation. Dr. Simpson saw Claimant on March 16, 2021 and ordered a corticosteroid injection. The injection provided a good short-term diagnostic response but no lasting therapeutic benefit.

6. Dr. Simpson recommended arthroscopic debridement, but Claimant declined and wanted to try other non-surgical options. Dr. Simpson requested authorization for PRP injections. Respondent denied the PRP injections based on peer review by Dr. Steven Arsht in August 2021. Dr. Arsht opined there was insufficient objective evidence of tendon damage or osteoarthritis to support PRP injections.

7. On August 3, 2021, Claimant told Dr. Johnson her pain was getting worse. She had been unable to pursue the PRP injection and wanted to try narcotics. Dr. Johnson referred Claimant to Dr. Kenneth Finn for a pain management evaluation.

8. Claimant saw Dr. Finn on September 7, 2021. Claimant told Dr. Finn that Tramadol had upset her stomach. She was prescribed Celebrex but had not yet picked it up. Dr. Finn documented Claimant had "lost" prescriptions and used a friend's pain

mediation. Physical examination showed "nonanatomic" sensory deficits to pinprick and light touch, and giveaway weakness of the left ankle but no atrophy. Ankle ROM was decreased because of pain complaints. Dr. Finn opined Claimant "may be at risk for opioids and recommended trial of Nucynta . . . She has already reportedly lost prescription and used a 'friend's' pain medication."

9. Claimant had a telemedicine appointment with Ms. Peterson on October 13, 2021. Ms. Peterson noted Claimant had missed about 10 appointments over the past two months. She had seen Dr. Finn and he gave her Nucynta for pain, but she lost the prescription and admitted taking her friend's narcotics. Ms. Peterson documented that Claimant's symptoms were unchanged, did not follow any particular pain pattern, and were not reproducible on serial examinations. She discussed a trial of full duty and MMI. Claimant was upset but said she would try the full duty and then abruptly hung up. Ms. Peterson concluded, "Pt at stability – condition is unchanged. MRI shows non-surgical changes. Poor compliance, pain-seeking behaviors. I feel pt is at MMI. Pt's adjustor [sic] had denied any further procedures."

10. Shortly after Ms. Peterson signed her report, Dr. Johnson reviewed the chart and concurred with the disposition and determination of MMI. He provided an addendum and completed a WC 164 form. He released Claimant to full-duty with no impairment and no need for maintenance care. Dr. Johnson opined the objective findings were not consistent with the history and/or a work-related injury.

11. Claimant disputes most of the information in the October 13, 2021 report. She denied that the visit on October 13, 2021 was via telemedicine. She did not recall talking about full duty or MMI, nor did she recall being upset by any such discussion. Because she testified the visit was not via telemedicine, she denied hanging up on Ms. Peterson. Claimant also denied that she told Ms. Peterson she was taking a friend's narcotics. She testified she missed "three or four" PT sessions but denied missing 10 appointments as noted in the report.

12. Employer is self-insured and uses Sedgwick Claims Management Services, Inc. ("Sedgwick") as the third-party administrator to adjust its workers' compensation claims.

13. Sedgwick filed a Final Admission of Liability ("FAL") dated January 10, 2022 based on Dr. Johnson's MMI report. The FAL admitted for $5,791.44 in medical benefits "to date," and denied all other benefits. The FAL was mailed to Claimant's correct address.

14. Claimant did not object to the FAL within 30 days of January 10, 2022. Although Claimant conceded the mailing address on the FAL is correct, she claims she did not receive it.

15. The FAL was prepared and filed by [Redacted] JS, an adjuster at Sedgwick. Although the claim was formally assigned to a different adjuster, Ms. JS[Redacted] had been asked to assist with some tasks. Ms. JS[Redacted] prepared the FAL after the close

of business on Friday, January 7, 2022. The FAL was filed electronically with the Division of Workers' Compensation ("DOWC"), consistent with WCRP 5-1(D)(d). Claimant's copy of the FAL was sent by U.S. Mail, as required by WCRP 1-4(A). But because the FAL would not be logged by the Division, or placed in the U.S. Mail to Claimant until the next business day, Ms. JS[Redacted] dated the certificate of service for Monday, January 10, 2022. This ensured that Claimant received the full 30-day objection window prescribed by statute.

16. The FAL was accompanied by a cover letter dated January 7, 2022. Ms. JS[Redacted] credibly explained that Sedgwick's document assembly system automatically generated the cover letter, and she inadvertently neglected to change the date on the cover letter when she changed the date on the FAL.

17. Sedgwick uses a centralized mailing facility to print and send all outgoing mail. Sedgwick's computer system shows the FAL was sent on January 10, 2022.

18. Sedgwick sent Claimant multiple documents during her claim, including an initial information packet and at least 11 sets of medical records. When asked at hearing if she received any of these documents, Claimant testified, "No, not a single piece of correspondence [from Sedgwick] of any shape, form, or fashion."

19. Any mail returned as undeliverable is logged into Sedgwick's computer system and attached to the claim file. Sedgwick has no record of any documents being returned regarding this claim, including the FAL.

20. Claimant also testified she called Sedgwick "a million times," but was sent to voicemail "each time" and "never" received a return call despite leaving "about 100 voicemails, with probably every adjuster at Sedgwick."

21. Ms. JS[Redacted]'s testimony is credible and persuasive.

22. Claimant's testimony is not credible.

23. Claimant was unrepresented when the FAL was filed. She retained counsel in late February or early March 2022. Claimant's counsel requested a copy of the claim file and found the January 10, 2022 FAL therein. Claimant's counsel promptly objected to the FAL on March 9, 2022.

24. Respondent proved the claim is closed by Claimant's failure to object to the FAL within 30 days. The FAL was properly addressed and sent to Claimant on January 10, 2022. The FAL was based on a valid determination of MMI by an ATP and otherwise complied with the statutory requirements. The claim was already closed by operation of law when the objection was filed on March 9, 2022.

25. Claimant failed to prove a mistake or error that would justify reopening the claim.

CONCLUSIONS OF LAW

A. The claim is closed by the January 10, 2022 FAL

An FAL provides a statutory mechanism for the respondents to close a claim. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Once an FAL is filed, the claimant must perfect an objection within thirty days or the claim will "automatically close." Section 8-43-203(2)(b)(II)(A). The purpose of an FAL is to notify the claimant of the exact basis on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). To that end, due process requires a claimant receive "actual notice" of an FAL before it can close a claim. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). The requirement of "actual notice" has repeatedly been interpreted to require receipt of the FAL itself, rather than mere knowledge of its potential existence. *E.g.*, *Duran v. Russell Stover Candies*, W.C. No. 4-524-717 (April 13, 2004); *Meskimen v. Fee Transportation*, W.C. No. 3-966-629 (March 31, 2003); *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999).

An assertion that a claim is closed is an affirmative defense that the respondents must prove by a preponderance of the evidence. *E.g.*, *Stubbs v. Choice Hotels International*, W.C. No. 4-299-627 (November 3, 2003); *Winters v. Cowen Transfer and Storage*, W.C. No. 4-153-716 (December 28, 1995). Proof that a document was properly addressed and mailed creates a rebuttable presumption of receipt. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). If the addressee denies receipt, the issue becomes a question of fact to be resolved by the ALJ. *Trujillo v. Industrial Commission*, 735 P.2d 211 (Colo. App. 1987).

As found, Respondent proved the claim was closed by Claimant's failure to timely object to the January 10, 2022 FAL. Ms. JS[Redacted]'s testimony is credible and persuasive. The FAL was properly addressed and placed in the U.S. Mail on January 10, 2022, as stated on the certificate of service. Although Ms. JS[Redacted] did not personally witness the FAL being placed in the mail, there is no persuasive reason to doubt the FAL was mailed on January 10, 2022 consistent with Sedgwick's established business practices. Claimant's allegation that she did not receive the FAL is not credible.

The procedure followed by Sedgwick in this case, whereby the FAL was filed electronically with the DOWC but sent to Claimant by U.S. Mail, was consistent with WCRP 5-1(D)(d) and WCRP 1-4(A). There is no persuasive evidence Claimant had previously requested Sedgwick to send important documents via email, as contemplated by § 8-43-203(3).

Respondent proved the FAL was properly supported by a determination of MMI from "an authorized treating physician" as required by § 8-42-107(8)(b)(I). Although the initial determination was made by a physician assistant, Dr. Johnson reviewed the chart and agreed that Claimant was at MMI with no impairment. The ICAO has previously held that "medical determinations made by physician assistants . . . may be adopted by the

physician and relied upon as a decision of the physician himself." *Flake v. JE Dunn Construction Co*., W.C. No. 4-997-403-03 (September 19, 2017). The critical question is whether the treating physician was involved in, adopted, or ratified the determination by the non-physician provider working under their supervision. E.g., *MacDougall v. Bridgestone Retail Tire Operations LLC*, W.C. No. 4-908-701-07 (April 12, 2016); *Terry v. Captain D's Seafood Restaurant*, W.C. No. 4-226-464 (December 9, 1997); *Bassett v. Echo Canyon Rafting Expeditions*, W.C. No. 4-260-804 (April 3, 1997). Here, the persuasive evidence shows that the ultimate responsibility for the determination of MMI remained with, and was exercised by, Dr. Johnson.

Nor is the ALJ persuaded the determination of MMI was invalid because it was based on non-medical administrative concerns related to authorization of treatment. The MMI report references several medical factors such as the nonanatomic distribution of Claimant's symptoms, the MRI results, variability of clinical examination findings, drug-seeking behavior, and her failure to respond to prior treatment modalities. These are legitimate factors for a provider to consider when deciding whether a claimant is at MMI from a medical standpoint.

The deadline for Claimant to object to the FAL was February 9, 2022. The objection filed on March 9, 2022 was untimely, and the claim is closed.

B. Claimant failed to prove the claim should be reopened

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The opportunity to request reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005). The party requesting reopening bears the burden of proof. Section 8-43-304(4).

In determining whether to reopen a claim based on error or mistake, the ALJ must determine whether a mistake or error was made, and if so, whether it was the type of mistake that justifies reopening the claim. *Travelers Insurance Company v. Industrial Commission*, 646 P.2d 399 (Colo. App. 19810. The ALJ can consider whether the mistake could have been avoided by the exercise of due diligence. *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984). But the failure to exercise a procedural right is not dispositive, and is only one factor for the ALJ to consider when determining whether to reopen the claim. *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989).

As found, Claimant failed to prove an error or mistake relating to the FAL. The FAL was based on a valid determination of MMI by an ATP, and otherwise complied with all statutory requirements.

ORDER

It is therefore ordered that:

1. This claim is closed pursuant to the uncontested January 10, 2022 Final Admission of Liability.

2. Claimant's request to reopen this claim based on mistake or error is denied and dismissed.

3. Claimant's request for medical benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 5, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1.Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021.

2.Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3.Whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries.

4.Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 14, 2021 until terminated by statute.

5.Whether Respondent has established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

6. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1.Claimant is an 82-year-old female who worked for Employer as a Clerk. Her job duties involved cleaning registers, cleaning glass doors and vacuuming.

2.Based on Employer's wage records, Claimant earned gross wages of $14,059.71 during the period from March 28, 2021 to October 12, 2021. The period consists of 199 days or 28 3/7 weeks. Dividing $14,059.71 by 28 3/7 weeks yields an AWW of $494.56. An AWW of $494.56 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3.On October 13, 2021 Claimant returned from a break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart

forward. Claimant fell down onto her right side. A couple of guests and a co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip.

4.Although Claimant experienced pain after the incident, she did not report a work injury or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She specifically testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. Claimant explained that she attempted to rest and recover at home without medical treatment because she feared termination if she reported a work injury. She has been on a medical leave of absence since the work injury.

5.Claimant reviewed video of her interaction with the suspected shoplifter and the recording showed her grabbing the cart. She acknowledged that confronting the shoplifter was a violation of company policy. Claimant's computer training records reflect that she completed Employer's "Denver Shoplifting Guidelines for all Employees" (Shoplifting Guidelines) on April 27, 2021. Although Claimant did not deny completing the course, she did not specifically recall the training.

6.Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture that required in-patient hip surgery. Claimant reported that her injury occurred when she fell in her yard on October 14, 2021. She did not disclose that the injury occurred at work because she feared the potential loss of employment. Claimant later acknowledged that she did not fall in her yard on October 14, 2021.

7.Claimant's surgery at Lutheran consisted of a right hip hemiarthroplasty. After the procedure Claimant suffered an acute stroke. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA stenosis versus occlusion. Claimant testified that, following treatment at Lutheran, she was released to a rehabilitation center and then to an extended nursing care facility.

8.Claimant has not returned to work for Employer. She has not been disciplined in any way related to her interaction with the shoplifter on October 13, 2021. Specifically, Claimant has not received a verbal or written reprimand, and her employment has not been terminated. Finally, Claimant has not earned income from any other source since her October 13, 2021 industrial injuries.

9.[Redacted, hereinafter AK] is Employer's District Asset Protection Manager. His duties involve supervising Employer's security programs and conducting investigations. AK[Redacted] testified that on October 13, 2021 Employer's policy prohibited all employees, except specially trained asset protection specialists, from any kind of confrontation with a shoplifter.

10.AK[Redacted] verified that Claimant completed the training on Employer's Shoplifting Guidelines on April 27, 2021. The e-signature showing completion of this training required Claimant to log on to the system using her employee identification LDAP. The LDAP is a unique identifier with the first couple of letters of the employee's name and an additional five or six numbers. In completing the training, Claimant would have had to enter a password that was not available to Employer's management. If Claimant forgot the password, the manager would have sent her a password reset link to create a new password.

11.The Shoplifting Guidelines specify that Employer's "primary focus and commitment is to the safety and security of all our employees, customers, and vendors. Improperly handling a shoplifting situation could lead to personal, financial, and reputational risk to you, customers, vendors, the shoplifter, and [Employer]." The Shoplifting Guidelines specifically provide, in relevant part, that employees shall:

> • NEVER accuse someone of having shoplifted or taken something from the store.
>
> • NEVER confront or stop a suspected shoplifter. You are NOT allowed or authorized to do so.
>
> • NEVER attempt to stop a suspected shoplifter from leaving the store. Let them leave.
>
> • NEVER grab or step in front of the suspected shoplifter's shopping cart. Let them leave with the cart.

The Shoplifting Guidelines note that "[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy." Claimant verified through her e-signature that she understood the Shoplifting Guidelines on April 27, 2021.

12.AK[Redacted] explained that a violation of the Employer's Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

13. AK[Redacted] testified that Employer's "New Company-Wide Shoplift Policy" (Updated Policy) was distributed to store directors via an interoffice memo on September 14, 2021. The Updated Policy did not change Employer's position on shoplifting as detailed in Claimant's April 27, 2021 training. The Updated Policy reiterates that "NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates." The Updated Policy specifies that "[a]ssociates who violate this policy will be subject to disciplinary action up to and including termination." Notably, store directors would ensure all employees reviewed and understood the policy. AK[Redacted] specified that the Updated Policy would have been communicated from store managers to employees during meetings or huddles. However, Claimant denied that Employer communicated that Updated Policy to her.

14.Claimant has demonstrated that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021. Initially, Claimant returned from break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Claimant fell down onto her right side. A couple of guests and a co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment.

15.Claimant explained that on October 26, 2021 she went to Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture and required in-patient hip surgery. Although Claimant reported that her injury occurred when she fell in her yard on October 14, 2021, she credibly testified that she did not fall in her yard. She feared the potential loss of employment if she reported a work injury. Store video of the accident reveals that Claimant fell to the floor after confronting a potential shoplifter and reaching for the handle of his cart during the course and scope of her employment on October 13, 2021.

16.Respondent asserts that Claimant deviated from her sphere of employment by confronting the shoplifter on October 13, 2021. Claimant acted in direct violation of Employer's Shoplifting Guidelines by confronting a suspected shoplifter. Respondent reasons that specific language in Employer's Shoplifting Guidelines demonstrates the intent to restrict employees from interacting with shoplifters and effectively eliminated the activity from the sphere of employment. Because Claimant was not acting within the sphere of employment when she confronted the suspected shoplifter, her injuries are not compensable.

17.Although an employer's direction to an employee may potentially limit the sphere of the employment relationship, the direction must be specific and show a clear intent to limit the sphere of the employment relationship. Employer provided Claimant with training about interacting with suspected shoplifters, but the directives do not evidence an intent to cease the employment relationship for a violation. The directives in Employer's Shoplifting Guidelines and training reveal they were intended to regulate Claimant's conduct while performing the duties of her position and not to limit the scope of her employment. The Shoplifting Guidelines specifically address appropriate behavior and actions in dealing with potential shoplifters rather than creating a restriction on the scope of Claimant's job. Employer's training about confronting potential shoplifters thus did not remove Claimant's injuries from the realm of compensability. Because Claimant's risk of injury was inherent in the work environment and she was performing her job duties, her injuries on October 13, 2021 occurred within the course and scope of her employment with Employer. Store video, in conjunction with Claimant's credible testimony, demonstrate that she suffered work injuries as a result of the October 13, 2021 accident in which she fell in the entryway to Employer's store. Accordingly, Claimant's work

activities on October 13, 2021 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

18.Claimant has established that it is more probably true than not that the right to select an ATP passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on October 13, 2021 Claimant suffered industrial injuries when she reached for the handle of a shopping cart and was pulled down when the shoplifter yanked the cart forward. Claimant suffered injuries to her arm, leg and hip, and did not complete the remainder of her work shift. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She has been on a medical leave of absence since the work injury.

19.Claimant first sought medical treatment on October 26, 2021 at Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was diagnosed with a closed right hip fracture that required in-patient hip surgery. Claimant then suffered an acute stroke. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

20.Employer was aware of Claimant's injuries immediately following the incident with the shoplifter on October 13, 2021. Claimant needed assistance to get up from the ground and reach the breakroom to try to recover and compose herself. Employer also knew that Claimant was unable to complete her shift on October 13, 2021 because of her pain and injuries. Because of Claimant's subsequent surgery and rehabilitation, she has been on a medical leave of absence from employment since the work injury. Employer thus had some knowledge of the accompanying facts connecting Claimant's injury to her employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim.

21.Despite Claimant's injuries on October 13, 2021 Respondent did not supply Claimant with a list of at least four designated medical providers. Specifically, Claimant credibly testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. The record is also devoid of a written list of four designated providers. Finally, Respondent has acknowledged that they did not explicitly meet the requirements of §8-43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

22.Claimant has demonstrated it is more probably true than not that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries. Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was assessed with a closed right hip fracture and required in-patient hip surgery. Claimant suffered an acute stroke after the procedure. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA

stenosis versus occlusion. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

23.Claimant's medical treatment and subsequent surgery at Lutheran were designed to address the injuries she sustained at work on October 13, 2021. Her acute stroke as a result of her surgery as well as her subsequent treatment at a rehabilitation center and an extended nursing care facility were causally connected to her industrial injuries. All of Claimant's medical treatment was thus reasonable and necessary to cure or relieve the effects of her October 13, 2021 work injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical benefits to cure or relieve the effects of her industrial injuries.

24.Claimant has proven that it is more probably true than not that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 14, 2021 until terminated by statute. The record reveals that Claimant's October 13, 2021 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered injuries as a result of the October 13, 2021 fall that eliminated her ability to earn wages. Claimant has not returned to work for Employer and has not earned income from any other source since the October 13, 2021 accident. Accordingly, Claimant is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute.

25.Respondent has established that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and her non-medical benefits should thus be reduced by fifty percent. On October 13, 2021 a suspected shoplifter walked past Claimant while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Video of Claimant's interaction with the suspected shoplifter showed her grabbing his shopping cart. She acknowledged that confronting the shoplifter was a violation of company policy.

26.Claimant testified that she did not recall Employer's Shoplifting Guidelines from training in April, 2021. In contrast to Claimant's testimony, computer training records reflect that Claimant completed Employer's Shoplifting Guidelines. Claimant verified through her e-signature that she reviewed and understood the Shoplifting Guidelines on April 27, 2021.The e-signature showing completion of the training required Claimant to log on to the system using her employee identification LDAP. In completing the training, Claimant would have had to enter a password that was not available to Employer's management. AK[Redacted] verified that Claimant completed the training.

27.The record reflects that Employer has adopted reasonable safety rules regarding interactions with suspected shoplifters. Employer's Shoplifting Guidelines specifically provide, in relevant part, that employees should never engage in any of the following: accuse an individual of shoplifting or taking something from the store; confront or stop a suspected shoplifter; attempt to stop a suspected shoplifter from leaving the

store; and grab or step in front of the suspected shoplifter's shopping cart. The Shoplifting Guidelines specify that "[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy." AK[Redacted] persuasively testified that Employer's Shoplifting Guidelines prohibit all employees, except specially trained asset protection specialists, from any kind of confrontation with shoplifters. Employer's safety rules are unambiguous, definite, and non-conflicting.

28.AK[Redacted] also testified that Employer's "New Company-Wide Shoplift Policy" (Updated Policy) was distributed to store directors through an interoffice memo on September 14, 2021. The Updated Policy did not change Employer's position on shoplifting as detailed in Claimant's April 27, 2021 training. The Updated Policy reiterated that "NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates." However, Claimant denied that Employer communicated that Updated Policy to her.

29.The record also reflects that Employer enforces its safety rules. Notably, AK[Redacted] persuasively explained that a violation of Employer's Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

30. Respondent has satisfied its burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding interactions with suspected shoplifters. Under the circumstances, Claimant's confrontation with the suspected shoplifter directly violated Employer's Shoplifting Guidelines involving never accusing an individual of shoplifting or taking something from the store; confronting or stopping a suspected shoplifter; attempting to stop a suspected shoplifter from leaving the store; and grabbing or stepping in front of the suspected shoplifter's shopping cart. Claimant directly violated Employer's reasonable safety rules regarding interactions with suspected shoplifters during the October 13, 2021 accident. Video of Claimant's interaction with the suspected shoplifter on October 13, 2021 showed her grabbing the cart. Claimant also acknowledged that confronting the shoplifter was a violation of company policy. Confronting the suspected shoplifter and grabbing his cart as he was exiting Employer's store constituted the direct cause of Claimant's right hip fracture and need for medical treatment.

31.Despite Claimant's testimony, the record reflects that Claimant was aware of Employer's Shoplifting Guidelines but deliberately confronted a suspected shoplifter. Notably, training on the Shoplifting Guidelines, the obviousness of the danger presented by the shoplifter and grabbing his shopping cart demonstrate that Claimant's actions were the result of deliberate conduct. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021 and her non-medical benefits should thus be reduced by fifty percent.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers

at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3.When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4.For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5.A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6.The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing

condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7.In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of Colorado's Workers' Compensation Act and is thus compensable as a work-related injury. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. *Id.* at 504-05. The Court also explained that the but-for test does not relieve the employee of the burden of proving causation, nor does it suggest that all injuries that occur at work are compensable. Id. at 505.

8.As a general rule, an employer has the right to issue directives concerning what an employee may do, and when she may do it. Commands of the preceding type regulate the "sphere" of employment. If an employee sustains an injury while violating a directive the injury is not compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Id.* at 1033.; *see In re Claim of Elorriage*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018).

9.As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021. Initially, Claimant returned from break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Claimant fell down onto her right side. A couple of guests and a

co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment.

10.As found, Claimant explained that on October 26, 2021 she went to Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture and required in-patient hip surgery. Although Claimant reported that her injury occurred when she fell in her yard on October 14, 2021, she credibly testified that she did not fall in her yard. She feared the potential loss of employment if she reported a work injury. Store video of the accident reveals that Claimant fell to the floor after confronting a potential shoplifter and reaching for the handle of his cart during the course and scope of her employment on October 13, 2021.

11.As found, Respondent asserts that Claimant deviated from her sphere of employment by confronting the shoplifter on October 13, 2021. Claimant acted in direct violation of Employer's Shoplifting Guidelines by confronting a suspected shoplifter. Respondent reasons that specific language in Employer's Shoplifting Guidelines demonstrates the intent to restrict employees from interacting with shoplifters and effectively eliminated the activity from the sphere of employment. Because Claimant was not acting within the sphere of employment when she confronted the suspected shoplifter, her injuries are not compensable.

12.As found, although an employer's direction to an employee may potentially limit the sphere of the employment relationship, the direction must be specific and show a clear intent to limit the sphere of the employment relationship. Employer provided Claimant with training about interacting with suspected shoplifters, but the directives do not evidence an intent to cease the employment relationship for a violation. The directives in Employer's Shoplifting Guidelines and training reveal they were intended to regulate Claimant's conduct while performing the duties of her position and not to limit the scope of her employment. The Shoplifting Guidelines specifically address appropriate behavior and actions in dealing with potential shoplifters rather than creating a restriction on the scope of Claimant's job. Employer's training about confronting potential shoplifters thus did not remove Claimant's injuries from the realm of compensability. Because Claimant's risk of injury was inherent in the work environment and she was performing her job duties, her injuries on October 13, 2021 occurred within the course and scope of her employment with Employer. Store video, in conjunction with Claimant's credible testimony, demonstrate that she suffered work injuries as a result of the October 13, 2021 accident in which she fell in the entryway to Employer's store. Accordingly, Claimant's work activities on October 13, 2021 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. *See In re Claim of Elorriage*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's attempt to regulate driving by prohibiting phone calls while driving constituted an effort to control the claimant's methods of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable). *Compare Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait

for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable).

Right of Selection

13. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

14. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

15. As found, Claimant has established by a preponderance of the evidence that the right to select an ATP passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on October 13, 2021 Claimant suffered industrial injuries when she reached for the handle of a shopping cart and was pulled down when the shoplifter yanked the cart forward. Claimant suffered injuries to her arm, leg and hip, and did not complete the remainder of her work shift. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She has been on a medical leave of absence since the work injury.

16. As found, Claimant first sought medical treatment on October 26, 2021 at Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was diagnosed with a closed right hip fracture that required in-patient hip

surgery. Claimant then suffered an acute stroke. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

17.As found, Employer was aware of Claimant's injuries immediately following the incident with the shoplifter on October 13, 2021. Claimant needed assistance to get up from the ground and reach the breakroom to try to recover and compose herself. Employer also knew that Claimant was unable to complete her shift on October 13, 2021 because of her pain and injuries. Because of Claimant's subsequent surgery and rehabilitation, she has been on a medical leave of absence from employment since the work injury. Employer thus had some knowledge of the accompanying facts connecting Claimant's injury to her employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim.

18.As found, despite Claimant's injuries on October 13, 2021 Respondent did not supply Claimant with a list of at least four designated medical providers. Specifically, Claimant credibly testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. The record is also devoid of a written list of four designated providers. Finally, Respondent has acknowledged that they did not explicitly meet the requirements of §8-43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

Medical Benefits

19. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

20.Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d

1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

21.As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries. Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was assessed with a closed right hip fracture and required in-patient hip surgery. Claimant suffered an acute stroke after the procedure. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA stenosis versus occlusion. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

22.As found, Claimant's medical treatment and subsequent surgery at Lutheran were designed to address the injuries she sustained at work on October 13, 2021. Her acute stroke as a result of her surgery as well as her subsequent treatment at a rehabilitation center and an extended nursing care facility were causally connected to her industrial injuries. All of Claimant's medical treatment was thus reasonable and necessary to cure or relieve the effects of her October 13, 2021 work injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical benefits to cure or relieve the effects of her industrial injuries.

TTD Benefits

23.Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

24. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute. The record reveals that Claimant's October 13, 2021 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered injuries as a result of the October 13, 2021 fall that eliminated her ability to earn wages. Claimant has not returned to work for Employer and has not earned income from any other source since the October 13, 2021 accident. Accordingly, Claimant is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute.

Safety Rule Violation

25. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003).

26. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006).

27. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

28.Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

29. As found, Respondent has established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and her non-medical benefits should thus be reduced

by fifty percent. On October 13, 2021 a suspected shoplifter walked past Claimant while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied “no,” Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Video of Claimant’s interaction with the suspected shoplifter showed her grabbing his shopping cart. She acknowledged that confronting the shoplifter was a violation of company policy.

30. As found, Claimant testified that she did not recall Employer’s Shoplifting Guidelines from training in April, 2021. In contrast to Claimant’s testimony, computer training records reflect that Claimant completed Employer’s Shoplifting Guidelines. Claimant verified through her e-signature that she reviewed and understood the Shoplifting Guidelines on April 27, 2021.The e-signature showing completion of the training required Claimant to log on to the system using her employee identification LDAP. In completing the training, Claimant would have had to enter a password that was not available to Employer’s management. AK[Redacted] verified that Claimant completed the training.

31. As found, the record reflects that Employer has adopted reasonable safety rules regarding interactions with suspected shoplifters. Employer’s Shoplifting Guidelines specifically provide, in relevant part, that employees should never engage in any of the following: accuse an individual of shoplifting or taking something from the store; confront or stop a suspected shoplifter; attempt to stop a suspected shoplifter from leaving the store; and grab or step in front of the suspected shoplifter's shopping cart. The Shoplifting Guidelines specify that “[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy.” AK[Redacted] persuasively testified that Employer’s Shoplifting Guidelines prohibit all employees, except specially trained asset protection specialists, from any kind of confrontation with shoplifters. Employer’s safety rules are unambiguous, definite, and non-conflicting.

32. As found, AK[Redacted] also testified that Employer’s “New Company-Wide Shoplift Policy” (Updated Policy) was distributed to store directors through an interoffice memo on September 14, 2021. The Updated Policy did not change Employer’s position on shoplifting as detailed in Claimant’s April 27, 2021 training. The Updated Policy reiterated that “NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates.” However, Claimant denied that Employer communicated that Updated Policy to her.

33. As found, the record also reflects that Employer enforces its safety rules. Notably, AK[Redacted] persuasively explained that a violation of Employer’s Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

34. As found, Respondent has satisfied its burden of proof to establish that Claimant acted with deliberate intent in violating Employer’s reasonable rules regarding interactions with suspected shoplifters. Under the circumstances, Claimant’s confrontation with the suspected shoplifter directly violated Employer’s Shoplifting Guidelines involving never accusing an individual of shoplifting or taking something from

the store; confronting or stopping a suspected shoplifter; attempting to stop a suspected shoplifter from leaving the store; and grabbing or stepping in front of the suspected shoplifter's shopping cart. Claimant directly violated Employer's reasonable safety rules regarding interactions with suspected shoplifters during the October 13, 2021 accident. Video of Claimant's interaction with the suspected shoplifter on October 13, 2021 showed her grabbing the cart. Claimant also acknowledged that confronting the shoplifter was a violation of company policy. Confronting the suspected shoplifter and grabbing his cart as he was exiting Employer's store constituted the direct cause of Claimant's right hip fracture and need for medical treatment.

35. As found, despite Claimant's testimony, the record reflects that Claimant was aware of Employer's Shoplifting Guidelines but deliberately confronted a suspected shoplifter. Notably, training on the Shoplifting Guidelines, the obviousness of the danger presented by the shoplifter and grabbing his shopping cart demonstrate that Claimant's actions were the result of deliberate conduct. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021 and her non-medical benefits should thus be reduced by fifty percent.

Average Weekly Wage

36.Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007).

37.In *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010) the court reaffirmed that, in determining an employee's AWW, the ALJ may choose from two different methods set forth in §8-42-102, C.R.S. The court noted the first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Id.* The court then explained that the second method for calculating an employee's AWW, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." *Id.*

38.The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability

instead of the earnings on the date of the injury. *Id.; see Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001) (stating that "the fact that claimant was not concurrently employed by the hospital and the employer at the time of the injury does not preclude the exercise of discretion under §8-42-102(3)").

39.As found, based on Employer's wage records, Claimant earned gross wages of $14,059.71 during the period from March 28, 2021, to October 12, 2021. The period consists of 199 days or 28 3/7 weeks. Dividing $14,059.71 by 28 3/7 weeks yields an AWW of $494.56. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021.

2. Because Respondent failed to provide a written list of at least four designated medical providers, the right to select an ATP passed to Claimant.

3. Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of her October 13, 2021 work injuries.

4. Claimant shall receive TTD benefits for the period October 14, 2021 until terminated by statute.

5. Because Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021, her non-medical benefits shall be reduced by fifty percent.

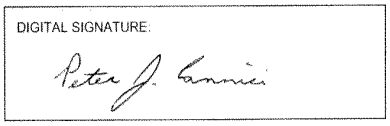
6. Claimant earned an AWW of $494.56.

7. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see*

Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

Prior to the hearing, the parties reached the following stipulations in the event that the claimed injuries were determined to be compensable:

- Claimant's average weekly wage (AWW) is $1,115.38.
- Claimant is entitled to payment of temporary total disability benefits from August 23, 2021 through September 22, 2021.
- Dr. McFarland with Mt. San Rafael Clinic is the authorized treating provider under the claim.
- Claimant is entitled to a general award of medical benefits reasonably necessary to cure and relieve the effects of the work-related condition.

REMAINING ISSUES

I. Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable injuries to her low back and SI joint, right hip, right shoulder, and right foot and ankle on August 22, 2021.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's Alleged August 22, 2021 Slip and Fall

1. Claimant is now a former employee of Respondent-Employer. At the time of the alleged injury, Claimant was working as the "grocery manager" for Respondent's store in Trinidad, Colorado. She had been working at this store since approximately May of 2018. Claimant was originally hired as the "grocery night stocker" and was subsequently promoted to grocery manager, a position she described as that of assistant store manager. (Tr. 17:18 – 18:23). According to Claimant, she directed store operations if the District Manager was not physically present in the store. Because of her position, Claimant testified that she felt unable to leave the store unless another manager was on site.

2. In response to the COVID-19 pandemic, Respondent implemented a program called "Drive Up and Go" ("DUAG") before Claimant's alleged date of injury. (August 22, 2021). The DUAG program enabled shoppers to place their grocery orders online through the Respondent-Employer's website. Employees would then gather,

mark and “stage” the items for customer pickup. Frozen goods picked for an order were stored in totes in the store’s large walk-in freezer.

3. Claimant testified that she sustained an injury while preparing a DUAG order on August 22, 2021. (Tr. 19:1 – 20:12). According to Claimant, she had finished picking items for the order and was in the process of placing the frozen items connected with that order into the walk-in freezer when she slipped and fell injuring her low back and SI joint, right hip, right shoulder, and right foot and ankle. Claimant testified as follows:

> I was getting ready to put my frozen tote in the freezer, walked in, had the tote in my hand, put it on the shelf, went to turn and when I did, I slipped on the ice…. My right foot flipped, went underneath the U-boat and twisted. And as I started to fall, I was afraid to go straight back and hit my head, so I twisted my body a little bit to the right, I extended my right arm out and, when I did, I was using my right arm and my right hand to try and catch myself. I landed on my buttocks and my hip on the right-hand side and my hand reached out, and my shoulder went into my neck and preventing my head from hitting the floor. I went down.

(Tr. 21:19 - 22:12).

4. After her fall, Claimant was able to gather herself and get up off the floor on her own. She testified that there was no one in the area when she fell so no one came to help her get to her feet. Once on her feet, Claimant testified that she walked through the grocery area of the store and found a co-worker ([Redacted, hereinafter AK) and asked her if she knew where [Redacted, whereinafter MC], the store’s courtesy clerk was. According to Claimant, it was the responsibility of the courtesy clerk to chip the ice in the freezers and remove it. Apparently, Ms. AK[Redacted] did not know where Mr. MC[Redacted] was because Claimant testified that she returned to the freezer and took pictures of the ice on the floor. She testified that she intended to show the pictures to Mr. MC[Redacted] as proof that the ice on the floor had not been chipped as required and he needed to get it done. (Tr. 22:13- 23:13).

5. The photographs of the walk-in freezer taken by Claimant were submitted into evidence as Claimant’s Exhibit 9. Claimant explained at hearing the pictures she took were of the ice on the floor “right where my foot slipped, right next to the cart, there’s a picture of a U-boat, which is… what my ankle went under, and then just the remaining amount of ice that was in the freezer.” (Tr. 23:22 – 24:3). The ALJ has carefully reviewed the photographs admitted into evidence. Although some of the images appear rather grainy, when viewed in their totality, the pictures reveal a room with a floor largely covered in ice. (Clmt’s Ex. 9). In some of the pictures, a portion of the ice appears to have been chipped while in other areas of the room there is obvious ice buildup. *Id*. The area where Claimant testified she fell in shown in the pictures admitted into evidence. (Clmt’s Ex. 9, p. 113, 115). These photographs clearly depict

an area where the expanse of the floor is substantially covered in ice, including chipped ice. *Id.*

6. Claimant testified that she attempted to contact her store director, Ms. [Redacted, hereinafter Ms. G] after her fall. According to Claimant, Ms. G[Redacted] was not working that day and she was unable reach her to report her fall. Claimant next tried to contact "[Redacted, hereinafter N", the district leader who was on the phone attending to another call and unable to speak with Claimant. Claimant testified that she tried calling N[Redacted] multiple times but was unable to reach her. (Tr. 25:9-23). Claimant's typical shift hours were 7:00am to 4:00pm. Although her injury occurred at an estimated 9:00am to 9:30am[1], Claimant testified that she continued to work until she was relieved at 4:00pm because her director (Ms. G[Redacted]) was not present in the store. Since Claimant was effectively the only onsite manager, she testified she could not leave the store. (Tr. 20:15 – 21:8).

7. Because Claimant did not make contact with and speak to Ms. G[Redacted] or N[Redacted] about her fall, she testified that she worked the balance of her shift in pain and left for the day. Claimant lives approximately 20 miles from the store[2] and by the time she arrived home after her August 22, 2021 shift, she was very sore. (Tr. 26:8-23). Once home, Claimant sent a text message to Ms. G[Redacted] and N[Redacted] to inform them she had fallen. (Tr. 25:9-24). The text from the evening of Sunday August 22, 2021 was sent to both Ms. G[Redacted] and N[Redacted], stating, "I was going to put in an accident report. I fell in the walk in. Landed on my right side." (Clmt's. Ex. 8, p. 95). Claimant sent N[Redacted] a text message separately on the morning of August 23, 2021. *Id.* at 94. She sent N[Redacted] the message separately, as Ms. G[Redacted] was not working. She inquired as to how she was supposed to go about filing a claim, expressing that although she had done this for workers before, she had never done it for herself. *Id.* Claimant was instructed to call "K[Redacted]" at the store to put the claim in "ASAP." *Id.*

8. Claimant followed her supervisor's instruction and provided a written incident statement to her Employer on August 23, 2021[3]. (Resp. Ex. F, p. 91). Her written statement is consistent with her testimony and her reporting of the incident to her medical providers. It also provides support for a critical fact. Claimant writes, "I did continue to work **and as the day went on I began to hurt**." *Id.* (emphasis added). Claimant testified, "the pain didn't subside [sic] as bad until when I finally got home after I left work." Claimant clarified her incorrect usage of "subside." "[The pain] got worse **after** I left." (Tr. 26:20 – 27:9). She further testified that she was in a lot of pain the next morning when she returned to the store to fill out the incident report with K[Redacted]. (Tr. 27:14-24).

[1] See also (Resp. Ex. F., p. 91) (Claimant estimated the incident occurred at approximately 9:15 am to 9:30 am in her August 22, 2021 witness statement).
[2] Claimant lives in Raton, New Mexico and commutes to work in Trinidad.
[3] Claimant's statement is dated August 22, 2021; however, the content of the statement indicates the statement was filled out the day after the incident. Moreover, the date Claimant came in to fill out her report is not in question.

Dr. McFarland's Treatment and Claimant's Prior Medical History

9. Upon completing her incident report, Claimant was provided the contact information for Dr. Douglas McFarland by K[Redacted], who informed Claimant that Dr. McFarland is Respondent's workers' compensation doctor. Claimant testified that she went straight to Dr. McFarland's office from the store after filling out the incident report. (Tr. 28:3-12).

10. Dr. McFarland examined Claimant on August 23, 2021. (Clm. Ex. 3, pp. 6-9). Claimant reported that she had injured herself in the walk-in freezer the day prior at approximately 9:15am. *Id.* at 8. She informed Dr. McFarland that her right foot slipped on ice while she was walking in the freezer. She reportedly twisted and landed on her right side, causing injury to the foot and ankle. Her right hip directly contacted the ground when she landed. As stated in her testimony, Claimant avoided striking her head by twisting her body to the right. She was also reporting pain in her right shoulder blade across her upper back due to her attempting to catch herself with that arm. *Id.* Examination revealed tenderness in the upper back over the right greater than left scapular area, the right lower back laterally, the right hip, the lateral malleolus, with noted swelling of the posterior aspect of the calcaneus. *Id.* Claimant was diagnosed with contusions of the right hip, lower back, right foot, along with sprains of the right ankle and thoracic spine. *Id.* Dr. McFarland restricted Claimant to no more than 10 pounds lifting, 5 pounds repetitive lifting, and no more than 1-2 hours of walking or standing per day, among other restrictions. *Id.* at 9.

11. Claimant was seen in follow-up by Dr. McFarland on September 3, 2021, September 17, 2021, and October 12, 2021. During these appointments, Claimant reported persistent symptoms in her low back, right shoulder and right hip and proximal thigh. She also reported increased pain in her right ankle noting that she was limping on the right leg. (Clmt's Ex. 3, pp. 13-26). X-rays were ordered on October 12, 2021, which revealed mild degenerative changes in the right hip and shoulder as well as "soft tissue swelling along the lateral malleolus but no visualized fracture. (Clmt's Ex 3, pp. 10-12, 25). The ALJ finds Claimant's ankle swelling to constitute some objective evidence of acute injury.

12. Claimant has no history of any significant injury to any of the body parts alleged to have been injured in her August 22, 2021 slip and fall. She testified that in approximately 2017 to 2018, she did see a doctor about body aches and joint pain. She conceded that she is a "rather heavy set woman" and was experiencing generalized aches and pains. Her doctor advised her to work on her diet and weight management noting that she would probably get better. Claimant testified that she increased her activity level, lost a significant amount of weight, and was generally feeling better. (Tr. 29:4-5). A review of the medical records from Claimant's primary care provider—La Familia Primary Care—corroborates her testimony. (Clmt's. Ex. 6). Claimant reported non-specific "muscle aches" and "joint pain" to her PCP on October 8, 2017. *Id.* at 61. Physical examination of Claimant was benign. *Id.* at 63. However, she was diagnosed

with essential hypertension and a vitamin D deficiency. *Id.* According to her medical records, Claimant's muscle and joint aches went away within months after starting a Vitamin D supplement. *Id.* at 74. There are no documented ongoing problems before or after the February 22, 2018 visit.

Dr. Burris' Independent Medical Examination

13. Claimant underwent an independent medical examination (IME) with Dr. John Burris on February 8, 2022 at the request of Respondents. (Resp. Ex. A). Per Dr. Burris, Claimant was reporting ongoing right shoulder, right low back/buttock, right hip, right ankle, and right heel pain. *Id.* at 3. Claimant reported her mechanism of injury (MOI) to Dr. Burris consistently with her other documented reports. *Id.* at 4. Dr. Burris discussed Claimant's employment history with her as well, noting that she had obtained a new job at Denny's after her employment with the Employer ended. *Id.* at 5. Dr. Burris documented that she started working for Denny's on October 23, 2021, and noted that Claimant's work at Denny's was less physically demanding than her prior work with Respondent-Employer. *Id.* He also noted that Denny's had been working with her restrictions. *Id.*

14. Respondent-Employer maintains a large commercial cardboard compactor in the backroom of the store. This compactor is covered by a security camera, which captures a view of a significant portion of the backroom work area. As part of his IME, Dr. Burris reviewed security video captured in the backroom on the day of Claimant's alleged slip and fall. While much of the room is visible, the freezer where Claimant claims to have fallen is not.

15. Dr. Burris reviewed the security camera and reached conclusions based upon that review. The ALJ has also thoroughly reviewed the video footage from the "Backroom Compactor" camera admitted into evidence Respondent's Exhibit H. There are four videos, the first being 1 hour 4 minutes and 35 seconds long, beginning at 9:00:19 am and ending at 10:19:58 am. The second video is 4 minutes and 59 seconds long, beginning at 12:50:00 am and ending at 12:54:58 am. The third video is shorter at 3 minutes and 54 seconds from 2:10:04 pm to 2:14:59 pm and the fourth video is 9 minutes and 14 seconds long, beginning at 3:42:21 pm and ending at 3:54:59 pm. (See Resp. Ex. H; see also Resp. Ex. A, p. 7)**.**

16. Relying heavily on the in-store surveillance footage from the backroom compactor room from August 22, 2021 and Claimant's prior history of body aches and joint pain, Dr. Burris diagnosed Claimant with "myofascial pain," (Resp. Ex. A., pp. 10-11). Dr. Burris starts his discussion with Claimant's reports of "chronic muscle and joint pain" during medical visits from 2017 and 2018. *Id.* at 10. Dr. Burris' report neglects to mention that the same medical records document Claimant lost weight, supplemented with vitamin D, and her symptoms resolved. Moreover, the ALJ notes that the same medical records only mention approximately four months of non-specific joint aches and pains occurring several years ago. Dr. Burris goes on to discuss the store surveillance video. *Id.* at 11. He acknowledges that the video does not capture the fall, nor does it

cover the freezer where Claimant allegedly fell. Nonetheless, Dr. Burris noted that in the short periods of time Claimant is seen on camera, he did not "observe" her to display any signs of physical distress indicative of having sustained an injury. *Id.* He felt the video was evidence that Claimant was capable of continuing her normal activities. *Id.* It was his opinion, given the surveillance video and the information he reviewed, that Claimant could not have sustained more than soft tissue strains and contusions. According to Dr. Burris, if one were to accept that Claimant fell as claimed, she would have reached maximum medical improvement (MMI) effective October 26, 2021, despite Dr. McFarland recommending continued treatment to the contrary. *Id.* at 11.

Dr. Castrejon's Independent Medical Examination

17. Claimant underwent an IME with Dr. Miguel Castrejon on March 2, 2022 at the request of her counsel. (Clmt's. Ex. 7). Claimant again described her mechanism of injury consistently with her prior reports. *Id.* at 86. She explained that she had to continue working after the incident, given the fact she was the only manager on duty at the time. *Id.* Claimant was able to perform the work, albeit with "ongoing and **worsening** discomfort." *Id.* (emphasis added). Claimant reported that Dr. McFarland had referred her for physical therapy, but she only had six treatments to date, and it was only for the right shoulder, nothing directed at the lower back, right hip, right ankle, or right foot. *Id.* Dr. McFarland discussed ordering an MRI, but this was denied by Respondents. *Id.*

18. Dr. Castrejon reviewed Claimant's prior medical records from La Familia Primary care. (Clmt's. Ex. 7, p. 87). Unlike Dr. Burris, Dr. Castrejon felt these records were "non-contributory" to the present matter. *Id.* He explained further on in his report that the "joint pains" were documented to have resolved long before the work injury, citing Claimant's significant weight loss as the primary factor. *Id.* He noted that Claimant had no limitations prior to the fall at work and that she continued to complain of right shoulder pain extending into her shoulder blade and trapezius; a dull to sharp pain in her right lower back and posterior hip that worsens with prolonged standing, along with the ongoing pain in the foot and ankle after her fall. *Id.* at 88. Dr. Castrejon observed Claimant walking with an antalgic gait, favoring the right limb. *Id.* at 89. Conversely, Dr. Burris documented she walked with a normal gait with no difficulties ambulating less than one month prior. (Resp. Ex. A, p. 9). Eight days prior to the IME with Dr. Burris, Claimant was evaluated by Dr. McFarland, who documented Claimant reportedly continued to walk with a limp, and his physical examination of Claimant was consistent with her report. (Resp. Ex. B, p. 20). Dr. Castrejon specifically tried to have Claimant squat, which she could only perform ¼ of the way, and she was unable to heel and toe walk at all due to right ankle pain. (Clmt's. Ex. 7, p. 89).

19. Dr. Castrejon's physical examination revealed findings in the cervical and lumbar spine, right shoulder, right hip and SI joint. She had pain and decreased ROM, in the right ankle pain with tenderness at the distal Achilles insertion with decreased eversion due to pain. (Clmt's. Ex. 7, p. 89). Dr. Castrejon diagnosed Claimant as having right shoulder girdle myofascial pain syndrome, an element of scapular dyskinesis, a possible right shoulder labral tear, a lumbar spine/strain with right SI joint involvement,

probable piriformis syndrome, a right ankle strain/sprain with a possible ligament injury, and chronic pain. *Id.* at 89-90.

20. Dr. Castrejon specifically addressed Dr. Burris' opinions in his IME report. (Clmt's. Ex. 7, p. 90). Dr. Burris stated Claimant had no objective findings the day after the incident. Dr. Castrejon stated he respectfully disagreed with Dr. Burris attempting to minimize the severity of Claimant's condition. *Id.* Dr. Castrejon goes into great detail providing his opinion on why Claimant's subjective reporting of symptoms are wholly supported by the medical record, noting that during the initial October 4, 2021, physical therapy visit examination revealed "weakness of shoulder flexion, extension, abduction, internal rotation and external rotation all of which were graded at a 3+/5." *Id.* at 91. Claimant also had positive provocative maneuver testing to include a "positive stretch" test, a positive "crank" sign and a positive "Hawkins-Kennedy" maneuver. *Id.* Dr. Castrejon was unable to reconcile the discrepancies between the examination findings of Dr. McFarland, the physical therapist and himself with the "normal" examination of Dr. Burris, especially when Dr. McFarland documented abnormal findings a mere eight before Dr. Burris' IME. *Id. at* p. 92. Dr. Castrejon opined there were sufficient objective findings documented by Dr. McFarland and Claimant's physical therapist to support her initial symptoms and her ongoing complaints. In "contradistinction" to the opinion of Dr. Burris, Dr. Castrejon opined that Claimant suffered a considerable fall. *Id.* Finally, Dr. Castrejon notes that while Dr. Burris opined that Claimant would be at MMI as of October 26, 2021; she had only been treated for her shoulder complaints without treatment directed to any of the other injured body parts, thus calling into question his opinion regarding MMI. *Id*.

21. Dr. Castrejon opined that Claimant remains under physical restrictions and that she sustained multiple injuries as a direct result of the August 22, 2021 incident. (Clmt's. Ex. 7, p. 92). He opined that Claimant should move forward with an MR arthrogram of the right shoulder, an MRI of the right ankle, evaluation by an orthopedic specialist for the shoulder and for the ankle. *Id.* He recommended chiropractic care or physical therapy to address the SI joint dysfunction and piriformis issue, and possibly a right SI joint injection for diagnostic purposes along with a right piriformis injection. *Id.* at 92-93. She should also receive massage therapy, acupuncture, dry needling, and trigger point injections for the right shoulder girdle and the piriformis syndrome. Finally, she should have access to ongoing anti-inflammatories, muscle relaxants, and a TENS unit. Any MMI determination would have to be made after additional workup and treatment. *Id.* at 93.

The Testimony of Dr. Burris

22. Dr. Burris testified at hearing as expert in the field of occupational medicine. (Tr. 58:5-14). He commented at hearing that he felt Claimant was moving "normally" in the videos he watched. He observed Claimant to reach overhead, lift and move totes from cart to waist level, carry loaded totes, bend over to pick-up debris from the floor, push carts, lift multiple loaded totes off shoulder level, scan and sort items in totes, load cases of bottled water, empty small trash cans into larger trash cans, and

place cardboard boxes into the compactor with both hands overhead. (Resp. Ex. A, p. 7). Dr. Burris noted that at all times in the video, including late in the afternoon, Claimant was observed moving about without limping or signs of difficulty or distress. He further noted that there was a discrepancy between Claimant's reported capabilities on the day of injury and her capabilities as observed on the store video. While conceding that the video captured less than 10% of Claimant's workday, Dr. Burris nevertheless opined that, the security video did not support a conclusion that a work injury of significance occurred on August 22, 2021. (Resp. Ex. A, p. 11; Tr. 62:8-18; 71:1-5). Indeed, Dr. Burris testified that based upon Claimant's described MOI and her demonstrated level of activity, the only injuries she may have suffered were very minor soft tissue strains and contusions.

23. In support of his conclusions, Dr. Burris testified that Claimant had diffuse complaints throughout her right shoulder, right side of her low back, right hip region, right ankle, and right heel. He stressed that his examination of Claimant's right shoulder joint, lumbar spine, and right hip joints were relatively benign with no objective findings. Claimant complained of a lot of myofascial tenderness, but had good range of motion, good strength, normal neurologic function, and negative provocative tests leading Dr. Burris' to conclude that Claimant had myofascial pain. He explained that Claimant's initial evaluation with Dr. McFarland was similar in that it did not document any evidence of trauma. According to Dr. Burris, Dr. McFarland noted findings similar to his, i.e. tenderness in multiple areas, but generally good range of motion and stretch. While Claimant did have some minimal ankle swelling on initial evaluation, there was no documentation of bruising or dysfunction. Further, none of the injuries appeared severe enough to warrant x-rays on the initial visit. (Tr. 60:6-25).

24. Dr. Burris testified that the Medical Treatment Guidelines recognize chronic pain as a psychosocial disease. He noted that Claimant had a past medical history of type 2 diabetes, chronic muscle and joint pain in 2017 and 2018 and PTSD secondary to childhood abuse, which is a well-known contributor to chronic pain complaints later in life. Resp. Ex. A, p. 10; Tr. 58:24 – 60:5).

25. According to Dr. Burris, the natural course of minor strains and contusions, such as those Claimant may have suffered in this case, is rapid, predictable improvement and recovery within days to weeks, regardless of treatment. Dr. Burris opined that because Claimant had numerous non-work-related risk factors for the development of chronic pain combined with a lack of objective examination findings following her work injury, her persistent pain, 5 ½ months after the workplace incident, is probably related to non-work-related psychosocial risk factors rather than the August 22, 2021 slip and fall. (Resp. Ex. A, p. 11; Tr. 65:9 – 69:4).

26. Dr. Burris reviewed the IME report from Dr. Castrejon. He noted that Dr. Castrejon did not appear to have reviewed the store surveillance video and had only spent approximately 1-hour reviewing records pertaining to the claim. Dr. Burris further testified that Dr. Castrejon had misconstrued some of the opinions and conclusions in his report. (Tr. 69:5 – 70:10).

The Security Camera Video

27. As noted, the ALJ has carefully reviewed the security video referenced above. Paragraph 15 of these Findings of Fact document the extent of the video provided. As found, there are four separate video files on a compact disc (Resp. Ex. H), which contain approximately 1 hour, 22 minutes, and 42 seconds of recording. Beginning with the video running from 9:00:19 and ending at 10:19:58 am, Claimant appears in the backroom compactor area at approximately 9:01 am using both arms/hands to prepare DAUG orders. Claimant is active preparing DAUG orders and is seen lifting items and pushing carts about the room until approximately 9:06 am when she pushes a cart out of view of the backroom camera. There is no visible activity in the backroom from 9:06 to 9:15:20, when two male workers enter the room for a very brief period. As noted, the freezer where Claimant reported she fell is not covered by the security camera producing the video. Consequently, any activity that occurred in or near this freezer cannot be verified. Regardless, the video demonstrates that the backroom, where the freezer is located, appears empty from 9:06 to 9:15, which the ALJ finds corroborates Claimant's testimony that there was no one in the vicinity when she fell. After the aforementioned male workers leave the room at approximately 9:15:45 am, the backroom is continually occupied by various workers through the 9:26:38 mark of the video when Claimant appears and is seen lifting DAUG totes onto a shelf. The video evidence supports a finding that the only time the backroom appears unoccupied is between 9:06 and 9:15 am. Claimant testified that the fall occurred between 9:00 and 9:30, which the ALJ finds fall in the window were the backroom appears empty. Based upon the video evidence, the ALJ finds that Claimant's reported fall probably occurred sometime in the ten (10) minute span between 9:06 and 9:15, when the backroom appears unoccupied.

28. Claimant's first actions in the video after the time of her probable fall are seen at approximately 9:26 am. (Resp. Ex. H). Claimant is seen lifting totes onto a shelf and talking briefly to a male co-worker. At 9:27:41, Claimant walks through the backroom carrying a tote and disappears from view until 9:28:07 when she is seen bending over to pick up some trash from the floor. She continues to perform various work duties, coming in and out of view of the camera, throughout the balance of the video, which ends at 10:19:58. Consistent with the observations of Dr. Burris', the ALJ watched Claimant lift, carry, push, pull, reach overhead, bend at the waist and walk while performing a variety of work tasks throughout the video admitted into evidence. Claimant appears to move her right arm and leg without obvious signs of pain or limitation. Nonetheless, Claimant's face is obscured by a mask and the images are taken from a distance making impossible to tell the degree of pain she may be experiencing as she completes her duties. Moreover, Claimant is only seen for transitory periods in video that Dr. Burris admitted comprises less than 10% of her workday. In this case, the ALJ finds the security camera video of limited value when determining the existence and/or severity of the injuries Claimant alleges she sustained as part of her August 22, 2021 slip and fall. Accordingly, the ALJ finds Dr. Burris' opinion that Claimant did not suffer a work injury of significance on August 22, 2021

unpersuasive. The remaining opinions of Dr. Burris regarding Claimant's credibility generally have been weighed against the totality of the evidence presented and are deemed unpersuasive.

The Testimony of KD [Redated]

29. KD[Redacted] testified at hearing in her capacity as the District Outside Protection Manager for Respondent-Employer. Her job is to manage investigations of employees (Tr. 77:11-24). Ms. KD[Redacted] initiated an investigation into Claimant's handling of a shoplifting incident occurring in the store on July 29, 2021. Claimant testified about this particular investigation and the incident during her direct examination. She explained that a customer was suspected of shoplifting at her store. According to Claimant, the suspect was grabbed by the employee running the self-checkout lane in the store in attempt to prevent him from leaving. At the same time, the store's courtesy clerk walked up and joined the altercation. Claimant, seeing what was occurring, instructed her two employees to let the individual go. They let him go and she proceeded to call law enforcement. (Tr. 30:2 – 31:12). Claimant testified that she was verbally reprimanded by Ms. KD[Redacted] because she was "not supposed to call law enforcement due to the fact that, apparently, I had been contacting law enforcement for so many things that now law enforcement no longer wanted to come to our store." (Tr. 31:13-22).

30. Claimant provided a written statement regarding the aforementioned shoplifting incident. (Resp. Ex. F, p. 90). It documents the details of the confrontation with the shoplifter. In her statement, Claimant states that she felt the best thing at the time was for them to let the shoplifter go, get as much information as possible, and call the police. *Id.* The statement is dated August 17, 2021; however, as noted the incident occurred on July 29, 2011, approximately one month before Claimant's slip and fall in the freezer.

31. Ms. KD[Redacted] disputed Claimant's explanation for why she was reprimanded. Ms. KD[Redacted] testified that she reprimanded Claimant because two employees—Jackie and Randy—were violating Employer policy by trying to detain the shoplifter while Claimant allegedly "stood and watched the incident while she was calling 911." (Tr. 79:5-23). Ms. KD[Redacted] testified that Claimant had created a bad relationship with the local police department due to prior incidents and, as a result, was instructed that another manager would need to be involved in the decision to contact the police for future incidents. Claimant expressed that she was "very upset" about her conversation with Ms. KD[Redacted]. Ms. KD[Redacted] then reprimanded Claimant and informed her that she "may" be subject to discipline as a result of the event, but this never took place as Claimant went out on leave for her reported work injury. (Resp. Ex. F, p. 90; Tr. 31:13 – 33:15, 39:2 – 40:18, 77:11 – 81:2, 83:5-15, 88:2-22).

32. During cross-examination, Ms. KD[Redacted] was asked how Claimant should have appropriately handled the situation. It was her testimony that Claimant

should have instructed the employees to stop what they were doing. She also felt that contacting the police over this shoplifting event was unreasonable.

The Testimony of Ms. G[Redacted]

33. Ms. G[Redacted] testified at hearing in her capacity as the store director where Claimant worked. (Tr. 86:14-24). She confirmed she was Claimant's direct supervisor as of August 22, 2021. (Tr. 87:21 – 88:1). She also confirmed Claimant that no corrective or written action against Claimant for the above described shoplifting incident. She was merely instructed not to call the police in the future. (Tr. 88:2-17). Furthermore, she did confirm that Claimant notified her of the alleged work injury the evening following the fall via text message. (Tr. 88:23 – 89:2).

34. Ms. G[Redacted] testified that she personally reviewed the security camera video in order to investigate the alleged injury. Following her review of the video, Ms. G[Redacted] concluded that the injury did not happen, or if it did, not to the severity it was reported. (Tr. 88:9 – 9:15). Ms. G[Redacted] claims to have reviewed other video footage from the store, which she asserts did not reveal any evidence of Claimant appearing to be injured. (Tr. 88:9 – 9:11). She did not preserve any other video from the store from the date of the injury, other than the selected videos outlined above. (Tr. 90:23 – 91:11).

35. Ms. D[Redacted] testified that the photographs submitted by Claimant because she did not "ever remember that freezer looking like that – in that area." (Tr. 92:4-7). She did confirm, however, that there have been past instances of ice accumulation in the freezer. (Tr. 92:8-22). Ms. G[Redacted] also questioned the authenticity of the photos taken by Claimant of the freezer, noting that she had never observed the freezer to look like that. (Tr. 92:4-7). Nonetheless, she admitted that there had been prior issues with ice on the freezer floor in the past. A work order had been put in and the manager in charge was responsible for checking the freezer every day. On the day of the alleged injury, claimant was responsible for checking the freezer floor. (Tr. 91:12 – 93:3).

36. During cross-examination, Ms. G[Redacted] went from being "pretty sure" that Claimant did not try calling her on August 22, 2021 prior to the evening text message; to being "a hundred percent certain", that Claimant did not call her earlier that day. (Tr. 94:1-6). At the 9:35:16 mark of the video, which the ALJ finds would had been shortly after the alleged fall, Claimant is observed to leave the backroom area of the store with a cell phone in hand. (Resp. Ex. H). She returns to the backroom carrying a tote approximately one minute later. While it is impossible to ascertain with 100% certainty, it is plausible that Claimant left the backroom around 9:35 am to call Ms. G[Redacted] only to return one minute later when her attempt failed. While Ms. G[Redacted] testified that, she was 100% certain that Claimant did not attempt to reach her at any time during the day prior to receiving Claimant's text message; she could not recall her whereabouts or what she was doing around the time Claimant's shift ended on August 22, 2021. Based upon the totality of the evidence presented, the ALJ finds

Ms. G[Redacted]'s 100% certainty that Claimant did not attempt to call her regarding the slip and fall unreliable and unpersuasive.

37. Based upon the totality of the evidence presented, the ALJ finds that Claimant probably fell in the freezer as she described. The ALJ credits Claimant's testimony regarding her attempts to report her injuries and her pain levels following this incident over the testimony of Ms. G[Redacted] and Dr. Burris. Specifically, the suggestion of Ms. G[Redacted] that Claimant is fabricating the incident and feigning her injuries is unconvincing.

38. While the ALJ is not convinced that Claimant's described MOI caused the degenerative changes noted on her right hip and right shoulder x-rays, the results of Dr. McFarland's initial physical examination coupled with Claimant's reports of persistent limping and the findings on her right ankle x-ray support a finding that she probably suffered an acute injury to her right hip and ankle consistent with a fall. Moreover, the ALJ is convinced that Claimant's fall caused injuries to her right shoulder, mid-back, and lower back and right SI joint giving rise to Dr. McFarland's treatment. While respondents attempt to minimize Claimant's observed ankle swelling on x-ray by indicating that there is no documentation of "bruising or dysfunction", the x-ray report makes it clear that pain and "injury" prompted the need for this imaging. (Clmt's. Ex. 3, p. 12). As found above, Claimant's ankle swelling constitutes some objective evidence of injury in this case.

39. Based upon the evidence presented as a whole, the ALJ finds the opinions and analyses of Dr. Castrejon to be more reliable and persuasive than those of Dr. Burris.

40. The ALJ finds Claimant has established by a preponderance of the evidence that she sustained compensable injuries to her right hip, right ankle, right foot and heel, right shoulder, mid-back, and lower back/right SI joint as a direct result of the August 22, 2021 work related incident. The scope of these injuries has yet to be determined, as Claimant has not received much of the treatment recommended by Dr. McFarland. Because the ALJ finds that Claimant has proven that she sustained compensable injuries, she is entitled, per the parties' stipulation, to a general award of medical benefits that are reasonably necessary to cure and relieve her of the effects of her work-related condition(s).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers,

without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). While there are differences in the testimony of Claimant and Ms. G[Redacted] regarding the reporting of the fall in this case, the ALJ resolves those conflicts in favor of Claimant to conclude that Claimant fell and probably tried to report her injuries to Ms. G[Redacted] shortly after the incident happened. As found, the ALJ credits the testimony of Claimant regarding the MOI in this case as well as her pain/functionality levels following her tumble over the contrary testimony of Dr. Burris.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the available medical record supports the expert medical opinions of Dr. Castrejon. Regardless of the documented MOI and effort to report the injuries in this case, Dr. Burris agrees that a slip and fall of the nature Claimant asserts she experienced is likely to at least cause minor soft tissue injuries.

Based upon the evidence presented, the ALJ concludes that Dr. Castrejon's opinion that the accepted MOI likely caused injuries to Claimant's right shoulder, low back, SI joint, right hip and right ankle is supported by the record evidence as a whole and in particular the physical examination of Dr. McFarland and the x-ray of Claimant's right ankle.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo.App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the ALJ finds that Claimant produced sufficient evidence to support a conclusion that her symptoms/injury occurred in the scope of employment after she slipped on ice in the walk in freezer after she was placed a DAUG tote containing frozen goods on a storage shelf. As found, the contrary testimony/suggestions of Ms. G[Redacted] that Claimant is fabricating the incident and feigning her injuries is unconvincing.

G. While Claimant established that she was injured in the course and scope of her employment, it is necessary to address whether her symptoms/injury arose out of that employment. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.*

H. There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient

"nexus" or causal relationship between a claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996).

I. As found, the ALJ credits the opinions of Dr. Castrejon and the testimony of Claimant. Claimant credibly testified that although she did fall and injure herself, she was not in immediate, excruciating pain. Claimant testified that she was able to continue working that day through the rest of her shift. She has stated, and continues to state, that she began feeling worse and worse as the day progressed, particularly after she had left work and drove the approximate 20 miles to her home. The pain became severe by the next morning, at which time Claimant came into the store, filled out her incident report, and presented directly to Dr. McFarland. Claimant's testimony is consistent with the parsed video provided by Respondents, in that she may not have been experiencing severe pain sufficient to produce obvious signs of injury visible on a low-definition internal security camera. Claimant testified that she was in significant pain and having trouble ambulating into the store on August 23, 2021 to complete her incident report, yet Respondents did not obtain or preserve any video from the store on this date.

J. The ALJ finds the weight of the evidence presented by Claimant to be more persuasive than that offered by Respondents. Here the evidence supports a conclusion that Claimant attempted to report the incident shortly after it occurred while still working. Despite not being able to, it is undisputed her employer was aware of the incident that evening after Claimant sent a text message to Ms. G[Redacted] and "N[Redacted]." Claimant was seeking treatment the next day, and the mechanism of injury reported has remained consistent. The examination findings documented by Dr. McFarland and Claimant's physical therapists and the x-ray of Claimant's right ankle support her version of events. Importantly, the examination and x-ray findings documenting swelling constitute objective evidence of acute injury. As found, the totality of the evidence presented, including opinions of Dr. Castrejon persuade the ALJ that Claimant's sudden slip and fall onto an icy floor in the walk in freezer likely resulted in an acute soft tissue sprain/strain injuries involving aforementioned body parts. The fact that Claimant may have suffered what Dr. Burris characterized as "minor" injuries does not negate the compensable nature of those injuries or compel a finding that Claimant's they are not work-related as suggested by Respondent. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the ALJ is convinced that a logical connection exists between Claimant's slip and fall in the freezer and her need for treatment. Consequently, the claimed injuries are compensable.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she

sustained compensable injuries to her right shoulder, low back, right SI joint, right hip and right ankle after falling in Respondent-Employer's walk-in freezer on August 22, 2021.

2. Prusuant to the parties' stipulation, Respondents shall pay for all reasonable, necessary, and related treatment for Claimant's work related injuries, including but not limited to the treatment rendered by Dr. McFarland.

3. Pursuant to the parties' stipulation, Claimant's AWW is $1,115.38.

4. Pursuant to the parties' stipulation, Claimant is entitled to payment of temporary total disability benefits from August 23, 2021 through September 22, 2021.

5. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2022

/s/ Richard M. Lamphere

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-039-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable work injury.

2. If compensable, did Claimant establish by a preponderance of the evidence that he is entitled to TTD benefits from July 16, 2021 and ongoing?

3. If compensable, did Claimant establish by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits?

4. What is Claimant's AWW?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 60 year-old man who was employed as a golf course maintenance crew member at [Redacted, hereinafter RCC]. Claimant worked in this position since 2013. (Tr. 16:9-17:2).

2. Claimant testified that he worked 40 hours a week, and sometimes worked overtime. (Tr. 17:16-23). Claimant's pay records confirm that Claimant was earning $15.50 per hour in June 2021. Based on Claimant's wage records, his salary increased to $15.50 an hour starting the week of May 24, 2021. (Ex. K). From May 24, 2021 through July 4, 2021, Claimant earned $5,035.15. The ALJ finds that Claimant's AWW is $839.19.

3. Claimant's job duties included raking sand traps, cutting grass, gardening, and performing work on the sprinkler system. (Tr. 16:16-20). [Redacted, hereinafter SD], Claimant's supervisor and the golf course superintendent, testified that Claimant's primary job duty was to rake sand traps in the morning and that this was performed daily. SD[Redacted] testified that Claimant spent anywhere from three to four hours each day raking sand traps and on Mondays he filled driving range tee divots. In the larger sand traps, Claimant would use a mechanical sand rake (Sand Pro) to ride into the sand trap and smooth out the sand. SD[Redacted] explained that Claimant would drive from sand trap to sand trap in the Sand Pro. After completing the sand traps in the morning, Claimant would perform various "detail tasks" such as filling divots in the fairways, trim work, and trimming drains. (Tr. 37:23-39:13).

4. SD[Redacted] testified that trimming (cleaning) the drains was not a daily task, but was done on a four-to-six week schedule, and he usually sent four people out at a time to do the job so it would not take a long time to complete. (Tr. 39:14-18). Claimant testified

that he cleaned the drains about four times a year, for two to three days at a time. (Tr. 32:24-33:6).

5. The ALJ finds that trimming/cleaning the drains was not a daily task, and Claimant only cleaned the drains approximately four times a year.

6. SD[Redacted] testified that the drains are eight to twelve inches wide, cast iron, and they captured surface water on the golf course. SD[Redacted] testified that the worker was usually on their knees using a sod knife to clean the drain. (Tr. 39:19-40:24).

7. Claimant testified that it took him approximately five minutes to clean one drain and he would clean approximately thirty drains in one afternoon. (Tr. 31:21-32:7). The ALJ finds that Claimant spent approximately two and a half hours on a given afternoon trimming drains.

8. Claimant testified that it was wet in the drainage areas and that his boots and socks would get wet while cleaning the drains. According to Claimant "there [was] water running from the grass." Claimant testified that his boots and socks would remain wet the entire shift and when he got home, he would have to put his boots outside to dry. (Tr. 20:4-21). Claimant testified, however, that none of the drains were in the pond. (Tr. 31:13-20).

9. Claimant worked in leather work boots from Wal-Mart and wore sandals when not at work. (Tr. 21:10-20). Claimant testified his work boots remained dry, but for when cleaning the drains. (Tr. 33:17-20).

10. SD[Redacted] credibly testified that there was never standing water around the drains, but the area could be moist. (Tr. 40:25-41:4). He explained that the golf course irrigated at night, usually starting at 8:15 p.m. The golf course used drone technology that flew over the course daily to obtain data of what locations were getting too dry or too wet, to determine daily which area needed irrigation. SD[Redacted] testified that it was very rare for an area of the golf course to be "soggy." (Tr. 41:13-42:9).

11. The ALJ finds that Claimant did not enter, nor did he stand in the pond, to clean the drains. The ALJ further finds that Claimant did not consistently stand in water to clean the drains.

12. Claimant testified that he developed a blister on the second toe of his left foot. (Tr. 21:3-9) He first noticed the blister in mid-June 2021. Claimant testified that he also started having pain in his left foot at this time. Claimant testified that he told his managers, SD[Redacted] and [Redacted, hereinafter TA] that his foot was hurting, but they made a joke about it, and did not send him to a doctor. (Tr. 18:12-19:9 and 23:21-24:12). There was no testimony that Claimant ever told Employer that his foot pain was related to his work.

13. Claimant developed gangrene in his left foot. (Tr. 18:2-6). He went to the emergency room at Saint Joseph Hospital on July 17, 2021 complaining of a left toe infection. Claimant reported that he noticed his toe becoming swollen and red approximately 15 days prior, which would have been the beginning of July 2021. Claimant

denied any injury to his toe. His x-ray was positive for osteomyelitis, and his lab work showed a glucose level of 244 and WBC of 13.2. The doctor noted "probable newly diagnosed diabetes." Claimant was diagnosed with osteomyelitis left second toe with cellulitis. (Ex. H).

14. Claimant was admitted to the hospital for further workup. Rachel Kubowicz, M.D. evaluated him. Claimant told Dr. Kubowicz that his pain started one month prior, and he thought it was related to his "workboot pinching." Dr. Kubowicz noted that Claimant's distal phalanx of the second digit of his left foot was erythematous and necrotic. She thought this was most likely due to long-standing, previously undiagnosed diabetes mellitus. A wound culture showed strep group B, staphylococcus aureus, and heavy gram positive cocci. (Ex. H).

15. On July 18, 2021, Claimant underwent a left second toe amputation. The following day, Claimant received diabetes education while in the hospital. According to the medical record, even though Claimant reported that this was a new diagnosis, he had been given a glucometer in 2007 for home use. Patients with diabetes use a glucometer to measure the glucose in their blood. Claimant told the nurse that he knew how to use the glucometer and it was provided to him by "Lutheran Medical Center" in 2007. (Ex. H).

16. The ALJ finds that Claimant has been diagnosed with diabetes since approximately 2007, and his 2021 diagnosis was not a new diagnosis.

17. Respondents filed a Notice of Contest on August 20, 2021 for further investigation to obtain prior medical records. (Ex. 3).

18. Claimant returned to St. Joseph's Hospital on August 1, 2021 with worsening redness to his third toe on his left foot. The areas of necrosis had expanded and involved the third and fourth toes and possibly the proximal foot. Claimant underwent a transmetatarsal left foot amputation, and an incision and drainage procedure of the left foot. On August 12, 2021, Claimant underwent repeat incision and drainage with wound VAC placement. (Ex. I).

19. On September 7, 2021, Claimant underwent additional surgery including incision, drainage and debridement of the chronic gangrene infection of the left foot with partial resection of the fourth and fifth metatarsals. Claimant underwent additional surgery on December 7, 2021 including resection of the first metatarsal bone remnant and a skin graft. (Ex. F).

20. Claimant testified that the blister, infection, and subsequent amputation was caused by him working in socks and boots that were soaking wet. Claimant testified that this occurred when he was cleaning the drains in June 2021. He testified that the water he stood in was dirty, his socks and boots became soaking wet, and he worked that way until he took his boots off at home. (Tr. 27:2-7).

21. Dr. Paz was admitted as an expert in internal medicine with a specialized knowledge in Level II accreditation. (Tr. 60:14-16). Dr. Paz is the chief medical director

for Restore Osteo. In this position, he is involved with chronic wound care and diabetic peripheral neuropathy. (Tr. 59:12-60:2).

22. Dr. Paz performed an Independent Medical Evaluation (IME) of Claimant on January 21, 2022 at the request of Respondents. Claimant told Dr. Paz that sometime in mid-June 2021, he developed pain in one of his toes on his left foot. Claimant said the pain worsened when his socks became wet. He told Dr. Paz that he periodically serviced the drainage pond on the course, which required him to clean the drain with a knife. Claimant said he had to enter the pond and his feet would become submerged in water from 8:00 a.m. to 3:30/4:00 p.m. (Ex. E).

23. During his examination, Dr. Paz noted that Claimant had decreased pulses in his upper and lower extremities along with neurologic findings in the right and left lower extremity consistent with peripheral neuropathy. Dr. Paz assessed Claimant with a diabetic foot ulcer and osteomyelitis. He opined that these conditions were not causally related to the alleged work injury and were not aggravated or accelerated by the alleged work injury. (Ex. E).

24. Claimant also underwent an IME with Tashof Bernton, M.D. on February 22, 2022. Dr. Bernton noted that Claimant reported he trimmed drain grates and stood in water wearing leather boots. Claimant told Dr. Bernton that when he cleaned the drainage pond, he "entered the pond" to clean the drains and Claimant's feet would be in water for many hours. (Ex. 9).

25. Dr. Bernton also concluded that Claimant had a diabetic foot ulcer in the setting of diabetes and probable peripheral neuropathy. Dr. Bernton opined that "[w]hile the necessary preconditions for diabetic foot ulcer include the presence of diabetes and probably neuropathy and microvascular disease, those conditions are not sufficient in themselves to result in a diabetic foot ulcer." Dr. Bernton further opined that Claimant's work duties may well have been the initiating factor for the formation of the ulcer and caused a significant and lasting exacerbation of the condition. (Ex. 9).

26. Dr. Bernton reached his opinion based on the fact that Claimant had "prolonged submersion" of his feet in water, and the "pond situation is one in which bacterial contamination would be presumed to be present." Dr. Bernton also reasoned that Claimant's other job duties, which included continued standing and walking, materially exacerbated his condition. (Ex. 9).

27. Dr. Paz testified in conjunction with his IME report. He testified that diabetic foot ulcers develop in diabetics when the individual has advancing underlying peripheral vascular disease, which is insufficient delivery of blood flow to the foot. (Tr. 61:6-14). When there is insufficient blood flow to an area of the foot and there is concurrent loss of sensation and poorly controlled blood sugars, a person can develop a diabetic foot ulcer. (Tr. 61:19-23).

28. Dr. Paz opined that based on the records and the history from Claimant, he was probably diagnosed with diabetes as early as 2007. (Tr. 63:1-7, 66:12-17). Dr. Paz

testified that Claimant had uncontrolled diabetes with an elevated A1C of 11.5 in the emergency room. (Tr. 63:22-25). Claimant also had hypertension, which is another risk factor for diabetic foot ulcer. The most prominent risk factor for a diabetic foot ulcer that Claimant had was diabetic peripheral neuropathy which puts the tissues in the foot at risk. (Tr. 64:1-13).

29. Dr. Paz testified that the natural history of a diabetic foot ulcer if it goes untreated is that the ulcer begins below the skin and is usually undetected because of the peripheral neuropathy. The next stage if the ulcer remains untreated is the loss of tissue over the top of the foot when the epidermis and dermis stop regenerating. A Grade 2 ulcer goes deeper below the epidermis and the dermis into the fatty tissue. A Grade 3 ulcer involves the bone and tendon and is when the patient ends up with osteomyelitis. This is the most serious level of a diabetic foot ulcer and is when the person develops gangrene. Dr. Paz explained that this last stage was when the infection starts. (Tr. 64:12-65:25).

30. Dr. Paz credibly testified that the etiology of a diabetic foot ulcer can occur simply with walking and the cause is not always identifiable. (Tr. 69:11-70-1). Dr. Paz opined that the mechanism of injury in this specific claim was Claimant's diabetes mellitus, diabetic peripheral neuropathy, small and microvascular disease secondary to diabetes mellitus, and progressive ulceration secondary to lack of re-epithelialization secondary to neurovascular dysfunction. (Ex. E, p. 28).

31. Dr. Paz credibly testified that by the time Claimant's diabetic foot ulcer was inspected in July 2021, it had reached the level of gangrene and the infection had entered into the bone. (Tr. 66:1-11). Thus, Dr. Paz determined that the diabetic foot ulcer would have begun prior to June and when Claimant sensed the pain in his toe, the diabetic foot ulcer had progressed to osteomyelitis or necrosis of the bone. Dr. Paz credibly testified that the initial development of the diabetic foot ulcer was likely as early as May 2021, which was prior to trimming the drains. (Tr. 66:22-67:17).

32. Dr. Paz explained that in the absence of treatment for the diabetes, little can be done for the microvascular disease and with no blood supply to the foot, Claimant's diabetic foot ulcer was going to progress with or without standing in water. (Tr. 70:12-22). Dr. Paz also testified that there were no aquatic bacterial flora identified on the cultures obtained in the emergency room. (Tr. 68:11-20). Dr. Paz credibly testified that it was not medically probable that working in wet boots and socks would aggravate a diabetic foot ulcer. (Tr. 83:9-17).

33. The ALJ finds Dr. Bernton's opinion to be credible, but not persuasive. In reaching his conclusion that Claimant's work duties caused or exacerbated his diabetic foot ulcer, Dr. Bernton relied upon Claimant's account that his feet were submerged in water, he stood in a pond, and the water was contaminated. As found, Claimant's feet were never submerged in water while he was cleaning the drains. Also as found, there was no indication that the water Claimant walked through was contaminated with bacteria.

34. Dr. Paz's opinions were both credible and persuasive. The ALJ finds that is was not medically probable that Claimant's working in wet boots and socks in mid-June 2021 either caused or aggravated Claimant's diabetic foot ulcer.

35. The ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury, an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S., *Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair,* 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004).

Claimant contends that his feet were wet while trimming drains in mid-June 2021, and this caused his diabetic foot ulcer. Claimant testified that this was his only job duty that would cause his feet to become wet. Trimming drains was not a daily occurrence, only took place a few times a year, and did not take a long time to complete. (Findings of Fact ¶¶ 5 and 7). Dr. Paz credibly testified and explained that due to the level of progression of Claimant's diabetic foot ulcer and infection when he presented to the emergency room on July 16, 2021, the diabetic foot ulcer likely started in May 2021. (Findings of Fact ¶ 31). As found, trimming drains and having wet boots in mid-June 2021 did not cause Claimant's diabetic foot ulcer. (Findings of Fact ¶ 34).

Furthermore, Dr. Paz credibly explained that diabetic foot ulcers are a metabolic condition caused by uncontrolled diabetes, peripheral neuropathy, and microvascular disease all of which Claimant suffers from. Dr. Paz explained that the diabetic foot ulcer can develop with any sort of micro-injury to the foot because of the complications of diabetes including peripheral neuropathy and microvascular disease. Dr. Paz explained that diabetics can develop diabetic foot ulcers from simply walking and the etiology of the ulcer is difficult to determine. Dr. Paz also credibly explained that once a diabetic foot ulcer develops, it will progress through the stages if it remains untreated regardless of a diabetic's occupation or work duties. (Findings of Fact ¶¶ 29-32).

As found, Claimant likely had been diagnosed with diabetes since 2007. (Findings of Fact ¶ 16). Claimant testified that he had been working for the golf course since 2013. It is likely that Claimant had diabetes throughout his employment with the golf course, yet he never developed a diabetic foot ulcer performing the same duties that he performed in 2021.

Claimant relies on Dr. Bernton's opinion that being submerged in water was a substantial risk factor for a diabetic foot ulcer. As found, however, Claimant was not submerged in water while at work, he did not enter a pond, and there is no evidence that the water he stood in had any sort of bacteria. (Findings of Fact ¶¶ 11 and 32).

Dr. Paz' testimony and opinions were credible and persuasive. The medical evidence supports Dr. Paz' opinion that Claimant had a long-standing history of uncontrolled diabetes, peripheral neuropathy, and microvascular disease which were all risk factors for a diabetic foot ulcer. Dr. Bernton's opinions were credible, but not persuasive. Several of the key facts relied upon by Dr. Bernton about Claimant's work duties were contradicted by Claimant and SD's[Redacted] testimony. Thus, Dr. Bernton's opinions were not persuasive.

Claimant failed to prove by a preponderance of the evidence that he sustained a compensable work injury. (Findings of Fact ¶ 35).

Average Weekly Wage

Where the Claimant is earning an hourly wage at the time of the injury, the AWW is to be determined by multiplying the hourly rate by the number of hours in a day the claimant would have worked but for the injury, then multiplying that sum by the number of days in a week the Claimant would have worked. § 8-42-102(2)(d), C.R.S. Section 8-42-102(3), C.R.S., however, provides that an ALJ may diverge from the statutorily-prescribed methods of calculating the AWW if, for any reason, they will not fairly compute the AWW. The ALJ has wide discretion to decide whether the statutorily-prescribed methods will fairly calculate the AWW, and if not, to devise a method which will fairly determine the AWW. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). Based on Claimant's wage records, his salary increased to $15.50 an hour starting the week of May 24, 2021. From May 24, 2021 through July 4, 2021, Claimant earned $5,035.15. This correlates to an AWW of $839.19. (Findings of Fact ¶ 2).

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable work injury.

2. Claimant's claim for medical benefits is denied and dismissed.

3. Claimant's claim for TTD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the L3-S1 anterior interbody fusion, as recommended by Dr. Basheal Agrawal, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 10, 2020 work injury?

FINDINGS OF FACT

1. The claimant began working for the employer's Road and Bridge Department on April 23, 2009. The claimant worked as a heavy equipment operator. His job duties primarily involved installation of culvert pipes under roads.

2. On August 10, 2020, the claimant suffered an injury while performing his normal job duties. The injury occurred when the claimant attempted to remove a spare tire from the back of his service truck. The tire in question was wedged in place, making removal difficult. While attempting to remove the tire, the claimant felt a pop in his low back.

3. The respondent admitted liability for the August 10, 2020 work injury via a General Admission of Liability filed on April 1, 2022.

Medical Treatment Prior to August 10, 2020

4. In approximately 2012, the claimant was diagnosed with rheumatoid arthritis (RA). The claimant testified that his RA symptoms typically involve joint swelling in his hands, feet, and knees. The claimant further testified that since taking medication for his RA diagnosis, he rarely has RA related symptoms.

5. The claimant also has a history of low back concerns. On September 27, 2012, magnetic resonance imaging (MRI) of the claimant's lumbar spine was performed. The MRI showed degenerative disc and degenerative facet changes from the L3 level to the 51 level. The MRI also showed some circumferential spinal stenosis at the L3-L4 level.

6. On January 10, 2017, x-rays of the claimant's lumbar spine showed degenerative changes that had progressed since November 30, 2012.

7. The claimant does not recall prior low back treatment. The claimant testified that it is possible that his rheumatologist, Dr. Jessica Mears, ordered the 2017 x-rays.

Medical Treatment After August 10, 2020

8. Initially, the claimant's authorized treating physician (ATP) for this claim was Dr. Robert McLaughlin. The claimant was seen on August 10, 2020 in Dr. McLaughlin's practice by Jim Harkreader, PA-C[1]. Thereafter, the claimant was seen by Dr. McLaughlin on August 13, 2020. At that time, the claimant reported ongoing numbness and tingling in his left leg and into his left foot. Dr. McLaughlin noted that PA Harkreader had prescribed Tramadol and Flexeril. Dr. McLaughlin referenced the claimant's prior lumbar spine imaging and diagnosed a lumbar injury with radiculopathy. Dr. McLaughlin recommended lumbar spine x-rays and an MRI. He also referred the claimant to physical therapy.

9. On August 13, 2020, lumbar spine x-rays showed bilateral L4-L5 foraminal stenosis and multilevel degenerative disc disease.

10. On August 21, 2020, the claimant returned to Dr. McLaughlin and reported constant left leg numbness from his hip to his foot. In the medical record of that date, Dr. McLaughlin explained that the loss of disc space (as evident in the recent x-rays) can make the spinal area "small to begin with". When this was this combined with the claimant's injury, it led to the radicular symptoms. Dr. McLaughlin again recommended an MRI of the claimant's lumbar spine. In addition, he referred the claimant for a surgical consultation.

11. On September 1, 2020, the claimant was seen by Dr. Peter Shorten. On that date, Dr. Shorten recommended an MRI of the claimant's cervical spine to determine whether the claimant had cervical myelopathy. Dr. Shorten prescribed a Medrol dose pack, Meloxicam, and Gabapentin.

12. On September 14, 2020, the claimant returned to Dr. Shorten. At that time, Dr. Shorten noted that the cervical spine MRI showed no significant canal stenosis. Dr. Shorten opined that the claimant's symptoms were consistent with L4 or L5 radiculopathy. He recommended left L5-L5 and L5-S1 transforaminal epidural steroid injections {TFESIs). The claimant underwent the recommended TFESIs on September 20, 2020. The claimant reported that the injections provided limited, short-term relief.

13. On October 29, 2020, the claimant returned to Dr. Shorten and reported no relief from the injections. In the medical record of that date, Dr. Shorten noted that the claimant had undergone extensive conservative treatment without significant improvement. At that time, Dr. Shorten recommended that the claimant undergo an L4-S1 laminectomy, foraminotomy, and an L4-L5 and L5-S1 posterior lumbar interbody fusion (PLIF).

[1] The August 10, 2020 medical record was not included in the parties' hearing submissions. However, Dr. McLaughlin made reference to that visit in the August 13, 2020 medical record.

14. At the request of the respondent, on November 10; 2020, Dr. Michael Rauzzino reviewed the claimant's medical records. In his report, Dr. Rauzzino opined that the surgery recommended by Dr. Shorten was not reasonable, necessary, or related to the claimant's work injury. In support of his opinion, Dr. Rauzzino noted a discrepancy regarding the relief provided by the various injections. Specifically, Dr. Rauzzino noted that the claimant reported improvement from five out of ten pain to no pain to Dr. Clifford, while Dr. McLaughlin recorded no relief from the same injections. Dr. Rauzzino also noted that a pain generator had not yet been identified.

15. On January 27, 2021, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records and obtained a history from the claimant. The IME was conducted by "telemedicine", so a physical examination was limited to what Dr. Reiss was able to see on video. In his IME report, Dr. Reiss opined that the claimant sustained a lumbosacral strain, and possibly a strain of his sacroiliac (SI) joint. Dr. Reiss further opined that the claimant's pre-existing low back condition was likely aggravated on August 10, 2020. With regard to the surgery recommended by Dr. Shorten, Dr. Reiss opined that the claimant is not a candidate for an L4-S1 decompression and fusion. In support of this opinion, Dr. Reiss noted that a two level fusion is not indicated for low back pain. As the fusion would not be indicated, then the decompression portion of the recommended surgery would likewise not be indicated. Dr. Rauzzino recommended that the claimant undergo core strengthening, aerobic conditioning, and stretching.

16. Based upon the reports of Drs. Rauzzino and Reiss; the respondent denied authorization of the surgery recommended by Dr. Shorten.

17. Thereafter, the claimant underwent a number of injections. On March 9, 2021, Dr. Robert Frazho administered bilateral SI joint injections. On April 30, 2021, Laramie Chandler, NP recommended the claimant undergo TFESIs on the left at the L3-L4, L4-L5, and L5-S1 levels. On June 10, 2021, Dr. Kyle Christopherson administered left L2 through L5 medial branch blocks. On July 8, 2021, Dr. Christopherson administered repeat left L2 through L5 medial branch blocks. On August 2, 2021, Dr. Christopherson performed radiofrequency ablation (RFA) at the left L2 through the L5 levels. On September 13, 2021, Dr. Christopherson administered bilateral L5-S1 TFESIs.

18. In August 2021, the claimant's treatment with Dr. McLaughlin was transitioned to Dr. Craig Stagg because Dr. McLaughlin was leaving the Grand Junction practice. On September 15, 2021, the claimant was seen by Dr. Stagg. At that time, the claimant reported that his most recent injection from Dr. Christopherson did not provide any relief. The claimant asked for a referral for a second opinion. Dr. Stagg agreed that a second opinion from a neurosurgeon was appropriate.

19. On October 7, 2021, the claimant returned to Dr. Shorten. On that date, Dr. Shorten opined that the majority of the claimant's symptoms were myofascial lumbosacral back pain. Dr. Shorten informed the claimant that surgery would not be effective in treating those symptoms.

20. On November 29, 2021, x-rays were taken of the claimant's lumbar spine. The x-rays showed multilevel degenerative disc disease and facet arthrosis.

21. On November 29, 2021, the claimant was seen by Sara Winsor, Nurse Practitioner with the SCL Center for Brain and Spine. On that date, NP Winsor recommended the claimant undergo right and left L4-L5 TFESIs. NP Winsor identified the purpose of these injections would be both therapeutic and diagnostic.

22. On December 6, 2021, Dr. Reiss issued a supplemental report after reviewing additional medical records. Dr. Reiss was asked to state an opinion on whether repeat ESIs were reasonable, necessary, and related to the claimant's work injury. In that report, Dr. Reiss opined that repeat injections were not indicated. In support of this opinion, Dr. Reiss noted that prior epidural injections, facet injections, SI joint injections and a rhizotomy provided little, if any, relief of the claimant's symptoms. Dr. Reiss again recommended the claimant undergo intensive core strengthening.

23. On January 27, 2022, the claimant returned to SCL Center for Brain and Spine and was seen by Dr. Basheal Agrawal. At that time, the claimant reported low back pain that was radiating down the lateral aspect of his legs to his knees. Dr. Agrawal noted that the claimant had no benefit from physical therapy and only limited relief with injections and related procedures. Dr. Agrawal also noted that the claimant had foraminal stenosis and desiccation at the L3-L4, L4-5, and L5-S1 disc spaces. Dr. Agrawal recommended an L3 to S1 anterior lumbar interbody fusion (ALIF). Despite this recommendation, Dr. Agrawal explained to the claimant that surgery for back pain alone would provide only "marginal success".

24. On March 9, 2022, Dr. Reiss reviewed the request for surgery as recommended by Dr. Agrawal. In that report, Dr. Reiss opined that the recommended surgery was not likely to decrease the claimant's pain symptoms nor improve his function. Dr. Reiss noted that the Colorado Medical Treatment Guidelines (MTG) address lumbar fusions of one to two levels, but do not address a three-level fusion. Dr. Reiss further noted that the claimant has axial low back pain with extensive degenerative changes without instability. Dr. Reiss further opined that the claimant should not undergo any additional invasive procedures to treat his low back pain.

25. On April 21, 2022, Dr. Stagg recommended that the claimant undergo a functional capacity evaluation (FCE) to determine whether the claimant has permanent work restrictions.

26. On June 6, 2022, the claimant participated in an FCE that was administered by Marty Haraway, OTR. In Therapist Haraway's FCE report, the claimant's physical tolerances were identified as sitting and standing up to 20 minutes at a time; walking up to 15 minutes at a time; lift 15 pounds occasionally to shoulder level; carry up to 10 pounds occasionally for short distances; occasionally push and pull up to 15 pounds of force; climb stairs with railing; reach close with no limit; extended reach occasionally (but not repetitively). Therapist Haraway also noted that the claimant could not safely bend, squat, crouch, kneel, crawl, climb, or perform repetitive tasks.

27. Dr. Reiss provided testimony that was consistent with his written reports. Dr. Reiss reiterated his opinion that the three-level spinal fusion recommended by Dr. Agrawal is not medically reasonable or necessary. Dr. Reiss noted that the claimant has multilevel degenerative changes without instability. Therefore, the recommended surgery is not likely to be helpful. Dr. Reiss also testified regarding his recommendation that the claimant undergo a core strengthening program. Such a program would help the claimant strengthen all of the muscles around his spine, which may help his back pain symptoms. Dr. Reiss testified that such a program requires exercising multiple days per week over many weeks. It is Dr. Reiss' opinion that the claimant has not participated in such a program. Dr. Reiss testified that the claimant has undergone passive modalities rather than core strengthening. Dr. Reiss further testified that the surgery is not recommended pursuant to the MTG because this would be a fusion of three levels and the claimant's pain generators have not been identified.

28. The claimant testified that his current symptoms included a dull ache in his back and legs, numbness in his left leg and foot, and a sharp, shooting pain in his right thigh. The claimant also testified that his left leg symptoms are worse than those on the right. The claimant further testified that his RA symptoms are different from those he has experienced since August 10, 2020. Specifically, the claimant's RA symptoms are not in his legs. In addition, his RA symptoms typically resolve within a few days.

29. The claimant also testified that he has engaged in core strengthening exercises in formal physical therapy and in a home exercise program. The claimant testified that core strengthening has not improved his symptoms.

30. The ALJ takes administrative notice of WCRP 17 and notes that Section 8.b.iii. of the Low Back Pain MTG addresses spinal fusion. Recommendation 152 identifies the requirements of proceeding with spinal fusion Those requirements include: all pain generators are adequately defined and treated; all physical medicine and manual therapy interventions are completed; imaging studies demonstrate spinal stenosis with instability or disc pathology, requiring decompression; spine pathology is limited to 2 levels; and a psychological evaluation. Recommendation 153 identifies diagnostic indications for pursuing a fusion. That list includes: neural arch defect with associated stenosis or instability; spondylolytic spondylolisthesis; degenerative spondylolisthesis (four mm or greater); surgically induced segmental instability; symptomatic spinal stenosis in the presence of spondylolisthesis (greater than two mm); or primary mechanical low back pain/functional spinal unit failure (with objective

evidence of two or more of the following: internal disc disruption, painful motion segment, disc resorption, facet syndrome, and/or ligamentous tear.)

31. The ALJ credits the medical records and the opinions of Dr. Reiss and finds that the claimant has failed to demonstrate that it is more likely than not that the surgery recommended by Dr. Agrawal constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ notes that in this instance the claimant's pain generator has not been identified and the recommended procedure is for a three level fusion. Both of these factors are specifically identified in the MTG with regard to lumbar fusion. The ALJ further notes that despite recommending the surgery, Dr. Agrawal has informed the claimant that such surgeries have marginal success rates. In addition, Dr. Shorten opined that the claimant's myofascial back pain would not benefit from surgery.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent*

Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

6. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." W.C.R.P. 17-1(A). W.C.R.P. 17-5(C) provides: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

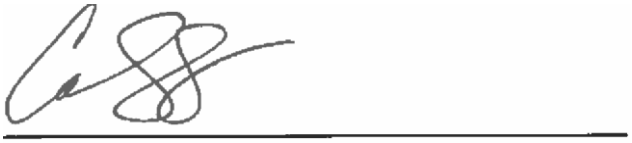
7. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the Medical Treatment Guidelines are not definitive. *Jones v. T.T.C. Illinois,* Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *Burchard v. Preferred Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTO); *see also Stamey v. C2 Utility Contractors et al,* W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

8. As found, the claimant has failed to demonstrate by a preponderance of the evidence, that the L3-S1 anterior interbody fusion, as recommended by Dr. Agrawal, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 10, 2020 work injury. As found, the medical records and the opinions of Dr. Reiss are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for L3-S1 anterior interbody fusion, (as recommended by Dr. Agrawal}, is denied and dismissed.

Dated August 10, 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A} and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-833-001

ISSUES

- Whether Respondents proved by a preponderance of the evidence that Claimant performed casual farm or ranch labor pursuant to §8-40-302(3) C.R.S.

- Whether Respondents proved by a preponderance of the evidence that Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S.

- Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury arising out of and in the course of employment for Respondent-Employer.

- Whether Claimant proved by a preponderance of the evidence the medical treatment he received was reasonable, necessary and related.

- Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits.

- Determination of Claimant's average weekly wage "AWW."

FINDINGS OF FACT

1. Owner is the sole proprietor of Respondent-Employer. Respondent-Employer operates leased stables at a location in Colorado Springs, Colorado (the "Stables"). Respondent-Employer is in the business of boarding, training and grooming horses, as well as showing horses at horse shows. Respondent-Employer also provides riding lessons at the Stables.

2. Owner testified that she was subject to a prior workers' compensation audit in which she was advised that the individuals working as stable hands at the Stables were considered employees.

3. Some of Respondent-Employer's clients compete in horse shows across the country. Owner's children also occasionally compete in horse shows with their own horses. Owner has no involvement in the organization of these horse shows and has no financial interest in the entities that host the horse shows. Each horse owner who participates in a horse show pays the costs associated with the horse show.

4. If a horse is stabled at Respondent-Employer's stables, either Owner or a commercial hauler will transport the horse to the horse show location where it is then stabled during the competition.

5. When her children and/or client's horses participate in horse shows, Owner arranges for grooms to be present at the horse show. A groom is responsible for physically taking care of the horses and setting up stalls. Grooms typically travel year-round to different horse shows and provide services for numerous horse owners and stables across the country.

6. To arrange grooms for horse shows, Owner typically contacts JL[Redacted], who either provides such services himself or assists Owner in finding a groom.

7. Owner contacted JL[Redacted] to arrange for grooms for her children's and clients' horses participating in the Summer in the Rockies Horse Show in Parker, Colorado on June 16-20, June 23-27 and July 7-11, 2021.

8. JL[Redacted] was injured at the time and unable to provide his services. As such, he contacted and arranged for another groom, Claimant, to provide groom services for Respondent-Employer. At the time JL[Redacted] contacted Claimant, Claimant was already working at the Summer in the Rockies Horse Show for other horse owners and stables. Respondent-Employer and Claimant did not sign any written document regarding the work arrangement.

9. Claimant has approximately 20 years of experience working as a groom. Respondent-Employer did not provide any training to Claimant nor instruct Claimant how to perform the grooming services. Respondent-Employer did not establish any specific quality standard for Claimant or dictate the time of his performance, other than providing Claimant the schedule for the horse shows. Respondent-Employer did not supervise Claimant's work.

10. Owner agreed to pay JL[Redacted] $70/horse per day and $200 for setup. JL[Redacted] informed Claimant of the pay and JL[Redacted] and Claimant agreed to split the money. Claimant was not given any employee or work benefits.

11. Regarding tools and equipment, Claimant testified that "they" provided equipment such as scissors, a hammer, a stapler, a shovel, a pitchfork, and cleaning materials. Claimant did not identify who "they" was, indicating that the equipment was already present at the horse show. He testified that he was also given a banner with Respondent-Employer's name to hang in the stable. Owner testified that the tools and equipment used by grooms come from a variety of sources, including the groom, individual horse owners, and stables at the show. JL[Redacted] testified he sometimes takes his own tools to the horse shows, but that each stable also brings tools to use.

12. Claimant first provided grooming services for Respondent-Employer at the horse show on June 14 and 15, 2021.

13. Claimant was performing grooming services for Respondent-Employer on June 16, 2021 when the horse of one of Respondent-Employer's clients kicked him in the face,

rendering Claimant unconscious. Claimant woke up in an ambulance. He sustained injuries to his face, teeth, and neck. Claimant received medical care at the emergency room, Centura Health, Comfort Dental and Altitude Oral and Facial Surgery. Claimant was unable to return to work for five days because his medication made him dizzy and he felt that it was unsafe to be around animals in such condition.

14. Claimant returned to work for Respondent-Employer on June 23, 2021.

15. Respondent-Employer issued a check to Claimant (first made out to "cash" then made out to Claimant's name for a total of $2,640 which consisted of (1) $140 for grooming services for Owner's children's horses; (2) $700 for grooming services for clients' horses; (3) $200 for set up and tear down; (4) $600 from Owner for Claimant's injury; and (5) $1,000 from a client as a tip. Owner testified that she paid Claimant the extra $600 because she felt bad that he was injured. Claimant did not split any of the first payment with JL[Redacted] per an agreement with JL[Redacted]. The first check was for services provided June 16-20, 2021.

16. Respondent-Employer issued a second check in JL[Redacted] name in the amount of $940 for grooming services for Owner's children's horses. JL[Redacted] split this amount with Claimant. The second check was for services provided June 23-27, 2021.

17. Respondent-Employer issued a third check in Claimant's name in the amount of $1,260, representing: (1) $1,050 for grooming services for Owner's children's horses; (2) $210 for grooming services for a client's horse. Claimant split this money with JL[Redacted]. The third check was for services provided July 7-11, 2021.

18. Based on the above findings, Respondent-Employer paid Claimant at least $2,140 in wages in 2021 ($1,040 in wages from the first check, which Claimant did not split with JL[Redacted], plus $470 for Claimant's half of the second check, plus $630 for Claimant's half of the third check).

19. JL[Redacted] estimates that Respondent-Employer paid him between $1,000 to $2,000 in 2021.

20. Typically, Respondent-Employer's clients pay grooms directly; however, for some of the Summer in the Rockies horse shows, Owner paid JL[Redacted] and Claimant on behalf of her clients and then invoiced the clients for reimbursement. Owner testified that she did this because Claimant was injured two days into the show so she and her assistant, SW[Redacted], had to provide grooming services for the remainder of the first dates. Rather than asking everyone to write multiple checks to Claimant, JL[Redacted], herself, and SW[Redacted], Owner attempted to simplify the situation by paying Claimant and JL[Redacted] on behalf of all clients and then seeking reimbursement.

21. Respondent-Employer's clients paid Claimant and JL[Redacted] directly for grooming services provided at the horse show July 7-11, 2021, with the exception of one

client, for whom Owner paid on her behalf and then sought reimbursement. All of Respondent-Employer's clients reimbursed Owner for her advancement of groom fees.

22. Owner also paid for Claimant's dental services resulting from the injury in the amount of $197 (Comfort Dental) and $697 (Altitude Oral and Facial Implant Center). Owner testified she paid these medical costs because she felt bad for Claimant due to his injury.

23. Claimant did not provide services for Respondent-Employer after the Summer in the Rockies horse show. Claimant completed his work as agreed at the Summer in the Rockies horse show then travelled to Virginia to work as a groom at other horse shows for other owners and stables. Claimant never provided services for Respondent-Employer at the Stables.

24. Respondent failed to prove by a preponderance of the evidence the casual farm or ranch labor under §8-40-302(3) applies.

25. Respondent proved by a preponderance of the evidence Claimant was an independent contractor and not an employee.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Casual Farm or Ranch Labor

Section 8-40-302(3), C.R.S. provides that the Act is

> [n]ot intended to apply to employers of casual farm and ranch labor or employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year, and if the amounts expended for wages by the employer of casual farm and ranch labor do not exceed the sum of two thousand dollars for any calendar year.

Section 8-40-302(3), C.R.S. creates a statutory exception to the general rule providing workers' compensation coverage to persons performing services under a contract of hire. *Butland v. Industrial Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988) (statute exempts casual laborers from coverage only if, among other things, the duties they perform are not within the course of the trade, business or profession of the employer). Because §8-40-302(3) establishes an exception or defense to the general rule that injuries to an "employee" are compensable the employer bears the burden of proof to establish the factual predicates for application of the statue. *See Cowin and Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Here, Respondent-Employer failed to prove the exception under §8-40-302(3), C.R.S applies. Owner testified that she was previously subject to a workers' compensation audit and had been informed that the stable hands working at the Stables are employees. Thus, Respondent-Employer does have other employees. Additionally, such employments are within the course of Respondent-Employer's business, which

includes boarding, training, and grooming horses, as well as showing horses at horse shows.

Lastly, Respondent-Employer paid Claimant at least $2,140 in wages in 2021. Claimant argues that Respondent-Employer paid Claimant a total of $1,135 in wages in 2021 for the care of her children's horses. Although Respondent-Employer invoiced her clients for Claimant's grooming services and received payment from the clients, Respondent-Employer directly paid Claimant on behalf of the clients in some circumstances. Such payments were wages paid to Claimant by Respondent-Employer. Additionally, Respondent-Employer paid JL[Redacted] approximately $1,000 to $2,000 in 2021. Considering the amount of wages paid to Claimant, JL[Redacted], and any other potential groomers who performed similar grooming services for Respondent-Employer in 2021, Respondent-Employer paid more than $2,000 in wages for such labor. Accordingly, Respondent-Employer failed to prove that it is more probable than not that the casual farm and ranch labor exception applies in Claimant's case.

Independent Contractor

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Independence may be demonstrated through a written document. §8-40-202(2)(b)(I), C.R.S.

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006).

The determination regarding whether a worker is an independent contractor or employee requires analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014). In *Softrock*, the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. *Softrock Geological Services,* 325 P.3d 565. The statutory requirement that the

worker must be “customarily engaged” in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the “vagaries of involuntary unemployment.” *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

If the evidence establishes that the claimant was performing services for pay, and there is no written document establishing the claimant’s independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office of Colo.,* 981 P.2d 210 (Colo. App. 1998)

No written document was offered as evidence establishing a rebuttable presumption of an independent contractor relationship between Claimant and Respondent-Employer. Therefore, it is Respondent-Employer’s burden of proof to establish that Claimant was both free from direction and control in the performance of services and customarily engaged in an independent business related to the service performed.

Although Respondent-Employer provided some tools and equipment and paid Claimant in his personal name, the remaining factors under §8-40-202(2)(b)(II), as well consideration of the actual nature of the working relationship, establish that Claimant was free from direction and control in the performance of his services. Respondent-Employer did not require Claimant to work exclusively for Respondent-Employer. It is undisputed Claimant worked for various horse owners and stables across the country. In fact, Claimant was providing grooming services for others at the Summer in the Rockies horse show when he was then engaged to also provide services for Respondent-Employer. Respondent-Employer did not provide any training to Claimant. Claimant has more than 20 years of experience as a groomer and was providing services in line with such experience. Respondent-Employer did not instruct Claimant as to how to perform such services or oversee his work. Respondent-Employer did not establish a quality standard for Claimant. As an experienced groomer, Claimant was apprised of the general grooming standards and there is no evidence Respondent-Employer established specific quality standards for Claimant. Other than establishing mutually agreeable work hours based on the schedule of the horse show, Respondent-Employer did not dictate Claimant’s time of performance.

Additionally, Respondent-Employer did not pay Claimant a salary or hourly rate. Claimant was paid based on a contract rate of $70.00/horse and $200.00 per setup, as determined by Respondent-Employer and JL[Redacted]. JL[Redacted] and Claimant then agreed between themselves to divide the payments. Respondent-Employer did not terminate Claimant’s services during the time period upon which they agreed Claimant would provide work and there is no evidence Respondent-Employer combined its business operations with those of Claimant.

Regarding whether Claimant was customarily engaged in an independent business or trade, there is no evidence Claimant had a business or trade name, a business listing, employed others, or carried liability insurance. Nonetheless, the preponderant evidence establishes that Claimant was engaged in an independent trade. As credibly testified to by Claimant, JL[Redacted], and Owner, the nature of the work Claimant performed for Respondent-Employer involves providing grooming services at horse shows for specified periods of time. Typically the grooms travel to various horse shows across the country providing services to various owners and stables. As discussed, Claimant has 20 years prior experience working as a groom and travelling to different horse shows providing services for different stables and owners. Claimant was working at the Summer in the Rockies horse show as a groomer for others prior to being engaged to perform grooming services for Respondent-Employer. Upon completion of the agreed upon time period for providing services, Claimant travelled to Virginia to work for others at a different horse show. The nature of Claimant's work arrangement with Respondent-Employer was different than that of the stable hands that work at Respondent-Employers Stables. Claimant only provided services to Respondent-Employer at the Summer in the Rockies horse show and did not perform any services at the Stables nor at any other horse shows for Respondent-Employer. The evidence does not indicate there was any intent on behalf of either party to establish an arrangement that differed from the standard set-up for grooms at horse shows or to otherwise enter into an employer/employee relationship.

Furthermore, the evidence does not establish that Claimant's income was almost wholly dependent upon continued employment with Respondent-Employer. Respondent-Employer paid Claimant less than $2,000 in wages for his services. Claimant earned wages from multiple other owners and stables from his work at various horse shows, including work from other people separate from Respondent-Employer at the Summer in the Rockies horse show. While Owner paid Claimant additional money related to his injury, the money was not paid pursuant to any sort of employee benefit.

Here, the totality of the circumstances, including analysis of the nine factors in §8-40-202(2)(b)(II), as well as the nature of the working relationship between Claimant and Respondent-Employer, demonstrates that it is more probable than not Claimant was an independent contractor and not an employee.

As Claimant was an independent contractor and not an employee, the remaining issues are moot.

ORDER

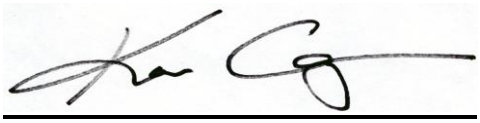
1. Respondent-Employer proved by a preponderance of the evidence Claimant was an independent contractor, not an employee of Respondent-Employer.

2. Claimant's claim for benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-174-315-001

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement recommended by Dr. Mark Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 19, 2021 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer providing home health services to clients. The claimant's job duties included assisting clients with bathing, toileting, dressing, cooking, and medication administration.

2. On May 19, 2021, the claimant was transferring a client out of bed and into a wheelchair when the client slipped. The claimant felt pain in her back and left shoulder. The respondents have admitted liability for the May 19, 2021 injury.

3. The claimant testified that she first received treatment at an urgent care location. Thereafter, she began treatment with Dr. Craig Stagg as her authorized treating physician (ATP).

4. On July 16, 2021, magnetic resonance imaging (MRI) of the claimant's left shoulder showed severe atrophy of the infraspinatus tendon, tendinopathy and mild partial thickness intrasubstance tearing of the distal supraspinatus tendon, moderately severe acromioclavicular {AC) joint arthrosis, and mild glenohumeral degenerative joint disease.

5. Dr. Stagg referred the claimant to Dr. Mark Luker for an orthopedic consultation. On August 17, 2021, the claimant was seen in Dr. Luker's practice by Daryl Haan, PA-C. At that time, the claimant reported sharp pain in her left shoulder, with a constant underlying ache. PA Haan opined that the claimant's work injury caused an acute aggravation of her pre-existing left shoulder condition. PA Haan discussed surgical options with the claimant, including an arthroscopic subacromial decompression, distal clavicle excision, and biceps tenodesis. The claimant expressed a desire to pursue non-surgical treatment. As a result, PA Haan recommended injections.

6. Dr Sheldon Feit, Board Certified Radiologist, reviewed the July 16, 2021 MRI of the claimant's left shoulder. In a report dated August 11, 2021, Dr. Feit opined that the claimant has chronic and longstanding degenerative findings in her shoulder. Dr. Feit further opined that "[w]hile there may have been some kind of aggravation, these findings appear longstanding and not related to the injury of 05/ 19/2021."

7. In a letter dated August 17, 2022, PA Haan explained that the MRI findings were likely acute because of the presence of AC joint edema and fluid in the subdeltoid space.

8. On November 3, 2021, the claimant was seen by Dr. Luker. At that time, Dr. Luker opined that the claimant's symptoms of AC joint pain and arthrosis, subacromial bursitis.and rotator cuff tendinitis were related to the claimant's work injury. Dr. Luker recommended a left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement.

9. In the medical records entered into evidence, Dr. Stagg has repeatedly indicated his agreement with Dr. Luker that surgery is appropriate.

10. At the request of the respondents, Dr. William Ciccone reviewed the claimant's medical records. In a report dated November 11, 2021, Dr. Ciccone opined that the claimant suffered a mild sprain/strain of her left shoulder on May 19, 2021. Dr. Ciccone further opined that the infraspinatus tear is chronic, pre-existing, and unrelated to the claimant's work injury. In support of this opinion, Dr. Ciccone made reference to the marked atrophy of the infraspinatus. Dr. Ciccone also opined that the degenerative changes in the claimant's AC joint are pre-existing and not work-related.

11. The claimant returned to Dr. Luker on March 16, 2022. On that date, Dr. Luker administered an injection into the subacromial space. The claimant testified that injections Dr. Luker administered to her left shoulder helped for a period of time.

12. The claimant testified that she wants to undergo the recommended left shoulder surgery. The claimant testified that her current sy mptoms include constant pain in her left shoulder that increases when she moves her arm away from her body. The claimant further testified that prior to May 19, 2021, she had no issues with her left shoulder. Prior to that time the claimant was able to swim and play violin. Since her injury the claimant is unable to engage in these activities. The claimant is restricted to lifting no more than 20 pounds.

13. The ALJ credits the medical records and the opinions of PA Haan and Dr. Luker over the contrary opinions of Ors. Feit and Ciccone. The ALJ finds the claimant had demonstrated that it is more likely than not that she suffered an acute aggravation of her pre-existing left shoulder condition. That aggravation has resulted in the need for treatment of the claimant's left shoulder. The ALJ also finds that the claimant had demonstrated that it is more likely than not that the claimant's need for left shoulder surgery {as recommended by Dr. Luker) is related to that aggravation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

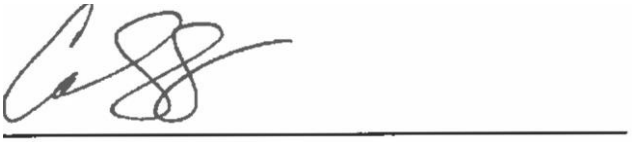
5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement recommended by Dr. Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 19, 2021 work injury. As found, the claimant suffered an acute aggravation of her pre-existing left shoulder condition, resulting in the need for treatment, including the recommended surgery. As found, the medical records and the opinions of PA Haan and Dr. Luker are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the left shoulder surgery recommended by Dr. Luker, pursuant to the Colorado Medical Fee Schedule.

Dated August 11, 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20} days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-972-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer.

2. If Claimant suffered compensable injuries on February 9, 2022, whether he has proven by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits.

FINDINGS OF FACT

1. Claimant is employed as a Senior Sales Consultant for Employer. He has worked for Employer since November 5, 2018.

2. On July 15, 2022 the parties conducted the post-hearing evidentiary deposition of [Redacted, hereinafter NF]. NF[Redacted] is the Senior Manager in Employer's benefits department. She explained that Employer offers all full-time employees benefits including medical, dental, vision, basic life insurance, supplemental life insurance, and long term disability (LTD). As a full-time employee, Claimant is eligible for benefits. NF[Redacted] explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. Employer pays for basic life insurance policies for all employees. Notably, the basic life insurance policy never requires an Evidence of Insurability (EOI) examination. Employer does not receive any benefit, whether financial or otherwise, from the benefits employees receive. There is also no consequence if an employee waives a benefit.

3. NF[Redacted] explained that employees choose benefits through a website portal administered by a third-party entity known as "bswift." For plan year 2022 Claimant selected several voluntary benefits through Employer. He specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability and LTD benefits. Claimant waived several benefits including a Health Savings Account (HSA), Critical Illness Insurance, Hospital Indemnity Insurance and transit and parking.

4. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, benefits provider Prudential Life Insurance Company requested an EOI examination. Employer did not receive the answers to Claimant's medical questions or request the EOI examination. Employer only receives an approval or denial of benefits after the EOI is completed.

5. Claimant testified that he scheduled the EOI examination through third-party vendor APPS Portamedic to take place at his home on a day off from work. APPS is not affiliated with Employer. On January 25, 2022 Claimant contacted Employer's General Manager [Redacted, hereinafter LM] about the EOI examination. LM[Redacted] then contacted Employer's Regional Human Resources Manager [Redacted, hereinafter CG] to determine whether Claimant was required to undergo an EOI examination. CG[Redacted] explained that she then contacted Employer's benefits department and was informed that, if Prudential had requested an EOI examination, then Claimant was required to undergo the examination. CG[Redacted] acknowledged that she does not have experience implementing benefits for Employer, but noted that employees are not required to obtain benefits. Furthermore, CG[Redacted] would not receive any notification from Prudential about the results of Claimant's EOI examination.

6. Claimant commented that on February 3, 2022 he spoke to CG[Redacted] regarding the EOI examination. He disputed having to obtain an EOI examination because he was already receiving benefits through Prudential. CG[Redacted] referred Claimant to [Redacted, hereinafter MM]. MM[Redacted] operated Employer's day-to-day life insurance benefits in partnership with Prudential.

7. Claimant explained that on February 9, 2022 he underwent the EOI examination at his home on his day off from work. Employer did not obtain any of the results of the EOI examination. The results of the examination had no impact or consequence on Claimant's employment. During the process, Claimant had blood drawn from his left elbow. The blood draw caused severe pain in Claimant's left arm. Claimant reported his injury to Employer's Senior Manager of the Operations Department Eddie Colbert. Employer then directed Claimant to Concentra Medical Centers for treatment.

8. On February 14, 2022 Claimant visited Barry M. Nelson, D.O. at Concentra for an examination. Dr. Nelson noted tenderness in the antecubital fossa of the left elbow. The remainder of the physical examination was normal. Dr. Nelson suspected a medial nerve injury or deep hematoma and recommended conservative management. Claimant was discharged at Maximum Medical Improvement (MMI). He subsequently obtained treatment for his elbow injury through his primary care physician and Alpine Neurology. Claimant did not lose time from work except to attend doctors' appointments.

9. On March 18, 2022 MM[Redacted] authored an e-mail to Claimant regarding why an EOI examination had been requested. She explained that supplemental fife Insurance and LTD are optional benefits for employees. The EOI examination is also optional for employees. MM[Redacted] further provided detailed responses to Claimant's questions regarding the EOI examination.

10. The record includes subsequent e-mails between Claimant and MM[Redacted] during late March and early April 2022. MM[Redacted] explained that Claimant's request for benefits had erroneously been denied after the EOI examination, but was later reinstated. NF[Redacted] confirmed that Claimant's request for supplemental life insurance and LTD benefits was initially denied by Prudential. However, because Claimant had previously been insured, Prudential subsequently approved

Claimant's request for benefits. NF[Redacted] noted that the EOI examination through Prudential was thus unnecessary from the outset.

11. Claimant has failed to demonstrate it is more probably true than not that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer. NF[Redacted] credibly explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. For plan year 2022 Claimant specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability, and LTD benefits. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, Prudential requested an EOI examination. The EOI examination required by Prudential was for the sole benefit of Claimant and was devoid of any connection to his work duties as a Senior Sales Consultant for Employer.

12. The record reflects that Claimant's February 9, 2022 elbow injuries during the EOI did not occur in the course and scope of employment. Claimant acknowledged that he scheduled the EOI examination to take place on his day off from work. The examination took place at Claimant's home and not on Employer's premises. Claimant selected the day and time of the examination through third-party vendor APPS. Employer did not require, request, schedule or pay for the EOI examination. Claimant was not at work, not on duty, and not performing his job at the time of the injury. Claimant's injury on February 9, 2022 thus did not occur within the time and place limits of his employment or during an activity that had some connection with his work-related functions. Furthermore, Claimant was not taking a break from work, leaving Employer's premises, collecting pay, or retrieving materials within a reasonable time after termination of a work shift. Claimant was thus not engaging in normal activities incidental to the employment relationship. Therefore, Claimant's February 9, 2022 injuries did not occur within the course and scope of his employment with Employer.

13. The February 9, 2022 incident also did not arise out of Claimant's employment with Employer. Claimant was not performing any of his job functions at the time of the EOI examination. He voluntarily selected supplemental life insurance and LTD benefits that triggered the EOI examination from Prudential. Although the EOI examination was admittedly obtained in error, Prudential initially required the examination based on the nature of the voluntary benefits that Claimant selected. Employer did not require Claimant to obtain benefits. Furthermore, Claimant could have waived the benefits with no consequences to employment. The supplemental life insurance and LTD benefits that Claimant selected were completely voluntary.

14. Because Claimant voluntarily elected to obtain certain benefits, his elbow injuries during the EOI examination did not have its origin in his work-related functions. Specifically, the EOI examination was not sufficiently related to Claimant's job duties to be considered part of his service to employer. Furthermore, obtaining an EOI examination did not constitute a risk that was reasonably incidental to the conditions and circumstances of Claimant's job duties as a Senior Sales Consultant. The EOI

examination was not a common, customary and accepted part of Claimant's employment but was an isolated incident in an attempt to obtain benefits. Therefore, Claimant's February 9, 2022 elbow injuries during the EOI examination did not arise out of his employment with Employer.

15. Claimant has failed to demonstrate that the injuries he suffered during a February 9, 2022 blood draw as part of his EOI examination arose out of the course and scope of his employment with Employer. He voluntarily sought to obtain various benefits with Prudential and underwent an EOI examination through third-party vendor APPS that caused injuries. The EOI examination was not a work-related function and lacked any connection to Claimant's work duties as a Senior Sales Consultant for Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related

functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAO, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *In re Broyles*, W.C. No. 4-510-146 (ICAO, July 16, 2002). As noted in Ventura v. Albertson's, Inc., 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

6. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAO, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715 (Colo. App. 1995).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer. NF[Redacted] credibly explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. For plan year 2022 Claimant specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability, and LTD benefits. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, Prudential requested

an EOI examination. The EOI examination required by Prudential was for the sole benefit of Claimant and was devoid of any connection to his work duties as a Senior Sales Consultant for Employer.

8. As found, the record reflects that Claimant's February 9, 2022 elbow injuries during the EOI did not occur in the course and scope of employment. Claimant acknowledged that he scheduled the EOI examination to take place on his day off from work. The examination took place at Claimant's home and not on Employer's premises. Claimant selected the day and time of the examination through third-party vendor APPS. Employer did not require, request, schedule or pay for the EOI examination. Claimant was not at work, not on duty, and not performing his job at the time of the injury. Claimant's injury on February 9, 2022 thus did not occur within the time and place limits of his employment or during an activity that had some connection with his work-related functions. Furthermore, Claimant was not taking a break from work, leaving Employer's premises, collecting pay, or retrieving materials within a reasonable time after termination of a work shift. Claimant was thus not engaging in normal activities incidental to the employment relationship. Therefore, Claimant's February 9, 2022 injuries did not occur within the course and scope of his employment with Employer.

9. As found, the February 9, 2022 incident also did not arise out of Claimant's employment with Employer. Claimant was not performing any of his job functions at the time of the EOI examination. He voluntarily selected supplemental life insurance and LTD benefits that triggered the EOI examination from Prudential. Although the EOI examination was admittedly obtained in error, Prudential initially required the examination based on the nature of the voluntary benefits that Claimant selected. Employer did not require Claimant to obtain benefits. Furthermore, Claimant could have waived the benefits with no consequences to employment. The supplemental life insurance and LTD benefits that Claimant selected were completely voluntary.

10. As found, because Claimant voluntarily elected to obtain certain benefits, his elbow injuries during the EOI examination did not have its origin in his work-related functions. Specifically, the EOI examination was not sufficiently related to Claimant's job duties to be considered part of his service to employer. Furthermore, obtaining an EOI examination did not constitute a risk that was reasonably incidental to the conditions and circumstances of Claimant's job duties as a Senior Sales Consultant. The EOI examination was not a common, customary and accepted part of Claimant's employment but was an isolated incident in an attempt to obtain benefits. Therefore, Claimant's February 9, 2022 elbow injuries during the EOI examination did not arise out of his employment with Employer.

11. As found, Claimant has failed to demonstrate that the injuries he suffered during a February 9, 2022 blood draw as part of his EOI examination arose out of the course and scope of his employment with Employer. He voluntarily sought to obtain various benefits with Prudential and underwent an EOI examination through third-party vendor APPS that caused injuries. The EOI examination was not a work-related function and lacked any connection to Claimant's work duties as a Senior Sales Consultant for

Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 11, 2022.

DIGITAL SIGNATURE.
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-190-470-001

ISSUES

- Did Claimant prove she suffered a compensable occupational disease caused by her work for Employer?

- If Claimant's injury is compensable, are Respondents liable for treatment Claimant received from Dr. Jeffry Watson and Colorado Springs Orthopedic Group physical therapy?

FINDINGS OF FACT

1. Claimant worked as a packer in Employer's fulfillment warehouse. The job involved pulling totes filled with small items from a conveyor belt, pulling the items from the totes, and placing them into bags for shipping. The incoming conveyor belt was to Claimant's left, so she primarily used her left arm to reach for the items. At hearing, she demonstrated extending her arm at the elbow to reach out and then flexing her elbow to place the items in front of her body. She performed this motion with her left arm several hundred times per hour. Claimant worked 10-hour shifts.

2. Claimant started working for Employer on August 4, 2021. In October 2021, the volume of product increased because of the approaching holiday season.

3. Claimant developed pain in her left elbow and arm on October 26, 2021. She was working in the "smalls" section, which involves packing small items into bags for shipping. She notified her supervisor but finished her shift. The pain returned the next day at the start of her shift, and she sought treatment from the on-site wellness center. Claimant applied heat and ice over the next several days without significant benefit.

4. Employer referred Claimant to Dr. Erik Ritch at Colorado Occupational Medicine Partners. At her initial appointment on November 11, 2021, Claimant described difficulty grasping, lifting, or carrying objects with her left hand because of severe pain in her left elbow radiating to the left shoulder and neck. She was also having compensatory right shoulder pain from favoring her left arm. She had no prior history of left upper extremity problems. Physical examination showed moderate tenderness to palpation over the left medial and lateral epicondyles and significant elbow pain with flexion, extension, pronation, and supination. She was also mildly tender in the upper left arm, shoulder, left trapezius, and cervical paraspinals. Dr. Ritch diagnosed acute lateral and medial epicondylitis with muscle spasms, and mild shoulder and neck strains. He opined, "These injuries were sustained within the normal course of her employment and should be considered work related." He prescribed muscle relaxers and referred Claimant to physical therapy. He also imposed work restrictions of no lifting over 10 pounds and no more than two hours of repetitive grasping with the left hand.

5. Claimant followed up with Dr. Ritch on December 1, 2021. She had improved significantly with therapy and work limitations, and estimated she was "about 90% better." She still had some left arm pain, mostly in the left extensors and around the lateral epicondyle. Physical examination showed full range of motion and good grip strength, although she had still had pain with gripping, resisted pronation, and resisted supination. Dr. Ritch stated, "The patient is showing some degree of improvement. Unfortunately, given the [way] that her job works, we will have to keep her on modified duty for a bit longer. She needs further work with physical therapy before we can safely have her return to large amount of lifting and carrying. Returning her to work too quickly has a potential to take an acute injury and turn it into a long-term/chronic condition."

6. Claimant next saw Dr. Ritch on December 15, 2021. Her left arm was "essentially 100% better." She had resumed normal daily activities and felt ready to return to full duty at work. Physical examination showed full elbow range of motion, no tenderness of the lateral epicondyle, normal grip strength, and no pain with resisted supination or pronation. Dr. Ritch released Claimant to full duty and asked her to follow up in three weeks.

7. Claimant returned to regular work and quickly experienced a recurrence of left arm and elbow pain.

8. Claimant next saw Dr. Ritch on January 14, 2022. She reported severe lateral forearm and elbow pain, "made worse by any using of the left hand." The examination findings were significantly worse than at the previous visit, particularly around the left lateral epicondyle. Grip strength was "very markedly reduced." Claimant had recently learned that Insurer had "closed her case." Dr. Ritch opined, "The functions of the patient's job are clearly in line with Rule 17 guidelines for a work-related medial and/or lateral epicondylitis. As such this is a work-related injury and I do not understand why insurance has closed the patient's case without consulting our office." Dr. Ritch reinstated work restrictions with "no use of the left arm." He gave Claimant a prescription for Voltaren gel, referred her for additional PT, and asked her to follow up in 2 weeks.

9. Claimant did not return to Dr. Ritch, but instead sought treatment on her own outside the workers' compensation system. On February 9, 2022, she saw Dr. Jeffry Watson at Colorado Springs Orthopedic Group ("CSOG"). Dr. Watson stated her examination findings were "certainly consistent with lateral epicondylitis with localized tenderness over the common extensor origin, stabbing pain at that level with resisted wrist extension." Claimant was frustrated about her lack of progress. Dr. Watson gave Claimant a steroid injection, which was not helpful. He also referred Claimant to PT, which was performed in-house at CSOG.

10. According to a Job Description and Physical Demands Summary provided by Employer, Claimant's work required "constant"[1] reaching and grasping. Pinch grip and

[1] The term "constant" is defined as 67%-100% of a shift.

simple grasping (< 15 pounds) were performed 7.5 to 10 hours per shift. Forceful grasp (>15 pounds) was performed from 0 to 2.5 hours per shift.

11. Dr. John Burris performed an IME for Respondents on April 19, 2022. He agreed with the diagnoses of lateral and medial epicondylitis but opined the conditions were not work-related. Dr. Burris primarily relied on the Cumulative Trauma Disorder ("CTD") MTGs to support his opinion. He opined Claimant's work did not expose her to any primary or secondary risk factors considered causative under the MTGs. He testified high repetition alone is insufficient under the MTGs to cause medial or lateral epicondylitis. Instead, he opined there must be a combination of repetition and forceful gripping or awkward postures to establish causation. He also noted Claimant had only worked for Employer approximately three months before the onset of symptoms, which is atypical for work-related cumulative trauma disorders. Finally, Dr. Burris pointed to non-occupational risk factors such as weightlifting, cycling, and boxing that involved forceful grasping and awkward wrist postures.

12. Claimant has been a fitness instructor most of her adult life. She continued working out regularly while working for Employer. Claimant had no problems with her left arm or elbow before October 2021 despite her regular participation in fitness activities.

13. Claimant was a credible witness.

14. Dr. Ritch's conclusion that Claimant suffered a work-related CTD to her left arm is more persuasive than the contrary opinions offered by Dr. Burris.

15. Claimant proved she suffered a compensable occupational disease involving her left arm.

16. Claimant failed to prove treatment she received from Dr. Watson and CSOG physical therapy was authorized. There is no persuasive evidence that Dr. Ritch referred Claimant to Dr. Watson or refused to treat Claimant for non-medical reasons. Therefore, Claimant did not have the right to select her own physicians.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant

must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved she suffered a compensable occupational diseases involving her left arm proximately caused by her work. The following factors are the most persuasive:

- Claimant had no left elbow or arm issues before starting work for Employer.
- The work was highly repetitious, particularly with respect to left elbow flexion and extension.
- Claimant worked 10-hour shifts, which further concentrated her exposure to the injurious movements.
- The onset of symptoms occurred during repetitive work activities.
- Claimant perceived that the symptoms were directly associated with her work activity. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular stimuli.

- Claimant's symptoms improved dramatically after she was put on work restrictions and stopped performing the repetitive activity.
- Claimant's symptoms quickly recurred when she resumed regular work activities.
- Claimant has no problems with her right arm. Her symptoms are confined to the arm she flexed and extended thousands of times per day.
- Claimant's ATP opined the condition is work-related.

Admittedly, Dr. Ritch's opinion that Claimant "clearly" meets the causation standards in the CTD MTGs is inaccurate. But his initial causation assessment was primarily based on his personal expertise and evaluation of Claimant. The MTGs are primarily intended to facilitate quick determinations by insurers regarding requests for pre-authorization. They are not binding rules, and not intended to supplant a case-by-case evaluation of individual circumstances. *See* § 8-43-201(3). Moreover, the CTD MTGs recognize that "most studies were *unable to truly assess repetition alone*. Indirect evidence . . . supports the conclusion that task repetition *up to 6 hours per day* unaccompanied by other risk factors is not causally associated with cumulative trauma conditions." (Emphasis added). Despite conceding the limits of medical literature, the MTG causation matrix purports to establish firm guidelines for the duration of activity that can be considered causative. Such certainty does not appear warranted given the underlying data on which the MTGs are based. This consideration is particularly salient here, because Claimant's job required *substantially more than 6 hours per day* of repetitive flexion and extension of her elbow. Under the circumstances, slavish adherence to the MTGs is misplaced.

There is no credible evidence that Claimant was equally exposed to the injurious activity outside of work. Dr. Burris' argument that Claimant's epicondylitis may be related to physical fitness activities is unpersuasive. Claimant has been involved in fitness training for years, but had no problems with her upper extremities until she started working a highly repetitive job with 10-hour shifts.

B. Authorization of medical treatment

The respondents must cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of a compensable injury or occupational disease. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial*

Claim Appeals Office, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

The mere fact that respondents deny a claim does not automatically entitle the claimant to select their own physicians. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Unless the ATP refuses treat based on lack of authorization, or advises the claimant to follow up with their personal providers, the respondents are not liable for treatment the claimant pursues outside the chain of referral. *E.g.*, *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

As found, Claimant failed to prove the treatment she received from Dr. Watson and CSOG physical therapy was authorized. There is no persuasive evidence that Dr. Ritch referred Claimant to Dr. Watson or refused to treat for non-medical reasons. In fact, Dr. Ritch made additional referrals and scheduled a follow-up appointment on January 14, 2022, despite learning Insurer had "closed" the claim. Accordingly, Respondents are not liable for the treatment notwithstanding that it was otherwise reasonably necessary and causally related.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable occupational disease.

3. Claimant's request for medical benefits related to treatment she received from Dr. Watson and Colorado Springs Orthopedic Group physical therapy is denied and dismissed.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 12, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-182-968-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that he is entitled to temporary indemnity (wage replacement) benefits?

2. Did Claimant prove by a preponderance of the evidence that Respondents are responsible for paying a medical bill from Next Care Urgent Care?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 28-year old man who worked as a carpenter for Employer. Claimant was hired by Employer on or around September 14, 2020. (Ex. C).

2. Claimant sustained an admitted work-related injury on July 7, 2021. Claimant was diagnosed with a right wrist and forearm strain. (Ex. B).

3. John Raschbacher, M.D., Claimant's authorized treating physician (ATP), evaluated Claimant on November 11, 2021. Dr. Raschbacher noted that Claimant had an MRI that was negative for any findings. He opined that Claimant did not need any further restrictions on physical activity, and gave Claimant a full-duty release. (Ex. B).

4. On December 13, 2021, Dr. Raschbacher placed Claimant at Maximum Medical Improvement (MMI). Claimant had no restrictions, no impairment rating, and no need for further treatment. (Ex. A).

5. Respondents filed a Final Admission of Liability (FAL) on December 29, 2021. According to the FAL this was a "[m]ed only claim with no lost time." Respondents paid $3,401.41 for medical expenses. (Ex. A).

6. Claimant signed his acknowledgment of Employer's Absenteeism Policy on September 14, 2020. The Policy specifically provides "[e]xcessive absenteeism, unexcused absence, continual lateness, early quits, failures to call or falsifying your reasons for being absent or late will result in disciplinary action, up to and including termination." (Ex. C).

7. Claimant regularly texted his direct supervisor, [Redacted, hereinafter AC]. Between March 5, 2021 and May 19, 2021, there are multiple texts from Claimant telling AC[Redacted] that he was either going to be late to work, or was not able to come in that day. (Ex. D). On June 26, 2021, Claimant was a no-call/no-show, so AC[Redacted] wrote him up. (Ex. C).

8. Claimant testified that he was admitted for mental health treatment from August 21, 2021 to September 21, 2021. There was no evidence presented, however, that this treatment related to Claimant's industrial injury.

9. The ALJ finds that Claimant's mental health treatment was not related to his industrial injury.

10. [Redacted, hereinafter JF], the Project Supervisor, testified that Employer was aware that Claimant was inpatient, and he was expecting Claimant to return to work after his discharge. JF[Redacted] testified that Claimant never contacted Employer nor did he return to work following his release from treatment.

11. JF[Redacted] testified that their work is crew based, and if they are missing a crew member production goes down. Employer terminated Claimant on September 24, 2021 for excessive absenteeism. (Ex. C).

12. The ALJ finds that Claimant was responsible for his termination due to his history of excessive absenteeism.

13. Claimant obtained part-time employment at HRB[Redacted] following his termination. Claimant testified that he earned $17.00 per hour at this job. Claimant further testified that he lost wages because he missed time (17 ½ hours) to attend medical appointments related to his work injury. Claimant is seeking $297.50 in lost wages.

14. Claimant testified that he missed time on the following days: November 11, November 22, November 30, December 2, December 9, December 13, and December 16, 2021.

15. The ALJ finds that Claimant was released to full-duty work on November 11, 2021, so any potential temporary disability benefits terminated on November 11, 2021. The ALJ finds that Claimant is not entitled to any indemnity benefits to compensate Claimant for lost wages.

16. Claimant's Exhibit 1 was admitted into evidence. Exhibit 1 is a February 16, 2022 invoice from Next Care Urgent Care in the amount of $274.13. The invoice was addressed and sent to Claimant. The ALJ infers that Claimant is seeking payment of this invoice.

17. [Redacted, hereinafter KJ] is a claims adjuster with Insurer. KJ[Redacted] testified that she has attempted to contact the provider to verify that the invoice was for care related to Claimant's work-injury. KJ[Redacted] also testified that she requested Claimant contact the provider and have the records and itemized charges sent to Insurer to determine if the medical care could be reimbursed.

18. No evidence was presented to demonstrate that the February 16, 2022 invoice from Next Care Urgent Care is reasonable, necessary and related to Claimant's work-related injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Disability Indemnity Payable as Wages

Claimant is seeking disability indemnity payable as wages for the time he was not working because he was attending doctor appointments. *See* §§ 8-42-103 and 8-42-105, C.R.S. To qualify for Temporary Total Disability (TTD) benefits under § 8-42-105 C.R.S., a claimant must establish three conditions: (1) the industrial injury caused the disability; (2) the injured employee left work as a result of the injury; and (3) the temporary disability is total and lasts for more than three working days. *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo.1995). Once a claimant establishes that the industrial injury is causing a temporary wage loss, that claimant is entitled to receive TTD benefits until: (1) the claimant reaches MMI; (2) the treating physician releases the claimant to return to regular employment; (3) the claimant actually returns to regular or modified employment; or (4) the treating physician authorizes a return to modified employment, the employer offers

such employment to the claimant, but the claimant fails to begin that employment. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637, 639 (Colo. App. 1997).

Here, Claimant is seeking reimbursement for the time he missed work to attend medical appointments. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." § 8-42-103(1)(g), C.R.S. As found, Claimant was responsible for the termination of his employment, and thus is not entitled to reimbursement of any lost wages after his termination on September 24, 2021.

Similarly, even though Claimant did not present evidence to prove an entitlement to TTD benefits, any TTD benefits ceased at the point Claimant was released to full-duty work on November 11, 2021. § 8-42-105(3)(c), C.R.S. All of the dates Claimant alleged to have not been able to work due to doctors' appointments occurred on or after Claimant was released to full-duty work on November 11, 2021. Accordingly, Claimant failed to prove by a preponderance of the evidence that he is entitled to any wage loss benefits.

As found, the ALJ infers that Claimant is seeking reimbursement of the February 16, 2022 invoice from Next Care Urgent Care. There was no evidence presented, however, to demonstrate that this care was reasonable, necessary and related to Claimant's work-related injury.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to wage benefits for lost time, and this claim is dismissed.

2. Claimant failed to present evidence that the February 16, 2022 medical bill from Next Care Urgent Care is reasonable, necessary and related to his work-related injury. This claim is dismissed without prejudice.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 12, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant was injured in the course and scope of his employment.

II. If Claimant has shown he has a compensable claim, whether Employer A and/or Employer B was Claimant's employer on September 24, 2021.

III. If Claimant has shown he has a compensable claim, the parties stipulated that the medical treatment at Sinergy Health Partners and the associated bill were reasonably necessary and related to the incident of September 24, 2021.

PROCEDURAL HISTORY

Respondents A filed an Application for Hearing on December 2, 2021 on issues that include compensability, medical benefits that are reasonably necessary and related to the injury, average weekly wage, temporary disability, causation, relatedness, preexisting condition, whether Employer A lent employees to Employer B for the Utah project or whether Employer A was contracted by Employer B for the Utah project, whether Employer B is the proper employer. Also listed are the issues of equitable reimbursement of all advanced lost wages and medical benefits paid by Respondents A under the Notice of Contest (NOC), if Employer B is found to be the proper employer, including compensation to the family members providing 24/7 home health care since Claimant returned to Colorado from Utah.

Claimant filed an Application for Hearing on December 22, 2021. The issues include those stated above as well as change of physician to Dr. David Reinhard and the cost of home health care provided by Claimant's family members since Claimant's return to Aurora, Colorado.

Employer B filed a Response to Application on January 25, 2022 with issues that included some of those listed above but also the Employer/Employee relationship, whether Claimant was an independent contractor, credits, offsets, apportionment, causation, indemnification from Employer A pursuant to contract between Employer B and Employer A.

Respondents A submitted multiple Prehearing Conference Orders that need not be listed, issued by PALJs Phillips, Gallivan, and Eley, as well as ALJ Glen Goldman. Specifically, PALJ David Gallivan's order of February 17, 2022 which bifurcated the issues for hearing. PALJ Gallivan stated in his order that the parties were on the verge of an agreement to stipulate to the compensable nature of the injury and the only issue that should be heard at hearing was "who was the employer of injury," therefore, PALJ Gallivan found good cause for the bifurcation.

The parties disclose that Insurer A has been paying for indemnity benefits, attendant care benefits to the family members that are caring for Claimant, who requires 24/7 supervision and care, and medical benefits without admitting liability in this matter. Respondents A argue that there was no prejudice to Claimant to continue to hold the issue of compensability in abeyance until the subsequent hearing. This ALJ finds it otherwise. Compensability is an integral and essential part of the issues that must be addressed before reaching the issue of who is the employer. The identity of the employer is moot unless a determination of compensability is made. Therefore this ALJ determines that the issue of compensability must be heard. The remaining issues shall be heard at the hearing on October 3, 2022 scheduled pursuant to Claimant's Application for Hearing dated June 7, 2022 and Respondents A Response to AFH as well as Respondents B Response to AFH both dated July 7, 2022.

The parties entered into a joint stipulation, which was approved and ordered on July 5, 2022 by ALJ Victoria E. Lovato and stated in pertinent part as follows:

1. Insurer A's policy issued to Employer A will cover any compensable injuries sustained by Claimant if it is determined that Employer A was Claimant's employer on the date of the alleged injury.

2. Employer B and Insurer B have no obligation to prove Insurer A's coverage at hearing.

3. Insurer A's policy will only be utilized for purposes to determine the appropriate employer on the date in question.

4. The parties agreed that if Employer B and Employer A are both found to be employers via a joint or shared employment relationship, the ALJ will determine the parties' share in the liability.

Further, at hearing the parties stipulated that the issue of medical benefits provided by Sinergy Health Partners and Dr. Wallace were reasonably necessary and related to the injury, if the claim was found compensable.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 20 years old at the time of the accident on September 24, 2021 and is currently 21 years of age. Claimant has an 8th grade education in El Salvador. Claimant testified that he lived in Aurora Colorado with his sister (MdeD) and could not speak, understand, read, or write English.

2. Claimant worked as a painter generally earning $20 to $22 per hour. He was hired by Employer A on approximately May 11, 2020 and continued working for Employer A through the date of the accident on September 24, 2021.

3. Employer A was in the business of painting and repair work for both commercial and residential projects. Claimant was trained by JSC (DSC's brother) as well as by DSC himself and Claimant's brother, BSQ. Claimant began earning $24.50 per hour, working full time while on the Utah project. He was paid more for the Utah job because they were out of town and this amount covered his meals.

4. DSC, Employer A's sole owner, stated that they usually worked in Colorado but did occasionally work in other states like Utah and Kansas. Employer B had a Master Agreement with Employer A and Employer B would contact Employer A for multiple jobs, as well as warranty work, throughout Colorado, and in other states.

5. Employer A was subcontracted to repair exterior, preparing it for painting and painting an apartment complex, of 7 buildings, in the Salt Lake City, Utah area in August of 2021 by Employer B. DSC worked alongside Claimant during this project. Claimant was paid from January 2021 through September 16, 2021 by checks directly from Employer A. Claimant did not receive any checks from Employer B.

6. DSC travelled with his brother, JSC, as well as Claimant to Salt Lake City in Employer A's vehicle. JSC drove the vehicle. The three of them stayed at a hotel for the first week or so, which was paid for by Employer B, then Employer B leased a two-bedroom apartment for Employer A, for the workers to stay in while they completed the job in Utah. Claimant's brother, BSQ and another painter (CA) joined them in Salt Lake City a little after the job had begun.

7. On September 24, 2021 they had been working for approximately three weeks when DSC asked Claimant to clear some branches from a tree that were touching the apartment building to be painted. DSC saw Claimant on the ladder that was extended to approximately 16 feet and belonged to Employer A. He then left Claimant to fill the paint machine and was away for a few minutes. He was not present when Claimant fell off the ladder. It was only a minute or two when he returned, finding Claimant on the ground, unconscious but breathing. DSC immediately called 911. Claimant sustained very serious injuries, including a traumatic brain injury.

8. Before the emergency personnel arrived on the scene, they were advised the patient was a 20 year old male that had fallen from a ladder and was unconscious. EMS first responders arrived on the scene of the accident at approximately 1:45 p.m. on September 24, 2021. EMS noted that Claimant was injured from the fall, possibly 20 ft. high, causing blunt trauma, though coworkers did not know exactly how high he was on the ladder. Co-workers had placed a pillow under his head for comfort, but Claimant was unresponsive. Upon assessment, they determined that Claimant had a GCS[1] of 3 and should be immediately stabilized. Claimant was placed in a full body splint and, after detecting an obvious right arm deformity, and unequal pupils following rapid assessment. The paramedics performed a needle decompression due to diminished left side lung sound and unequal chest rise/fall. He was transported to Davis Hospital and Medical Center.

[1] Glasgow coma scale is used to objectively describe the extent of impaired consciousness for eye, verbal and motor responses. A 3 is the lowest possible score of non-responsive to visual, verbal and motor stimuli and often associated with an extremely high mortality rate.

9. Claimant was seen by Neurosurgeon Sara Menacho, M.D. at University of Utah Hospital as a transfer trauma 1 patient on September 25, 2021 at approximately 9 a.m., with a report of falling from a ladder 30 feet to the ground at a construction site. Dr. Menacho noted that Claimant was found to have multiple supratentorial and infratentorial intraparenchymal hemorrhages including in the brainstem compatible with a severe, Grade 3 DAI[2] as well as scattered traumatic subarachnoid hemorrhage and intraventricular hemorrhage. She documented that, upon arriving at the hospital, the patient was noted to be a GCS of 3. Claimant was noted to have a left fixed and dilated pupil and a sluggish right pupil. He had no motor response, no verbal response, eyes closed, no corneal reflex but intact cough and gag reflex. He was taken for a CT scan, where repeat CT head demonstrated interval increase in diffuse intraparenchymal hemorrhages. During the CT scan, Claimant was both bradycardic and hypertensive and they were concerned of impending cerebral herniation. In addition, the providers noted a right distal radius fracture and a trace right pneumothorax. Dr. Menacho noted that Claimant did not open his eyes, make noise or respond to pain. Following x-rays of the forearm Claimant was noted to have acute displaced fractures of the distal radius, ulnar styloid process and scaphoid. X-rays of the right wrist showed comminuted fracture of the distal radius. More detailed x-rays showed a possible triquetral fracture. Dr. Menacho stated that "Unfortunately, this patient has suffered a severe closed head injury and currently is GCS 3T off sedation. As such, there are no plans for placement of an ICP monitor[3] or operative intervention given the likelihood that it would not change the patient's poor prognosis."

10. The Division's Moderate/Severe Traumatic Brain Injury Medical Treatment Guideline, W.C.R.P. Rule 17, Exhibit 2B, CCR 1101-3 addresses a moderate/severe TBI as follow:

> C.1.c Moderate/severe TBI (M/S TBI)
>
> M/S TBI is a traumatically induced physiological and/or anatomic disruption of brain function as manifested by at least one of the following:
>
> - altered state of consciousness or loss of consciousness for greater than 30 minutes,
> - an initial GCS of 12 or less, and/or standardized structural neuro-imaging evidence of trauma, and/or
> - post-traumatic amnesia (PTA) greater than 24 hours.
>
> If the GCS is not available, the closest approximation to the patient's state at 30 minutes post injury should be used.

11. Respondents A filed a First Report of Injury (FROI) on September 28, 2021, noting that Claimant had fallen from a ladder on September 24, 2021, injuring multiple body parts, including a right hand fracture and a concussion while on the job in Layton,[4] Utah. The FROI stated that Employer A's representative, DSC, was notified on the date of the accident and that Claimant had been unable to return to work. It also documented that Claimant's mailing address was in Aurora, Colorado.

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[2] Diffuse axonal injury, a severe traumatic brain injury (TBI) which includes gross focal lesion of the corpus collosum and focal lesion of in the brainstem.

[3] IPC monitor is an intracranial pressure monitor.

[4] Suburb just north of Salt Lake City, Utah.

12. Employer A's Insurer filed a Notice of Contest on October 18, 2021 for further investigation.

13. Claimant was initially evaluated by Bethany Wallace, D.O. at Sinergy Medical Services on December 21, 2021. Dr. Wallace also documented a fall of indeterminate height from a ladder at a construction site in Utah. She noted Claimant was taken to the U of U Hospital. He was noted to have multiple areas of bleeding seen in his brain imaging as well as a fractured right arm and blood in his right chest. He was placed on life support. His family were told his injuries were incompatible with life, but Claimant did improve, surviving the injuries. He was discharged from the U of U on November 23, 2021 to his family's care in Colorado. He requires 24/7 care, which his siblings have been providing, and while he continued to improve, he continued with multiple pain complaints and neurologic deficits. Dr. Wallace made referrals to Craig Hospital, for medications and an ankle brace.

14. Dr. Wallace performed a limited record review which states as follows:

> On 10/01/21, he went to the operating room for a tracheostomy and PEG (feeding tube) placement. He was stable and then transferred to neuro acute care. He started to make progress, and the trach was downsized on 11/06. He was tolerating capping trials and was decannulated on 11/01. He progressed with SLP[5], and PEG[6] was removed on 11/22. He was able to tolerate a regular diet. He made significant improvements in PT and OT. They were able to do family training since he had no funding. The family wished to take him back to Colorado where he has family support. He was given orders for outpatient PT, OT, and SLP (speech and language) therapy. It was recommended that he follow up with primary care in his area, attend therapy as able, and follow up with the University of Utah neurosurgery and orthopedics over telehealth until he can find providers in his area.

15. Dr. Wallace documented the following lists of complaints through Claimant's sister, who acted as an interpreter:

- Neck, upper back, and lower back pain: Moderate and aching.
- Bilateral hip pain, knee pain, ankle pain, and shoulder pain: Aching.
- Bilateral elbow pain: Aching.
- Left wrist and hand pain: Moderate and aching.
- Right wrist and hand pain: Severe. This is where he has the three fractures.
- Dizziness and lightheadedness: Moderate and comes and goes.
- Vision changes: He has blurred vision in his left eye.
- Right leg: His right leg feels numb. This is severe.

Dr. Wallace further noted that Claimant needed to wear protection at night for loss of continence, had numbness of the right calf and leg, a locking right ankle that interfered with walking, a tremor in his head and neck, and blurry vision. She noted that Claimant reported memory loss, difficulty with problem-solving, and getting lost or confused easily, had problems with bathing, showering, and dressing, cannot perform any of complex self-

[5] SLP stands for "speech-language pathologist" who works in health care and diagnoses and treats a wide range of speech, language, cognitive, and swallowing disorders.

[6] Percutaneous gastrostomy tubes for feeding patient that are in a coma or are unable to feed themselves.

care or household duties such as cleaning, financial management, vacuuming, sweeping, mopping, managing his own medications, yard work or play soccer. Claimant reported he had difficulty lifting above his shoulders, climbing stairs, and getting up from lying down, basic communication including with speaking, writing, typing, computer use, and texting.

14. On Exam, Dr. Wallace remarked Claimant had some spasticity with motion, a tremor, hypertonicity to palpation of the muscles in the cervical, thoracic and lumbar areas, mildly decreased range of motion of the shoulders bilaterally, right elbow tenderness to palpation, decreased motion of the right wrist and hand, tenderness in the right ankle, tremor in the head and upper body, his gait was antalgic with difficulty moving the right leg with abnormal reflexes bilaterally. Dr. Wallace diagnosed severe traumatic brain injury (TBI) with diffuse axonal injury and loss of consciousness, fracture of right wrist, resolved hemothorax, neck pain, back pain, bilateral shoulder pain, bilateral hip pain, bilateral ankle injuries, history of tracheostomy and history of gastric feeding tube.

15. Dr. Wallace made a causation analysis and determined that, within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries listed. Dr. Wallace recommended a multidisciplinary team approach for recovery from the severe traumatic brain injuries. She recommended University of Colorado or Craig Hospital. She stated Claimant required ongoing neurology and neurosurgery consults, physical therapy, occupational therapy, speech therapy, orthopedic consultation for the right hand wrist fractures. She also recommended care for his lower extremity mobility and coordination, visual distortions related to an eye injury or the brain injury, CT of the spine, MRIs of the cervical and lumbar spine, and acupuncture.

16. Claimant returned to see Dr. Wallace on January 11, 2022. At this time, Claimant was not complaining of pain, and she cancelled the referrals for the MRIs of the cervical and lumbar spine, despite ongoing spasticity. She again emphasized that the best course of care for Claimant was a multidisciplinary program to address Claimant's ongoing TBI sequelae, including neurologic evaluations due to ongoing tremors.

17. Craig Hospital documented multiple injuries. On March 9, 2022 the medical providers documented a fall from a ladder from 15 to 30 feet while working. They noted a brain stem injury, significant cognitive impairments, hemorrhage to the right posterior midbrain and splenium of the corpus callosum, right cerebellum, dystonic posturing of the left arm, rhythmic torticollis of the cervical spine, and spasticity of the right upper extremity and lower extremities with non-sustained clonus of the right ankle. They noted Claimant continued to have blurred vision in the left eye and oculomotor dysfunction, dysconjugate gaze, diplopia on the left. He was evaluated for problems related to his vision, finding that the corrected vision was still lacking. They recommended he wear a patch over his left eye secondary to difficulties with prism correction for diplopia. They also noted that Claimant would walk short distances with his arm over a family member's shoulders, which was very unsafe. They documented that Claimant had cognitive impairments as shown by agitation, irritation, and was referred for psychological care with Dr. Torres. They noted his difficulty with balance, a right displaced ulnar styloid fracture, problems swallowing, right shoulder injury and right ankle sprains. Claimant continued to treat at Craig Hospital at least through July 2022 for physical therapy.

18. DSC testified that he was interviewed by Insurer A's investigator and tried to be honest about what happened to Claimant when he fell from the ladder, as well as about his sole ownership interest in Employer A. His brother, JSC, is only an employee of the company and not an owner. DSC testified that Employer A is in the business of residential and commercial painting, and he confirmed that Claimant was working for Employer A in the Salt Lake City area the summer of 2021. He confirmed that Claimant had worked many jobs in Colorado for Employer A prior to the Utah job and that Claimant's brother, BSQ, also worked for Employer A. He stated that Claimant was on the Utah project approximately three weeks before the fall from the ladder.

19. DSC stated that Employer A was contracted by Employer B to paint seven buildings in an apartment complex in Utah but that they have had a Master Subcontractor Agreement from Employer B since June, 2016 subcontracting work to Employer A. DSC signed the contract himself. The Master Subcontractor Agreement (MSA) dated June 1, 2016 laid out the terms under which Employer A was to complete any subcontractor work for Employer B. Since DSC did not read English, Employer B had someone explain the Contract in Spanish to the owner of Employer A and then DSC signed the contract. It reflected that Employer B was the general contractor and Employer A a subcontractor. In pertinent part it stated that

> Subcontractor shall indemnify and gold[7] [sic.] harmless General Contractor from all suits, actions or claims of any character, name of description for or on account of:
>
> a. Any injuries or damages received or sustained by any person, persons or property, by or from subcontractor or its employees or its sub- subcontractors or their employees during construction at the premises, or by/in consequence of any neglect in safeguarding the work
>
> …
>
> Subcontractor shall maintain in force at Subcontractor's own cost an insurance policy covering worker's compensation in an amount required by state statute, [sic.] Furthermore insurance policy against all risks of damage of destruction of property or persons resulting from Subcontractor's performance of this contract, …

20. DSC generally was contacted by Employer B and offered different jobs. DSC and Employer A could reject any job offers made. He was the one in charge of obtaining the people to perform the painting jobs. He confirmed that Employer A agreed to perform the work in the Salt Lake City area for Employer B. He recalled reviewing the "Statement of Work – Subs" for the Utah job but not the specific document entered into evidence. He believed they were working under that Statement of Work for the Utah project. The Statement of Work clearly identifies Employer B as the General Contractor and Employer A as the subcontractor. DSC confirmed that he, on behalf of his own company, invoiced the work performed and Employer B would pay Employer A for the work. Then Employer A would p ay the painters, his employees.

[7] This ALJ infers that the correct word is "hold."

21. DSC also stated that he is the one that hired Claimant, as well as the other painters, on behalf of Employer A for the Utah project. He was the one to keep track of the hours each of them worked, writing the hours in a notebook and he calculated what each painter would be paid, including Claimant. He was the one to decide what each worker would be paid per hour, and he wrote and signed the checks to Claimant. He acknowledged that he carried workers compensation insurance, and that the policy was valid and in effect on the date of the injury.

22. DSC noted that the Utah job was not the only project Employer A had performed outside of Colorado, but it was the first one Employer B had contracted with Employer A to perform outside of Colorado, except for a limited warranty project in Kansas. DSC gave Claimant the Employer A credit card to book flights back home (Aurora, Colorado) for the weekends, which Claimant sometimes reimbursed and sometimes not. DSC organized who would be on the team to work in Utah and assigned job tasks at the beginning of the day and at mid-day. They were in Utah approximately four weeks to complete the project and he had four other workers with them.

23. Employer B paid for Employer A to travel from Colorado to Utah, provided all the materials to be used for the project including paint, wood and other materials to make repairs in preparation for painting the buildings, including the caulk, nails, plastic, paper, dumpsters, a storage trailer, even hard hats if needed, though Employer A generally purchased the hard hats. Employer B paid Employer A for the transportation as well as the living arrangements, electricity, and other utilities, the first week or so in a hotel and then an apartment where all five Employer A employees lived for the remainder of the project.

24. DSC would sometimes wear Employer B t-shirts that he obtained when visiting Employer B's offices. DSC also had Employer A t-shirts, which Employer B requested he have. However, he had forgotten his t-shirt in Colorado and did not wear it during the Utah job. Employer B's superintendent would inspect the Utah job to make sure it was being done correctly and, if the superintendent asked DSC to correct something, he would perform the work but normally he just did what the contract between Employer B and Employer A required. Employer B's superintendent was the one to sign off on the job when it was completed at each stage. DSC brought the painting and repair equipment such as brushes, rollers, paint sprayers, ladders, caulking guns and other tools needed to perform the repairs and painting job.

25. DSC stated he worked alongside Claimant on the day of the accident of September 24, 2021. He, JSC and BSQ all three trained Claimant how to use a ladder and paint utilizing all the tools required for the painting projects, including the paint sprayer. DSC would supervise Claimant and would check every day to make sure the work was done well.

26. DSC was the one that found Claimant laying on the ground on September 24, 2021, but he did not see Claimant fall and no other workers were in the immediate area. When he discovered Claimant, he called to the other workers and then called 911 himself.

27. DSC testified that a video was taken by his brother, JSC, of Claimant spray painting while on the ladder and confirmed that it was taken during the Utah project. The

video showed Claimant high up on a ladder demonstrating how he utilized the paint sprayer.

28. Claimant stated that he worked for Employer A. He was hired by Employer A to perform the Utah job. He had worked over a year for Employer A by the time he was injured. JSC is the one that taught Claimant how to paint with a sprayer. Claimant is the one that requested that JSC take the video of himself while spraying because he wanted to see how he was doing it. He was hurt in Utah.

29. Mr. BSQ testified that he had been working primarily in Colorado with Employer A for approximately 3 years and was hired by DSC. He further stated that both brothers would give him assignments, but that JSC was the one to tell him about the Utah Job. He was in Utah for approximately one- and one-half months. He did not know who Employer B was.

30. The controller of accounting for Employer B testified that she oversaw the day to day accounting tasks, completing paperwork, making sure subcontractors were properly entered into the system. They had over one hundred subcontractors at the time of the hearing. She explained that superintendents checked on the jobs and job progress of the subcontractors, then they would be entered into a master spreadsheet in order to approve the progress (which was done by first the superintendent and then the president of the company) and the payments, then they are sent to her and she would cut the checks. The checks generally would be cut to the subcontractor's company, not to individuals. The companies were required to fill out a W-9 with the business name and the EIN.[8] Employer B does not pay the individual workers and has no information about the individual workers including Claimant. She further stated that, as a subcontractor, Employer A provided services to Employer B that Employer B could not have offered without Employer A or without hiring its own painters. (This ALJ infers from this statement that Employer B was a general contractor of projects.) While she occasionally created receipts, that was a task generally completed by the superintendents. Once she received the invoice, she would cut the checks to the subcontractor's business.

31. The controller also looked at a summary of costs against the Utah job, which included payment for materials, labor, rentals like dumpsters and storage, paint from Sherwin Williams, Specialty Wood products for replacement when needed, Hardy Manufacturing for siding, and other costs including the contracted work by Employer A. Employer B also paid for an apartment for Employer A.

32. The superintended for Employer B also testified in this matter. He stated that superintendents run the jobs, making sure that they are running smoothly, and do not get complaints from the property managements, as well as get all the materials for the jobs. He knew the owner of Employer A for some time and thought Employer A had subcontracted with Employer B for approximately a 12 or so projects.

33. The superintendent stated that he was the one that offered the Utah job to Employer A. He stated that they generally offered the jobs to several subcontractors and whoever accept first would get the job. In this case Employer A accepted the job in Utah. He stated that Employer A had to supply the painters to perform the job and that Employer

[8] Federal Employer Identification Number, or Federal Tax Identification Number, also abbreviated FEIN.

B does not have any workers on the projects. He would visit the project every two weeks to make sure that everything was progressing as needed (the percentage of completion) in order to pay the subcontractor company every two weeks. He explained that the subcontractor issued the invoice and once he had determined the percentage of the work invoiced was completed, he would report it so that the "sub" could get paid. He did not know Claimant. Employer B only paid Employer A for the work, not any of the workers directly. The subcontractor was responsible for paying their own workers.

34. The superintendent was also responsible for pricing of a project, but not the contracts themselves. He knew about the Statement of Work-Subs, which is in essence the contract between Employer B and Employer A for the Utah job. It spelt out the terms of service, including a description of work, the payment schedule, and the costs of painting and repairs to the buildings before painting. Employer B wanted to keep control of the quality of products used on the projects so they supplied all the materials needed, pursuant to the contract with the management company that contracted the work with Employer B, which were not addressed in the contract with Employer, with the exception of the labor, paint brushes, rollers, sprayers and other materials needed to carry out a painting job. The superintendent would point out items that needed to be done again and expected the sub to comply with his requests. He also stated that Employer B paid for housing for all of Employer A's employees and sometimes would take the crew out for a meal. However, Employer A was not obliged to take the Utah job, it was optional and under the owners' control. He agreed that without the work of the subcontractors, Employer B would not be able to fulfill their contracts.

35. As found, Claimant sustained a compensable work-related injury in the course and scope of his employment. He was on the job, at the Utah project when he fell off of a ladder on September 24, 2022, falling from a height of approximately 20 feet. He was performing work activities, including trimming of branches or tips of branches, as ordered by his supervisor, DSC. The Claimant was unconscious and unable to provide a history of how he had fallen. Claimant remained unconscious for a significant period of time. DSC is the one that communicated with the 911 operator and the EMTs were provided with the information of the approximate height from which Claimant fell before reaching the Claimant. EMTs found Claimant on the ground with a pillow under his head. They determined that he had a GSC of 3, non responsive to verbal, eye movement or to pain sensations, despite the fractures of his upper extremity. He was taken first to Davis Hospital and Medical Center, then transferred to the University of Utah Hospital, where he remained until released in November 2022 to his family care in Colorado.

36. As found, Claimant's employer was Employer A. Employer A controlled how Claimant travelled to the Utah project, as he was transported by Employer A's vehicle (truck), which was driven by JSC, DSC's brother, an employee of Employer A. Claimant performed the tasks as assigned by DSC each day in the morning and at midday. He utilized Employer A's equipment to perform his job, including paint brushes, rollers, sprayers and ladders. Despite Employer B supplying the materials required by the contracts between the management company and Employer B, Employer B is found not to be Claimant's employer in whole or in part.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or

interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

It is important to note that a determination of the issue of compensability in this case is an essential question and prerequisite before the issue of who the employer is can be addressed. The reason for this is that if the claim is not compensable, then the issue of who the employer was at the time of the injury would be a moot issue. Therefore compensability should be addressed first.

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Claimant was within course of his employment as he was engaged in performing painting for Employer. This job required Claimant to perform various tasks including prepping the building to be painted. This involved trimming branches off trees that would

interfere with the painting of the building. Claimant's direct supervisor, DSC, ordered him to trim the tips of the branches and DSC saw Claimant on the ladder a few minutes before he found Claimant unconscious on the ground. DSC was the one to call 911. Claimant and owner of Employer A are credible and persuasive in this matter. Claimant's injuries arose out of his employment as he fell from a ladder, an indeterminate height which was documented as approximately 20 feet though the records document a height of anything from 16 feet (DSC) to 30 feet (report to medical providers by third parties). Claimant sustained very significant injuries, including traumatic brain injuries as well as lower extremity strains and upper extremity fractures. Drs. Wallace, Dr. Menacho and the providers at Craig Hospital are persuasive in this matter. Dr. Wallace specifically stated that "within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries listed." These injuries included traumatic brain injury, vision issues, upper extremity, and lower extremity injuries as well as other issues caused by the TBI. There is no doubt that Claimant's injuries, caused by the fall, were work related as Claimant was performing the duties of his job when he fell from the ladder. He sustained the injuries within a time, place, and circumstances of his job functions. In this case, while he was trimming the branches as ordered by his supervisor. While the fall was not witnessed by any other person or employee, the supervisor last saw Claimant on the ladder, before he left for a few minutes to fill the paint machine, after which he found Claimant on the ground, unconscious. As found, Claimant has proven by a preponderance of the evidence that the fall off the ladder arose within the course and scope of his employment as a painter.

C. Who was Claimant's employer on September 24, 2021

An "employer" is defined as "Every person, association of persons, firm, and private corporation, …, who has one or more persons engaged in the same business or employment, …, in service under any contract of hire, express or implied. Sec. 8-40-203(1)(b), C.R.S. An "employee" is harder to define as the statutory definition encompasses many more requirements. But generally, an employee is "Every person in the service of [another]… under any appointment or contract of hire, express or implied. Sec. 8-40-202(1)(a)(I)(A), C.R.S.

To be entitled to workers' compensation benefits, a person must qualify as an employee under the statutory definition. *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 595, 307 P.2d 805, 811 (1957); Section 8-40-202(1)(b) C.R.S. 2008. The burden is on the claimant to prove that he was an employee when he was injured. See *Hall v. State Compensation Ins. Fund*, 154 Colo. 47, 50, 387 P.2d 899, 901 (1963); *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991).

Section 8-40-202(2)(a), C.R.S. 2022, provides that "any individual who performs services for pay for another shall be deemed to be an employee ..., unless such individual is free from control and direction in the performance of the service." For purposes of the Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S. 2000; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991); *Benjamin Mendez v. Interstate Van Lines and/or Scott Pennell and/or Manitou Express*, W.C. No. 4-330-270 (Jan. 19, 2001).

Respondents A argue that Claimant entered into a contract of hire with both Employer A and Employer B and that both should be held liable for benefits to Claimant if the claim is found compensable. However, to enter into a contract, there has to be an agreement or meeting of the minds. For purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, *supra*. It is the contract of hire with the respondent employer that triggers coverage under the Act, and the reciprocal benefits and duties of the workers' compensation system flow to each party because of their entry into that contract of hire. *In re Claim of Ritthaler*, 050714 COWC, 4-905-362-02 (Colorado Workers' Compensation Decisions, 2014)

A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v Apostolou*, 866 P.2d 1384 (Colo. 1994). A "contract of hire" is created when there is a "*meeting of the minds*" which creates a mutual obligation between the worker and the employer. *Id.* A contract of hire may be formed even though not every formality attending commercial contracts is found to exist. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 220, 422 P.2d 630, 632 (1966). But, whether a contract exists between the parties is a question to be determined by the trier of fact. *Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972 (Colo.App.1987). *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991).

The statutory scheme was designed to grant an injured employee compensation from his or her employer without regard to negligence and, in return, the responsible employer would be granted immunity from common-law negligence liability. *Finlay v. Storage Tech. Corp., 764 P.2d 62 at 63 (Colo.1989); Monell v. Cherokee River, Inc., 2015 COA 21, 347 P.3d 1179 (Colo. App. 2015)*. This jurisdiction has long provided an extra layer of protection for the employees of subcontractors by imposing employer liability for their injury or death not only on the subcontractors by whom they are directly employed, but also on the companies contracting out work to those subcontractors. See San Isabel Electric Assoc. v. Bramer, 182 Colo. 15, 19, 510 P.2d 438, 440 (1973), if the subcontractor is uninsured.

Section 8-41-401(1) specified that except for certain enumerated exceptions, any person, company, or corporation leasing or contracting out any part of its work would be construed to be an employer and liable to compensate the lessee, sublessee, contractor, or subcontractor, as well as its employees (or their dependents), for injuries or death resulting from that work. See Sec. 8-41-401(1)(a)(I). In the next two, closely related subsections, the statute also made express that if such a subcontractor were itself an employer and insured its liability as required by the act, neither the subcontractor nor any of its employees would have any right of action against the person or company contracting out the work. Sec. 8-41-401(2); and that recovery for death or injuries according to the provisions of the act would not be available to designated individuals who maintained their independence from another by whom they were engaged to perform a service. See

Sec. 8-41-401(3), C.R.S. *Frank M. Hall & Co., Inc. v. Newsom,* 125 P.3d 444 (Colo. 2005).

While the reference in the body of section 8-41-401(1)(a) to the recipient of leased or contracted-out work is clearly intended to include business entities having employees of their own, the exception applies, by its own terms, only to a subset of such recipients, which is limited to those who can establish that they perform their service independently within the meaning of subsection 8-40-202(2)(b), so as to be excluded from the broader definition of "employee" altogether. See § 8-41-401(1)(a)(I) (incorporating by reference § 8-40-202(2)(b)). *Frank M. Hall & Co., supra*.

The persuasive evidence shows that Claimant was hired by DSC, the owner of Employer A, who acknowledged that Claimant was his employee and that he hired him. DSC hired, trained, supervised, determined the hourly pay, kept records of hours worked and paid Claimant. Claimant's paychecks were issued by Employer A and signed by DSC himself. DSC never stated that Claimant was an employee of another on the date of injury. DSC is persuasive in this matter.

Employer B did not enter into a contract of hire with Claimant. Employer B did not know Claimant was working for Employer A and did not pay Claimant wages. There was no mutuality of agreement between Claimant and Employer B, nor did Claimant have any expectation of remuneration from the Employer B. The elements of a contract of hire could not exist because there was no employer-employee relationship between Claimant and Employer B. Therefore, under the statute there can be no workers' compensation liability. See *In re Claim of Ritthaler*, *supra.* Had Claimant acknowledged Employer B and reported to Employer B in some manner, this may have been a different situation. But it is clear from both Claimant's testimony as well as BSQ's testimony that they were not aware of any relationship with Employer B and BSQ stated he did not even know who Employer B was. Employer B did not know who worked for Employer A and kept no records of their names, did not pay wages or any other benefit. Employer A exercised control of Claimant and Claimant's work for Employer A, performing repair, preparation of the surfaces and the painting of the buildings.

Respondents A repeatedly state that Employer B provided construction/project materials such as paint, wood, plastic, paper, storage sheds, dumpsters, as well as transportation, housing and utilities. However, none of those items were provided to Claimant directly. These are items that Employer B required Employer A to use on the project and were provided to Employer A as part of the subcontractor agreement or an implied agreement with Employer A. There is not any implied co-employment arrangement here. Neither was there an agreement either explicit or implied between Employer A and Employer B that Employer B was responsible for Employer A's employees, including for workers compensation coverage. This case is distinguished from the example supplied by Respondents B in citing *Bigby v. Big 3 Supply Co.*, 937 P.2d 794 (Colo. App. 1996). Employer B did not exercise sufficient control over Claimant's compensation, terms, or conditions of employment and cannot be considered Claimant's employer. Employer B was not engaged closely to Employer A as a joint enterprise or joint venture. There was no persuasive evidence of comingled tasks, projects or ventures.

The testimony of Employer B's controller as well as the superintendent was persuasive that Employer B provided certain benefits to Employer A but did not perform the same work. Employer B was the general contractor that arranged contracts with third parties for the performance of work, which they then subcontracted with other skilled corporation or companies, such as Employer A, to actually perform the work. They had no employees that performed the same kind of work as those employees of Employer A. It is true that Employer B is likely a statutory employer for Claimant, however, since Employer A is insured, Employer B cannot be found to be liable for Claimant's injuries. See Sec. 8-41-401(2), C.R.S. (Cum. Supp. 2022)

Respondents A also argue that Claimant's testimony that he worked for Employer A and not Employer B was self-serving. However, this ALJ finds nothing self-serving in the testimony as Claimant, if the claim is compensable, would receive the same benefit from either Insurer A or Insurer B as workers compensation benefits are dictated by the Workers' Compensation Act. The argument that Employer B aided or assisted Employer A in performing their job by providing materials is unpersuasive. General contractors in the construction industry commonly provide the building materials so that they are consistent, of a certain quality and are not over ordered and do inspections of the projects as the superintendent explained. Respondents A failed to show that Employer B hired, controlled, supervised, or borrowed Claimant for the painting project in Utah, or that they even knew who Claimant was. Employer B was not a lending employer, concurrent employer or a co-employer. There are no persuasive facts or legal theory which would make Employer B an employer in this case.

Claimant proved by a preponderance of the evidence that Employer A was his employer at the time of the injuries sustained following the fall from the ladder on September 24, 2021. Respondents A have failed to show that Claimant was an employee of Employer B. As found, from the totality of the evidence, Claimant was an employee of Employer A and that Employer A was Claimant's sole employer, who was insured at the time of the accident of September 24, 2021.

D. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296.

All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment related to the fall on September 24, 2021. The parties have stipulated that the medical treatment at Sinergy Health Partners and the associated bill were reasonably necessary and related to the accident of September 24, 2021. Therefore, as found, Claimant is entitled to medical benefits that are reasonably necessary and related to the September 24, 2021 injuries including the Dr. Wallace's charges.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for date of injury of September 24, 2021 is compensable.

2. Employer A is Claimant's employer on the date of the compensable injuries.

3. Respondents A shall pay the reasonably necessary and related medical costs in this matter, specifically for those charges by Bethany Wallace, M.D. at Sinergy Health Partners.

4. Any medical treatment payments are limited to the Colorado Fee Schedule.

5. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 15th day of August, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-181-640-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable work injury during the course of and arising out of her employment with Employer on August 2, 2021.

II. Whether Claimant has proved by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related care for her left shoulder and neck.

III. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits beginning August 2, 2021 and continuing until otherwise terminated by operation of law.

IV. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for her termination from employment and thus not entitled to TTD benefits pursuant to §§8-42-105(4) & 8-42-103(1)(g) C.R.S.

FINDINGS OF FACT

1. Claimant is a 36-year-old former senior monitor for Employer. Claimant worked at a treatment center that houses criminal offenders referred to as "residents." As part of her job duties, Claimant performed house counts and walk-throughs to ensure all residents were in the facilities and that there was no contraband.

2. On August 2, 2021 at approximately 10:15 a.m., Claimant was conducting a house count and entered a room containing residents [Redacted, hereinafter RW], [Redacted, hereinafter SM], [Redacted, hereinafter JL], and [Redacted, hereinafter DT]. Claimant saw RW[Redacted] in possession of what appeared to be drugs and asked him to surrender the contraband. RW[Redacted] refused and became aggressive toward Claimant. Claimant radioed her co-workers for assistance multiple times to no avail.

3. Claimant testified that she began to walk backwards out of the room when RW[Redacted] stood up and began walking towards her. Claimant stated she was not comfortable turning her back to RW[Redacted] in order to face the door, so she continued to walk backwards. Claimant reached the closed door with her back facing the door. Claimant testified that, at that time, RW[Redacted] pushed her against the closed door frame. She testified that it was a "pretty significant shove" that caused her to fall backwards into the door frame. Claimant stated that RW[Redacted] pushed her with both hands at collarbone level. She testified that she had immediate pain in her neck and shoulder but no tingling. Claimant testified that at the time of the incident she experienced a lot of adrenaline and was upset and in shock.

4. Claimant testified that she instructed RW[Redacted] to not put his hands on her again. Claimant testified JL[Redacted] then jumped down from his top bunkbed, positioned himself between her and RW[Redacted], and told RW[Redacted] not to put his hands on Claimant again. She testified that during the incident SM[Redacted] appeared to be asleep with his back facing her. RW[Redacted] then jumped out of a window in the first floor room.

5. Claimant further testified that after RW[Redacted] jumped out of the window she exited the room and went to the recreation yard to see if she could see RW[Redacted] attempting to leave the premises. She observed RW[Redacted] heading back towards the room. RW[Redacted] entered the room a second time, grabbed his belongings, and again exited through the window.

6. At 11:00 a.m. that same day, Claimant submitted a written statement to Employer regarding the incident stating,

> Resident shoved this writer [Claimant] into the room door and was advised to back up and not put his hands on me again. Resident maintained his aggressive posture and stated he was going to leave the room. This writer had my back to the door and could not move from the position due to resident blocking me from turning or moving forward.

(R. Ex. B, p. 8).

7. JL[Redacted] completed a written statement on August 2, 2021. He stated,

> Was asleep in room woke up to [Claimant] and RW[Redacted] arguing, she asked him what he had and do not leave, he crowded her at the door so I got up to make sure she was gonna be good told him cool off he tried to push up on her again, then he ran out of the damn window, came back through window, then back out window again, don't know why.

(Id. at p. 13).

8. DT[Redacted] completed a written statement on August 2, 2021. DT[Redacted] stated, "I was sleeping and heard [Claimant] arguing with a resident. He was trying to get out of door. Then he jumped out window. Sorta aggressive towards [Claimant]." (Id. at p. 14).

9. SM[Redacted] completed a written statement on August 2, 2021 which read: "I was sleeping and heard [Claimant] having an argument with resident and he jumped out the window." (Id. at p. 12).

10. Claimant spoke to [Redacted, hereinafter LB], Case Manager, shortly after the incident occurred. Claimant testified that she informed LB[Redacted] that she was

"pissed" that RW[Redacted] touched her and put his hands on her. She testified that she never told LB[Redacted] that RW[Redacted] did not touch her.

11. LB[Redacted] completed a written statement for Employer on September 8, 2021. Per LB's[Redacted] written statement, shortly after the incident she asked Claimant if she was okay, and Claimant stated that RW[Redacted] had "almost put his hands on her while she was doing a walk through." (Id. at p. 9). LB[Redacted] wrote that Claimant stated she was okay but "it would have been different if the client RW[Redacted] had put his hands on her." (Id.) LB[Redacted] wrote that she asked Claimant if RW[Redacted] had touched her and she said "No." (Id.) LB[Redacted] further wrote that there were three other residents in the room who stated that they were ready to jump up and protect Claimant if RW[Redacted] would have put his hands on her, but it did not appear that RW[Redacted] touched Claimant.

12. LB[Redacted] testified at hearing on behalf of Respondents. She testified that at the time of the incident, she heard Claimant yelling and approached Claimant. She testified consistent with her September 8, 2021 written statement. LB[Redacted] testified that she asked Claimant if she had been hurt and that Claimant did not indicate any sort of pain or arm or neck symptoms. She stated that Claimant did not say she was shoved or assaulted. LB[Redacted] further testified that, the week following the incident, Claimant informed her of arm soreness and numbness in her fingers. She testified that a few weeks after the incident Claimant made a comment to her about suing Employer for the injuries, at which time LB[Redacted] notified Employer and wrote her September 8, 2021 statement.

13. [Redacted, hereinafter RG], Facility Director, completed a written statement for Employer on October 21, 2021. RG[Redacted] stated, in relevant part,

> [Claimant] reported that resident RW[Redacted] got closer to her and put his hands on her shoulders to get to the door. [Claimant] was asked if she was hurt or feeling pain and she reported she was not hurt and was not in any pain. [Claimant] reported that she was fine and could go back to work. I met with the three residents who were in the room no residents reported that they saw the physical altercation or saw resident RW[Redacted] put his hands on her. Two reported that they were sleeping and heard the voices of both. Another resident reported that he saw the whole thing and reported he saw them argue but no physical altercation. That resident was SM[Redacted].

(Id. at p. 11).

14. RG[Redacted] testified at hearing on behalf of Respondents. RG[Redacted] also testified consistent with his written statement. He testified that, on the day of the incident, Claimant said she was not hurt and that she could return to work. RG[Redacted] testified that Claimant did not tell him she was shoved by RW[Redacted] and that she did not indicate that she was in pain or that she sustained any injury.

15. SM[Redacted] testified at hearing on behalf of Respondents. He testified that, contrary to his August 2, 2021 written statement, he was not sleeping and his back was not turned to Claimant and RW[Redacted] at the time of the incident. SM[Redacted] testified that he wrote that he submitted a written statement saying he was asleep during the incident because he did not want to "snitch" and did not want to be involved. SM[Redacted] testified that he observed the entire incident during which Claimant attempted to block RW[Redacted] from exiting the door. SM[Redacted] testified that RW[Redacted] did not put his hands on or shove Claimant. He stated that RW[Redacted] pushed against Claimant in an attempt to get around Claimant to exit the room.

16. Claimant completed her work shift on August 2, 2021 and continued working as scheduled for the next few days, including attending a work training during which she participated in physical training. Claimant testified she continued to experience pain and developed tingling in her arm and decided to notify Human Resources that she needed to see a doctor as a result of the incident on August 2, 2021. Employer sent Claimant for medical evaluation and had her report the incident to the police.

17. Claimant presented to Barry M. Nelson, D.O. at Concentra on August 6, 2021. She reported that a resident pushed her against a closed door and the next day she began feeling tingling down her left arm into her fingertips. Claimant reported having no pain but limited range of motion. On examination, Dr. Nelson noted normal appearance of the left shoulder with tenderness and limited range of motion in all planes. There was cervical spine tenderness with muscle spasms but full range of motion. Dr. Nelson diagnosed Claimant with a left shoulder contusion, brachial plexus injury and cervical strain. He prescribed Claimant medication and physical therapy and placed her on work restrictions releasing her to modified duty.

18. Claimant testified that she returned to work performing modified duty. She testified that she was restricted from reaching overhead and out in front; that she could not lift anything over five pounds; and that she could not perform twisting maneuvers.

19. On August 25, 2021 Dr. Nelson referred Claimant for MRIs of the cervical spine and left shoulder. He also referred Claimant for evaluations by a physiatrist and neurosurgeon.

20. At a follow-up evaluation with Dr. Nelson on September 10, 2021, Claimant reported that she was not taking her prescribed muscle relaxers as they made her groggy. She reported that because of this, she was having issues sleeping and had been late to work.

21. On September 28, 2021 Claimant presented to Michael Rauzzino, M.D. at Concentra for a neurosurgery evaluation. Dr. Rauzzino noted that a cervical MRI obtained on 9/21/2021 showed C5-6 left foraminal disc herniation compressing the left-sided C6 nerve root with moderate-to-severe left foraminal narrowing. The remainder level showed mild degenerative changes consistent with age. He felt that the left focal disc protrusion is the root cause of Claimant's left-sided radiculopathy. He noted that there is no prior

documentation of any cervical radiculopathy symptoms prior to her work injury. Dr. Rauzzino opined that Claimant's symptoms were confirmed with the imaging. He discussed treatment options for Claimant, including epidural steroid injections and surgery.

22. Claimant presented to physiatrist Frederic Zimmerman, M.D. on October 7, 2021. On examination, Dr. Zimmerman noted Claimant exhibited no pain behaviors. Dr. Zimmerman assessed Claimant with a cervical strain and left sided C5-6 disc herniation with left C6 radiculitis. He prescribed Claimant medication and referred Claimant for physical therapy and trigger point injections.

23. Dr. Zimmerman performed trigger point injections on Claimant on October 28 2021, December 2, 2021 and January 13, 2022. He noted that the trigger point injections provided Claimant significant relief for 24-48 hours then partial relief for up to one week.

24. On January 28, 2022, Anant Kumar, M.D., M.S., performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported to Dr. Kumar that after the work incident she immediately developed tingling in her left hand, pain over the left posterior shoulder and that her left arm felt cold. She reported that she also experienced throbbing at the back of her skull and subsequent difficulty lifting her left arm. She reported 10/10 neck pain, 6/10 arm pain, and 9/10 posterior occipital headaches. He noted Claimant had not experienced any significant improvement despite four months of conservative treatment. On examination, Dr. Kumar noted no obvious neurological deficits. He further noted subjective loss of sensation over the left entire upper extremity with a non-dermatomal distribution of numbness with no clinical evidence of thoracic outlet syndrome, brachial plexus irritability, motor deficits but subjective complaints with absence of muscle spasms and Waddell's tests were positive. Neck and shoulder range of motion were painless. Dr. Kumar noted that the cervical MRI showed C5-6 left foraminal disc herniation compressing the left nerve root with moderate to severe left foraminal narrowing.

25. Dr. Kumar reviewed the written statements of LB[Redacted], RG[Redacted] and SM[Redacted], noting that their accounts of the incident contradicted the reports of Claimant. He opined that the findings on his IME and other examinations did not match the radiological findings. Dr. Kumar concluded that Claimant had no objective neurological deficits or clinical findings and only subjective symptoms that he could not explain. He opined that Claimant had reached maximum medical improvement ("MMI") with no need for restrictions or further medical treatment.

26. Dr. Kumar testified by post-hearing deposition as a Level II accredited expert in orthopedic surgery. Dr. Kumar testified consistent with his IME report. He testified that Claimant told him she was pushed backwards but was inches from the door, did not twist her body, and at that point developed numbness and tingling involving all of her fingers, her entire arm, with throbbing in the back of her skull. Dr. Kumar testified twisting is more likely to injure than simply bending backwards. Dr. Kumar testified that Claimant's Spurling test was negative on his exam and other exams by multiple providers, indicating

no clinical evidence of nerve root irritation. Dr. Kumar testified that Claimant tested positive for four out of five Waddell's signs, which indicate subjective complaints unverified by objective findings. Dr. Kumar testified that Claimant's complaints were worsened by a specific test designed to relax the nerve, which is expected to relieve symptoms, and he was unable to explain these symptoms.

27. Dr. Kumar further testified that he reviewed MRI studies of the neck from September 21, 2021 and opined that there was no evidence of acute injury, no fracture, no dislocation and no evidence of acute trauma. Dr. Kumar opined that there were multilevel degenerative changes with no acute findings. He testified that the MRI study did not indicate any condition which would have caused complete arm numbness or any condition matching Claimant's subjective symptoms. Dr. Kumar credibly opined the conditions seen on the MRI preexisted the alleged work injury and would not have been aggravated by the alleged event given that it was a low velocity, minor injury from Claimant's own description. Dr. Kumar indicated the initial diagnosis of brachial plexus injury by Dr. Nelson was differential, reflecting the most likely match to Claimant's symptoms in the absence of definitive objective findings. Dr. Kumar opined he did not see any injury resulting from the described mechanism, which he characterized as "barely benign."

28. Claimant testified she did not have any prior injuries to her neck, shoulder or back. Claimant was working full duty prior to August 2, 2022 and subsequently worked modified duty until being placed on a paid administrative leave of absence by Employer on December 17, 2021. Claimant remained on the leave of absence until she was terminated by Employer on January 31, 2022. Claimant received her regular wages through January 28, 2022.

29. Employer alleges Claimant was placed on the leave of absence and subsequently terminated due to performance issues, including attendance and attitude. On September 3, 2021, Claimant received a written warning regarding her tardiness. Employer placed Claimant on a written performance improvement plan ("PIP") on October 6, 2021, indicating issues with tardiness, negative attitude, communication, and leadership issues. Claimant met with her supervisors on multiple subsequent occasions to discuss Claimant's progress, as noted in the PIP. Supervisors noted improvement in all areas on the date of each follow-up meeting (October 14, October 21, November 2, and November 17, 2021). Additional notes were attached to the PIP. Neither party identified the author of the additional notes, which appear to contain additional observations from each follow-up meeting. The additional note dated November 17, 2021 documents that although Claimant had improved in many areas, there are concerns regarding what other staff and residents were seeing. It notes that Claimant continued to "bring others in the picture vs. really looking at herself and what is needed. This will be an area that will need to be addressed in upcoming sessions." (R. Ex. C, p. 24). The notes state that there was no close out meeting on December 1, 2021, and that Claimant was told they would close it out when she returned to the office.

30. There is no evidence of any additional meetings, verbal warnings, or written warnings that took place until Claimant was terminated. There is no documentation of any specific interaction or incident that led to Claimant being placed on a leave of absence and ultimately terminated.

31. Respondents terminated Claimant on January 26, 2022. The termination document dated January 31, 2022 notes an incident date of January 26, 2022. The document states that Claimant was terminated due to a failure to foster a respectful environment. It specifically notes that Claimant's behavior had not improved to the level expected of a Senior Monitor and as described in her PIP. It noted that Employer continued to see issues with residents and employees in regards to fostering a respectful environment and ongoing issues with behavior in regards to treating others with respect. No specific incidents or examples were detailed in the termination document.

32. RG[Redacted] testified that Claimant had performance issues prior to the work injury, which continued after the work injury, ultimately resulting in her termination. He specifically referred to a February 2021 incident in which Claimant "called out" a staff member in front of others. He met with Claimant about the incident. RG[Redacted] testified that Employer made the decision to terminate Claimant on January 26, 2022. He was unable to identify any specific incidents that resulted in the termination, solely referring to general issues with Claimant's attitude regarding being rude and demeaning to residents and staff. He testified that Claimant was terminated for a violation of the Code of Ethics and Business Conduct for fostering a respectful environment in the workplace.

33. Claimant testified that she did not receive any written warnings prior to the work injury. She testified that after the work injury she received a written warning for tardiness and then the October 2021 PIP. Claimant acknowledged that she was tardy for a time period after the work injury due to issues with her medication making her groggy. Claimant testified that she was no longer tardy once she ceased taking the medication. Claimant testified that in December 2021 Employer informed her she was being placed under investigation but was not told the reason. On January 31, 2022 she met with Employer and was informed she was being terminated for being disrespectful. She notes that the termination document indicates an incident date of January 26, 2022, a date on which she was not working. Claimant testified that she asked Employer to identify a specific example of her being disrespectful that led to her termination, which Employer did not do. Instead, Employer informed Claimant that her tone was an issue. Claimant testified to her belief that some individuals believed her tone to be curt and "less gentle" than others. Claimant does not perceive an issue with her tone. Claimant testified that, after being placed on the PIP, her understanding was that she was making huge improvements and that she believed she was doing well. Claimant was aware of Employer's Code of Ethics and Business Conduct.

34. Claimant has not obtained other employment within her work restrictions and not earned any wages since being terminated by Employer.

35. The ALJ finds the testimony of Claimant, as supported by records, more credible and persuasive than the testimony of RG[Redacted], LB[Redacted], and SM[Redacted].

36. The ALJ finds the opinion of Drs. Nelson, Rauzzino and Zimmerman more credible and persuasive than the opinion of Dr. Kumar.

37. Claimant proved it is more probable than not she sustained an industrial injury arising out of and in the course of her employment for Employer on August 2, 2021.

38. Claimant failed to prove by a preponderance of the evidence she is entitled to temporary disability benefits from August 2, 2021 through January 28, 2021, as Claimant did not sustain any wage loss during such time period.

39. Claimant proved by a preponderance of the evidence she is entitled to TTD benefits from January 29, 2021 and ongoing, as Claimant was temporarily disabled and sustained wage loss as of such time.

40. Respondents failed to prove it is more probable than not Claimant was at fault for her termination from employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

Respondents contend that Claimant was not shoved and thus did not sustain any work injury, noting that Claimant’s account of the incident is rebutted by LB[Redacted], RG[Redacted] and SM[Redacted]. As found, Claimant’s report of the incident was more credible and persuasive than the contradictory reports of the aforementioned individuals.

Claimant submitted a written statement to Employer approximately 45 minutes after the incident occurred in which she specifically stated that RW[Redacted] shoved her.

JL's[Redacted] written statement from the day of the incident indicates that RW[Redacted] at one point "pushed up on" Claimant. DT[Redacted] written statement from the day of the incident also indicated RW[Redacted] was attempting to get out of the door in an aggressive manner. RG[Redacted] written statement documents that Claimant reported to him that RW[Redacted] put his hands on her shoulders to get to the door.

The testimony and written statements of LB[Redacted] and RG[Redacted] were less credible and persuasive, as the statements were written several weeks after the incident occurred and were written in response to being informed that Claimant would be pursuing some legal action or workers' compensation claim related to the incident. SM's[Redacted] testimony was also less credible and persuasive, as he acknowledged that he lied about being asleep in his initial written statement. Claimant's report regarding the work incident has generally been consistent in her written statement, testimony and the medical records. The ALJ does not deem any discrepancy in the reported onset of symptoms so significant that it discredits Claimant's case in light of the totality of the evidence.

There is no indication Claimant sustained an injury during her work training. Claimant credibly testified, and there is no evidence to the contrary, that she did not have any neck, arm or back issues leading up to the work injury. Dr. Kumar's opinion that Claimant's subjective symptoms are not based on any objective findings on imaging or exam is contradicted by the credible opinion of ATP Dr. Nelson, who opined that the MRI confirmed cervical disc herniation and nerve compression, causing radiculopathy. He credibly noted that Claimant did not have a prior history of cervical radiculopathy symptoms. Dr. Rauzzino also opined that Claimant's symptoms were consistent with the findings on MRI. Moreover, Dr. Kumar's opinion appears to be heavily based on the written reports of residents and Claimant's co-workers regarding the incident, which the ALJ found to be less credible and persuasive than that of Claimant.

Based on the totality of the evidence, Claimant proved that it is more probable than not she sustained a compensable work injury arising out of and in the scope of her employment on August 2, 2021. Claimant was performing her regular work duties during a regularly scheduled shift when a resident pushed her into a door. This incident resulted in Claimant requiring medical treatment and being placed on work restrictions, constituting a compensable work injury.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As Claimant proved she sustained a compensable work injury, Claimant is entitled to reasonable, necessary and related treatment to cure and relieve the effects of work injury.

Temporary Indemnity Benefits and Responsibility for Termination

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Claimant failed to prove she is entitled to temporary disability benefits from August 2, 2021 through January 28, 2022. Subsequent to the work injury, Claimant worked modified duty and continued to earn her regular wages. Claimant was then placed on a paid leave of absence during which she continued to earn her regular wages through January 28, 2022. The preponderant evidence does not establish that Claimant left work and sustained actual wage loss as a result of the work injury from August 2, 2021 through January 28, 2022.

Claimant did prove by a preponderance of the evidence she is entitled to TTD benefits from January 29, 2022 and ongoing. Due to the work injury, Claimant was placed

on work restrictions that impaired her ability to resume her regular work. Thus, Claimant suffered temporary disability as a result of the work injury. *See In re Claim of Salgado*, WC 4-975-288-02 (ICAO, Aug. 23, 2016) ("A temporarily 'disabled' employee has a restricted bodily function coupled with an inability to resume his prior work"); *Culver, supra*. Claimant suffered wage loss subsequent to January 29, 2022 after being terminated from employment. §8-42-105(4)(a) does not require that a claimant first be shown to have wage loss prior to the job termination in order for that section to apply. *In re Claim of Salgado, supra*. As Claimant proved she was temporarily disabled, it is Respondents' burden to prove Claimant was responsible for her termination from employment.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Respondents failed to prove it is more probable than not Claimant was responsible for her termination. Respondents allege Claimant was terminated due to ongoing performance issues. Claimant was placed on a PIP in October 2021 for various

concerns, including tardiness and attitude/behavior. The notes included in the actual PIP document that Claimant was making improvement in each specified area and there were no continued concerns as of the follow-up meeting on November 17, 2021. Despite these notes, an additional document written by an unidentified individual indicated that concerns remained regarding what other staff and residents were seeing with respect to Claimant's attitude, behavior and ability to self-reflect. The November 17, 2021 note states that such area would be addressed in upcoming sessions. There is no indication any subsequent follow-up meetings occurred with Claimant prior to placing Claimant on an administrative leave and then terminating Claimant.

Claimant's understanding was that, after being placed on the PIP, she had made significant improvements and was in compliance with Employer's policies and expectations. Claimant's understanding is corroborated by the notes in the actual PIP that reflect improvement and do not document continued issues. To the extent the separate notes indicate continued concerns with Claimant's behavior, there is insufficient evidence this was actually communicated to Claimant such that she was aware there continued to be a perceived issue. Respondents did not specify any particular incident or interaction that ultimately led to the decision to terminate Claimant. Based on the totality of the evidence here, a general allegation of continued issues with Claimant's behavior absent more specifics fails to establish Claimant committed a volitional act that she would reasonably expect to cause the loss of employment. Accordingly, the preponderant evidence does not establish Claimant was at fault for her termination.

ORDER

1. Claimant sustained a compensable work injury on August 2, 2021.

2. Respondents shall pay for reasonable and necessary medical treatment related to Claimant's August 2, 2021 work injury.

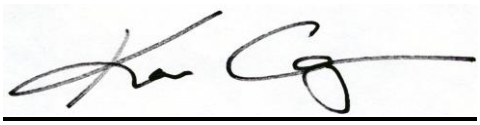
3. Claimant failed to prove she is entitled to temporary indemnity benefits from August 2, 2021 through January 28, 2022.

4. Respondents shall pay Claimant TTD benefits from January 29, 2022 and ongoing, until terminated by operation of law.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-275-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence bilateral hip arthroplasty surgeries were reasonable, necessary and related to his admitted January 30, 2020 industrial injury.

II. Whether Respondents proved by a preponderance of the evidence that temporary total disability ("TTD") should be terminated due to an intervening disability.

FINDINGS OF FACT

1. Claimant is a 58-year-old male who works for Employer as a truck driver.

Prior History

2. Claimant underwent a lumbar spinal fusion in 2005.

3. Claimant has a prior history of a left hip injury and bilateral hip pain. On March 3, 2019, Claimant was involved in a motor vehicle accident ("MVA") and sought treatment at the emergency department at Craig Memorial Hospital. Claimant complained of left hip and groin pain. A left hip x-ray revealed moderate degenerative arthrosis of the hip joint, evidenced by subchondral sclerosis, subchondral cyst formations and small marginal osteophytes. Claimant was diagnosed with a left hip contusion, prescribed naproxen and tramadol, and discharged.

4. Claimant was released to full duty work on March 26, 2019.

5. On September 16, 2019, Claimant participated in a telehealth visit with Kathleen Havrilla, R.N. at Claimant's primary care clinic, the Veterans Administration Medical Center ("VAMC"). Claimant reported bilateral hip pain, right worse than left. He reported driving a truck all day and that by the end of the day he could hardly walk. He noted the ibuprofen and gabapentin he was taking was not working. Claimant endorsed pain at level 8/10.

6. On September 24, 2019, Claimant presented to his primary care physician ("PCP") Renee Dunn, M.D. at the VAMC with complaints of bilateral hip pain, worse with movement or walking, subjective weakness of his legs when climbing, and constant tingling. Dr. Dunn opined that Claimant's bilateral hip pain was likely due to lumbar radiculopathy. She referred Claimant for a lumbar MRI, increased his gabapentin dosage, and prescribed Claimant meloxicam and omeprazole.

7. Claimant underwent a lumbar MRI on October 4, 2019, which revealed probable left and mild right foraminal narrowing at L5-S1; mild degenerative disc disease with mild/moderate bilateral foraminal narrowing at L4-5 related to shallow disc bulge, endplate proliferation, moderate facet arthrosis, and ligamentum flavum thickening. No canal stenosis was present at any level.

January 30, 2020 Industrial Injury

8. Claimant sustained an admitted industrial injury while working for Employer on January 30, 2020. Claimant fell to the ground when his foot became entangled in plastic shrink wrap. Claimant presented to the emergency room at Yampa Valley Medical Center. The medical record from this evaluation notes Claimant got caught in plastic wrap, landed on his right side, but stuck his left wrist out. Claimant denied other complaints or injuries. On examination, the physician noted obvious deformity of the left wrist. Bilateral lower extremities had full range of motion without pain or problems. Claimant's gait and station were documented as normal. Patrick Johnston, M.D. diagnosed Claimant with a distal radius fracture and performed left wrist surgery that same day.

9. Claimant subsequently treated with authorized treating physician ("ATP") Larry Kipe, M.D. at Workwell. Claimant first presented to Dr. Kipe on February 4, 2020, the soonest date available for Dr. Kipe to evaluate Claimant. Dr. Kipe noted Claimant was progressing after the wrist surgery. Claimant reported experiencing some left hip area pain without issues walking or any bruising. On physical examination, Dr. Kipe noted Claimant was ambulating normally. Left hip area was normal to inspection. Dr. Kipe restricted Claimant from use of his left arm and recommended continued follow-up for the wrist with Dr. Johnston.

10. On April 10, 2020 Claimant's PCP Dr. Dunn, authored a letter remarking that the October 2019 lumbar MRI results were available. She stated that the lumbar MRI revealed postsurgical changes but no obviously pinched nerves or new areas of herniated discs. Dr. Dunn opined that Claimant's pain as most likely due to postsurgical changes and not any new issues that needed to be addressed surgically.

11. On April 20, 2020, Claimant returned to Dr. Kipe with continued complaints of left hip pain. Dr. Kipe noted Claimant was doing well with the left wrist recovery and had been released to full duty work. On examination of the left hip, Dr. Kipe noted inspection was normal and Claimant ambulated well. Claimant reported pain in the groin area with internal rotation and hip flexion. Dr. Kipe referred Claimant for a left hip x-ray and continued Claimant at full duty work. Bilateral hip x-rays obtained on April 21, 2020 revealed moderate to severe degenerative changes; bony remodeling within the femoral head with extensive subchondral cystic change and sclerosis.; no definite acute fractures; and postsurgical changes in the lumbosacral spine. Claimant was referred for chiropractic treatment.

12. At a follow-up evaluation with Dr. Kipe on May 21, 2020, Dr. Kipe noted that the chiropractor felt Claimant's pain was more from the back. Claimant felt he had a hip

problem and not a back problem, and related his left hip pain to the January 30, 2020 work injury. Claimant was ambulating with a limp. Dr. Kipe referred Claimant for evaluation by an orthopedic specialist and spine surgeon.

13. On May 28, 2020, Claimant saw Jessica Nyquist PA-C for an orthopedic consultation. Claimant reported experiencing increasing pain in his legs and hips since returning to work. He complained of pain in the anterior bilateral thighs radiating down the front of his legs, as well as groin pain. Claimant reported that he did not experience any improvement from medications or chiropractic treatment. On examination, PA-C Nyquist noted pain with passive internal rotation of both hips and decreased range of motion. PA-C Nyquist noted a 10/2/2019 lumbar MRI showed moderate left L5 foraminal narrowing and bilateral hip x-rays from 4/20/2020 showed moderate to severe bilateral hip osteoarthritis. PA-C Nyquist diagnosed Claimant with bilateral hip osteoarthritis. She opined that Claimant's pain was coming from his hips, not his spine, and recommended Claimant undergo hip injections. She referred Claimant for a surgical evaluation for the bilateral hips.

14. On June 4, 2020, Jon M. Erickson, M.D. performed a physician advisor review regarding the recommendation for hip injections. Dr. Erickson noted the lack of hip complaints at the initial hospital visit on the date of injury, remarking that the physician did a very careful examination of Claimant's gait pattern which was normal. Claimant had no apparent range of motion difficulties with either lower extremity at that visit. He further noted Claimant has advanced arthrosis in both hips and that the imaging findings were degenerative in nature. Dr. Erickson concluded that Claimant sustained a left distal radius fracture in the work fall but suffered no additional injuries. Dr. Erickson recommended denial of hip treatment on the basis that Claimant's pain was a progression of his pre-existing pathology which was not caused, aggravated or worsened by the work injury.

15. At a return visit to Dr. Kipe on June 8, 2020, Dr. Kipe removed Claimant from all work due to hip pain.

16. Claimant attended a telehealth visit with his PCP Dr. Dunn on June 17, 2020. He recounted the history of his workplace fall and noted that his wrist was feeling better. Claimant noted that he had developed severe left worse than right hip pain after his workplace fall. Claimant told Dr. Dunn that he was in need of hip replacement on the left side and that the right was "not far behind." In her assessment she wrote "hip pain not due to lumbar radiculopathy: would like referral to Dr. Meininger which was placed today." She did not assign Claimant any diagnosis for his back or recommend treatment for his back.

17. On June 20, 2020, Claimant sought treatment at the emergency department at Memorial Regional Hospital requesting medication for bilateral hip pain. Michael Melton, M.D. gave an assessment of bilateral hip osteoarthritis, prescribed medication, and placed Claimant on lifting, walking and standing restrictions.

18. On July 6, 2020, Dr. Kipe noted Claimant could barely get up out of the chair and walk. He continued Claimant's restrictions.

19. Claimant presented to Dr. Meininger on July 7, 2020. Claimant reported undergoing a prior spinal fusion. He described his current symptoms as being more "groin-based" in comparison to his prior symptoms that were more radicular. Dr. Meininger diagnosed Claimant with progressive secondary arthritis, including osteonecrosis, of bilateral hip joints. Dr. Meininger wrote,

> I discussed with [Claimant] that his hips have deteriorated likely due to reduced circulation or integrity of the femoral heads. I discussed this is likely avascular necrosis or dead bone disease that has allowed for the collapse of the femoral head and contributed to his chronic, severe hip pain. (Ex. J, p. 170).

He noted Claimant had failed conservative treatment and recommended Claimant undergo a staged bilateral total hip arthroplasty.

20. On July 31, 2020, Insurer sent Dr. Kipe a letter inquiring about Claimant's status for the left wrist injury. In a response faxed August 4, 2020, Dr. Kipe opined that Claimant reached maximum medical improvement ("MMI") for his left wrist injury without impairment or the need for maintenance care. Dr. Kipe did not otherwise specify a MMI date.

21. Claimant underwent a direct supine total left hip arthroplasty on August 18, 2020, performed by Dr. Meininger. Postoperative diagnoses were chronic left hip pain and left hip osteoarthritis.

22. On September 22, 2020, James P. Lindberg, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Lindberg conducted a telephone interview with Claimant and reviewed medical records dated 3/3/2019 – 8/3/2020. Claimant reported falling on his left side during the work incident and experiencing hip pain the day of the fall and a severe increase in hip pain after returning to work. Dr. Lindberg noted that, although Claimant denied prior hip problems to him, the records documented that Claimant sustained a left hip injury in March 2019. Dr. Lindberg further noted that Claimant reported to him falling on his left side, when the initial hospital record reflected Claimant fell on his right side. He noted that x-rays revealed advanced pre-existing degenerative arthritis in both hips and non-traumatic probable avascular necrosis, with no evidence of any acute changes. Dr. Lindberg opined that Claimant's condition was due to the natural progression of his significant underlying osteoarthritis and was not secondary to the workplace fall.

23. Claimant continued to see Dr. Kipe, who maintained Claimant's restrictions of being completely off of work.

24. On October 13, 2020, Claimant underwent a direct anterior supine total right hip arthroplasty, performed by Dr. Meininger. Postoperative diagnoses included right hip osteoarthritis. Dr. Meininger wrote that the surgery was requested "for unrelated right hip surgery within the global postoperative period of contralateral, left-sided total hip replacement performed 8 weeks ago to summarily treat his bilateral hip joint osteoarthritis." (Ex. L, p. 190).

25. Claimant testified at hearing that he experienced 3/10 left hip pain as a result of the March 2019 MVA and that the hip pain subsequently resolved and he did not undergo further evaluation or treatment for the left hip. Claimant testified he did not have any issues with left hip in the days, weeks and months leading up to the January 30, 2020 work injury. Claimant stated that the March 2019 MVA did not result in any right hip complaints and he did not have right hip symptoms prior to the work injury. Claimant also initially testified that he did not have any back problems leading up to the work injury, but later stated he sought treatment in September 2019 for what he believed was back pain, not hip pain. Claimant testified that what he believed were low back symptoms subsided after September 2019, but returned after the work injury.

26. Claimant further testified that he fell on his left side on January 30, 2020, and was unaware why the initial hospital record refers to him falling on his right side. Claimant testified that although he noticed hip pain on the date of the injury, his primary concern at the time was his left wrist, which was broken and deformed. Claimant testified that when he saw Dr. Kipe on February 4, 2020, his left hip pain was 8/10 and he was limping severely. Claimant stated that when he returned to working his normal job duties after the wrist surgery, he experienced pain walking and bending over. Claimant stated his recovery from wrist surgery went well. He testified that he was placed on work restrictions in June 2020 due to his hip complaints. Claimant has been receiving $450.89/week in temporary disability benefits since that time. Claimant believes that his right hip worsened due to overcompensating for his left hip. Claimant's pain significantly decreased after undergoing the bilateral hip surgeries.

27. Dr. Lindberg testified at hearing as a Level II accredited expert in orthopedic surgery. He testified that since authoring his initial report, he had received additional medical records, including all of the records in Respondents' exhibit packet. Dr. Lindberg testified consistent with his IME report and continued to opine that the need for bilateral hip surgery was due to Claimant's longstanding, pre-existing, severe degenerative arthritis, which was not aggravated by the work fall. He explained that the medical literature did not support the position that Claimant's right hip symptoms were secondary to compensation for the left side. Dr. Lindberg noted that the medical records reflect Claimant had significant symptomatic pre-existing bilateral hip pain prior to the work injury. He explained that it was not uncommon for patients or practitioners to struggle in differentiating back pain from hip pain, and opined that Dr. Dunn's conclusion that Claimant's issues were related to postsurgical changes in the lumbar spine was incorrect. He opined that Claimant was, more than likely, complaining of pain in hips secondary to his underlying osteoarthritis at the time. Dr. Lindberg acknowledged that it is possible Claimant did not have symptoms between late March 2019 and September 2019, as

osteoarthritis of the hips waxes and wanes. Dr. Lindberg testified that, regardless of whether Claimant fell on his left or right side, the work fall did not cause or aggravate Claimant's hip condition and the need for treatment. He explained that Claimant's symptoms and need for treatment represented the natural progression of his pre-existing condition.

28. The ALJ finds the testimony of Dr. Lindberg, as supported by the medical records and the opinion of Dr. Kipe, more credible and persuasive than Claimant's testimony.

29. Claimant failed to prove by a preponderance of the evidence the bilateral total hip arthroplasties are reasonable, necessary and related to the January 30, 2020 work injury.

30. Respondents proved by a preponderance of the evidence the bilateral hip surgeries constitute intervening events which severed the causal connection between the work injury and Claimant's disability. Accordingly, Claimant's entitlement to TTD benefits should terminate as of the date of the first hip surgery, August 18, 2021.

31. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable to provide medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Regardless of the filing of a GAL for medical benefits or an order containing a general award of medical benefits, insurers retain the right to dispute whether the need for medical treatment was caused by the compensable injury. *Hardesty v. FCI Constructors, Inc.*, W.C. No. 4-611-326 (ICAO, July 7, 2005), citing *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (concerning Grover medical benefits); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997) (concerning GAL for medical benefits); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). This principle recognizes that even though an admission is filed the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Hardesty, supra*.

As found, Claimant failed to prove it is more probable than not the bilateral total hip arthroplasties performed by Dr. Meininger were reasonable, necessary, and related to the January 30, 2020 work injury. The medical records document Claimant was reporting 8/10 bilateral hip pain in September 2019, just four months prior to the work injury. The reported pain was so severe Claimant reported having difficulties walking by the end of the day, and worsening pain with movement. Dr. Dunn focused her evaluation

and treatment of Claimant's reported symptoms on the low back. Dr. Lindberg credibly explained that Dr. Dunn's initial conclusion that Claimant's issues were related to postsurgical changes in the lumbar spine was incorrect. Dr. Dunn herself later opined that Claimant's symptoms were not the result of lumbar radiculopathy. Assuming Claimant is credible in his testimony that he was not experiencing issues between late September 2019 and the work injury, such absence of symptoms could reasonably be attributed to the nature of Claimant's arthritic condition, which Dr. Lindberg credibly opined waxes and wanes. Claimant testified that his complaints of "back pain" resolved after September 2019 and returned after the work injury, which contradicts Claimant's contention that his pre-existing symptoms were different in nature than the post-injury symptoms. Although Claimant did report hip pain to Dr. Kipe at his initial evaluation, Dr. Kipe noted that Claimant had no issues walking, that he observed Claimant ambulating normally, and normal inspection of the left hip. This is contrary to Claimant's testimony that he was suffering 8/10 pain and limping severely at the time. Dr. Kipe again noted Claimant was ambulating well and a normal inspection at his April 20, 2020 evaluation. Dr. Kipe did not note any issues with Claimant's gait until May 21, 2020.

Claimant's imaging revealed significant bilateral hip osteoarthritis. Drs. Lindberg and Erickson credibly opined that Claimant's hip condition and any further need for treatment is due to the natural progression of Claimant's significant, pre-existing bilateral hip osteoarthritis. Dr. Meininger diagnosed Claimant with progressive secondary arthritis, including osteonecrosis, which he opined had likely allowed the collapse of Claimant's femoral head and contributed to his chronic, severe hip pain. The evidence indicates Dr. Meininger recommended and performed bilateral hip surgeries due to Claimant's severe pre-existing, chronic condition. The ALJ is not persuaded the work injury caused or contributed to the need for the bilateral hip surgeries performed by Dr. Meininger. The preponderant evidence establishes it is more likely Claimant's need for hip surgery was the result of the natural progression of his pre-existing condition, which was symptomatic prior to the work injury.

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no

requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

The respondents are only liable for the "direct and natural" consequences of the work related injury. *Reynal v. Home Depot USA, Inc.*, WC 4-585-674-05 (ICAO, Dec. 10, 2012). An intervening injury may sever the causal connection between the injury and the claimant's temporary disability if the claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

There is no dispute that Claimant's wrist injury has healed, and that his ongoing disabilities and limitations are related to his bilateral hips. Claimant has not alleged any ongoing dysfunction or limitation concerning his wrist. Claimant returned to work following resolution of the wrist injury and was subsequently placed on restrictions due to his hip complaints. Claimant's ATP, Dr. Kipe, opined that Claimant reached MMI for his left wrist injury as of August 4, 2020. As discussed, Claimant's bilateral surgeries were unrelated to the work injury. The need for hip surgery was the result of the natural progression of Claimant's severe, chronic and pre-existing degenerative hip condition and not the direct and natural consequence of the work injury. Claimant's disability after undergoing the bilateral hip surgeries was solely due to his bilateral hip condition and not the work injury to his left wrist. As such, the unrelated hip surgeries constitute an intervening event that severed the causal connection between the work injury and Claimant's disability. Accordingly, Claimant's entitlement to TTD benefits shall terminate as of the date of the first hip surgery, August 18, 2020.

ORDER

1. Claimant failed to prove the bilateral hip arthroplasty surgeries were reasonable, necessary and related to his admitted January 30, 2020 industrial injury. Respondents are not liable for the costs of the bilateral hip surgeries.

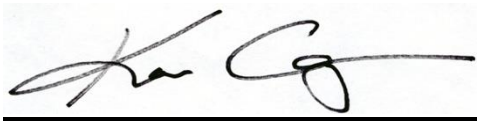
2. Respondents proved that the bilateral hip surgeries constitute intervening events that severed the casual connection between Claimant's work injury and disability.

3. Claimant's entitlement to TTD benefits is terminated as of August 18, 2021 due to the intervening events of Claimant's unrelated hip surgeries and subsequent disability.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the respondent has demonstrated, by a preponderance of the evidence, that on April 9, 2021, the claimant was an independent contractor and not an employee of the company/employer.

2. If the claimant is found to be an employee. whether the claimant has demonstrated, by a preponderance of the evidence, that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the company/employer.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Grand River Medical Center and UC Health Burn Unit was reasonable and necessary to cure and relieve him from the effects of the injury.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

5. If the claimant is found to be entitled to TT☐ benefits, whether the respondent has demonstrated, by a preponderance of the evidence, that the claimant committed a volitional act that led to his termination of employment.

6. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The company operates a heating and cooling business. As part of the company's operations, fabrication of ductwork and other items is performed. This involves the need for individuals with welding experience.

2. The claimant has provided services to the company off and on for several years. At times, [Redacted, hereinafter MB] would contact the claimant when he had work available. At other times, the claimant could contact MB[Redacted] to ask if work was available. When he accepted work from the company, the claimant typically performed welding work.

3. In performing his welding services for the company, the claimant did so at the company shop or at specific locations. MB[Redacted] communicated where the work was to be performed. The claimant performed work for the company using the company's tools and equipment.

4. When the claimant was not performing services for the company, he has worked as a handyman and as a car detailer.

5. In 2021, the claimant began working on a ventilation project for the company in approximately January 2021. Between January 2021 and April 9, 2021, the company paid the claimant $18.00 per hour. The claimant worked 40 hours per week and his work day began at 8:00 a.m. The claimant was paid via company check. These checks were issued to the claimant in his name. The claimant did not work for any other company or individuals while working for the company.

6. On April 9, 2021, the claimant was fabricating an item for the company. The specifications of this item was communicated to the claimant by MB[Redacted]. On April 9, 2021, the claimant was working in the company shop. While fabricating the item in question on that date, the claimant was operating a grinder. A spark from the grinder started a fire in the shop.

7. The claimant attempted to extinguish the fire by using blankets and papers that were present in the shop. In doing so, the claimant sustained burns to his right arm, right hand, and face.

8. There were individuals[1] that came to the claimant's assistance in extinguishing the fire. One of these individuals immediately transported the claimant to the emergency department (ED) at Grand River Medical Center in Rifle, Colorado.

9. In the ED the claimant was seen by Dr. Ronald Lawton. The medical record of that date states that the claimant "was grinding metal when the sparks ignited a fire on cardboard in the bed of his truck. He reached with his bare hands to pull a cardboard out sustaining burns to his right hand, forearm and face." Specifically, the claimant was diagnosed with a first degree burn to his face, and second degree burns on his right arm and hand. The claimant's burns were cleaned and bandaged. The claimant was referred to UC Health Burn Center. The claimant was transported by a family member to the UC Health Burn Center, (which is located at the Anschutz Medical Campus in Aurora, Colorado).

10. The claimant was admitted to the burn center on April 9, 2021. At that time, the claimant reported that he "was grinding metal with a machine when sparks flew and caught some nearby paper." The claimant's diagnoses included burns to 4.25 percent of his total body surface area (TBSA), and third degree bums to his right hand and right forearm.

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[1] It is unclear to the ALJ whether these individuals were employees of the company or unaffiliated bystanders.

11. While hospitalized, the claimant's burns were cleaned and debrided. In addition, skin grafts were performed, utilizing skin from the claimant's right thigh. The claimant was released from the burn center on April 25, 2021.

12. While the claimant was hospitalized, the company continued to pay him at a rate of $18.00 per hour for 40 hours per week. In addition, the company has paid for the treatment the claimant received at Grand River Medical Center.

13. After the claimant was released from the hospital on April 25, 2021, he returned to the company and worked on a full-time basis with no work restrictions. The claimant worked in this capacity for approximately one month.

14. The claimant testified that after one month, MB[Redacted] fired him because his production had diminished since the fire. MB[Redacted] testified that the claimant quit working for the company because his duties changed after the fire. MB[Redacted] further testified that when the claimant was released from the hospital, MB[Redacted] did not want the claimant welding. He assigned the claimant other duties such as picking up debris at job sites, or driving to pick up materials. It is MB's[Redacted] understanding that the claimant did not like this change and quit as a result.

15. In July 2021, the claimant began other employment. The claimant now works as a handyman for a party rental company. The claimant works in his new position on a full-time basis with no work restrictions.

16. The company asserts that the claimant worked for the company as an independent contractor. MB[Redacted] testified he asked the claimant for proof of liability insurance, but the claimant did not provide that information to the company.

17. The ALJ has considered the facts presented at hearing and finds that the respondents have failed to demonstrate that the claimant was an independent contractor on April 9, 2021. In reaching this conclusion, the ALJ considered the following: the claimant did not provide services for any other individual or entity while working for the company; the claimant was paid an hourly rate and had consistent hours; the claimant continued to be paid these same wages while he was hospitalized; MB[Redacted] directed the claimant as to where work would be performed and what was to be done; the claimant used the company's tools when performing his work; the claimant performed work at the company shop; and the claimant was paid in his own name. The ALJ finds that the claimant was an employee of the company on April 9, 2021.

18. The ALJ credits the medical records and finds that the claimant has demonstrated that it is more likely than not that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer/company. The claimant was working within the scope of his job duties fabricating an item (as directed by MB[Redacted]) at the company's shop when he was burned.

19. The ALJ credits the medical records and finds that the claimant has demonstrated that it is more likely than not that the treatment the claimant received at Grand River Medical Center and the UC Health Burn Unit was reasonable, necessary, and related to the claimant's work injury.

20. The ALJ credits the testimony of the claimant and MB[Redacted] and finds that for the period of April 10, 2021 through April 25, 2021, the claimant did not suffer a wage loss as the employer continued to pay the claimant his normal wages during that period of time. After his release from the hospital, the claimant returned to work for the employer for approximately one month. The ALJ finds that the claimant suffered no wage loss during that time.

21. The period beginning on approximately May 25, 2021[2] the claimant's employment with the employer ended. The ALJ has considered the testimony presented by both parties regarding the claimant's job separation. The ALJ credits' MBs[Redacted] testimony and finds that after the claimant returned to work for the company, the claimant was not given any additional welding responsibilities, but was provided with full-time work. The claimant was dissatisfied with this change to his job duties and he quit his employment. The ALJ finds that the respondents have demonstrated that it is more likely than not that the claimant was responsible for the termination of his employment. Therefore, the claimant is not entitled to temporary total disability (TTD) benefits beginning on May 25, 2021 and thereafter.

22. Based on the testimony presented at the hearing, the ALJ finds that the claimant's average weekly wage (AWW) at the time of his injury was $720.00 ($18.00 per hour, and 40 hours per week).

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

[2] Which is one month after the claimant's return to work.

bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation... under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

6. As found, the claimant provided services to the respondent and was paid for his services. Therefore, the claimant is presumed to be an employee of respondent.

7. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

a. required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

b. established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed)

c. paid a salary or hourly rate but rather a fixed or contract rate;

d. may terminate the work during the contract period unless the individual violates the terms of the contract or fails

to produce results that meet the specifications of the contract;

e. provided more than minimal training for the individual;

f. provided tools or benefits to the individual; (except that materials and equipment may be supplied);

g. dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

h. paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

i. combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. In *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014) the Colorado Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

9. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose

benefit liability on the employer. See *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

10. Section 8-40-202(b }(IV}, C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b}(II}, C.R.S. and includes language in bold faced font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

11. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant did not provide services for any other individual or entity while working for the company; the claimant was paid an hourly rate and had consistent hours; the claimant continued to be paid these same wages while he was hospitalized; MB[Redacted] directed the claimant as to where work would be performed and what was to be done; the claimant used the company's tools when performing his work; the claimant performed work at the company shop; and the claimant was paid in his own name. The ALJ concludes that the claimant was not free from the direction and control of the company when performing his duties. The ALJ further concludes that the claimant was not engaged in an independent trade or business.

12. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment.
See H & H Warehouse v. Vicory, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

13. As found, the claimant has demonstrated, by a preponderance of the evidence, that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the medical records and the testimony of the claimant and MB[Redacted] are credible and persuasive on this issue.

14. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

15. As found, the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Grand River Medical and UC Health Burn Unit was reasonable, necessary, and related to the work injury. As found, the medical records are credible and persuasive.

16. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995).

17. As found, the claimant's AWW at the time of his injury was $720.00 ($18.00 per hour, and 40 hours per week).

18. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy &* Co., 964 P.2d 595 (Colo. App. 1998).

19. As found, the claimant did not suffer a wage loss between April 10, 2021, and April 25, 2021 as the employer continued to pay his normal wages during his hospitalization. As found, beginning April 26, 2021 and until his final day of employment, the claimant continued to work on a full-time basis for the employer. Therefore, he did not suffer any wage loss during that time.

20. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance

context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

21. As found, the respondents have demonstrated, by a preponderance of the evidence, that the claimant is responsible for the termination of his employment with the employer. The claimant exercised a volitional act when he quit his employment because he was dissatisfied with changes to his job duties (no longer welding). Ongoing full-time work was available to the claimant if he had not quit. Therefore, any wage loss the claimant experienced as a result of his job separation was due to his own actions, and not due to any work restrictions or limitations caused by the work injury. As found, the testimony of MB[Redacted] is credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant was an employee of the employer on April 9, 2021.

2. The claimant suffered a compensable injury while working on April 9, 2021.

3. The respondents are responsible for the medical treatment the claimant has received as a result of the April 9, 2021 work injury.

4. The claimant is not entitled to temporary total disability (TTD) benefits.

5. The claimant's average weekly wage (AWW) is $720.00.

6. All matters not determined here are reserved for future determination.

Dated August 16, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6^{1h} Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-968-001

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1.Respondent did not own or operate the [Redacted, hereinafter PF] facility in Colorado Springs where Claimant was working out on July 20, 2021.

2. Claimant did not report his back injury until October 29, 2021.

3.Claimant's medical treatment on and after October 29, 2021 through UC Health and James M. Bee, M.D. was authorized, reasonable and necessary.

4.Claimant earned an Average Weekly Wage (AWW) of $1089.80.

FINDINGS OF FACT

1.Claimant is a resident of Colorado Springs, CO. During October 2020 he purchased a basic gym membership from PF[Redacted] in Colorado Springs. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his fees.

2.Employer hired Claimant as a Firefighter Cadet on February 1, 2021. Claimant testified that, as part of the hiring process, he underwent a physical examination and was cleared as a Cadet. Because Claimant was expected to maintain adequate physical fitness, he was permitted to choose the facility where he worked out. Claimant continued to exercise at PF[Redacted] in Colorado Springs.

3.Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

4.At hearing, Claimant introduced §10.29 of Respondent's Manual of Procedures (MOP) for firefighters. Section 10.29 specifically addressed the Cadet program. Section 10.29 provides that Cadets would participate in all fitness assessments during their first week. Cadets were "allowed" to work out for three hours during their 40-hour work weeks. Cadets electing to participate in fitness activities during their work day were supposed to

coordinate workout times with a "designated point of contact in the division they are assigned." Section 10.29 specified certain facilities where Cadets could and could not work out. In the alternative, Cadets could work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

5.On July 20, 2021 Claimant began his work day at 6:00 a.m. and concluded his day at 4:00 p.m. He was paid for his ten-hour shift. Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period with the exception of holiday pay.

6.After Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant did not go to the gym at the direction of Respondent. When Claimant was performing squats/lunge squats with 270 pounds, he felt immediate pain in his lower back. Claimant remarked that he was injured at 5:30 p.m. or approximately 90 minutes after his work day concluded. He was not paid for any of the time spent at PF[Redacted] on July 20, 2021.

7.In contravention of §10.29 Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Respondent. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Respondent's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021.

8.Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant alone decided his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up.

9.Claimant's first documented medical visit following the July 20, 2021 incident occurred on September 9, 2021 when he visited Amelia Anne Martin, NP at Lake Plaza Primary Care within UCHealth (Lake Plaza Primary). The reason for the visit was a reported testicular lump. Claimant specifically reported a lump on his left testicle that had grown in size, generating intermittent tenderness and scrotal swelling. He "sometimes" experienced pain that radiated into his right groin and lower back. The clinical notes do not mention a specific incident arising from the lifting of weights or any other fitness activities on July 20, 2021.

10.On October 28, 2021 Crystal Michealson, PAC at UCHealth Urgent Care-Powers authored a "to whom it may concern" note. The document stated Claimant had been evaluated and could return to work with restrictions limiting repetitive bending and lifting not to exceed ten pounds for two weeks. The note was accompanied by an "After Visit Summary." The Summary stated that the October 28, 2021 visit was for "acute left-sided low back pain with left-sided sciatica."

11.On October 28, 2021 Claimant reported his July 20, 2021 injury to Employer. He completed a First Report of Injury (FROI) on the following day at 7:00 a.m. Claimant remarked that his injury occurred at PF[Redacted] in Colorado Springs. His work day on July 20, 2021 began at 6:00 a.m. and ended at 4:00 p.m. Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. He noted the injury occurred when he was "[w]orking out during [his] daily allotted physical training time." Accompanying the FROI was a Notice of Claim on the Job Injury (Notice of Claim). The Notice of Claim repeated the date, time and location of Claimant's injury as stated in the FROI. Claimant reiterated that the injury occurred "while doing lunge squats." He specified "work out was done for my allotted physical training time."

12.Claimant returned to Lake Plaza Primary on November 5, 2021 and was diagnosed with epididymitis and "chronic left-sided low back pain with left sided sciatica." NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." On physical examination of Claimant's lower back NP Martin found normal range of motion, negative straight leg raise tests bilaterally, and no swelling, edema, deformity, lacerations, spasms, tenderness or bony tenderness. Although Claimant had no SI joint pain, he experienced symptoms while performing the left-sided straight leg raise.

13.Claimant began treating at Powers Adult Rehab within the UCHealth system on November 19, 2021. Providers initiated a physical therapy plan to alleviate Claimant's reported symptoms. The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training.

14.On January 10, 2022 Claimant visited James M. Bee, M.D. of the Colorado Springs Orthopaedic Group. Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." On physical examination, Claimant displayed normal muscle tone, normal thoracic range of motion, and no tenderness of the thoracic or lumbar spine. He exhibited some limited lumbar flexion and extension with tightening at the extremes. X-rays revealed an L5 pars fracture and a grade 1 spondylolisthesis. MRI films reflected bilateral pars defects at L5 and posterior disc bulging combined with L5-S1 spondylolisthesis that caused compression of the exiting L5 nerve roots bilaterally. Dr. Bee diagnosed an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis and intermittent left leg radiculopathy.

15.On May 17, 2022 Claimant returned to NP Martin at Lake Plaza Primary for an evaluation. She noted that Claimant continued to suffer lower back pain and activity restrictions. Claimant had been attending physical therapy and visiting Dr. Bee on a regular basis. Dr. Bee recommended an ESI and possible surgery if Claimant failed to improve. NP Martin remarked that Claimant has been on light duty work with Employer. She assessed Claimant with spondylolisthesis and foraminal stenosis of the lumbar

region. NP recommended continued treatment with Dr. Bee and possible surgical intervention in the absence of improvement.

16.Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer. Initially, when Employer hired Claimant as a Cadet he was expected to maintain adequate physical fitness. Claimant chose to continue to exercise at PF[Redacted] in Colorado Springs. Claimant explained that on July 20, 2021 he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. While performing squats/lunge squats with 270 pounds, he experienced pain in his lower back. Claimant did not immediately report his symptoms because he was concerned he may have suffered a testicular injury. He ultimately reported his lower back injury to Employer on October 28, 2021. In the FROI Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. Dr. Bee ultimately diagnosed Claimant with an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis, and intermittent left leg radiculopathy.

17.Although medical providers did not specifically articulate a causal connection between Claimant's workout activities on July 20, 2021 and his lower back injuries, the bulk of the medical evidence reflects a likely causal relationship. Claimant consistently attributed his lower back symptoms to performing squats while weight-training. Specifically, on November 5, 2021 NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training. Finally, at a January 10, 2022 visit with Dr. Bee, Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." The record thus reveals that medical providers evaluated Claimant's symptoms and diagnosed his condition based on symptoms that he developed while performing squats. However, despite a causal connection between Claimant's lower back condition and weight-training, the critical issue is whether Claimant's injuries arose during the course and scope of his employment while performing squats on July 20, 2021. Based on the factors detailed in *Price,* Claimant has failed to meet his burden.

18.The first *Price* factor is whether the injury occurred during working hours. The preceding factor receives substantial weight in the analysis. The record reflects that Claimant's July 20, 2021 lower back injuries did not occur during working hours. The FROI prepared by Claimant stated that his work day began at 6:00 a.m. and concluded at 4:00 p.m. During the hearing, Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period, with the exception of holiday pay.

19.After Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant stated in both the FROI and Notice of Claim that his injury occurred at 5:30 p.m. on July 20, 2021. He was not paid for any of the time spent at PF[Redacted] on the day of his accident. In contrast, Employer's MOP §10.29 only provided an opportunity for Claimant to engage in physical fitness activities for up to three hours per week while being paid. Because Claimant's lower back injuries occurred approximately ninety minutes after the conclusion of his work day, he was not injured during working hours.

20.The second *Price* factor considers whether the injury occurred on the employer's premises. The reporting documents prepared by Claimant state that he was engaged in a fitness program at a PF[Redacted] facility in Colorado Springs. The parties stipulated that Respondent did not own or operate the facility. The injury thus did not occur on Employer's premises. Nevertheless, Claimant has emphasized that Respondent permitted him to work out at a gym of his choice. Specifically, §10.29 of Respondent's MOP permitted Cadets to work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

21.Although Claimant was permitted to choose his own workout facility pursuant to Employer's policy, PF[Redacted] did not constitute Employer's premises. The determination of whether a facility or gym is on the employer's premises is based on whether it is owned by the employer or the employer exercises a degree of control over the operation of the facility. Employer's "control" over Claimant's workout at PF[Redacted] on July 20, 2021 was so limited that it negated a finding that the off-premises injury occurred in the course of employment. Employer simply did not exercise control over the risks associated with off-premises workouts. Accordingly, the record reveals that Claimant's lower back injuries on July 20, 2021 did not occur on Employer's premises.

22.The third *Price* factor is whether the employer initiated the employee's exercise program. The record regarding the third factor is somewhat mixed. Weighing in favor of initiation is that Employer encouraged Claimant and other Cadets to maintain adequate physical fitness. However, Claimant, on his own accord, had entered into a contract with PF[Redacted] to avail himself of the exercise equipment and other amenities conducive to maintaining physical fitness in October 2020, or several months before he was hired by Employer. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his membership fees. Claimant's fitness program at PF[Redacted] was self-directed without the involvement of a personal trainer. While Claimant's fitness program was "influenced" by Employer, his program predated his employment and was not initiated by Respondent. Moreover, Claimant was not directed to engage in a specific program. The record thus reveals that, although Employer encouraged Claimant to maintain physical fitness as a Cadet, Employer did not initiate Claimant's fitness program at PF[Redacted].

23.The fourth *Price* factor is whether the employer "exerted any control or direction over the employee's exercise program." Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of

certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

24.However, Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Employer. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Employer's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021. Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant determined his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up. Furthermore, Claimant purchased the basic customer or client plan at PF[Redacted] before he worked for Employer. The basic plan necessarily dictated the amenities to which he had access while implementing his fitness program. The record thus reveals that Employer did not exert control or direction over Claimant's fitness program during July 2021.

25.The final *Price* factor is whether the employer "stood to benefit from the employee's exercise program." Employer expected Claimant to maintain adequate physical fitness as a Cadet. His improved fitness level through working out would enhance his abilities as a Cadet and ultimately as a firefighter for Employer. Similarly, in *Price*, the Supreme Court noted the employer stood to benefit from the claimant's exercise program because it would provide the employer with a physically fit employee.

26.However, the Supreme Court in *Price* observed that fitness was a qualification of employment in the first place. The Court thus placed very little weight on the fifth factor. The Supreme Court noted that where fitness was a condition or qualification for employment but did not specify what the employee had to do to satisfy the criteria, the employee assumed responsibility for and any attendant risk of meeting the job qualifications. Similarly, here, Employer generally encouraged fitness but did not detail the criteria for Claimant's fitness level as a Cadet. Therefore, any benefit to Employer was negligible.

27.Considering all of the *Price* factors reveals that Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 lower back injuries arose out of the course and scope of his employment with Employer. Notably, because Claimant failed to satisfy the first two *Price* criteria, he was required to "make an extremely strong showing on the other factors in order to prevail on his claim." *Id*. at 211. However, the record reveals that only the fifth factor, to a negligible degree, clearly favored compensability for Claimant's workout activities at PF[Redacted] on July 20, 2021. Accordingly, Claimant's request for Worker's Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3.When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4.To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its origin in a “work-related function and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Whether an injury arises out of and in the course and scope of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Indus. Claim Appeals Off.,* 961 P.2d 1141 (Colo. App. 1998).

5.In *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207 (Colo. 1996) the Colorado Supreme Court detailed the factors relevant to determining whether an injury suffered by an employee engaged in an exercise program is compensable. The Court enumerated the following factors: (1) whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction

over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. *Id.* at 210-11. The first two factors receive the greatest weight "because these indicia of time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment." *Id.* at 211.

6.As found, Claimant has failed to demonstrate by a preponderance of the evidence that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer. Initially, when Employer hired Claimant as a Cadet he was expected to maintain adequate physical fitness. Claimant chose to continue to exercise at PF[Redacted] in Colorado Springs. Claimant explained that on July 20, 2021 he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. While performing squats/lunge squats with 270 pounds, he experienced pain in his lower back. Claimant did not immediately report his symptoms because he was concerned he may have suffered a testicular injury. He ultimately reported his lower back injury to Employer on October 28, 2021. In the FROI Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. Dr. Bee ultimately diagnosed Claimant with an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis, and intermittent left leg radiculopathy.

7.As found, although medical providers did not specifically articulate a causal connection between Claimant's workout activities on July 20, 2021 and his lower back injuries, the bulk of the medical evidence reflects a likely causal relationship. Claimant consistently attributed his lower back symptoms to performing squats while weight-training. Specifically, on November 5, 2021 NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training. Finally, at a January 10, 2022 visit with Dr. Bee, Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." The record thus reveals that medical providers evaluated Claimant's symptoms and diagnosed his condition based on symptoms that he developed while performing squats. However, despite a causal connection between Claimant's lower back condition and weight-training, the critical issue is whether Claimant's injuries arose during the course and scope of his employment while performing squats on July 20, 2021. Based on the factors detailed in *Price,* Claimant has failed to meet his burden.

8. As found, the first *Price* factor is whether the injury occurred during working hours. The preceding factor receives substantial weight in the analysis. The record reflects that Claimant's July 20, 2021 lower back injuries did not occur during working hours. The FROI prepared by Claimant stated that his work day began at 6:00 a.m. and concluded at 4:00 p.m. During the hearing, Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by

the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period, with the exception of holiday pay.

9.As found, after Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant stated in both the FROI and Notice of Claim that his injury occurred at 5:30 p.m. on July 20, 2021. He was not paid for any of the time spent at PF[Redacted] on the day of his accident. In contrast, Employer's MOP §10.29 only provided an opportunity for Claimant to engage in physical fitness activities for up to three hours per week while being paid. Because Claimant's lower back injuries occurred approximately ninety minutes after the conclusion of his work day, he was not injured during working hours.

10.As found, the second *Price* factor considers whether the injury occurred on the employer's premises. The reporting documents prepared by Claimant state that he was engaged in a fitness program at a PF[Redacted] facility in Colorado Springs. The parties stipulated that Respondent did not own or operate the facility. The injury thus did not occur on Employer's premises. Nevertheless, Claimant has emphasized that Respondent permitted him to work out at a gym of his choice. Specifically, §10.29 of Respondent's MOP permitted Cadets to work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

11.As found, although Claimant was permitted to choose his own workout facility pursuant to Employer's policy, PF[Redacted] did not constitute Employer's premises. The determination of whether a facility or gym is on the employer's premises is based on whether it is owned by the employer or the employer exercises a degree of control over the operation of the facility. *See Price,* 919 P.2d at 211. Employer's "control" over Claimant's workout at PF[Redacted] on July 20, 2021 was so limited that it negated a finding that the off-premises injury occurred in the course of employment. *See In Re Pargas,* W.C. No. 4-397-537 (ICAO, Feb. 17, 1999). Employer simply did not exercise control over the risks associated with off-premises workouts. Accordingly, the record reveals that Claimant's lower back injuries on July 20, 2021 did not occur on Employer's premises.

12.As found, the third *Price* factor is whether the employer initiated the employee's exercise program. The record regarding the third factor is somewhat mixed. Weighing in favor of initiation is that Employer encouraged Claimant and other Cadets to maintain adequate physical fitness. However, Claimant, on his own accord, had entered into a contract with PF[Redacted] to avail himself of the exercise equipment and other amenities conducive to maintaining physical fitness in October 2020, or several months before he was hired by Employer. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his membership fees. Claimant's fitness program at PF[Redacted] was self-directed without the involvement of a personal trainer. While Claimant's fitness program was "influenced" by Employer, his program predated his employment and was not initiated by Respondent. Moreover, Claimant was not directed to engage in a specific program. The record thus reveals that,

although Employer encouraged Claimant to maintain physical fitness as a Cadet, Employer did not initiate Claimant's fitness program at PF[Redacted].

13. As found, the fourth *Price* factor is whether the employer "exerted any control or direction over the employee's exercise program." Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

14. As found, however, Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Employer. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Employer's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021. Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant determined his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up. Furthermore, Claimant purchased the basic customer or client plan at PF[Redacted] before he worked for Employer. The basic plan necessarily dictated the amenities to which he had access while implementing his fitness program. The record thus reveals that Employer did not exert control or direction over Claimant's fitness program during July 2021. *See Price*, 919 P.2d at 211 (employer exercised no control over employee's home exercise program because it did not furnish equipment or dictate the type of equipment to be used).

15. As found, the final *Price* factor is whether the employer "stood to benefit from the employee's exercise program." Employer expected Claimant to maintain adequate physical fitness as a Cadet. His improved fitness level through working out would enhance his abilities as a Cadet and ultimately as a firefighter for Employer. Similarly, in *Price*, the Supreme Court noted the employer stood to benefit from the claimant's exercise program because it would provide the employer with a physically fit employee.

16. As found, however, the Supreme Court in *Price* observed that fitness was a qualification of employment in the first place. *Price*, 919 P.2d at 211. The Court thus placed very little weight on the fifth factor. The Supreme Court noted that where fitness was a condition or qualification for employment but did not specify what the employee had to do to satisfy the criteria, the employee assumed responsibility for and any attendant risk of meeting the job qualifications. Similarly, here, Employer generally encouraged fitness but did not detail the criteria for Claimant's fitness level as a Cadet. Therefore, any benefit to Employer was negligible.

17. As found, considering all of the *Price* factors reveals that Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 lower back injuries arose out of the course and scope of his employment with Employer. Notably, because Claimant failed to satisfy the first two *Price* criteria, he was required to "make an extremely strong showing on the other factors in order to prevail on his claim." *Id*. at 211.

However, the record reveals that only the fifth factor, to a negligible degree, clearly favored compensability for Claimant's workout activities at PF[Redacted] on July 20, 2021. Accordingly, Claimant's request for Worker's Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 16, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-121-928-002

ISSUES

The issues set for determination included:

- Is Claimant's claim is barred by the statute of limitations?
- If Claimant's claim is not barred by the statute of limitations, did Claimant sustain a compensable injury?
- Is Claimant's right knee arthroscopy recommended by Dr. Phillip Stull reasonable, necessary and related to the work injury of September 18, 2017?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on June 28, 2022. Respondent requested a full Order on July 15, 202, which was received on July 16, 2022. Claimant filed amended proposed Findings of Fact, Conclusions of Law and Order. This Order follows.

FINDINGS OF FACT

1. Claimant was employed as a teacher and coach by Respondent.

2. Claimant's medical history was significant in that he had three previous work injuries while working for Employer, including one in which he hurt his ankle on February 12, 2009. He treated with J. Raschbacher, M.D. as well as Yusuke Wakeshima, M.D. for the 2009 injury.

3. Claimant's treatment for the 2009 ankle injury included an ankle fusion surgery performed in 2016 and rehabilitation treatment following the surgery. Claimant also required treatment for his low back as a result of that injury. Claimant was continuing that treatment in 2017, which was being overseen by Dr. Wakeshima.

4. On September 18, 2017, Claimant injured his knee at work while walking across the field. Claimant testified this was near the ground was uneven and he felt pain in his knee when he stepped into a hole. Claimant thought he told Dr. Wakeshima that he stepped into hole when his knee popped.[1] Claimant was a credible witness and his testimony established he was working at the time.

[1] Hearing Transcript ("Hrg. Tr.") pp. 45:16-46:8.

5. On September 19, 2017, Claimant was evaluated by Dr. Wakeshima, who noted Claimant presented sooner than originally scheduled due to increased right knee pain and reported that something "popped" in his right knee. On the progress form, Claimant referenced pain in his right knee in the written description, as well as on the pain diagram.

6. The medical report said Claimant wasn't doing it anything out of the ordinary, except coaching high school football practice and to get out on the practice field, he had to go through uneven terrain with many holes.[2] Dr. Wakeshima also noted Claimant denied "any new trauma… As regards work-relatedness, since he does wear a high ankle brace… he may have additional stress to his knee region, especially if he has to pick or go up and down on his knees or push off when on the field and therefore I would opine that the knee issue is related to his current work injury of his ankle…"

7. The ALJ found that, while these entries were not completely clear, it was more probable than not that a traumatic event causing injury to the knee occurred on that day, as evidenced by the "pop".

8. The ALJ noted that Dr. Wakeshima listed the date of injury as February 12, 2009 and said Claimant was being seen for right ankle issues today. Dr. Wakeshima recorded that Claimant's right knee was swollen and ordered an ultrasound for the right lower extremity, which showed no evidence of DVT. With respect to the right knee, Dr. Wakeshima listed the diagnosis of "acute" pain of right knee and ordered an MRI.[3] The ALJ inferred Respondent-Employer was provided a copy of the medical September 19, 2017 report.

9. The ALJ concluded Claimant's injury on September 18, 2017 arose out of and was in the course of his employment.

10. Claimant testified that he reported the injury to [Redacted, hereinafter AK], who is an assistant principal/athletic director. Claimant said he also talked to BS[Redacted] who was the secretary in AK's[Redacted] office. AK[Redacted] sent Claimant to Dr. Wakeshima.[4] Claimant said he spoke to the adjuster on the claim following the injury in the presence of Dr. Wakeshima's assistant.

11. There was no written document that corroborated Claimant's report of injury to AK[Redacted].

[2] Exhibit 2, second page (no Bates number).

[3] The report also contained the diagnoses related to the ankle injury, which included DJD, pain in right ankle and joints of right foot; other chronic pain; lumbar facet arthropathy; low back pain; pain in left hip; pain in right hip.

[4] Hrg. Tr. p. 24:22-25:7.

12. On cross-examination, Claimant admitted he knew the process for reporting an injury to Employer.

13. On September 25, 2017, Claimant underwent an MRI of the right knee and the films were read by Matthew Chanin, M.D. Dr. Chanin's conclusion was: age-indeterminate medial meniscus tear; chronic tri-compartment chondromalacia, including a large osteochondral erosion along the patellar median ridge; effusion. The ALJ inferred that the presence of effusion was some evidence Claimant suffered a trauma to the right knee. The ALJ inferred Respondent-Employer was provided a copy of the medical September 25, 2017 MRI report.

14. Claimant was evaluated by William Ciccone, II, M.D. on October 16, 2017. Claimant testified Dr. Wakeshima referred him to Dr. Ciccone. Dr. Ciccone's assessment was: right knee pain with degenerative changes; traumatic tear of medial meniscus of right knee. This assessment was evidence that supported the conclusion that Claimant suffered a knee injury as alleged in September 2017.

15. Physical therapy ("PT") was ordered to strengthen the knee. Dr. Ciccone noted that if Claimant had persistent mechanical symptoms, the possibilities for arthroscopic intervention existed, however, given his degenerative changes this would be his last resort to help with mechanical-type symptoms. The ALJ inferred Respondent-Employer was provided a copy of the medical October 16, 2017 report.

16. On November 6, 2017, Claimant was evaluated by Dr. Raschbacher. The treatment note that stated this was a recheck of the ankle, but referenced the fact that Dr. Ciccone ordered eight visits of PT for Claimant's knee. Dr. Raschbacher also said "it appears this is covered under his ankle claim rather than being a new claim". Claimant was awaiting ankle surgery. The ALJ inferred Respondent-Employer was provided a copy of the medical November 6, 2017 report and was aware that the knee treatment was being provided under the September 18, 2017 claim.

17. When Claimant returned to Dr. Raschbacher on February 22, 2018, the treatment note recorded the fact that Claimant was going to get PT on the right knee, but this was delayed for ankle surgery. Therapy was to start on the right knee.

18. Claimant was evaluated by James Johnson, M.D. on February 20, 2019. Claimant testified Dr. Wakeshima referred him to Dr. Johnson. At that time, Claimant reported pain and discomfort in the right knee. Dr. Johnson reviewed a repeat MRI of the knee and noted that it showed a complex tear of the horn of the medial meniscus, along with end stage arthritis. He opined that Claimant's knee condition was secondary to a change in gait mechanics from the ankle injury. Dr. Johnson recommended Claimant for arthroscopic medial meniscectomy and chondroplasty.

19. Timothy O'Brien, M.D. performed an IME on April 30, 2019, at Respondent's request. Dr. O'Brien opined that the requested knee surgery was not reasonable or necessary to repair Claimant's torn meniscus and further that it was not related to

Claimant's ankle injury. Dr. O'Brien noted that Claimant's right lower extremity was actually receiving much less use due to his frequent ankle surgeries and as such was being rested. He did not believe Claimant's brace altered the biomechanics of his right lower extremity. Dr. O'Brien stated Claimant's right knee condition was the result of his personal health, his genetic makeup and of his age. Dr. O'Brien further stated that arthroscopic surgery on arthritic knees was contraindicated by scientific studies, as well as the American Academy of Orthopedic Surgeons. Based upon Dr. O'Brien's report, Respondent denied authorization for the requested surgery.

20. Dr. O'Brien testified as an expert in Orthopedic Surgery at hearing, and was board certified by the American Academy of Orthopedic Surgeons ("AAOS"). He is Level-II accredited pursuant to the W.C.R.P. Dr. O'Brien said he reviewed the extensive records as part of the IME process. He agreed the case was complex and he questioned whether the incident in September 2017 caused the meniscal tear. There was a question regarding whether there was an acute injury or trauma to the right knee. Dr. O'Brien said Clamant had advanced degeneration of the patellofemoral joint and deterioration of the cartilage.

21. Dr. O'Brien stated that, regardless of whether or not there was an injury, surgery in this case was contraindicated by the medical literature as well as by the AAOS' treatment guidelines. He specifically noted that the science and research concerning arthroscopic surgeries on arthritic patients all concluded that surgery was not recommended.[5]

22. Dr. O'Brien disagreed with Dr. Stull that surgery was supported in this case, but felt Dr. Stull's opinion was unsupported. He did not believe Dr. Stull had reviewed all of Claimant's medical records, although he noted Dr. Stull was board-certified by the AAOS. Dr. O'Brien testified that Claimant's right knee condition was not related to the work injury.

23. Claimant returned to Dr. Wakeshima on June 17, 2019. At that time, right knee pain issues, with swelling and sensation of a pop were noted. The question arose whether he may have injured his knee with chronic use of high ankle foot orthotics and the MRI study of September 25, 2017 was referenced. Dr. Wakeshima discussed Claimant's case with Dr. Johnson, who opined that an arthroscopic surgery to address the meniscal tear of the right knee would be medically appropriate and indicated. Dr. Johnson said this was the standard of care for a meniscal tear. The ALJ credited Dr. Johnson's opinion that the proposed arthroscopic surgery was reasonable and necessary.

24. Both Dr. Wakeshima and Dr. Johnson agreed that the case should have a second orthopedic opinion offered by an orthopedic surgeon who specialized in arthroscopy and was fellowship trained in sports medicine and knee arthroscopy.

[5] Hrg. Tr. p. 63:24-65:15.

25. The ALJ found medical records from Dr. Wakeshima consistently referenced the February 12, 2009 date of injury (See reports from evaluations on March 13, 2018, March 4, 2019, April 25, 2019, May 10, 2019 and July 1, 2019). There was evidence of right knee complaints in these records.

26. On July 9, 2019, Claimant was evaluated by Philip Stull, M.D. to whom he was referred by Dr. Wakeshima. Dr. Stull noted Claimant was injured while working in September 2017 when he stepped in a hole and twisted his right knee. Claimant had no prior right knee problems, although he had chronic right ankle issues and multiple surgeries. Dr. Stull noted Claimant's persistent knee symptoms got pushed to the back burner as he tried to recover from his ankle surgery.

27. On examination, the alignment of Claimant's right knee was normal and the range of motion was full on extension and flexion. The medial joint space was tender and there was a positive McMurray's test medially. Dr. Stull stated the medial meniscus tear was "clearly and unequivocally related to the work–related trauma in September 2017". Dr. Stull recommended a right knee arthroscopy. Dr. Stull disagreed with the opinions expressed by Dr. O'Brien with respect to the proposed arthroscopy. Dr. Stull's opinions were persuasive to the ALJ.

28. Claimant returned to Dr. Stull on July 17, 2019 after the proposed surgery was denied. Dr. Stull reiterated his opinion that arthroscopy was the best option for Claimant.

29. Claimant testified that he thought the adjuster for Respondent authorized his prescriptions, which he took as part of the treatment for his knee. He said he did not have to pay for the prescriptions.

30. The evidence in the record led the ALJ to conclude that Respondent provided medical benefits which included Claimant's treatment of the right knee under the ankle work injury.

31. Claimant filed a Workers' Claim for Compensation on October 28, 2019, which was the first time Claimant filed a separate claim for the right knee.[6]

32. Claimant's Workers' Claim for Compensation was filed two years and forty days after his injury. The ALJ found Claimant did not file a written claim before the Workers' Claim for Compensation was filed. Claimant demonstrated there was a reasonable excuse for the delay in filing the Workers' Claim, given that medical benefits were provided under the prior claim.

33. The ALJ concluded Respondent had notice of Claimant's September 18, 2017 injury by virtue of the medical reports prepared by Dr. Wakeshima and Dr. Raschbacher, who were ATP-s on the Claimant's prior work injury.

[6] Exhibit A.

34. Respondent was not prejudiced by the failure of Claimant to file the Worker's Claim for Compensation before October 28, 2019.

35. Claimant proved that the surgery proposed by Drs. Johnson and Stull was reasonable, necessary and related to his work injury.

36. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Statute of Limitations Defense

As a starting point, this case arose out of a complex set of facts, including a complex injury history on the part of Claimant. Claimant sustained an admitted industrial injury to his ankle on February 12, 2009 and received extensive treatment for this injury. (Finding of Fact 2). This included multiple surgeries and the treatment for that injury overlapped the time in which Claimant injured his right knee on September 18, 2017. *Id.*

Claimant testified he was injured while he was working on September 18, 2017. As found, Claimant first treated for that injury on September 19, 2017 with ATP, Dr. Wakeshima and specifically scheduled an earlier appointment due to the knee injury. Claimant argued that the injury was compensable and he had a reasonable excuse for the delay in filing the Worker's Claim for Compensation.

Respondent contended Claimant's claim was barred by the statute of limitations found in § 8-43-103(2), C.R.S. Claimant contended a reasonable excuse existed to excuse the failure to report the injury within two years and that the Worker's Claim for Compensation was filed within three years. § 8-43-103(2), C.R.S. provides in pertinent part:

> "The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title….. the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby..."

Jones v. Adolph Coors Co., 689 P.2d 681, 684 (Colo. App. 1984) is apposite to the considerations here. The Court stated: "An employer is deemed notified of an injury when he has 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim', [citing] 3 A. Larson, Workmen's Compensation Law § 78.31(a) at 15-105 (1983)". After reviewing the evidence admitted in the case at bench, the ALJ concluded Respondent had notice of Claimant's right knee injury. (Finding of Fact 33).

The ALJ found that the medical evidence in the record established Respondent was provided medical reports that detailed the circumstances of the September 18, 2017 injury. (Findings of Fact 8, 13,15-16). These records showed that Claimant's ATP's were treating his right knee complaints under the admitted February 12, 2009 injury. There were multiple references to this fact in Dr. Wakeshima's records. (Finding of Fact 25). Dr. Ciccone also referenced this fact. (Findings of Fact 14-15). The ALJ concluded Respondent was on notice of this injury. In addition, there was evidence in the record to indicate that the medical benefits were paid by Respondent. (Finding of Fact 29). Specifically, Claimant testified the prescriptions for the knee claim were paid by Respondent's adjuster. *Id.*

Under the facts of this case, the ALJ found Respondent had information regarding the knee claim and was not prejudiced by Claimant's delay in filing a Worker's Claim for

Compensation. (Finding of Fact 34). In addition, under the circumstances where Claimant‘s medical benefits were being provided under the prior claim and treatment was delayed for the knee, Claimant established a reasonable excuse for the delay in filing the worker‘s claim for compensation. (Finding of Fact 32).

When coming to this conclusion, the ALJ considered Respondent’s contention that Claimant was aware that his knee injury was a separate, distinct claim and he had knowledge of how to file a workers‘ compensation claim. (Claimant testified that he had filed separate claims previously.) Respondent averred Claimant did not establish a reasonable excuse for the failure to file the Worker’s Claim for Compensation within two years. However, the ALJ was persuaded that under these facts, where the ATP-s treated Claimant under the prior claim and the ATP-s had differing explanations for the etiology of the knee pain, Claimant established a reasonable excuse for the delay. Accordingly, the statute of limitations does not bar the claim.

Compensability of Right Knee Injury

Claimant was required to prove by a preponderance of the evidence that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. § 8-41-301(1)(a) through (c), C.R.S. The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 4-8, Claimant was working as a coach for Employer on September 18, 2017 when he walked across a field and injured his right knee. The evidence established he was working at the time. *Id.* While noting that the medical record for the evaluation on September 19, 2017 was not completely clear, the ALJ found Dr. Wakeshima described a potential cause as the ankle brace and initially opined the issue was related to the work injury. Dr. Wakeshima also described right knee pain as “acute”. (Findings of Fact 6-8). The ALJ also found there was evidence of an acute condition in the right knee, as evidenced by the presence of effusion on the MRI. (Finding of Fact 13).

The finding that Claimant suffered a compensable knee injury was also supported by the later medical records admitted into evidence. Dr. Johnson offered the opinion that Claimant‘s knee condition was secondary to a change in gait mechanics in the report, dated February 20, 2019. (Finding of Fact 18). This opinion was confirmed in a discussion Dr. Johnson had with Dr. Wakeshima on June 17, 2019. (Finding of Fact 23). As found, Dr. Stull opined that the medial meniscus tear was clearly and unequivocally related to Claimant‘s work related trauma. (Finding of Fact 27).

Accordingly, the ALJ concluded Claimant established by a preponderance of the evidence that it was more probable than not that he injured his right knee and this necessitated the surgery. (Finding of Fact 7). Respondent, therefore, is required to provide medical benefits to Claimant.

Medical Benefits

In the case at bench, Claimant had the burden of proof to show that the surgery proposed by Dr. Johnson was reasonable, necessary and related to the industrial injury. Claimant asserted the injuries sustained on September 18, 2017 aggravated the underlying degenerative changes in his knee and necessitated the surgery. Claimant relied upon the expert opinions of Dr. Johnson and Dr. Stullto support his claim that the work injury caused the need for surgery. Respondent averred Claimant's need for surgery was because of the degenerative changes in his knee. Respondent cited the opinions of Dr. O'Brien in support of their contentions.

Respondent is liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The ALJ concluded Claimant met his burden of proof that the proposed surgery was reasonable, necessary and related to the injury. (Finding of Fact 35). This was based upon the opinions of Dr. Johnson and Dr. Stull, whom the ALJ found more credible than Dr. O'Brien. (Findings of Fact 18, 27-28, 35). Claimant proved the proposed arthroscopic medial meniscectomy and chondroplasty would cure and relieve the effects of the September 18, 2017 injury. *Id.* Respondent will be ordered to provide those benefits.

ORDER

It is, therefore, ordered that:

1. The ALJ finds that the Claimant demonstrated that he suffered a compensable injury to his right knee at work on September 18, 2017.

2. The September 18, 2017 injury is not barred by the statute of limitations, as Respondent had notice of the injury.

3. Respondent is liable for medical treatment provided to Claimant by authorized providers, which is reasonable and necessary to cure and relieve the effects of the injury occurring on September 18, 2017, including right knee surgery recommended by Drs. Johnson and Stull. Medical benefits shall be paid pursuant the Colorado Workers' Compensation Fee Schedule.

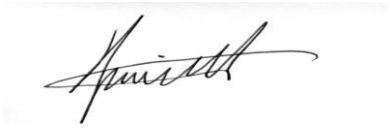
4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2022

STATE OF COLORADO



Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-175-275-001;5-179-157-001

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $718.70. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

II. If Claimant established that she suffered a compensable left knee injury, whether she also established, that she is entitled to all reasonable, necessary and related medical care to cure and relieve her of the effects of her compensable left knee injury, including but not limited to the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged June 18, 2021 Left Knee Injury

1. Employer operates a medical device assembly and sales business. Claimant works as an assembler for the company. She started working for the Employer roughly one year prior to her alleged June 17-18, 2021, left knee injury. She began her tenure as a "temp" worker around May of 2020 and became a full-time employee in January of 2021.

2. As an assembler, Claimant's job duties required her to stand at a table and "side step" from one end to the other, moving left to right and back repeatedly, at least every minute or so, in order to assemble medical catheters". Claimant began her shift on the evening of June 17, 2021 and had worked into the early hours of June 18, 2021 when she claimed she injured her left knee. Claimant testified that her injury occurred shortly after midnight, so while she reported to work on June 17, 2021 her asserted injury occurred on June 18, 2021.

3. According to Claimant, while she was preparing to close the jacket on a catheter under assembly, she pivoted slightly to side step to the left at which time she felt a "pop" and experienced immediate pain on the inside aspect of the left knee.

4. Claimant testified that she was working a graveyard shift as part of a skeletal crew on the date of injury. According to Claimant, no onsite supervisor was present in the building when she was injured. Consequently, there was no one to whom she could report her injury. Thus, she did not report her injury on the day it occurred. Claimant testified that she did not feel her injury was a "big deal" at the time it happened because she was used to having soreness in many parts of her body after working an 8-10 hour shift, which required prolonged standing/walking, outside of occasional breaks and lunch.

5. Claimant completed her June 17-18, 2021 graveyard shift and was not scheduled to return to work until the following Monday, June 21, 2021. Claimant returned to work as scheduled on Monday and reported the incident/injury. A first report of injury, completed by an individual named [Redacted, hereinafter KD], states that Claimant, "felt a snap on [the] inside of [her] left knee when stepping from right to left at the workstation." (Resp. Ex. F, p. 94). This document further states she was "stepping to the left" just before the incident occurred. *Id.* Claimant was then provided with a list of doctors to choose from to attend to her alleged injury. She selected Dr. Eric Ritch with Occupational Medical Partners.

The Job Tasks Video

6. Claimant's precise mechanism of injury is in dispute. Respondents prepared a video, which demonstrates the tasks associated with assembly of the type of catheters Claimant was building on June 17-18, 2021. The steps in fabricating these catheters was demonstrated by [Redacted, hereinafter LL]. (Resp. Ex. E, p. 93). Claimant viewed the video and agreed that it revealed, "Pretty much what we do all day." However, she explained the video does not show the body mechanics of the lower half of the body, i.e., the hips, legs, knees, and feet. Indeed, Claimant testified: "[B]ut you can't really see underneath the table, what's going on with the feet. . . . You can see some twisting, but you can't really see the footwork of what's going on under the table." (Tr. 14:17 – 15:1).

7. Careful review of the video largely supports Claimant's contention. The ALJ agrees that during the majority of the video you cannot see the lower half of LL[Redacted] body or her feet as she moves along the length of the assembly table. However, at 3:13 of the video LL[Redacted] is observed to pivot on her left leg and walk the length of the table to unclamp the end of a fully assembled catheter.

The Medical Record Evidence

8. Claimant described the mechanism of injury (MOI) to Dr. Ritch during her initial appointment on June 24, 2021. (Resp. Ex. D, pp. 30-36). Dr. Ritch documented that Claimant reported an injury while at work assembling catheters. *Id.* at 32. She explained to Dr. Ritch that her job required her to stand at a table and to "side step from one side of the table to the other repeatedly, at least every minute or so, in order to assemble the catheter." *Id.* Dr. Ritch documented mild, i.e. a "small amount" of swelling in Claimant's left knee during this appointment. (Resp. Ex. D, p. 33). Physical examination also revealed "some" tenderness to palpation of the medial collateral ligament with mild laxity

of the MCL. *Id.* Per Dr. Ritch, "This is most likely a direct consequence of doing large amounts of stepping side to side while working. As such, Dr. Ritch noted, "*this injury would almost certainly be considered work related*." *Id.* (emphasis added). Dr. Ritch noted that Claimant had been involved in a motor vehicle accident 30 years prior to her June 17-18, 2021 incident in which she injured her knees but she fully recovered from that accident without any "significant knee problems." Claimant was provided a hinged knee brace and assigned work restrictions for her condition. *Id.*

9. Claimant testified that she was not suffering from any significant left knee condition prior to the June 18, 2021 incident. She was not treating for her left knee, nor was her ability to perform her job impacted by her left knee prior to June 18, 2021. (Tr. 24:16-25). She testified that she has required modified duty in a mostly seated capacity since the incident. (Tr. 26:4-14). Claimant reported that she continued to have persistent, daily knee pain and what she described as visible swelling of the knee through the time of her testimony at hearing. (Tr. 25:5-13).

10. Dr. Ritch observed Claimant to be walking with a limp at her next visit a week later on July 1, 2021. *Id.* at 38. During this appointment, Claimant reported that she had not improved and the brace she was provided would not stay on her knee properly. *Id.* at 37. Dr. Ritch advised her to stop wearing the brace given how poorly it fit. He recommended that Claimant undergo a few weeks of physical therapy (PT) and then consider an MRI if she failed to improve. *Id.* at 39.

11. Claimant reported the same MOI when she was seen by the physical therapist for the first time. Indeed, the initial PT note indicates: "Patient reports [she] was side stepping at work and felt a snap in the L medial knee. After this [she] felt a burning sensation and noticed swelling." *Id.* at 41.

12. Claimant reported to Dr. Ritch on July 14, 2021, that the physical therapy was not providing any relief and, if anything, she was having more pain in her right knee and hip from compensation for her left knee injury. (Resp. Ex. D, p. 45). She continued to have ongoing left medial knee pain made worse by standing or working. *Id.* at 46. Dr. Ritch examined Claimant's knee for swelling; however, her body habitus made that near impossible. Regarding this swelling, Dr. Ritch noted, "The patient's left knee is not obviously swollen, although the patient's body habitus makes it almost impossible to determine if she has a small joint effusion." *Id.* at 47. He recommended an MRI. *Id.*

13. A left knee MRI was performed on July 30, 2021 at Colorado Springs Imaging. (Resp. Ex. C, pp. 26-27). The MRI revealed a horizontal tear in the body and posterior horn of the medial meniscus. *Id.* at 26. The MRI also demonstrated some mild to moderate chondral fibrillation. *Id.* at 27. Dr. Ritch referred Claimant to Dr. David Walden to evaluate her for treatment based on the MRI findings. He also asked Dr. Walden to comment on causation of the torn medial meniscus observed on MRI. (Resp. Ex. D, p. 55). Dr. Ritch stated that Claimant's MOI was not "classic" for a torn meniscus. *Id.* at 59. It is noted, however, that none of Claimant's providers to this point appreciated the fact that her job required her to turn and pivot to some degree to walk back and forth from

each end of the table. Rather, the records simply refer to Claimant having to side step repeatedly to complete her job duties.

14. Dr. Walden first examined Claimant on August 31, 2021. (Resp. Ex. B, pp. 18-21). He was also the first provider to appreciate the pivoting associated with Claimant's need to turn and walk the length of the assembly table to complete her job duties. Claimant informed Dr. Walden that she was working on the assembly line with her feet planted, moving things from a right to left position prompting Dr. Walden to note: "Some pivoting is involved in this". *Id.* at 18. Dr. Walden noted that Claimant's meniscal tear was continuing to cause medially based pain. Regarding causation, Dr. Walden noted:

> "[Claimant] is having a significant increase in pain compared to her preinjury status, however the findings on her x-rays and MRI scan do indicate some underlying osteoarthritis of the medial femoral condyle and patellofemoral joint. There is also a horizontal tear without significant effusion. This could result from an acute irritation of underlying osteoarthritis, and acute irritation of a chronic meniscus tear, or a new tear. [It] is difficult to know.

15. Claimant's ongoing pain in combination with the presence of both osteoarthritis and a horizontal tear of the medial meniscus prompted Dr. Walden to recommend the administration of a steroid injection, which he concluded, "might be beneficial for diagnostic and potentially therapeutic purposes". (Resp. Ex. B, p. 18). The ALJ interprets the recommendation for a steroid injection to constitute Dr. Walden's attempt to treat and delineate the cause of Claimant's pain, i.e. whether the pain was emanating from her osteoarthritis, which would respond to a corticosteroid injection or whether her pain was related to the meniscal tear, which would not respond to such an injection.

16. Claimant testified the injection performed by Dr. Walden reduced the swelling in her knee, but did not do anything for her pain.

17. Claimant returned to Dr. Walden on September 28, 2021. (Resp. Ex. B., pp. 22-25). She reported that her pain was not relieved by the injection administered during her prior visit. *Id.* at 22. It was also noted during this appointment, that Claimant had undergone a couple of sessions of physical therapy before she stopped because her knee felt like it was "sticking." *Id.* Dr. Walden recommended an arthroscopy of the knee with a probable partial medial meniscectomy versus repair. *Id.* He put in a request for prior authorization on September 29, 2021. (Clmt. Ex. 5, p. 71). It was Claimant's understanding the surgery was necessary because the meniscal tear caused a "flap" of torn tissue that needed to be removed in order for her condition to improve. The request was denied and Claimant has not been afforded ongoing care. (Tr. 23:2-6).

The Independent Medical Examination of Dr. Farber

18. Dr. Adam Farber performed an independent medical examination (IME) of

Claimant at Respondents request on October 27, 2021. (Resp. Ex. A., pp. 1-17). Dr. Farber described the same "sidestepping" MOI as other providers, failing to document any of the turning/pivoting motion involved in completion of Claimant's job duties as documented by Dr. Walden. *Id.* at 3. Dr. Farber's report specifically states, "She does not report a twisting injury to her left knee either." *Id.* At the time of her IME, Claimant reported ongoing left knee pain and swelling to Dr. Farber. *Id.* at 9. Despite Dr. Walden eliciting a positive medial McMurray's test, Dr. Farber's examination did not document any medial knee pain. *Id.* at 13. Indeed, Dr. Farber noted that his "physical exam findings do not demonstrate any objective abnormalities related to the industrial injury in question." He went on to indicate that "[Claimant] has diffuse multifocal non-localizing tenderness but no localizing joint line tenderness" and "no visible swelling, reproducible mechanical symptoms, or medial sided knee pain with McMurray's testing, although this maneuver does result in lateral sided knee pain". (Resp. Ex. A, p. 15).

19. Although Claimant's MRI did show radiographic evidence of a horizontal tear of the medial meniscus, Dr. Farber, concluded that the tear appeared degenerative in nature. He noted that the tearing pattern visualized was also an incidental finding frequently seen in association with underlying osteoarthritis, which was also present on the MRI. (Resp. Ex. A, p. 16). Accordingly, Dr. Farber opined: "[G]iven the video footage provided for my review demonstrating the nature of her occupational activities, it is unlikely that this mechanism resulted in an acute meniscal tear." *Id.* at 15.

20. Dr. Farber opined that Claimant's subjective left knee complaints were "grossly" out of proportion to the objective findings on physical examination and imaging study. Consequently, Dr. Farber concluded that Claimant's physical exam/MRI findings "do not support any diagnosis or diagnoses that would explain her subjective symptoms especially as it relates to the industrial injury in question". *Id.* Dr. Farber ultimately concluded, that given the "nature of [Claimant's] work activities, the documented medical records . . . outlining her initial clinical symptoms and exam findings, the objective x-ray and MRI findings, her current symptoms, and [his] physical examination findings, there is no evidence to support a causal relationship between the industrial injury and her current left knee pain or her diffuse right lower extremity symptoms". (Resp. Ex. A, p. 14).

21. In support of his opinions, Dr. Farber explicitly relied upon his review of the job demands video prepared by Respondents in this case. (Resp. Ex. A, p. 15). As noted above, review of the video shows LL[Redacted] performing tasks that require her to repeatedly walk from one end of the table to the other. With each return to the previous end, or to the middle of the table, LL[Redacted] is observed to turn and pivot her body as she starts walking sideways, approximately at a 45-degree angle to the table. The ALJ credits the video as an accurate representation of Claimant's work duties to find that she does not rely solely on "sidestepping" from one end of the table to the other to complete the tasks associated with catheter assembly. Indeed, the notion that Claimant completes the steps necessary to assemble the catheters by sidestepping only is inconsistent with the content of the video. Despite it being evident Claimant would/does not purely sidestep for her entire shift, Dr. Farber concludes the following: "[T]he described mechanism of injury, *simply sidestepping*, cannot reasonably be expected" to cause Claimant's left knee condition and need for treatment. *Id.* at 16 (emphasis added).

The Independent Medical Examination of Dr. Rook

22. Claimant subsequently underwent an IME with Dr. Jack Rook at the request of Claimant's counsel. (Clmt. Ex. 6, pp. 72-90). Dr. Rook examined Claimant on December 2, 2021 and authored a report in conjunction with that examination. *Id.* at 72-85. Dr. Rook documented that Claimant works as an assembler, requiring her to be on her feet from 7 to 9 hours per day, working at the 12-foot table seen in the submitted video. *Id.* at 72. He documented that she is either standing or moving laterally from side to side for the duration of her shift. *Id.* Similar to Dr. Walden, Dr. Rook focuses on the critical fact of Claimant's turning, i.e. pivoting while performing her work duties. Dr. Rook documented that as Claimant would travel along each side of the table, there is a degree of trunk rotation "with her feet planted as she manipulates the clamps." *Id.* 72. As noted, the aforementioned video captures LL[Redacted] engaging in a degree of trunk rotation as she travels the length of the assembly table. Although the video does not capture the movement of LL[Redacted] legs/feet repeatedly, she is seen turning her body while pivoting on her left foot in order to walk to the left end of the assembly table to unclamp the end of the catheter she is constructing on one occasion. According to the history obtained by Dr. Rook, Claimant makes 20 to 25 catheters per hour, requiring her to move back and forth 2 to 3 times per catheter. Thus, the ALJ finds it reasonable to infer that while assembling catheters, Claimant is probably pivoting to the left and right multiple times every hour and perhaps hundreds of times per shift.

23. Claimant was asked about why she consistently reported that her injury occurred while "sidestepping." Claimant testified that she reported the injury as occurring during sidestepping because she herself did not appreciate the significance of any twisting/pivoting motion involved with her work. She demonstrated to Dr. Rook exactly how she was injured. Dr. Rook then observed that she was in fact pivoting during her demonstration, which LL[Redacted] also performed during the aforementioned video replicating the job duties associated with assembling catheters. (Tr. 40:2-11; Resp. Ex. E).

24. Dr. Rook notes that Dr. Ritch stopped physical therapy after Claimant reported catching in her left knee. (Clmt. Ex. 6, p. 74). He also documented Claimant's ongoing left knee pain, "primarily along the medial knee joint," although she did have some discomfort along the lateral side as well. *Id.* at 74. His physical examination documented severe medial tenderness with minimal lateral tenderness. *Id.* at 80. Based upon the history provided, his medical records review and his physical examination, Dr. Rook opined that Claimant probably tore her medial meniscus at work while performing the work duties associated with catheter assembly. *Id.* at 81-82. Regarding causation, Dr. Rook noted that the "combination of the lateral movement, the planted foot, and the [Claimant's] weight (she is morbidly obese) created enough stress to damage her medial meniscus". *Id.* at 82. Moreover, Dr. Rook noted that Claimant was not "involved in any traumatic events around the time outside of work to account for this condition". *Id*.

25. Dr. Rook explained that he was in disagreement with most of Dr. Farber's conclusions. (Clmt. Ex. 6, pp. 83-85). Dr. Rook summarizes that Dr. Farber was of the

opinion that there was no medical evidence to support a causal relationship between Claimant's reported injury and her current left knee symptoms. *Id.* at 83. Dr. Rook disagrees, noting that the content of Claimant's medical records belie this conclusion. Indeed, Dr. Rook notes that the first report of injury documents that Claimant felt a snap on the inside/medial side of her left knee. *Id.* Furthermore, Dr. Rook notes that the initial medical report of Dr. Ritch documents that Claimant felt a "sudden" pain in the medial aspect of the left knee. *Id.* According to Dr. Rook, this early post-injury documentation is consistent with an acute injury to the medial meniscus. *Id.* Dr. Rook next addressed Dr. Farber's contention that Claimant's symptoms are more consistent with symptomatic osteoarthritis versus the meniscal tear. Dr. Rook rebuts Dr. Farber by noting that while there is a presence of osteoarthritis, there is no evidence in the medical record to suggest the arthritis was limiting or requiring any form of treatment. *Id.* at 84. Based upon the entirety of the medical record, Dr. Rook opined that Claimant sustained an acute tearing of the medial meniscus along with aggravation of her underlying osteoarthritis, which he concluded constituted a compensable injury. *Id.* at 85.

The Deposition Testimony of Dr. Walden

26. Dr. David Walden testified via evidentiary deposition on January 4, 2022 in his capacity as Claimant's treating surgeon. Dr. Walden testified as a Level II accredited expert in orthopedic surgery and sports medicine. (Depo. 5:2 – 6:12). Dr. Walden reviewed his medical records; Claimant's imaging studies and Dr. Farber's IME report before testifying. (Depo. 6:14-21). Dr. Walden testified that he met with Claimant on two occasions, those being the documented visits on August 31, 2021 and September 28, 2021. Dr. Walden was asked his understanding of Claimant's mechanism of injury to which he responded: "She reported to me that she was—she had to take items from the right and move them to the left, *which required her to move her feet, do a little bit of twisting*. And that on one of those occasions, she felt a pop in her knee with pain immediately." (Depo. 7:16 – 8:1)(emphasis added). Dr. Walden explained that Claimant's mechanism of injury, which involved a degree of twisting, and the associated popping/snapping described by Claimant along with the examination finding of medial joint line tenderness were indicative of a meniscal injury. It was his opinion that the meniscus tear was either an acute tear, or a condition made worse by Claimant's work activity. He did not believe that the osteoarthritis visualized on MRI was caused by Claimant's work related injury. He testified that because he did not know whether Claimant's pain was "coming primarily from arthritis or the meniscal tear, he directed a steroid shot into the knee. As noted at paragraph 14 above, Dr. Walden elected to administer the steroid injection for both diagnostic and therapeutic purposes. Because the steroid injection was not overly helpful in reducing Claimant's pain, Dr. Walden felt there was a mechanical issue, i.e. a meniscal tear within the knee that was driving Claimant's persistent symptoms. (Depo. 9:5 – 10:11). Simply stated, the results of Claimant's injection were diagnostic for internal disruption of the left knee rather than just arthritis.

27. Dr. Walden was asked about Dr. Farber's commentary that Claimant's meniscal tear was a degenerative in nature. Dr. Walden explained that with any tear, there is going to be a day that it was not torn, followed by the day it tears. "So calling

something degenerative when you really don't have any idea whether or not that's the case, is just a cop out", according to Dr. Walden. Dr. Walden explained the tear needs to be looked at in conjunction with other factors, such as whether there was some sort of precipitating event associated with the onset of symptoms, i.e., a twist with a pop in the knee, in order to determine whether an injury and need for treatment is "degenerative" or acute. According to Dr. Walden, there is really no way to tell simply from an MRI whether a tear is degenerative. Based on all the different factors/information he was provided in this case, Dr. Walden opined that Claimant sustained an acute injury requiring treatment. (Depo. 10:23 – 12:17).

28. Dr. Walden further supported his diagnosis and need for surgery for the meniscal tear by explaining the steroid shot has been shown to have beneficial effects for the treatment of arthritic sources of pain, but is not really a treatment option for meniscal tears. (Depo. 13:1-24). Dr. Farber stated in his report and his subsequent testimony that Claimant's lack of a pain reduction response to the steroid injection argued against the meniscus tear being Claimant's current pain generator. (Resp. Ex. A, p. 106; Tr. 75:23-25; 76:1-22).

29. As noted, Dr. Walden testified that he performed the steroid injection, which may have helped some with swelling and maybe a little with pain, but her condition overall did not improve much. He also explained the steroid shot would not be expected to help with a meniscal tear. This led Dr. Walden to believe there was both an arthritic and a structural, i.e. meniscal tear component to Claimant's ongoing pain. (Depo. 9:12 – 10:11). Regardless, it was his opinion the arthritis was aggravated by Claimant's work activities, as he previously stated in his report. He testified on cross-examination that there are in fact patients who have irritation of arthritis from nothing more than regular activities, "But I don't think that's what happened here." (Depo. 27:6-17). Dr. Walden was asked why he recommended/requested authorization for an arthroscopic evaluation of the knee with likely partial medial meniscectomy versus repair, to which he replied succinctly, "Because that's the treatment recommended for a meniscal tear that has mechanical symptoms." (Depo. 15:22 – 16:6).

The Testimony of LL[Redacted]

30. LL[Redacted] testified at hearing on behalf of Respondents in her capacity as a "line lead" for Employer. (Tr. 44:13-25). LL[Redacted] is responsible for making sure those on the "line" perform their jobs properly to ensure smooth business operations. She is familiar with how to fabricate the catheters that Claimant assembles on a daily basis. As noted above, LL[Redacted] is the individual seen in the video demonstrating how to assemble the catheters Claimant was constructing at the time of her alleged injury. (Tr. 45:1-25). LL[Redacted] confirmed the essential job duties of assembling catheters as testified to by Claimant. (Tr. 46:1-12). She testified it was her opinion there was no "forceful" twisting of the knee involved with performing that job task, not that there was no twisting. (Tr. 47:2-5). In fact, LL[Redacted] admitted that she has to "turn [her] entire body" to walk alongside the table. (Tr. 47:20-25). She does not merely "sidestep" when performing the job duties associated with catheter fabrication.

The Testimony of Dr. Farber

31. Dr. Farber testified at hearing on behalf of Respondents. Dr. Farber testified that Claimant did not explain to him any kind of rotation or pivot at the time of injury. (Tr. 52:8-18). Dr. Farber testified that, during his IME examination, Claimant denied twisting the knee. (Tr. 52:15-18; 53:19-25; 54:1-7). Additionally, he testified that Claimant's complaints were inconsistent with the MRI findings. (Tr. 61:9-19). Dr. Farber explained that the classic cause of a meniscus tear is an acute, sudden, *forceful* pivoting activity – a "dramatic" twist or pivot, not just a slight turn while walking along a table. (Tr. 61:23-25; 62:1-3). While Dr. Farber explained that a "forceful" twisting/pivoting activity is often the cause of acute meniscal tears, he also testified Claimant was predisposed to susceptibility to meniscal tears given her "morbid obesity." (Tr. 58:3-25).

32. Dr. Farber also testified that Claimant's severely morbid obesity results in a higher incidence of knee pain, knee arthritis and degenerative meniscus tears. (Tr. 58:10-25). Further, he explained that a "snap" is a "very non-specific symptom" and people with arthritis get snaps and pops all the time in their knee". (Tr. 68:20-25). Nonetheless, he testified that a snap is "by no means, indicative of one specific diagnosis. (Tr. 68:23-25; 69:1-2). Rather, it (snap) is a piece of the puzzle, which is not exclusively diagnostic, in and of itself, of a meniscus tear. Because a snap is not indicative of any specific diagnosis, the ALJ finds from Dr. Farber's testimony that it could be associated with arthritis or a meniscus tear.

33. Dr. Farber's testified that "given the nature of her injury, her described mechanism, her weight, the presence of arthritis on her X-rays and MRI scan, and the symptoms that she presented with when I evaluated her, and the – the exam findings that I documented when I evaluated her, I don't think surgery is appropriate, would benefit her at all." (Tr. 71:13-20).

34. During cross-examination, Dr. Farber admitted that there is no evidence to support a finding that Claimant was having any difficulties (symptoms) or required treatment for any left knee condition leading up to the June 18, 2021 incident. (Tr. 73:1-7). He noted further that Claimant's symptoms at the time she first presented to Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). He testified, "A lot of different things can aggravate arthritis" including repetitive standing and walking, ten-hour shifts or Claimant's routine day-to-day activities. (Tr. 73:13-20). He reiterated his position that the aggravation did not have to come from the "slight twist from working on her catheters". *Id.* Nonetheless, he did not eliminate that MOI (twisting/pivoting) as the potential cause surrounding the aggravation of Claimant's underlying arthritis.

35. Concerning the meniscal tear, Dr. Farber admitted that a degenerated meniscus could be torn more readily than one that is not compromised. (Tr. 74:23-25). He testified that he did not believe that a "slight pivot" could have caused the meniscal tear, but later agreed that prolonged walking or standing in combination with Claimant's age and weight could cause a tear. (Tr. 75:1-11). Indeed, Dr. Farber admitted that just

about “anything could cause it” before adding that he would not attribute the tear to that one activity of pivoting while assembling catheters. (Tr. 75:12-22).

36. Based upon the entirety of the evidence presented, the ALJ finds the opinions and analyses of Drs. Rook and Walden to be more reliable and persuasive than those of Dr. Farber.

37. The ALJ credits the opinions of Drs. Rook and Walden and Claimant’s testimony to find that she has established, by a preponderance of the evidence, that she sustained a compensable injury to her left knee on June 18, 2021.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, Claimant’s reporting concerning the MOI has been consistent as simply as sidestepping to the left. The evidence presented supports a conclusion that Claimant’s actions on June 18, 2021 were

consistent with the actions seen on the video. The video unequivocally demonstrates the twisting/pivoting motion necessary for LL[Redacted] to turn from one end to walk toward the other. This is the same observation made by Dr. Rook during his independent medical examination that largely formed his opinion. Dr. Rook saw the pivot/twisting involved with Claimant's feet when he asked her to demonstrate how she was injured. It is also the same understanding regarding the MOI held by Dr. Walden. Dr. Farber's opinion was based largely on Claimant's described mechanism of injury being "sidestepping." The video evidence refutes this assumption. Claimant does not deny that she has described her actions as "sidestepping." Based upon the evidence presented, the ALJ is persuaded that Claimant did not appreciate the role that twisting/pivoting to the left on her planted leg played in causing her injury as she moved toward the end of the assembly table. Consequently, she simply described the MOI as sidestepping. While Claimant did not provide a detailed description of all the movements involved in the MOI in this case, the ALJ is persuaded that Claimant was injured while moving from one end of the assembly table to the other on June 18, 2021. Accordingly, the ALJ finds Claimant's current reports of pain and dysfunction reliable and persuasive. Based on this and the totality of the evidence presented, the expert medical opinions of Drs. Rook and Walden are more persuasive than the contrary opinions of Dr. Farber.

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of her employment relationship with Employer, i.e. at a catheter assembly table during her regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely catheter assembly, which the ALJ concludes is expected of Claimant in her position as an assembler. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" her employment must be resolved before the injury can be deemed compensable.

E. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's left knee was symptomatic or required treatment before June 18, 2021. The evidence presented supports a conclusion that Claimant sought care following the June 18, 2021 incident, for symptoms she attributed to repetitive sidestepping involving slight twisting/pivoting while moving along the catheter assembly table. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working her job despite the onset of symptoms. As found, the ALJ credits the opinions of Dr. Rook and Dr. Walden to conclude that Claimant either suffered an acute irritation/aggravation of an underlying chronic meniscus tear, or a new meniscal tear as she twisted/pivoted in preparation to move toward the end of catheter assembly table.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing left knee osteoarthritis, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the onset of symptoms and disability Claimant experienced on June 18, 2021 arose as a consequence of an industrially based aggravation of her underlying left knee osteoarthritis, chronic underlying meniscal tear or a new left meniscal tear. Even Dr. Farber noted that Claimant's symptoms at the time of her initial appointment with Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). Moreover, he agreed that Claimant's repetitive walking, standing and ten-hour shifts could be causative in the onset of her left knee symptoms.

I. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, the discrete injury to Claimant's left knee in this case arose out of her involvement in work activity rather than being precipitated by an idiopathic condition she imported to the work place. Accordingly, the ALJ concludes that Claimant was not required to establish that the concurrence of a pre-existing weakness and a hazard of employment lead to her injury in this case.

J. Analogous to the MOI asserted in *Bastian* and *Fisher*, *supra* the MOI claimed to have caused injury in this case arose from activities that, per Dr. Farber, are the type which should not lead to a finding of compensability because the forces involved are "minimal" and are activities performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically sidestepping, twisting and pivoting, which are performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Respondents. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965).

Contrary to Dr. Farber's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the left medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the MOI in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/pivoting activities at work, her left knee symptoms and her need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

K. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Ritch and his referrals, including the orthopedic evaluation and surgery recommended by Dr. Walden was/is reasonable, necessary and related to Claimant's June 18, 2021 injury. The aforementioned care provided by Dr. Ritch was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referral to Dr. Walden was reasonable and necessary to determine the extent of injury in light of Claimant's ongoing pain and disability surrounding the function of the left knee. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left knee surgery is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including the recommended arthroscopic evaluation and any definitive treatment directed to the left knee therefrom.

ORDER

It is therefore ordered that:

1. Per the parties' stipulation, Claimant's average weekly wage is $718.70.

2. Claimant has established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

3. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee injury including, but not limited to, the arthroscopic evaluation and medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $718.70. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

II. If Claimant established that she suffered a compensable left knee injury, whether she also established, that she is entitled to all reasonable, necessary and related medical care to cure and relieve her of the effects of her compensable left knee injury, including but not limited to the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged June 18, 2021 Left Knee Injury

1. Employer operates a medical device assembly and sales business. Claimant works as an assembler for the company. She started working for the Employer roughly one year prior to her alleged June 17-18, 2021, left knee injury. She began her tenure as a "temp" worker around May of 2020 and became a full-time employee in January of 2021.

2. As an assembler, Claimant's job duties required her to stand at a table and "side step" from one end to the other, moving left to right and back repeatedly, at least every minute or so, in order to assemble medical catheters". Claimant began her shift on the evening of June 17, 2021 and had worked into the early hours of June 18, 2021 when she claimed she injured her left knee. Claimant testified that her injury occurred shortly after midnight, so while she reported to work on June 17, 2021 her asserted injury occurred on June 18, 2021.

3. According to Claimant, while she was preparing to close the jacket on a catheter under assembly, she pivoted slightly to side step to the left at which time she felt a "pop" and experienced immediate pain on the inside aspect of the left knee.

4. Claimant testified that she was working a graveyard shift as part of a skeletal crew on the date of injury. According to Claimant, no onsite supervisor was present in the building when she was injured. Consequently, there was no one to whom she could report her injury. Thus, she did not report her injury on the day it occurred. Claimant testified that she did not feel her injury was a "big deal" at the time it happened because she was used to having soreness in many parts of her body after working an 8-10 hour shift, which required prolonged standing/walking, outside of occasional breaks and lunch.

5. Claimant completed her June 17-18, 2021 graveyard shift and was not scheduled to return to work until the following Monday, June 21, 2021. Claimant returned to work as scheduled on Monday and reported the incident/injury. A first report of injury, completed by an individual named Kelly Derusha, states that Claimant, "felt a snap on [the] inside of [her] left knee when stepping from right to left at the workstation." (Resp. Ex. F, p. 94). This document further states she was "stepping to the left" just before the incident occurred. *Id.* Claimant was then provided with a list of doctors to choose from to attend to her alleged injury. She selected Dr. Eric Ritch with Occupational Medical Partners.

The Job Tasks Video

6. Claimant's precise mechanism of injury is in dispute. Respondents prepared a video, which demonstrates the tasks associated with assembly of the type of catheters Claimant was building on June 17-18, 2021. The steps in fabricating these catheters was demonstrated by [Redacted, hereinafter LL]. (Resp. Ex. E, p. 93). Claimant viewed the video and agreed that it revealed, "Pretty much what we do all day." However, she explained the video does not show the body mechanics of the lower half of the body, i.e., the hips, legs, knees, and feet. Indeed, Claimant testified: "[B]ut you can't really see underneath the table, what's going on with the feet. . . . You can see some twisting, but you can't really see the footwork of what's going on under the table." (Tr. 14:17 – 15:1).

7. Careful review of the video largely supports Claimant's contention. The ALJ agrees that during the majority of the video you cannot see the lower half of Ms. LL[Redated]' body or her feet as she moves along the length of the assembly table. However, at 3:13 of the video Ms. LL[Redated] is observed to pivot on her left leg and walk the length of the table to unclamp the end of a fully assembled catheter.

The Medical Record Evidence

8. Claimant described the mechanism of injury (MOI) to Dr. Ritch during her initial appointment on June 24, 2021. (Resp. Ex. D, pp. 30-36). Dr. Ritch documented that Claimant reported an injury while at work assembling catheters. *Id.* at 32. She explained to Dr. Ritch that her job required her to stand at a table and to "side step from one side of the table to the other repeatedly, at least every minute or so, in order to assemble the catheter." *Id.* Dr. Ritch documented mild, i.e. a "small amount" of swelling

in Claimant's left knee during this appointment. (Resp. Ex. D, p. 33). Physical examination also revealed "some" tenderness to palpation of the medial collateral ligament with mild laxity of the MCL. *Id.* Per Dr. Ritch, "This is most likely a direct consequence of doing large amounts of stepping side to side while working. As such, Dr. Ritch noted, "*this injury would almost certainly be considered work related*." *Id.* (emphasis added). Dr. Ritch noted that Claimant had been involved in a motor vehicle accident 30 years prior to her June 17-18, 2021 incident in which she injured her knees but she fully recovered from that accident without any "significant knee problems." Claimant was provided a hinged knee brace and assigned work restrictions for her condition. *Id.*

9. Claimant testified that she was not suffering from any significant left knee condition prior to the June 18, 2021 incident. She was not treating for her left knee, nor was her ability to perform her job impacted by her left knee prior to June 18, 2021. (Tr. 24:16-25). She testified that she has required modified duty in a mostly seated capacity since the incident. (Tr. 26:4-14). Claimant reported that she continued to have persistent, daily knee pain and what she described as visible swelling of the knee through the time of her testimony at hearing. (Tr. 25:5-13).

10. Dr. Ritch observed Claimant to be walking with a limp at her next visit a week later on July 1, 2021. *Id.* at 38. During this appointment, Claimant reported that she had not improved and the brace she was provided would not stay on her knee properly. *Id.* at 37. Dr. Ritch advised her to stop wearing the brace given how poorly it fit. He recommended that Claimant undergo a few weeks of physical therapy (PT) and then consider an MRI if she failed to improve. *Id.* at 39.

11. Claimant reported the same MOI when she was seen by the physical therapist for the first time. Indeed, the initial PT note indicates: "Patient reports [she] was side stepping at work and felt a snap in the L medial knee. After this [she] felt a burning sensation and noticed swelling." *Id.* at 41.

12. Claimant reported to Dr. Ritch on July 14, 2021, that the physical therapy was not providing any relief and, if anything, she was having more pain in her right knee and hip from compensation for her left knee injury. (Resp. Ex. D, p. 45). She continued to have ongoing left medial knee pain made worse by standing or working. *Id.* at 46. Dr. Ritch examined Claimant's knee for swelling; however, her body habitus made that near impossible. Regarding this swelling, Dr. Ritch noted, "The patient's left knee is not obviously swollen, although the patient's body habitus makes it almost impossible to determine if she has a small joint effusion." *Id.* at 47. He recommended an MRI. *Id.*

13. A left knee MRI was performed on July 30, 2021 at Colorado Springs Imaging. (Resp. Ex. C, pp. 26-27). The MRI revealed a horizontal tear in the body and posterior horn of the medial meniscus. *Id.* at 26. The MRI also demonstrated some mild to moderate chondral fibrillation. *Id.* at 27. Dr. Ritch referred Claimant to Dr. David Walden to evaluate her for treatment based on the MRI findings. He also asked Dr. Walden to comment on causation of the torn medial meniscus observed on MRI. (Resp.

Ex. D, p. 55). Dr. Ritch stated that Claimant's MOI was not "classic" for a torn meniscus. *Id.* at 59. It is noted, however, that none of Claimant's providers to this point appreciated the fact that her job required her to turn and pivot to some degree to walk back and forth from each end of the table. Rather, the records simply refer to Claimant having to side step repeatedly to complete her job duties.

14. Dr. Walden first examined Claimant on August 31, 2021. (Resp. Ex. B, pp. 18-21). He was also the first provider to appreciate the pivoting associated with Claimant's need to turn and walk the length of the assembly table to complete her job duties. Claimant informed Dr. Walden that she was working on the assembly line with her feet planted, moving things from a right to left position prompting Dr. Walden to note: "Some pivoting is involved in this". *Id.* at 18. Dr. Walden noted that Claimant's meniscal tear was continuing to cause medially based pain. Regarding causation, Dr. Walden noted:

> "[Claimant] is having a significant increase in pain compared to her preinjury status, however the findings on her x-rays and MRI scan do indicate some underlying osteoarthritis of the medial femoral condyle and patellofemoral joint. There is also a horizontal tear without significant effusion. This could result from an acute irritation of underlying osteoarthritis, and acute irritation of a chronic meniscus tear, or a new tear. [It] is difficult to know.

15. Claimant's ongoing pain in combination with the presence of both osteoarthritis and a horizontal tear of the medial meniscus prompted Dr. Walden to recommend the administration of a steroid injection, which he concluded, "might be beneficial for diagnostic and potentially therapeutic purposes". (Resp. Ex. B, p. 18). The ALJ interprets the recommendation for a steroid injection to constitute Dr. Walden's attempt to treat and delineate the cause of Claimant's pain, i.e. whether the pain was emanating from her osteoarthritis, which would respond to a corticosteroid injection or whether her pain was related to the meniscal tear, which would not respond to such an injection.

16. Claimant testified the injection performed by Dr. Walden reduced the swelling in her knee, but did not do anything for her pain.

17. Claimant returned to Dr. Walden on September 28, 2021. (Resp. Ex. B., pp. 22-25). She reported that her pain was not relieved by the injection administered during her prior visit. *Id.* at 22. It was also noted during this appointment, that Claimant had undergone a couple of sessions of physical therapy before she stopped because her knee felt like it was "sticking." *Id.* Dr. Walden recommended an arthroscopy of the knee with a probable partial medial meniscectomy versus repair. *Id.* He put in a request for prior authorization on September 29, 2021. (Clmt. Ex. 5, p. 71). It was Claimant's understanding the surgery was necessary because the meniscal tear caused a "flap" of torn tissue that needed to be removed in order for her condition to improve. The request was denied and Claimant has not been afforded ongoing care. (Tr. 23:2-6).

The Independent Medical Examination of Dr. Farber

18. Dr. Adam Farber performed an independent medical examination (IME) of Claimant at Respondents request on October 27, 2021. (Resp. Ex. A., pp. 1-17). Dr. Farber described the same "sidestepping" MOI as other providers, failing to document any of the turning/pivoting motion involved in completion of Claimant's job duties as documented by Dr. Walden. *Id.* at 3. Dr. Farber's report specifically states, "She does not report a twisting injury to her left knee either." *Id.* At the time of her IME, Claimant reported ongoing left knee pain and swelling to Dr. Farber. *Id.* at 9. Despite Dr. Walden eliciting a positive medial McMurray's test, Dr. Farber's examination did not document any medial knee pain. *Id.* at 13. Indeed, Dr. Farber noted that his "physical exam findings do not demonstrate any objective abnormalities related to the industrial injury in question." He went on to indicate that "[Claimant] has diffuse multifocal non-localizing tenderness but no localizing joint line tenderness" and "no visible swelling, reproducible mechanical symptoms, or medial sided knee pain with McMurray's testing, although this maneuver does result in lateral sided knee pain". (Resp. Ex. A, p. 15).

19. Although Claimant's MRI did show radiographic evidence of a horizontal tear of the medial meniscus, Dr. Farber, concluded that the tear appeared degenerative in nature. He noted that the tearing pattern visualized was also an incidental finding frequently seen in association with underlying osteoarthritis, which was also present on the MRI. (Resp. Ex. A, p. 16). Accordingly, Dr. Farber opined: "[G]iven the video footage provided for my review demonstrating the nature of her occupational activities, it is unlikely that this mechanism resulted in an acute meniscal tear." *Id.* at 15.

20. Dr. Farber opined that Claimant's subjective left knee complaints were "grossly" out of proportion to the objective findings on physical examination and imaging study. Consequently, Dr. Farber concluded that Claimant's physical exam/MRI findings "do not support any diagnosis or diagnoses that would explain her subjective symptoms especially as it relates to the industrial injury in question". *Id.* Dr. Farber ultimately concluded, that given the "nature of [Claimant's] work activities, the documented medical records . . . outlining her initial clinical symptoms and exam findings, the objective x-ray and MRI findings, her current symptoms, and [his] physical examination findings, there is no evidence to support a causal relationship between the industrial injury and her current left knee pain or her diffuse right lower extremity symptoms". (Resp. Ex. A, p. 14).

21. In support of his opinions, Dr. Farber explicitly relied upon his review of the job demands video prepared by Respondents in this case. (Resp. Ex. A, p. 15). As noted above, review of the video shows Ms. LL[Redated] performing tasks that require her to repeatedly walk from one end of the table to the other. With each return to the previous end, or to the middle of the table, Ms. LL[Redated] is observed to turn and pivot her body as she starts walking sideways, approximately at a 45-degree angle to the table. The ALJ credits the video as an accurate representation of Claimant's work duties to find that she does not rely solely on "sidestepping" from one end of the table to

the other to complete the tasks associated with catheter assembly. Indeed, the notion that Claimant completes the steps necessary to assemble the catheters by sidestepping only is inconsistent with the content of the video. Despite it being evident Claimant would/does not purely sidestep for her entire shift, Dr. Farber concludes the following: "[T]he described mechanism of injury, *simply sidestepping*, cannot reasonably be expected" to cause Claimant's left knee condition and need for treatment. *Id.* at 16 (emphasis added).

The Independent Medical Examination of Dr. Rook

22. Claimant subsequently underwent an IME with Dr. Jack Rook at the request of Claimant's counsel. (Clmt. Ex. 6, pp. 72-90). Dr. Rook examined Claimant on December 2, 2021 and authored a report in conjunction with that examination. *Id.* at 72-85. Dr. Rook documented that Claimant works as an assembler, requiring her to be on her feet from 7 to 9 hours per day, working at the 12-foot table seen in the submitted video. *Id.* at 72. He documented that she is either standing or moving laterally from side to side for the duration of her shift. *Id.* Similar to Dr. Walden, Dr. Rook focuses on the critical fact of Claimant's turning, i.e. pivoting while performing her work duties. Dr. Rook documented that as Claimant would travel along each side of the table, there is a degree of trunk rotation "with her feet planted as she manipulates the clamps." *Id.* 72. As noted, the aforementioned video captures Ms. LL[Redated] engaging in a degree of trunk rotation as she travels the length of the assembly table. Although the video does not capture the movement of Ms. LL[Redated]' legs/feet repeatedly, she is seen turning her body while pivoting on her left foot in order to walk to the left end of the assembly table to unclamp the end of the catheter she is constructing on one occasion. According to the history obtained by Dr. Rook, Claimant makes 20 to 25 catheters per hour, requiring her to move back and forth 2 to 3 times per catheter. Thus, the ALJ finds it reasonable to infer that while assembling catheters, Claimant is probably pivoting to the left and right multiple times every hour and perhaps hundreds of times per shift.

23. Claimant was asked about why she consistently reported that her injury occurred while "sidestepping." Claimant testified that she reported the injury as occurring during sidestepping because she herself did not appreciate the significance of any twisting/pivoting motion involved with her work. She demonstrated to Dr. Rook exactly how she was injured. Dr. Rook then observed that she was in fact pivoting during her demonstration, which Ms. LL[Redated] also performed during the aforementioned video replicating the job duties associated with assembling catheters. (Tr. 40:2-11; Resp. Ex. E).

24. Dr. Rook notes that Dr. Ritch stopped physical therapy after Claimant reported catching in her left knee. (Clmt. Ex. 6, p. 74). He also documented Claimant's ongoing left knee pain, "primarily along the medial knee joint," although she did have some discomfort along the lateral side as well. *Id.* at 74. His physical examination documented severe medial tenderness with minimal lateral tenderness. *Id.* at 80. Based upon the history provided, his medical records review and his physical examination, Dr. Rook opined that Claimant probably tore her medial meniscus at work while performing

the work duties associated with catheter assembly. *Id.* at 81-82. Regarding causation, Dr. Rook noted that the "combination of the lateral movement, the planted foot, and the [Claimant's] weight (she is morbidly obese) created enough stress to damage her medial meniscus". *Id.* at 82. Moreover, Dr. Rook noted that Claimant was not "involved in any traumatic events around the time outside of work to account for this condition". *Id*.

25. Dr. Rook explained that he was in disagreement with most of Dr. Farber's conclusions. (Clmt. Ex. 6, pp. 83-85). Dr. Rook summarizes that Dr. Farber was of the opinion that there was no medical evidence to support a causal relationship between Claimant's reported injury and her current left knee symptoms. *Id.* at 83. Dr. Rook disagrees, noting that the content of Claimant's medical records belie this conclusion. Indeed, Dr. Rook notes that the first report of injury documents that Claimant felt a snap on the inside/medial side of her left knee. *Id.* Furthermore, Dr. Rook notes that the initial medical report of Dr. Ritch documents that Claimant felt a "sudden" pain in the medial aspect of the left knee. *Id.* According to Dr. Rook, this early post-injury documentation is consistent with an acute injury to the medial meniscus. *Id.* Dr. Rook next addressed Dr. Farber's contention that Claimant's symptoms are more consistent with symptomatic osteoarthritis versus the meniscal tear. Dr. Rook rebuts Dr. Farber by noting that while there is a presence of osteoarthritis, there is no evidence in the medical record to suggest the arthritis was limiting or requiring any form of treatment. *Id.* at 84. Based upon the entirety of the medical record, Dr. Rook opined that Claimant sustained an acute tearing of the medial meniscus along with aggravation of her underlying osteoarthritis, which he concluded constituted a compensable injury. *Id.* at 85.

The Deposition Testimony of Dr. Walden

26. Dr. David Walden testified via evidentiary deposition on January 4, 2022 in his capacity as Claimant's treating surgeon. Dr. Walden testified as a Level II accredited expert in orthopedic surgery and sports medicine. (Depo. 5:2 – 6:12). Dr. Walden reviewed his medical records; Claimant's imaging studies and Dr. Farber's IME report before testifying. (Depo. 6:14-21). Dr. Walden testified that he met with Claimant on two occasions, those being the documented visits on August 31, 2021 and September 28, 2021. Dr. Walden was asked his understanding of Claimant's mechanism of injury to which he responded: "She reported to me that she was—she had to take items from the right and move them to the left, *which required her to move her feet, do a little bit of twisting*. And that on one of those occasions, she felt a pop in her knee with pain immediately." (Depo. 7:16 – 8:1)(emphasis added). Dr. Walden explained that Claimant's mechanism of injury, which involved a degree of twisting, and the associated popping/snapping described by Claimant along with the examination finding of medial joint line tenderness were indicative of a meniscal injury. It was his opinion that the meniscus tear was either an acute tear, or a condition made worse by Claimant's work activity. He did not believe that the osteoarthritis visualized on MRI was caused by Claimant's work related injury. He testified that because he did not know whether Claimant's pain was "coming primarily from arthritis or the meniscal tear, he directed a

steroid shot into the knee. As noted at paragraph 14 above, Dr. Walden elected to administer the steroid injection for both diagnostic and therapeutic purposes. Because the steroid injection was not overly helpful in reducing Claimant's pain, Dr. Walden felt there was a mechanical issue, i.e. a meniscal tear within the knee that was driving Claimant's persistent symptoms. (Depo. 9:5 – 10:11). Simply stated, the results of Claimant's injection were diagnostic for internal disruption of the left knee rather than just arthritis.

27. Dr. Walden was asked about Dr. Farber's commentary that Claimant's meniscal tear was a degenerative in nature. Dr. Walden explained that with any tear, there is going to be a day that it was not torn, followed by the day it tears. "So calling something degenerative when you really don't have any idea whether or not that's the case, is just a cop out", according to Dr. Walden. Dr. Walden explained the tear needs to be looked at in conjunction with other factors, such as whether there was some sort of precipitating event associated with the onset of symptoms, i.e., a twist with a pop in the knee, in order to determine whether an injury and need for treatment is "degenerative" or acute. According to Dr. Walden, there is really no way to tell simply from an MRI whether a tear is degenerative. Based on all the different factors/information he was provided in this case, Dr. Walden opined that Claimant sustained an acute injury requiring treatment. (Depo. 10:23 – 12:17).

28. Dr. Walden further supported his diagnosis and need for surgery for the meniscal tear by explaining the steroid shot has been shown to have beneficial effects for the treatment of arthritic sources of pain, but is not really a treatment option for meniscal tears. (Depo. 13:1-24). Dr. Farber stated in his report and his subsequent testimony that Claimant's lack of a pain reduction response to the steroid injection argued against the meniscus tear being Claimant's current pain generator. (Resp. Ex. A, p. 106; Tr. 75:23-25; 76:1-22).

29. As noted, Dr. Walden testified that he performed the steroid injection, which may have helped some with swelling and maybe a little with pain, but her condition overall did not improve much. He also explained the steroid shot would not be expected to help with a meniscal tear. This led Dr. Walden to believe there was both an arthritic and a structural, i.e. meniscal tear component to Claimant's ongoing pain. (Depo. 9:12 – 10:11). Regardless, it was his opinion the arthritis was aggravated by Claimant's work activities, as he previously stated in his report. He testified on cross-examination that there are in fact patients who have irritation of arthritis from nothing more than regular activities, "But I don't think that's what happened here." (Depo. 27:6-17). Dr. Walden was asked why he recommended/requested authorization for an arthroscopic evaluation of the knee with likely partial medial meniscectomy versus repair, to which he replied succinctly, "Because that's the treatment recommended for a meniscal tear that has mechanical symptoms." (Depo. 15:22 – 16:6).

The Testimony of Lizbeth LL[Redated]

30. Ms. Lizbeth LL[Redated] testified at hearing on behalf of Respondents in her capacity as a "line lead" for Employer. (Tr. 44:13-25). Ms. LL[Redated] is responsible for making sure those on the "line" perform their jobs properly to ensure smooth business operations. She is familiar with how to fabricate the catheters that Claimant assembles on a daily basis. As noted above, Ms. LL[Redated] is the individual seen in the video demonstrating how to assemble the catheters Claimant was constructing at the time of her alleged injury. (Tr. 45:1-25). Ms. LL[Redated] confirmed the essential job duties of assembling catheters as testified to by Claimant. (Tr. 46:1-12). She testified it was her opinion there was no "forceful" twisting of the knee involved with performing that job task, not that there was no twisting. (Tr. 47:2-5). In fact, Ms. LL[Redated] admitted that she has to "turn [her] entire body" to walk alongside the table. (Tr. 47:20-25). She does not merely "sidestep" when performing the job duties associated with catheter fabrication.

The Testimony of Dr. Farber

31. Dr. Farber testified at hearing on behalf of Respondents. Dr. Farber testified that Claimant did not explain to him any kind of rotation or pivot at the time of injury. (Tr. 52:8-18). Dr. Farber testified that, during his IME examination, Claimant denied twisting the knee. (Tr. 52:15-18; 53:19-25; 54:1-7). Additionally, he testified that Claimant's complaints were inconsistent with the MRI findings. (Tr. 61:9-19). Dr. Farber explained that the classic cause of a meniscus tear is an acute, sudden, *forceful* pivoting activity – a "dramatic" twist or pivot, not just a slight turn while walking along a table. (Tr. 61:23-25; 62:1-3). While Dr. Farber explained that a "forceful" twisting/pivoting activity is often the cause of acute meniscal tears, he also testified Claimant was predisposed to susceptibility to meniscal tears given her "morbid obesity." (Tr. 58:3-25).

32. Dr. Farber also testified that Claimant's severely morbid obesity results in a higher incidence of knee pain, knee arthritis and degenerative meniscus tears. (Tr. 58:10-25). Further, he explained that a "snap" is a "very non-specific symptom" and people with arthritis get snaps and pops all the time in their knee". (Tr. 68:20-25). Nonetheless, he testified that a snap is "by no means, indicative of one specific diagnosis. (Tr. 68:23-25; 69:1-2). Rather, it (snap) is a piece of the puzzle, which is not exclusively diagnostic, in and of itself, of a meniscus tear. Because a snap is not indicative of any specific diagnosis, the ALJ finds from Dr. Farber's testimony that it could be associated with arthritis or a meniscus tear.

33. Dr. Farber's testified that "given the nature of her injury, her described mechanism, her weight, the presence of arthritis on her X-rays and MRI scan, and the symptoms that she presented with when I evaluated her, and the – the exam findings that I documented when I evaluated her, I don't think surgery is appropriate, would benefit her at all." (Tr. 71:13-20).

34. During cross-examination, Dr. Farber admitted that there is no evidence to support a finding that Claimant was having any difficulties (symptoms) or required treatment for any left knee condition leading up to the June 18, 2021 incident. (Tr. 73:1-7). He noted further that Claimant's symptoms at the time she first presented to Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). He testified, "A lot of different things can aggravate arthritis" including repetitive standing and walking, ten-hour shifts or Claimant's routine day-to-day activities. (Tr. 73:13-20). He reiterated his position that the aggravation did not have to come from the "slight twist from working on her catheters". *Id.* Nonetheless, he did not eliminate that MOI (twisting/pivoting) as the potential cause surrounding the aggravation of Claimant's underlying arthritis.

35. Concerning the meniscal tear, Dr. Farber admitted that a degenerated meniscus could be torn more readily than one that is not compromised. (Tr. 74:23-25). He testified that he did not believe that a "slight pivot" could have caused the meniscal tear, but later agreed that prolonged walking or standing in combination with Claimant's age and weight could cause a tear. (Tr. 75:1-11). Indeed, Dr. Farber admitted that just about "anything could cause it" before adding that he would not attribute the tear to that one activity of pivoting while assembling catheters. (Tr. 75:12-22).

36. Based upon the entirety of the evidence presented, the ALJ finds the opinions and analyses of Drs. Rook and Walden to be more reliable and persuasive than those of Dr. Farber.

37. The ALJ credits the opinions of Drs. Rook and Walden and Claimant's testimony to find that she has established, by a preponderance of the evidence, that she sustained a compensable injury to her left knee on June 18, 2021.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers'

Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, Claimant's reporting concerning the MOI has been consistent as simply as sidestepping to the left. The evidence presented supports a conclusion that Claimant's actions on June 18, 2021 were consistent with the actions seen on the video. The video unequivocally demonstrates the twisting/pivoting motion necessary for Ms. LL[Redated] to turn from one end to walk toward the other. This is the same observation made by Dr. Rook during his independent medical examination that largely formed his opinion. Dr. Rook saw the pivot/twisting involved with Claimant's feet when he asked her to demonstrate how she was injured. It is also the same understanding regarding the MOI held by Dr. Walden. Dr. Farber's opinion was based largely on Claimant's described mechanism of injury being "sidestepping." The video evidence refutes this assumption. Claimant does not deny that she has described her actions as "sidestepping." Based upon the evidence presented, the ALJ is persuaded that Claimant did not appreciate the role that twisting/pivoting to the left on her planted leg played in causing her injury as she moved toward the end of the assembly table. Consequently, she simply described the MOI as sidestepping. While Claimant did not provide a detailed description of all the movements involved in the MOI in this case, the ALJ is persuaded that Claimant was injured while moving from one end of the assembly table to the other on June 18, 2021. Accordingly, the ALJ finds Claimant's current reports of pain and dysfunction reliable and persuasive. Based on this and the totality of the evidence presented, the expert medical opinions of Drs. Rook and Walden are more persuasive than the contrary opinions of Dr. Farber.

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of her employment relationship with Employer, i.e. at a catheter assembly table during her regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely catheter assembly, which the ALJ concludes is expected of Claimant in her position as an assembler. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" her employment must be resolved before the injury can be deemed compensable.

E. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's left knee was symptomatic or required treatment before June 18, 2021. The evidence presented supports a

conclusion that Claimant sought care following the June 18, 2021 incident, for symptoms she attributed to repetitive sidestepping involving slight twisting/pivoting while moving along the catheter assembly table. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working her job despite the onset of symptoms. As found, the ALJ credits the opinions of Dr. Rook and Dr. Walden to conclude that Claimant either suffered an acute irritation/aggravation of an underlying chronic meniscus tear, or a new meniscal tear as she twisted/pivoted in preparation to move toward the end of catheter assembly table.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing left knee osteoarthritis, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the onset of symptoms and disability Claimant experienced on June 18, 2021 arose as a consequence of an industrially based aggravation of her underlying left knee osteoarthritis, chronic underlying meniscal tear or a new left meniscal tear. Even Dr. Farber noted that Claimant's symptoms at the time of her initial appointment with Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). Moreover, he agreed that Claimant's repetitive walking, standing and ten-hour shifts could be causative in the onset of her left knee symptoms.

I. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her

employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, the discrete injury to Claimant's left knee in this case arose out of her involvement in work activity rather than being precipitated by an idiopathic condition she imported to the work place. Accordingly, the ALJ concludes that Claimant was not required to establish that the concurrence of a pre-existing weakness and a hazard of employment lead to her injury in this case.

J. Analogous to the MOI asserted in *Bastian* and *Fisher*, *supra* the MOI claimed to have caused injury in this case arose from activities that, per Dr. Farber, are the type which should not lead to a finding of compensability because the forces involved are "minimal" and are activities performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically sidestepping, twisting and pivoting, which are performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Respondents. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Contrary to Dr. Farber's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the left medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the MOI in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/pivoting activities at work, her left knee symptoms and her need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

K. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* § 8-41-301(1)(c), C.R.S*.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere

occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Ritch and his referrals, including the orthopedic evaluation and surgery recommended by Dr. Walden was/is reasonable, necessary and related to Claimant's June 18, 2021 injury. The aforementioned care provided by Dr. Ritch was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referral to Dr. Walden was reasonable and necessary to determine the extent of injury in light of Claimant's ongoing pain and disability surrounding the function of the left knee. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left knee surgery is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including the recommended arthroscopic evaluation and any definitive treatment directed to the left knee therefrom.

ORDER

It is therefore ordered that:

1. Per the parties' stipulation, Claimant's average weekly wage is $718.70.

2. Claimant has established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

3. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee injury including, but not limited to, the arthroscopic evaluation and medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he was injured in the course and scope of his employment on March 2, 2022.

II. If the claim is found compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to additional medical benefits that are reasonably necessary and related to the March 2, 2022 accident.

STIPULATION

Respondents stipulated that they have paid both Advanced Urgent Care and North Colorado Medical Center for the March 3, 2022 and March 8, 2022 visits, respectively.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a 37 year old male at the time of the hearing and was hired by Employer on approximately January 27, 2022. Claimant worked for Employer on March 2, 2022. He was a machine operator performing work excavating ditches. On that day, Claimant had completed his ditch work and went to assist a coworkers with changing a valve on a machine. He was working with a pipe wrench, leaning over and exerting force, when he stood up from the bent position he felt a pull and stabbing pain in his low back and left shoulder. The pain was so severe that he laid down on another piece of equipment for a minute before he could straighten up.

2. He reported the back and shoulder strain to his supervisor but stated he would check out and go home to see if the problem resolved. When he checked out, the Employer had a policy that workers had to note if they were injured on the job that day and Claimant indicated that he had not.

3. On March 3, 2022 Claimant returned to work and requested medical attention from the Safety Manager. The Safety Manager took Claimant to Urgent Care, based on Axis' direction. He advised Claimant that Axis was a third party management company that assisted Employer and workers in finding a provider and appropriate medical care when they were injured.

4. Claimant was seen at Advanced Urgent Care Occupational Medicine on March 3, 2022 by Erin Layman, PA-C. She noted as the chief complaint that "[T]he patient presents with a chief complaint of constant joint pain of the left shoulder, scapular region, left scapular region, and central lower back since Wed. Mar 02, 2022." Claimant provided a history that Claimant was leaning over operating a pipe wrench when he stood up and felt sudden stiffness and pain in his low back. She also noted some left posterior shoulder pain. Claimant reported he used icy hot and Tylenol.

5. On exam, Ms. Layman found Claimant had an abnormal posture as he had his torso hunched forward and had pain with back extension as well as difficulty standing upright. Ms. Layman noted Claimant had left shoulder tenderness and tightness over the left trapezius and the superior shoulder blade. She also noted spasms and tenderness to palpation bilaterally in the lumbar muscles extending to the sacrum, L1-S1.

6. Ms. Layman proceeded to provide an injection of Ketorolac.[1] The final diagnosis was muscle, fascia and tendon strain of the low back with muscle spasms, which noted an acute injury. He was provided with instructions to go to his primary care physician (PCP), or their clinic if he did not have a PCP, within three days if the pain did not abate. He was prescribed ibuprofen and Tylenol as well as lidocaine patches for ongoing discomfort and to continue stretches and avoid long periods of inactivity. He was advised to return to work as tolerate by pain and discussed proper body mechanics. It is noted that Ms. Layman did not provide a diagnosis for the left shoulder complaints.

7. On March 5, 2022 the Safety Director filed a First Report of Injury, noting that Claimant injured himself while assisting mechanical finish bolting up, while leaning over to torque the bolt. He noted Claimant used improper movement to perform the task and that the injury occurred on the Employer's premises. However, it noted that the injury occurred on March 3 (not March 2) and that Employer was notified on March 4. It also stated that Claimant continued work and had no restrictions. This report is incongruent with the Safety Manager's testimony and Claimant's testimony that the incident occurred on March 2, 2022, especially in light of the fact that the Safety Manager took Claimant to the clinic on March 3, 2022, clearly Claimant notified his employer by that date.

8. Claimant was attended by Banner Health North Colorado Medical Center on March 8, 2022 by Charles Nemejc, PA at the emergency Department. The Nursing Triage lists a chief complaint that Claimant had kneeled down at work the prior Thursday[2] and had sudden onset of lower back pain. The nurse noted he was seen at a work clinic, who gave Claimant pills that did not help much, but could not state the name of the medication. History taken by PA Nemejc was as follows:

> The patient presents with back pain and Continued [sic.] low back pain after bending over while at work to fix a pipe *3 weeks* ago.[3] He has been taking over-the-counter medications without relief. No bowel or bladder changes and no weakness or distal numbness or paresthesias. No decrease in discomfort after over-the-counter medications. Patient states that this is a work comp injury. He has no chronic medical conditions and takes no chronic medications. No other medical complaints. The pain is throbbing and aching and mild to moderate intensity and only over the lumbar spine. (*Emphasis added.*)

9. PA Nemejc prescribed valium, anaprox, Phenergan and prednisone as well as ordered x-rays of the lumbar spine. The diagnostic testing showed moderate disc space narrowing at L2-3 and a very mild disc space narrowing at L4·L5 and L5-S1, with

[1] A nonsteroidal antiinflamatory often used for short-term treatment of moderate to severe pain.
[2] Thursday was March 3, 2022, not March 2, 2022.
[3] The mention of three weeks is disregarded since the same report stated that Claimant had been injured on March 3, 2022, which is also found to be incorrect.

small marginal osteophytes, most apparent anteriorly at L2·3 (degenerative changes) as read by Dr. Phillip Gunther. Claimant was discharged with a diagnosis of lumbosacral spine strain, low back pain, and degenerative arthritis of the lumbar spine and prescribed naproxen for the pain and cyclobenzaprine for the muscle spasms. Claimant was released to go home and directed to follow up with Banner Occupational Health within 1-2 days or his company's work comp clinic.

10. On April 13, 2022 the Insurer's adjuster interviewed Claimant.[4] The interview transcription is riddled with "INAUDIBLES." From inferences made from the transcript Claimant stated that Claimant was not sure whether the accident date was March 2, 2022. Claimant noted that the accident happened in Aurora but could not recall the exact address where they were working but could locate it if necessary. Claimant stated that the accident happened at approximately 2:00 or 2:30 p.m. He advised he is a heavy machine operator and on that day he had finished his work so he went to help some coworkers with a pipe wrench to fix a valve. Claimant stated that he was bent over for approximately a minute, giving the wrench several tugs. He then went to grab the electric gun to tighten the screws and flange on the valve when he felt a pull in his back. He went to get up but could not straighten up due to a back strain. He also was having left shoulder pain. He explained that he told his immediate supervisor about his back pain that day and the supervisor laughed at Claimant. He explained when he came back the following day, barely able to walk standing straight. Claimant demanded that his supervisor report the injury to the Safety Manager and do something for him because he could not walk properly due to his back pain. He stated that after the accident he did stop working for approximately a week and two days but when he did not get paid for his time off he returned to work in pain due to financial hardship. He stated that he was let go from his employment on April 1st, 2022 because his work permit was expired.

11. Insurer filed a Notice of Contest on April 14, 2022 for further investigation and that the injury/illness was not work related.

12. On May 12, 2022 Dr. Brian McCrary performed a medical record review of the March 8, 2022 emergency room visit. He opined that, if Claimant did not seek any further treatment that he was likely at maximum medical improvement.

13. On June 21, 2022 Dr. McCrary wrote an addendum to review an interview where Claimant could recall little regarding the date of injury or the actual dates or places of treatment. Dr. McCrary stated as follows:

> … there is no evidence provided, other than the claimant's statement on 3/8/22 that any work related injury ever occurred on 3/2/22 except for [Claimant]'s statement that this occurred 6 days later. His described mechanism of injury is consistent with, at most, a minor soft tissue strain which would be expected to resolve with or without treatment in a short period of time. There is no actual evidence presented that any occupational injury occurred on 3/2/22, although the given mechanism of injury could conceivably have resulted in a short term soft tissue strain to the lumbar musculature. For this to have occurred, it would have required a pre-existing

[4] This ALJ infers from the April 13, 2022 transcript (Exh. I) that Q is the adjuster, INT is the interpreter, A is Claimant and A2 is Claimant's attorney.

lumbar condition to be present, and this would represent a short term exacerbation to a pre-existing lumbar condition (unspecified).

14. Dr. McCrary wrote a second addendum on July 12, 2022 noting he review the medical records from March 3, 2022, which did not change his opinion.

15. Claimant stated that he continues to have intermittent pain in his low back when he stands, but requires no further medical treatment.

16. Claimant's supervisor testified that Claimant did report a wrenching of his back when he was helping coworkers with a pipe wrench, a tool used to thread pipe. Claimant told him that he felt discomfort but did not ask for care the same day. He also stated that upon leaving the worksite, Claimant stated on his check out form that he had not incurred any injuries. It was not until the following day that Claimant asked to see a provider. He went to the provider and then returned to work. He continued working the full shift. He also continued working until March 11, 2022 his full 10 hour shifts. Claimant then stopped working from March 12, 2022 through March 21, 2022, when he returned to work his full schedule. The supervisor stated that he did not know why, since Claimant did not have restrictions. He was terminated at the end of March.

17. The Safety Manager (SM) also testified in his matter. He stated he knew Claimant as he was under the Safety Manager's supervision. He was aware of the termination, but was not involved in terminating Claimant. He was knew Claimant reported a work accident on March 2, 2022. Claimant's supervisor advised him of the claim the following morning. He engaged Axium medical and took Claimant to the nearest Advanced Urgent Care then returned to the job site with Claimant. He was aware that Claimant was released to return to work with a note that he may return to work as tolerated by pain, but with no specific restrictions.

18. The SM discussed Claimant's refusal to communicate with Axium, a third party administrator. Claimant reported that he was not happy with Axium. He was upset because SM advised Claimant that he was obliged to discuss his care with Axium and not go to an emergency room, but Claimant ended up going anyway. He stated that if Claimant took time off from work, it was not due to any medical report provided to the company as Claimant had no restrictions. Claimant sent a message that he would not return to work until he was 100%. Claimant returned and worked from March 21, 2022 through March 31, 2022. The SM had a conversation with Claimant after the ER visit on March 8, 2022 to let Claimant know that he had to follow up with Axium. Claimant did not refuse to return to Advanced Urgent Care, a provider on the designated provider list, only they had referred Claimant to his PCP.

19. The pay logs for March 2 and March 3, 2022 both state that Claimant was not claiming any injuries for those dates. Further, the payroll log confirms both the supervisor's and the SM's testimony that Claimant was paid for full 10 hours on March 2 and March 3, 2022. He continued working full time from March 4 through March 11, 2022, did not work from March 12, 2022 through March 20, 2022, and returned to work from March 21, 2022 through March 31, 2022.

20. On April 1, 2022 Claimant was terminated due to a "Tentative conconfirmation" (TNC) from either the U.S. Department of Homeland Security (DHS) and/or Social Security Administration (SSA). Once they receive a TNC, the employee

must receive notice within 10 days. Then the employee has 10 days to correct the status if they are contesting the TNC obtained through the E-Verify system.

21. This ALJ finds that Claimant has failed to show that it is more likely than not that he was injured in the course and scope of his employment with Employer on March 2, 2022 or March 3, 2022. At most he had a temporary strain which resolved. Dr. McCrary is persuasive in this matter. Respondents paid for the Urgent Care visit of March 3, 2022 and the emergency room visit on March 8, 2022 and Claimant is persuasive that he does not require any further medical care. As found, Claimant has not proved by a preponderance that any care beyond what has been provided is proximately caused by the March 2, 2022 accident. In fact, if Claimant has any further need for medical care, that care would be related to the underlying pathology and not an aggravation of the underlying pathology.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial*

Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory, supra.* However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008).

As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's alleged injury and work activities.

There is a difference between an accident and an injury at work. *Wherry v. City & County of Denver*, W.C. No. 4-475-818 (ICAO March 7, 2002). Just because an accident may have occurred at work, does not necessarily mean Claimant suffered a compensable injury. *Id.* The Workers' Compensation Act creates a distinction between the terms

"accident" and "injury." The term "accident" refers to an "unexpected, unusual, or un-designed occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury."

In *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO 2020), the Industrial Claim Appeals Office upheld the ALJ's order denying and dismissing Claimant's claim for compensation where Claimant had proven an accident occurred, but where Claimant failed to prove the injury was causally related to the accident. In *Washburn*, Claimant had video evidence of a slip and fall at work, and it was clear there was an accident or incident at work. *Id*. However, the ALJ found Claimant failed to prove she sustained a work-related injury as a result of the fall, and dismissed the claim. *Id.*

The court examined a similar case in *Kelly v. Insta Flap*, W.C. 5-120-413 (ICAO March 30, 2022). In *Kelly*, Claimant alleged an injury at work while moving a rolling rack, when the pipe rack began to fall off the hook and Claimant reached for the pipe to catch it and hurt his back. Claimant described the pain as instant and shocking. Claimant went home after the incident and sought medical treatment the next day. Claimant had a history of longstanding back complaints. The ALJ allowed respondents to withdraw their admission, and found that Claimant did not sustain a work injury that necessitated treatment, and that the Claimant's pre-existing or chronic low back condition was not aggravated or accelerated by the incident at work.

Here, Claimant has failed to prove by a preponderance of the evidence that Claimant's back condition was proximately caused by the accident at work or that it was more probably true than not that he sustained a compensable injury. Claimant did not establish that his symptoms were a product of the work activity but the symptoms appear to be from a preexisting condition.

As found, to the extent the symptoms were a result of the work activity, they were temporary in nature and Claimant, through his own testimony, acknowledge that he did not require any further care beyond the two urgent care visits, which were paid for by Respondents, despite their filing a Notice of Contest.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical

testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Respondents have paid for the two emergency visits of March 3, 2021 and March 8, 2021. Claimant agreed he did not require any further care. This ALJ finds that Claimant had an incident that was only temporary and requires no further care. Claimant has failed to prove he requires any additional medical care related to the accident of March 2, 2022. While there may have been an accident, there are no injuries proximately caused by the work related incident.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for benefits related to the accident of March 2, 2021 are *denied* and *dismissed*.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 22nd day of August, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-131-725-004

ISSUES

I. Whether the doctrine of issue preclusion applies to Judge Kabler's determination that Claimant's January 30, 2020, injury was a shoulder strain and that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery performed in August 2020 was not reasonably necessary to cure or relieve Claimant from the effects of her work injury.

II. Whether Respondents have overcome the opinion of the DIME physician regarding the date of maximum medical improvement by clear and convincing evidence.

III. Whether Claimant has proven by a preponderance of the evidence that the scheduled rating should be converted to a whole-person rating.

IV. If Claimant has proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Respondents have overcome the opinion of the DIME physician regarding causation and permanent impairment by clear and convincing evidence.

V. If Claimant has not proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Claimant has established a scheduled impairment rating by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant, who speaks Spanish, suffered a compensable right shoulder injury on January 30, 2020.
2. While obtaining medical treatment and undergoing independent medical examinations, Claimant has required the use of a translator – unless the medical provider speaks Spanish.
3. The issue of compensability went to hearing before ALJ Kabler on May 18, 2021. ALJ Kabler found and concluded that Claimant sustained an injury on January 30, 2020, to her right shoulder. He also found and concluded that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery she had undergone was

reasonably necessary and related to her January 30, 2020, work injury. (See ALJ Kabler's SFFCLO Respondents' Exhibit B.)

4. Claimant was injured on January 30, 2020, when she was on a ladder and tried to pull a box out and down from a shelf. While trying to get the box, and while reaching, she felt a pop and her right arm/shoulder started hurting. (Hrg. trans. 28:1–6; Polanco 32:22-25, 33:1-2.)

5. On February 18, 2020, Claimant presented to Concentra for her right shoulder injury. The record notes that Claimant had right arm pain and limited range of motion. The authorized treating provider (ATP), Jonathan Joslyn, PA-C, diagnosed Claimant with a right shoulder strain and placed her on 10-pound work restrictions.

6. On February 20, 2020, Claimant returned to PA-C Joslyn. At this visit Claimant was having pain with overhead lifting.

7. On February 25, 2020, physical therapist, Jessica McAlee noted that Claimant had intermittent right shoulder pain. Claimant also reported pain when lifting, reaching overhead, and behind her back. Ms. McAlee further noted that Claimant showed symptoms of right shoulder impingement of the supraspinatus with limited range of motion.

8. On March 3, 2020, Claimant presented to Dr. Darla Draper. At this appointment, Claimant complained of increased pain in her right shoulder and right upper back. Dr. Draper's assessment included a shoulder and thoracic strain. (Ex. 4, pp. 86-89.)

9. On March 18, 2020, Claimant returned to PA-C Joslyn. At this appointment, Claimant continued to experience right arm pain as well as pain radiating to her neck and shoulder. (Ex. 4, p. 91.)

10. On April 1, 2020, Claimant saw PA-C Joslyn. At this appointment, Claimant continued to experience shoulder pain. As of April 1, 2020, the diagnosis included a shoulder strain as well as a strain of a muscle and tendon of the wall of Claimant's thorax. (Ex. 4, p. 99.)

11. On April 10, 2020, Claimant underwent physical therapy at Concentra. At this visit, Claimant had pain that was located along the posterior portion of her upper shoulder to the midline of her back. (Ex. 5, p. 120.)

12. On May 11, 2020, Claimant presented to the emergency department at UC Health. For at least part of this appointment, Claimant's daughter translated for Claimant and the medical providers. The medical records show that Claimant provided a history of injuring her shoulder at work in January while moving something heavy. The medical records also indicate that while moving something at work, Claimant felt a "pop." (Ex. 7, p. 151.) In addition, several portions of the medical record from this visit indicate Claimant has not fallen within the last 6 months. (Ex. 7, p. 151.) On the other hand, a section of the medical record from this visit indicates Claimant fell in January 2020. (Ex. 7, p. 134.) The ALJ resolves this conflict in the evidence by finding that the reference to a fall in January 2020 is a mistake and that Claimant did not injure her shoulder due to a fall. In the end, Dr. Daniel Willner, diagnosed Claimant with "acute pain of right shoulder," which he thought was most consistent with arthritis, adhesive capsulitis, or rotator cuff pathology. (Ex. 7, Bates, 133.)

13. On June 17, 2020, Claimant underwent an MRI of her right shoulder. The MRI findings showed a large full-thickness tear involving the majority of Claimant's supraspinatus tendon. The MRI further revealed that there was "mild rotator cuff degeneration" and "mild muscular atrophy" as well as a degenerative appearing labral tear. (Cl. Ex. 6, p. 123.)

14. On August 27, 2020, Claimant underwent right shoulder surgery. (Ex. C, p. 15.)

15. On February 25, 2021, Dr. Failinger performed an IME for Respondents and issued a report. In his report, Dr. Failinger noted that Claimant said she injured her right shoulder while grabbing and pulling a box above her head that weighed about 5-10 pounds. He also noted that Claimant said she felt a pop in her right shoulder while pulling the box and developed pain that progressively got worse as she kept working that day – which included moving a pallet jack full of boxes. Based on his assessment, Dr. Failinger concluded that merely grabbing and pulling a 5–10 pound box, which was above her head, was insufficient to cause Claimant's rotator cuff tear and was insufficient to permanently aggravate her preexisting shoulder pathology. (Ex. C.)

16. Dr. Failinger also addressed whether Claimant's actions of pushing or pulling the pallet jack – where Claimant was placing the boxes – might have caused her rotator cuff tear or caused an aggravation of her preexisting rotator cuff pathology. Based on the information available to him, he could not determine whether those actions injured Claimant's rotator cuff. (Ex. C.)

17. In the end, Dr. Failinger concluded that Claimant was such a poor historian that he could not conclude that she suffered an injury at work based on the medical records and the history she provided to him during the IME. (Ex. C.)

18. On July 2, 2021, ALJ Kabler issued his order in which he found Claimant failed to establish by a preponderance of the evidence that the shoulder surgery she had was reasonably necessary to cure or relieve Claimant from the effects of her January 30, 2020, work accident. (Ex. B.)

19. On August 6, 2021, Respondents wrote a letter to Dr. Cava and advised her of ALJ Kabler's order. In the letter, Dr. Cava was advised that ALJ Kabler found that Claimant sustained a compensable injury to her right shoulder in the nature of a shoulder strain on or about January 30, 2020. The letter added that the ALJ found that Claimant failed to establish that the August 2020 shoulder surgery was reasonably necessary to cure or relieve Claimant from the effects of her January 30, 2020, work injury. (Ex. F, p. 63.)

20. On August 30, 2021, Claimant was seen by Dr. Cava. Claimant reported sharp pain in her right shoulder that "comes and goes." Dr. Cava stated that if surgery is "accepted under work comp." then Claimant is eligible for an impairment rating. Regarding maximum medical improvement (MMI), Dr. Cava stated that if the surgery is not "accepted under work comp." Claimant's MMI date is April 1, 2020. (Ex. 2, pp. 41-45.)

21. On October 15, 2021, in response to Respondents' August 6, 2021, letter, Dr. Cava stated that Claimant reached MMI on April 1, 2020. On permanent impairment, Dr.

Cava checked the box indicating that she did not believe Claimant sustained any permanent impairment for the January 30, 2020, work injury. (Ex. F, pp. 63-66.)

22. On December 1, 2021, the adjuster filed a Final Admission of Liability (FAL), admitting to an MMI date of April 1, 2020, with no impairment based on Dr. Cava's report. (Ex. A.)

23. Claimant, being dissatisfied with the FAL objected and requested a Division Independent Medical Examination (DIME).

24. On January 6, 2022, Dr. Cava was deposed. In her deposition, Dr. Cava stated that had Judge Kabler found the surgery to be related to the work injury, her determination on MMI would have been "after the completion of treatment from the surgery and any post-surgery physical therapy or other treatment." (Ex. 2, p. 55.) Regarding Claimant's impairment rating, Dr. Cava again relied on Judge Kabler's Order explaining that – because the order states that Claimant sustained a shoulder strain – she could not assign an impairment rating. Dr. Cava's opinion regarding MMI and permanent impairment appear to depend solely on Judge Kabler's prior ruling. (Ex. 2, pp. 50-59.)

25. Frank Polanco, M.D. was selected as the DIME physician.

26. On February 8, 2022, Claimant saw Dr. Frank Polanco for a DIME. In his report, Dr. Polanco noted Claimant having shoulder pain and limited range of motion in her shoulder. After reviewed the medical records and meeting with Claimant, Dr. Polanco determined that Claimant suffered a compensable shoulder injury on January 30, 2020, and reached MMI on August 30, 2021. In support of his determination, Dr. Polanco explained:

> The findings within the medical records reflect that the claimant sustained an injury on 1/30/2020. As a result of this injury, she was diagnosed with a rotator cuff and labral tear. While it appears that she had pre-existing degenerative/tear changes, she was not symptomatic nor limited in her work activities prior to the reported work injury. Thus, while she may have had pre-existing degenerative findings, it would appear that the least that she permanently aggravated her condition requiring surgical treatment. (Ex. 1, p. 5.)

27. As to permanent impairment, Dr. Polanco assigned a 3% extremity rating – converting to a 2% whole person rating. (Ex. 1, p. 5.)

28. On May 16, 2022, Respondents deposed Dr. Polanco. Respondents thoroughly questioned Dr. Polanco regarding his reasoning for MMI and permanent impairment. Even in light of ALJ Kabler's Order, Dr. Polanco disagreed with ALJ Kabler's finding that the surgery was not reasonably necessary to cure and relieve Claimant from the effects of her January 30, 2020, work injury. Dr. Polanco credibly defended his opinions and provided additional support for his reasoning regarding the date of MMI and Claimant's permanent impairment. His deposition testimony was consistent with Claimant's testimony and consistent with the majority of Claimant's medical records. As a result, the ALJ finds Dr. Polanco's opinions to be credible, highly persuasive, and well supported.

29. On June 8, 2022, Claimant saw Dr. Sander Orent for an independent medical examination (IME). Dr. Orent's report notes that Claimant stated she injured her right shoulder while grabbing a box that was well over her head. Although the weight of the box she lifted when she got injured was not specifically described, Claimant did note that the boxes in general weighed between 20 and 40 pounds. Dr. Orent noted that Claimant had pain in her right shoulder and neck. After meeting with Claimant and reviewing the medical records, Dr. Orent determined that the right shoulder surgery was related to Claimant's work injury. Although Dr. Orent did not believe Claimant had reached MMI, he assigned a 10% extremity rating based on Claimant's range of motion - translating to a 6% whole person rating. (Ex. 3, pp. 65-72.)

30. On July 8, 2022, Dr. Failinger was deposed regarding his opinions. Dr. Failinger testified consistent with his report regarding his opinion that the need for surgery was not caused by anything Claimant might have done at work. In essence, he concluded that the surgery was reasonable and necessary, but that it was not related to Claimant's work activities. For example, Dr. Failinger agreed that the surgery on Claimant's right shoulder was reasonable and necessary explaining that Claimant "had a rotator cuff tear that appeared to be symptomatic and was ongoing. That was a reasonable surgery." (Failinger Depo, 51-52: 25-5.) There were some different accounts during Dr. Failinger's IME regarding how Claimant injured her shoulder at work. But Dr. Failinger admitted that it was possible that there were misunderstandings with the interpreter when he met with Claimant. When probing more into his opinion that Claimant was a poor historian, Dr. Failinger ultimately acknowledged that the issue may have been related to misunderstandings surrounding the interpreter, not Claimant's inability to remember the details of her injury. Dr. Failinger agreed that no other treating provider noted problems with Claimant's ability to remember the details of her injury.

31. Dr. Failinger agreed that a "high majority" of individuals have asymptomatic arthritis as well as rotator cuff tears that are often asymptomatic. He then agreed that there can be an accelerating event that causes the arthritis or the rotator cuff tear to become symptomatic. Dr. Failinger also agreed that a person with a rotator cuff tear will have symptoms and limitations that wax and wane explaining "[t]hat's exactly the classic history of a person's rotator cuff, the symptoms wax and wane with time, yes." (Failinger Depo, 49: 3-5.)

32. Dr. Failinger agreed that it is not uncommon for a rotator cuff tear and a surgery to repair the tear to cause symptoms in the muscles surrounding the shoulder including the neck. (Failinger Depo, 52: 7-17.)

33. Dr. Failinger agreed that he could find no medical records showing Claimant had any history of right shoulder problems before January 30, 2020. He also agreed that there was no evidence of Claimant having any work restrictions before January 30, 2020. Dr. Failinger agreed that, since meeting with Claimant in February 2021, he has seen over a thousand patients. He also agreed that he may not have a clear recollection of his visit with Claimant. (Failinger Depo, 40-54: 11-19).

34. Dr. Failinger also concluded that because the shoulder surgery is unrelated, that he would also not assign an impairment rating because the range of motion deficits probably relate to the surgery. (Failinger Depo., pp. 17-18.)

35. Claimant developed symptoms in her neck and upper back after the work injury and these symptoms continued after Claimant had shoulder surgery. Thus, Claimant's neck and upper back symptoms have been consistent throughout her claim.

36. Claimant's shoulder injury caused pain and functional impairment of her neck and upper back. As a result, the ALJ finds that Claimant's shoulder injury has caused symptoms and functional impairment that extends beyond her arm at the shoulder and into her neck and upper back.

37. During the DIME, Dr. Polanco measured Claimant's shoulder range of motion and found ratable impairment pursuant to the AMA Guides. Based on the record, the ALJ finds that Dr. Polanco properly rated Claimant's impairment under the AMA Guides.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the

consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the doctrine of issue preclusion applies to Judge Kabler's determination that Claimant's January 30, 2020, injury was a shoulder strain and that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery performed in August 2020 was not reasonably necessary to cure or relieve Claimant from the effects of her work injury.

Issue preclusion bars relitigating of an issue that has been finally decided by a court in a prior hearing. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The Colorado Court of Appeals previously held that issue preclusion may not apply where the burdens of proof involved in the two adjudications are not the same. *Holnam v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2007). This scenario often arises when a DIME doctor's determinations on MMI and permanent impairment conflict with an ALJ's prior order. Nonetheless, ICAO and the Court of Appeals have made clear the DIME physician's findings on MMI and permanent impairment are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), (c), C.R.S. 2008; *Montoya v. Industrial Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008).

In *Sharpton*, the fist ALJ ruled that the claimant sustained a compensable injury to the right finger, but also found that the claimant's carpel tunnel in the left finger was not compensable. The claimant later sought a DIME in which the DIME physician determined that the claimant was not at MMI because she required treatment for the carpel tunnel syndrome in the left finger. The Respondents challenged the DIME's findings arguing that the DIME physician was precluded from addressing the left upper extremity condition because of the ALJ's prior order. The Panel explained that, while the issue before first ALJ was based on a preponderance of the evidence, the second ALJ was asked to review a determination of a DIME physician regarding whether the claimant's left upper extremity condition was at MMI using the clear and convincing evidence standard. From this, the Panel concluded that "the issue determined by [the first ALJ] is not identical to the later issue decided by [the second ALJ]. Consequently, issue preclusion does not prevent either the DIME physician or the decision of the second ALJ. Rather, consistent with our prior decisions in both *Braun* and *Ortega*, issue preclusion is inapplicable because the issue decided by [the first] ALJ is not identical to the issue determined by [the second] ALJ." *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (November 29, 2016).

The Panel addressed a similar factual scenario in *Madrid* but provided another rational clarifying why a DIME's determination on MMI and permanent impairment is not restricted by an ALJ's prior order. The panel explained that:

> "Consistent with our prior decisions in both *Braun* and *Ortega*, we conclude that issue preclusion does not apply in this matter because the issue

> decided by ALJ Allegretti was not identical to the issue determined by ALJ Felter. ALJ Allegretti made a decision pertinent to the compensability of a body part in the context of a request for medical treatment of that body part. Her decision was predicated on a preponderance of the evidence standard. However, ALJ Felter was asked to review a determination of a DIME physician that the claimant was not at MMI because the claimant did require treatment for the same body part found not compensable by ALJ Allegretti." *Madrid v. Trinet Group, Inc.,* W.C. No. 4-851-315-03 (April 1, 2014).

The *Yeutter* decision addressed a comparable situation in which respondents admitted liability for permanent impairment related to a condition (assigned by a DIME) then later argued such condition was unrelated to the work injury at a hearing on permanent total disability (PTD). The claimant in that case argued that the DIME opinions regarding relatedness of the condition carried presumptive weight and that the parties were bound by those opinions at the hearing on PTD. The Court of Appeals held that the presumptive effect of a DIME's opinion is limited to MMI and impairment and does not extend to a subsequent proceeding on other issues such as PTD. *Yeutter v. Industrial Claim Appeals Office*, 487 P.3d 1007 (Colo. App. 2019).

Additionally, Section 8-42-107(8)(b)(II) explains that the fundamental purpose of a DIME is to assess MMI and permanent impairment. In making these two determinations, WCRP 11-3 (c) states that the DIME shall be conducted in an objective and impartial manner; and that a DIME should be based on medical evidence, not legal records, or video. (§ 8-42-107(8)(b)(II), C.R.S. 2008).

Here, Respondents argued that ALJ Kabler's prior ruling precluded the DIME physician from determining that the right shoulder surgery was work related for purposes of determining Claimant's MMI date. At the hearing before ALJ Kabler, Claimant had to prove by a preponderance of the evidence that Claimant sustained a compensable injury and that the right shoulder surgery was work related. Akin to the Panel's explanation in *Madrid*, ALJ Kabler decided on the relatedness of a medical benefit, for purposes of Claimant receiving the medical benefit. At this hearing, however, Respondents have the burden to prove by clear and convincing evidence that the surgery is not work related for purposes of the DIME doctor's determination on MMI (thus, in addition to the two different standards of proof, the burden also shifts to Respondents). In making his MMI determination, Dr. Polanco properly relied on his review of the medical records, Claimant's physical examination, and the history she provided. The issue before ALJ Kabler and the issue before the ALJ now are separate thus making issue preclusion inapplicable. The ALJ also finds that the same rational from *Yeutter* applies to this claim such that the ALJ's opinions on the extent of Claimant's injury and the relatedness of the shoulder surgery is not binding as it applies to the DIME.

In summary, the ALJ finds that the prior order from ALJ Kabler does not preclude Dr. Polanco from deciding that the right shoulder surgery was work related for purposes of determining Claimant's MMI date and permanent impairment.

II. Whether Respondents have overcome the opinion of the DIME physician regarding the date of maximum medical improvement by clear and convincing evidence.

Overcoming the DIME on MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monforte Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc*., W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gusset*, 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712- 812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gusset, supra*.

Here, Dr. Polanco determined Claimant reached MMI on August 8, 2021, after he determined that Claimant's right shoulder surgery was related to her work injury. To overcome the DIME, Respondents must prove that it is highly probably that Dr. Polanco erred in his determination regarding the date Claimant reached MMI based on the relatedness on the shoulder surgery. To accomplish this, Respondents rely primarily on the IME from Dr. Failinger. Dr. Failinger concluded that, while the surgery was reasonable and necessary to cure Claimant from the effects of her rotator cuff tear, it was unrelated to the January 30, 2020, work injury. In forming this opinion, Dr. Failinger stated that Claimant lacked credibility because she was a poor historian. He also stated that there was no objective evidence of a right shoulder tear due to the work injury. Ultimately, the ALJ finds Dr. Failinger's opinions not persuasive. Dr. Failinger admitted that there may have been issues with the interpreter when he performed his IME. This alone casts doubt on his opinion that Claimant was a poor historian. Furthermore, no other treating provider or evaluator mentioned Claimant being a poor historian or not remembering the details of her injury.

Dr. Failinger also concluded that there was no objective evidence that the work injury caused an acute rotator cuff tear. At the same time, Dr. Polanco and Dr. Orent reviewed the same medical records as Dr. Failinger and both determined that there was enough objective evidence to find that the January 30, 2020, work injury either tore her rotator cuff or aggravated Claimant's preexisting asymptomatic rotator cuff pathology. The evidence to support Dr. Polanco's and Orent's opinions includes Claimant's loss of function after the work injury and the MRI report. Plus, after meeting with Claimant, Dr. Wilner also noted that Claimant showed symptoms of an acute tear. In summary, the ALJ credits the opinions from Dr. Polanco and Dr. Orent over the opinions of Dr. Failinger.

Dr. Failinger concluded that Claimant's mechanism of injury would not cause Claimant's symptoms. However, for purposes of overcoming the DIME, the ALJ finds that Claimant reported the same mechanism of injury to the ATPs, Dr. Polanco, and Dr. Orent – all of whom found that the work injury caused Claimant's symptoms and need for treatment. Although the ATP records note that Claimant sustained a shoulder strain, this was only determined after the initial encounter with Claimant. Thus, the ALJ is unsure if the shoulder strain is what the ATPs ultimately determined was Claimant's diagnosis to be from the work related incident. Thus, for purposes of overcoming the DIME, the ALJ finds Dr. Failinger's opinion on Claimant's mechanism of injury insufficient and unpersuasive.

In viewing the totality of the evidence, Respondents failed to produce sufficient credible evidence to meet the clear and convincing standard. Dr. Failinger's opinion stands alone in that no other treating provider agrees with him. In addition, the ALJ credits the opinions from Dr. Polanco and Dr. Orent that the work injury caused the symptoms in Claimant's shoulder and the need for shoulder surgery. All evidence and inferences to the contrary are deemed unpersuasive.

III. Whether Claimant has proven by a preponderance of the evidence that the scheduled rating should be converted to a whole-person rating.

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. The threshold issue is application of the schedule. This is a determination of fact based on a preponderance of the evidence. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. However, a claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss*. Walker v. Jim Fucco Motor Co*., 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

"Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines. As noted above, the site of functional impairment is not necessarily the

site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. Functional impairment need not take any particular form. *Nichols v. LaFarge Construction*, W.C. No. 4-743-367 (October 7, 2009*); Aligaze v. Colorado Cab Co*., W.C. No. 4-705-940 (April 29, 2009); *Martinez v. Alberston's LLC*, W.C. No. 4-692- 947 (June 30, 2008). "Referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc*., W.C. No. 4-390-943 (July 8, 2005).

Here, in reviewing the Claimant's medical records, it is found that Claimant consistently reported having pain in her neck and right upper back. Dr. Failinger agreed that a rotator cuff tear and rotator cuff surgery can lead to symptoms in an individual's neck. In weighing the totality of the evidence, the ALJ finds that Claimant's work injury caused the symptoms and functional impairment in Claimant's neck and upper back. The ALJ relies on the Claimant's testimony and the medical records in making this finding. The ALJ also credits the portion of Dr. Failinger testimony in which he stated that it is not uncommon for rotator cuff tears and rotator cuff surgery to cause symptoms in the muscles surrounding the shoulder including the neck. In weighing the totality of the evidence, the ALJ finds that Claimant sustained functional impairment beyond the arm at the shoulder and into her neck and upper back because of the work injury. Therefore, Claimant qualifies for the 2% whole person rating assigned by Dr. Polanco.

IV. If Claimant has proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Respondents have overcome the opinion of the DIME physician regarding causation and permanent impairment by clear and convincing evidence.

Claimant has established by a preponderance of the evidence that her scheduled rating should be converted to a whole person. Therefore, the DIME provisions apply to her medical impairment rating.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing

evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, there is a lack of credible and persuasive evidence that Claimant had range of motion deficits of her right shoulder before her work injury. Moreover, after her work injury and subsequent surgery, Dr. Polanco measured Claimant's shoulder range of motion and found ratable impairment pursuant to the AMA Guides. The ALJ has credited the opinions and conclusions of Dr. Polanco and finds that the 3% extremity rating, which converts to a 2% whole person impairment rating, to be well supported by the medical record and Claimant's testimony.

Respondents have provided the opinions of Dr. Failinger to support their contention that Claimant's work injury did not result in any permanent impairment. As found and concluded above, the ALJ has not found Dr. Failinger's opinions to be persuasive. As a result, the ALJ concludes that Respondents have failed to overcome Dr. Polanco's opinion by clear and convincing evidence.

The ALJ has also considered the opinion of Dr. Orent. Dr. Orent concluded Claimant incurred a 10% scheduled impairment, which converts to a 6% whole person impairment. However, this is merely a difference of opinion between Dr. Orent and Dr. Polanco, the DIME physician. The report of Dr. Orent fails to demonstrate Dr. Polanco erred in assessing Claimant's impairment.

Therefore, the ALJ finds that Claimant has suffered a 2% whole person impairment of her right upper extremity.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents failed to establish that issue preclusion applies to the DIME physician's determination of MMI and permanent impairment.

2. Claimant established by a preponderance of the evidence that her 3% scheduled rating should be converted to a 2% whole person rating.
3. Respondents failed to overcome by clear and convincing evidence the DIME physician's determination of MMI and permanent impairment.
4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 22, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-182-216-001

ISSUE

1. What is Claimant's AWW?

2. Did Claimant prove by a preponderance of the evidence that she is entitled to TPD benefits?

3. Did Claimant prove by a preponderance of the evidence that she is entitled to TTD benefits?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 53 year-old woman who worked as a hotel housekeeper. Claimant testified that she also worked in the laundry and kitchen areas.

2. Claimant was hired on June 11, 2021 and "rehired" on June 25, 2021. (Ex. B). Claimant testified that she took time between June 11 and June 25, 2021 to decide whether she would work for Employer permanently.

3. Claimant was rehired as a part-time, hourly employee. According to Claimant's "pay information" her "standard work day" was eight hours. (Ex. B). Claimant's first day of work after being rehired was June 29, 2021. (Ex. D).

4. Claimant sustained an admitted industrial injury on July 17, 2021.

5. Claimant's gross pay for the four weeks between June 25, 2021 and July 22, 2022[1] was $2,245.96. (Ex. C). The ALJ finds that $561.49 ($2,245.96/4) is a fair and accurate representation of Claimant's pre-injury AWW.

6. Authorized Treating Provided (ATP), Karen Larson, M.D., evaluated Claimant on July 23, 2021. Claimant reported that a guest pushed the cleaning cart towards her and the cart hit her left foot. Dr. Larson diagnosed Claimant with a left foot contusion. Claimant's initial x-rays were negative, but her examination was suspicious for a fracture. Dr. Larson referred Claimant for an MRI of her left foot. Claimant was given work restrictions. She was required to wear an ortho boot, could stand and walk for one hour per shift, but needed to be allowed to elevate her leg as needed. The restriction also noted "primarily seated work" and no squatting. (Ex. 4).

[1] Claimant worked on July 19, 20, 21, and 22, 2022. (Ex. D).

7. Claimant's MRI was scheduled for August 16, 2021. The August 13, 2021, WC164 Form continued the work restrictions previously recommended for Claimant. (Ex. 4).

8. Claimant testified that when she told her general manager about her work restrictions, he told her that "she had one way to work." Claimant testified that even though Employer told her she could lift her left leg every hour, this did not happen. The ALJ infers that the nature of Claimant's housekeeping work prevented her from elevating her leg every hour.

9. On August 27, 2021, ATP, Katherine Drapeau, D.O. evaluated Claimant. Dr. Drapeau noted that Claimant's MRI showed prominent bone marrow edema in her second distal phalanx. Claimant reported that her work restrictions were not being followed, and she cleaned rooms from 7:00 a.m. to 4:00 p.m. without any breaks. (Ex. 4).

10. According to the payroll records, Claimant took an approximately 30-minute break every day that she worked between August 16, 2021 and August 27, 2021. There is no evidence in the record that Employer accommodated Claimant's work restrictions. Her employment records show that Claimant consistently worked as a housekeeper. (Ex. D). The ALJ infers that as a housekeeper, Claimant was unable to be on her feet only one hour per shift.

11. Dr. Drapeau noted that Claimant's injured foot did not have a chance to heal because she was working full duty. Dr. Drapeau referred Claimant to physical therapy and for an orthopedic evaluation. On August 27, 2021, Dr. Drapeau changed Claimant's restrictions. Claimant was able to work her regular job, but only four hours per day. (Ex. 4). The ALJ finds that Claimant was restricted to only four hours of work per day.

12. On multiple days between August 27, 2021 and September 8, 2021, Claimant worked more than four hours per day. (Ex. D).

13. On September 20, 2021, Claimant had a follow-up appointment with ATP, Lynne Yancey, M.D. Claimant told Dr. Yancey that she was worried about her finances while working half time, and she felt her employer did not respect her restrictions. Dr. Yancey noted that Claimant was not improving. Claimant was to continue physical therapy, and Dr. Yancey referred her for stress management. Claimant was still restricted to only working four hours per day. (Ex. 4).

14. Claimant had a follow-up visit with ATP, Jacqueline Denning, M.D. on October 5, 2021. Dr. Denning noted that Claimant was not progressing as expected and Claimant's "[c]urrent work and activity restrictions are unchanged." Dr. Denning ordered additional physical therapy, and referred Claimant to a physiatrist. Claimant was still restricted to four hours of work per day. (Ex. 4).

15. Claimant's employment was terminated on October 12, 2021. (Ex. B). Employer's records indicate that Claimant voluntarily terminated her employment to relocate to California, and she was eligible for rehire. (Ex. E). [Redacted, hereinafter KN] oversees Employer's general managers. KN[Redacted] testified that if Claimant had been laid off or if there was no modified work for her, this would have been noted in Claimant's

employment file, and it was not. She further testified that Employer was short staffed, so there was plenty of work for Claimant.

16. Claimant testified that she lived in California in 2018 and 2019, and she moved to Colorado in either 2019 or 2020. Claimant currently lives in Colorado. She testified that even though she traveled frequently to California, she never had an intention to relocate to California.

17. Claimant's testimony as to why her employment was terminated was inconsistent. Claimant initially testified that after her shift on October 11, 2021, she clocked out and spoke with her supervisor, [Redacted, hereinafter VL]. Claimant told VL[Redacted] she had a medical appointment in California, and would be leaving work for a week. Claimant subsequently testified that her General Manager told her there was no more work for her, and that is why she did not return to work. Claimant testified that she never applied for unemployment.

18. The ALJ finds that Claimant's testimony regarding her termination is not credible. The ALJ finds that Respondents proved by a preponderance of the evidence that Claimant voluntarily terminated her employment on October 12, 2021.

19. Claimant did not attend the follow-up appointment with her ATP on October 19, 2021. She testified that during her previous appointment with the ATP, the doctor told her that the insurance company would no longer cover her medical expenses. The ALJ does not find this testimony credible. The medical records and the WC164 Form clearly outline Claimant's continued treatment and work restrictions. The Form notes a follow-up appointment scheduled for October 19, 2021 and referrals for physical therapy and a physiatry consult. (Ex. 4).

20. Claimant testified that she traveled to California in October 2021 for medical treatment unrelated to her work injury. Claimant's medical records from Clinica Sierra Vista in California are from visits in September 2021, January 2022 and February 2022. (Ex. I).

21. Claimant was evaluated by ATP, Dr. Denning, on December 23, 2021. Claimant told Dr. Denning that she was not working. Dr. Denning noted in the WC164 Form, under "Limitations/Restrictions," that Claimant "[m]ay work regular job but only 4 hours per day." She also noted that Claimant's MMI date was unknown because she was under treatment. (Ex. 4).

22. ATP, Dr. Yancey evaluated Claimant on February 28, 2022. Dr. Yancey continued Claimant's restriction of only working four hours per day. She also noted that Claimant's MMI date was unknown because she was under treatment. (Ex. H).

23. Respondents filed a General Admission of Liability (GAL) on September 22, 2021. Liability was admitted for medical benefits, TTD, and TPD beginning August 28, 2021. (Ex. 1). August 28, 2021 was the first day Claimant was restricted to working four hours a day.

24. Kathy McCranie, M.D., examined Claimant for a Respondents' IME on March 29, 2022. Based upon her review of the medical records and her physical examination of Claimant, Dr. McCranie opined that Claimant reached MMI as of March 29, 2022. Dr. McCranie noted that Claimant has not been placed at MMI by her own treating physicians. (Ex. G).

25. There is no evidence in the record that Claimant's ATP has placed her at MMI. The ALJ finds that Claimant has not reached MMI.

26. Claimant was restricted to four hours of work per day beginning August 28, 2021. There is no evidence in the record that this restriction has been lifted. Over the eight week period from August 20, 2021 to October 14, 2021, Claimant earned $3,497.74. The only pay period during this time when Claimant exceeded her AWW was the period between September 17, 2021 and September 30, 2021, when Claimant's AWW was $572.28 ($1,144.56/2).

27. The ALJ finds that Claimant proved by a preponderance of the evidence that she sustained a partial wage loss and she is entitled to TPD benefits from August 28, 2021 until terminated by statute. The ALJ further finds that Claimant's voluntary termination does not terminate her entitlement to TPD benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

"In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." §§ 8-42-103(1)(g), 8-42-105(4) C.R.S. (termination statutes). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the respondents to establish the claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is responsible for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Id.*; *Padilla v. Digital Equip.,* 908 P.2d 1185 (Colo. App. 1995).

In this case, the ALJ finds and concludes that Claimant voluntarily terminated her employment. Claimant's testimony regarding the reason she did not return to work after her October 11, 2021 shift was inconsistent, and not credible. (Findings of Fact ¶ 7). Claimant's employment records indicate that she voluntarily terminated her employment. This evidence was supported by the testimony of KN[Redacted]. Further, Claimant never filed for unemployment, she was eligible for rehire. (Findings of Fact ¶ 15).

The termination statutes, however, do not automatically preclude Claimant from an award of TPD benefits. The TPD statute does ***not*** contain a termination provision such as those found in sections 8-42-103(1)(g) and 8-42-105(4) of the Colorado Revised Statutes. TPD payments continue until the employee reaches MMI, or until the attending physician gives the employee a written release to return to modified employment, the offer is given to the employee in writing and the employee fails to begin such employment. § 8-42-106(2) C.R.S.

The question here is whether Claimant's resulting wage loss from her voluntary termination includes any preexisting wage loss related to her injury. In *Sparks v. Mattas Marine & RV*, W.C. No. 4-982-976-01 (I.C.A.O. Sept. 26, 2016), the claimant suffered a work injury and subsequently worked a modified job. The claimant was terminated for negligence and found at fault for the termination. The ICAO found that the application of § 8-42-105(4) C.R.S. did not preclude the claimant from an award of TPD benefits after his date of termination. The ICAO reasoned "[t]he wage loss 'resulting' from claimant's termination does not include the preexisting wage loss represented by the difference between the claimant's AWW and the wages he would have been paid had he not been terminated from the modified job duty." *Id.* In other words, the claimant was still entitled to TPD benefits to compensate him for that portion of his wage loss that continued to result from the injury. *Id.* citing *Tarman v. U.S. Transport*, W.C. No. 4-981-955-01 (June

2, 2016); *see also Montoya v. Indus. Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2018) (claimant sustained a wage loss despite having full duty release to work).

Here, Respondents admitted to TPD benefits beginning August 28, 2021, the date Claimant was restricted to only four hours of work per day. The medical records and WC164 forms all clearly note that this is a restriction. As found, Claimant voluntarily terminated her employment on October 12, 2021, but she is still subject to restricted to modified duty and is not yet at MMI. (Findings of Fact ¶¶ 25 and 26). As found, Claimant is entitled to TPD benefits from August 28, 2021 until terminated by statute. (Findings of Fact ¶ 27).

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. §§ 8-42-103, 8-42-105 C.R.S.; *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). There is no evidence in the record to support Claimant's entitlement to TTD benefits. Regardless, even if Claimant proved by a preponderance of the evidence that she was entitled to TTD, any such benefits would have ceased on October 12, 2021, when Claimant voluntarily terminated her employment. §§ 8-42-103(1)(g), 8-42-105(4), C.R.S. The ALJ finds that Claimant is not entitled to TTD.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $561.49.

2. Claimant has proved by a preponderance of the evidence that she is entitled to TPD benefits from August 28, 2021 until terminated by statute.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to TTD benefits.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-071-543-001

ISSUES

I. Whether Claimant has proven by clear and convincing evidence that the Division Independent Medical Examining (DIME) physician's opinion with regard to maximum medical improvement (MMI) has been overcome by clear and convincing evidence.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and will cure and relieve of the compensable injuries.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing (AFH) on February 24, 2022 in this matter on the issue of challenging the DIME physician's determination of MMI, medical benefits, and permanent total disability benefits.

Respondents filed a Response to the AFH on multiple issues including affirmative defenses of offsets, apportionment, termination for cause and subsequent intervening disability.

Claimant filed an Unopposed Motion to Hold the Issue of Permanent Total Disability in Abeyance for a Determination at a Later Date, which was granted by OAC on April 21, 2022.

Claimant clarified that she did not dispute the admitted permanent partial impairment rating already admitted in this case and Respondents clarified that their affirmative defenses listed are those that relate to the issue of permanent total disability benefits and were withdrawn at this time but were reserved for when that issue was determined.

STIPULATIONS

The parties stipulated that a Final Admission of Liability (FAL) was filed on February 16, 2022 pursuant the DIME physician's second report. The FAL admitted to a general award for maintenance medical benefits after MMI that are reasonably necessary and related to the injury pursuant to an authorized treating physician's orders..

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On March 8, 2018 Claimant was involved in a motor vehicle accident causing traumatic brain injury (TBI), double vision, cervical spine and lumbar spine injuries. Claimant continued to have active treatment since her injury to the present with San Luis Valley Medical Center and specifically with Kimberly Woodke, PA-C as supervised by Angel Castro, M.D. and Heidi Helgeson, M.D.

2. Claimant stated that Ms. Woodke had referred her for both trigger point injections and facet blocks but neither have taken place to date. Claimant was hoping that the treatment would provide her with further improvement to function and mobility as well as improved pain levels. If that were the case, she would not be as limited from or avoid social situations, especially activities with her daughter, like a normal mother would do. She would like the opportunity to have the treatment in order to have a fair chance of returning to as close to normal as possible, including playing with her child, lifting her, pushing her on a swing as long as she would like, or enjoy outdoor activities like she used to do. Claimant stated that if she was not in pain all the time, she would be a more pleasant person to be around and could go back to enjoying family gatherings and such.

3. Claimant testified that she continues to be limited to staying home, not able to engage in lifting, pushing her child on a swing, or engage in the same outdoor activities which she used to perform with family members without difficulty.

4. The Alamosa EMT paramedic found Claimant unconscious at the scene of the two motor vehicle accident under the purview of the fire department personnel. Claimant was noted to have a significant scalp laceration, was in a cervical collar, unconscious with a GCS[1] of 11. They stabilized her for transport.

5. On March 8, 2018 Claimant was admitted to San Luis Valley Health Regional Medical Center (RMC) by Dr. Julian Maendel as a 32 year old female, post motor vehicle accident (MVA), with a GCS 14 as assessed in the emergency room. Injuries included a large right scalp hematoma with initial bleeding from a scalp laceration, which was controlled with sutures, a small focus of the right frontal ICH[2] and C-spine precautions. Neurosurgery assessment by Dr. Gowriharan Thaiyananthan noted ICH and an L3 transverse process fracture but did not recommend any neurosurgical intervention.

6. The CT of the head, as read by Dr. Kristen Darden on March 8, 2018, showed a small focus intracranial hemorrhage withing the right frontal lobe. The CT of the lumbar spine showed a left-sided L3 transverse process fracture with minimal displacement. Claimant was stabilized at San Luis Valley Health and then the providers contacted Penrose Hospital, in Colorado Springs, to transfer the patient under the care of Dr. Beverly by flight for life as a Trauma 1 patient.

7. Dr. Katlyn Beverly noted that Claimant was involved in a MVA and transferred from Alamosa. The imaging showed an ICH and L2 transverse process fracture. Claimant was reporting nausea, vomiting, and mild headache but remained at a GCS of 17.

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[1] Glasgow coma scale is used to objectively describe the extent of impaired consciousness for eye, verbal and motor responses.

[2] Intracerebral brain hemorrhage.

8. On March 10, 2018 Dr. Andrew Fanous determined that Claimant had an active traumatic hemorrhage of the right cerebrum with loss of consciousness greater than 31 minutes due to the MVA, a scalp hematoma, a scalp laceration, acute pain due to trauma, was at risk of deep venous thrombosis but stated that the cervical and lumbar fractures did not confer instability. He prescribed Keppra for seizure prophylaxis.

9. Claimant was discharged from Penrose Hospital to Penrose Inpatient Rehabilitation in Colorado Springs on March 12, 2018 by Jamie Glen House, M.D. to participate in therapies as she still required significant assistance with mobility and activities of daily living and inpatient comprehensive rehabilitation for further therapies. Dr. House continued medical management, including physical therapy, occupational therapy, speech therapy and rehabilitation nursing.

10. Dr. House took a history stating Claimant had imaging that showed an anterior cerebral hemorrhage, as well as a fracture at L3 transverse process, and a GCS of 14 throughout her evaluation. She had a head CT on admission to Penrose Hospital that showed a tiny focus of hyperdensity in the right frontal cortex medially that was suspicious for a focal cortical contusion. There also was a large right frontal temporoparietal scalp hematoma with laceration. She had a follow up scan of her head that showed punctate high convexity parenchymal hemorrhages in the frontoparietal region. She had a CT scan of the cervical spine that showed an age indeterminate fracture versus congenital defect at the spinous process of C6. An MRI was then performed which showed diffuse posterior paraspinal edema that was concentrated around the spinous process of C6 and favored an acute C6 spinous process fracture. There also was intraspinous edema at C5-C6 and C6-C7 favoring intraspinous ligament tears. She was placed in a cervical collar and had non-surgical treatment. She was placed in a Miami J collar[3] and an LSO.[4] She also was placed on Keppra for seizure prophylaxis. She was seen in Neurosurgical consultation by Dr. Fanous.

11. Dr. House noted that relatives gave a history of her being a home care CNA in the Alamosa area and a "go getter." On exam Dr. House noted that her level of function was limited by her TBI, that she needed minimal assistance with toileting, total assistance with transfers, maximum assistance with ambulation, and needed maximum assistance with memory. Overall, he noted that Claimant did not fully participate in the exam as she was difficult to arouse and was very lethargic, though had intact muscle appearance of the upper extremities and intact motor exam in the lower extremities but had very little communication verbally. Despite the exam, he stated that she had a fairly good medical and functional prognosis. Dr. House continue to see Claimant throughout several years. He prescribed assistive devices, medications (except while Claimant was pregnant or nursing), physical therapy, a CT of Claimant's head and neck, labs, neuropsychological evaluation, speech therapy, ENT referral, and made recommendations with regard to her diet to promote better brain function.

12. On March 14, 2018 Dr. Thomas Wilson, a neuro-optometrist, evaluated Claimant due to ongoing vision difficulties as she complained of extreme hardship with focus and near vision acuity. Dr. Wilson noted that Claimant had significant

[3] The Miami J collar is a hard cervical collar that immobilized the neck.
[4] Lumbar sacral orthosis.

accommodative insufficiency[5] and recommended near-far accommodative rocks with vision therapy.

13. Claimant was evaluated by neuropsychologist Michael Nunley, PhD. on March 20, 2018. He noted that Claimant's speech production was somewhat limited but expected to improve, as she did not show any obvious evidence of gross thought disorganization and was not easily distracted from the conversation. Dr. Nunley noted that Claimant did go through somewhat of a stage of agitation and restlessness and defined this as level IV on the rancho scale[6] (confused, agitated). They discussed that as one improves they climb higher on the scale and clearly at this point she likely is functioning around a level VII which is automatic, appropriate, and requiring minimal assistance for activities of daily living (ADLs). He diagnosed diffuse TBI with loss of consciousness and other specified mental disorders due to known physiological condition. Dr. Nunley followed up with Claimant on March 27, 2018, noting Claimant was doing well and had a good prognosis for good outcome recovery, but recommended further care. On May 16, 2018 Dr. Nunley explained the need for counselling, medications to assist with sleep and that she was working with a speech-language pathologist to assist with cognitive struggles. He recommended neuropsychological testing to assess the extent of her cognitive dysfunction.

14. Claimant was first seen by PA-C Kimberly Woodke Rio Grande Hospital Clinics on April 9, 2018, following discharge from the Penrose Inpatient Rehabilitation Center. Claimant had increased headaches, memory problems, tingling and weakness in her right upper extremity, vision problems and dizziness as well as cervical pain. She noted complaints of adjustment disorder, cervicalgia, diplopia, dorsalgia, hand numbness, headaches, insomnia, amnesia, and incomplete lesion at C6 level of cervical spinal. She diagnosed intracranial injury with loss of consciousness, incomplete lesion at the C6 cervical level, amnesia and visual disturbances. She prescribed medication, despite Claimant's resistance to taking any, stated Claimant would be seeing a vision specialist and Claimant would continue to require monitoring.

15. Claimant testified that, despite the fact that the medical records reflect that PA Woodke's clinical notes have been co-signed by either Dr. Castro or Dr. Helgeson, Claimant has never seen Dr. Castro, and she only saw Dr. Helgeson for a few times during the first year of her treatment. Claimant acknowledged that the last two years of her treatment, she has only saw PA Woodke.

16. Claimant was referred to occupational therapy, physical therapy and speech/language therapy by Dr. House to address multiple difficulties, with walking, unsteadiness on feet, abnormalities of gait and mobility as well as muscle weakness generally and stiffness of the right knee, word finding and cognitive issues. He was also to treat her cervical spine issues.

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[5] A vision anomaly that is characterized by an inability to focus or sustain focus for near vision.

[6] Rancho Los Amigos Levels of Cognitive Functioning Scale is a clinical tool used to rate how people with brain injury are recovering. (Level X is the highest level; purposeful, independent, appropriate multitasking with memory retention though may still demonstrate intermittent periods of depression and frustration under stress.)

17. Claimant first saw the outpatient therapist, Eric Schoer, DPT from SLVH Pro Therapy Alamosa, on April 19, 2018 who noted a clinical presentation consistent with a TBI and C6 fracture following a MVA on March 8, 2018. She demonstrated deviations in gait and balance which requires use of and assistive, slight decreases in sensation along the RUE, range of motion (ROM) restrictions at the cervical spine, and slight muscle weakness and guarding with left upper extremity ROM. Additionally, Claimant reported high degrees of cervical spine pain that radiates into her shoulders, which limit her ability to perform ADLs, ambulate without an assistive device, sleep, and perform transfers without pain or difficulty. Claimant also had swelling of the lower extremities, and was wearing compression hose. Mr. Schoer stated Claimant would benefit from skilled PT intervention to address the listed impairments to increase her independence so she could return to work and prior levels of function.

18. Claimant continued with occupational therapy with Pro Therapy until May 1, 2018, when she was discharged with recommendations for assistive devices, including grab bars, long handle shoe horn, long handle sponge, document holder, and sock aide. Claimant also saw the speech therapist, Kristin Ferris, on this date due to continued cognition problems, difficulty with word finding and memory as well as processing time, especially math functions, double vision and working memory deficits.

19. On May 11, 2018 Claimant was examined at Centura Spine Care. The medical records documented that Bryant William Reinking, PA-C stated Claimant was examined with a chief complaint of multiple spinal fractures as a result of a significant motor vehicle accident. Claimant required further management of her symptoms related to the development of an intracranial hemorrhage, a C6 spinous process fracture, interspinous ligament sprain, and L3 transverse process fracture. She continued to have neck pain that was relatively unchanged from when she was discharged from the hospital with a diffuse achy pain throughout her neck and a localize sharp pain in the middle of her lower cervical spine. She did report tingling in her right hand that included the small, fourth, and third digits as well as some weakness. Claimant was also reporting very poor balance unchanged since her discharge, though she would ambulate with the use of a cane for balance. Claimant was also reporting constant pain in her low back, which was sharp with movements. Claimant was frustrated with the slow progress of therapy, and was managing her symptoms with Norco and Tylenol as needed. X-rays revealed that Claimant had both an L3 and L4 transverse process fractures, and a C6 spinous process fracture, C5-6 showed a 1 mm anterolisthesis.

20. Mr. Reinking diagnosed a fracture of cervical spinous process, cervical sprain, lumbar transverse process fracture, acute midline low back pain, and provided several options for treatment, including interventional modalities such as injections. On exam he noted Claimant to have positive Hoffmann sign and clonus bilaterally. The patient had MRIs that ruled out spinal cord etiology and Mr. Reinking believe the clinical findings were related to her cranial injuries. He recommended Claimant be as active as tolerated and to especially increase her walking as well as to continue to have aggressive physical therapy to manage her balance deficits related to her cranial injuries as well as her cervical and lumbar spine symptoms.

21. CT of the cervical spine from May 18, 2018 showed Claimant had a resolution of the visible intracranial hemorrhage and near resolution of the right scalp hematoma, a grade I C5-6 spondylolisthesis with widening between C5 and C6 spinous processes, suggesting an intervening interspinous ligament injury and a chronic C6 spinous process fracture, as well as an abnormal C6-C7 facet alignment and additional ligamentous injury as read by Dr. Nicholas Moore.

22. On June 20, 2018 Claimant followed up with PA Woodke, who noted that Dr. House had to increase Claimant's medications on May 18, 2018 due to mood swings and short temper. PA Woodke continued to recommend therapies, and noted Claimant was still using a soft collar. She also made referrals to Avalan Wellness for neurofeedback, to Cynthia Tanaka for counselling and recommended Claimant start tapering from the cervical collar.

23. Radiographs from June 27, 2018 showed that the C6 spinous process fracture was stable but revealed kyphosis (a hunched curvature) of the C5-6 level and the anterolisthesis. The lumbar spine x-rays continued to suggest that the L3 and L4 transverse process fractures were stable throughout flexion and extension. While Mr. Reinking PA-C noted that interventional medicine, such as injections was a possible alternative for treatment, he did not make a referral or include it in the conservative plan for treatment options. Claimant reported that she was frustrated with the slow progress in physical therapy and was managing her pain with Tylenol and Norco prescribed by Dr. House. However, she continued to use a cervical collar and a cane for ambulation due to the unsteadiness of her gait.

24. Claimant was initially evaluated by Dr. Steven G. Gray, Ph.D. a doctor of behavioral medicine, board certified in neuropsychology, on August 30, 2018. He diagnosed major neurocognitive disorder due to TBI, personality change, adjustment disorder with mixed anxiety and depressed mood. On September 28, 2018 he took an extended history consistent with other medical records of the MVA and conducted neuropsychological testing. He noted that due to loss of consciousness and loss of memory of the accident, she had retrograde and antegrade amnesia. Dr. Gray noted that Claimant had cognitive markers for bilateral pre-frontal, right greater than left, which cause difficulty with cognitive flexibility, selective attention, working memory, planning and judgement as well as self-evaluation, gratification delay, spatial reasoning and emotional lability. He recommended medications, neurofeedback treatment, computerized cognitive rehabilitation, including addressing reasoning, reading comprehension, selective attention, working memory and both verbal and vision-special realms. On October 19, 2018 he noted that Claimant had an excellent prognosis for recovery. However, Claimant was unable to locate a psychotherapist near her and Dr. Gray recommended psychotherapy with him. Claimant continued to work with Dr. Gray once or twice a month through May 2022.

25. Claimant continued to follow up once or twice monthly with PA Woodke with regard to her TBI and ongoing neck and low back symptoms. PA Woodke indicated in multiple records that Claimant continued to make progress but had to stop medications due to her pregnancy. On September 18, 2018 she noted that Claimant continued to heal but could not predict when that healing process would be complete. On October 30, 2018

PA Woodke issued a referral to Dr. Gray for neurofeedback and psychotherapy; continued and refilled medications, and advised Claimant to continue with follow ups with Dr. House.

26. She continued to follow up with Colorado Orthopedic Specialists. On September 28, 2018 Mr. Reinking recommended Claimant wean off of narcotics, use Tylenol and antiinflamatories, once approved by neurosurgeon, but continued to state that Claimant was not a surgical candidate and made a pain management referral.

27. On February 1, 2019, Claimant reported to Mr. Reinking that she was 18 weeks pregnant. He recommended that Claimant continue with conservative care, such as walking, losing weight and physical therapy. In light of the pregnancy, there was nothing further from an orthopedic standpoint that he could offer.

28. On February 11, 2019 PA Woodke stated that Claimant continued to be unable to work but was continuing to make slow but steady progress with therapy. Claimant became pregnant and her treatment with Dr. House, the neurologist was interrupted. She recommended a return follow up visit with him once she had the baby. She was also supposed to continue with neurofeedback appointments. She recommended Claimant continue to work on cognition, noted that maximum medical improvement (MMI) was still not in sight and as Claimant's vision improves, she may want to consider post traumatic counselling focused on potentially driving. From the records submitted, none took place.

29. On March 7, 2019 Claimant maximized her physical therapy with Dr. Schoer, who stated Claimant had made significant progress since starting PT and was no longer having constant and consistent neck and low back pain. Claimant participated in 75 sessions of physical therapy. She was able to use exercises and self-mobilization techniques she had learned to either reduce or relieve her symptoms. Mr. Schoer noted that she had functional strength and range of motion in her extremities and spine to perform ADLs and recreational activities without symptoms while using good technique. Claimant completed a total of 78 physical therapy visits.

30. PA Woodke noted that Claimant had "graduated" from physical therapy and continued to perform her home exercise program but continued to have limited right rotation of her neck. She continued to have vision therapy, speech therapy and neurofeedback therapy, making progress.

31. On April 27, 2019 Charles Reich, MA, CC-SLP, discharged Claimant from speech therapy after 72 sessions. He noted that she had made significant progress and could now write formal papers with notation/references. Her verbal expression was considered within normal limits (WNL) with only the occasional pause to find a word. Her reasoning/judgment was considered WNL, memory, especially recent (24 hrs.) was actually very functional and she used her cell phone/calendar, lists, to support any memory deficit, she reported being stressed at times but overall she is functioning at a high level of cognition considering the personal situation she was in at that time (her pregnancy). He noted, however that she continued to require behavioral health counselling.

32. On May 28, 2019 PA Woodke noted that Claimant was awaiting her prism glasses to be authorized, continued her care with Dr. Gray and would be seeing Dr. House at the end of July 2019. Claimant continued unable to work at that time, but continued to make slow, steady progress with her remaining therapies.

33. Claimant returned to consult with Heidi Helgeson, M.D. on June 18, 2019 who noted that she prescribed lidocaine patches and discussed use of the TENS unit. Claimant continued to have complaints of constant cervical spine pain and vision problems.

34. After a hiatus due to being pregnant, Claimant returned to Dr. House for care related to her TBI on July 18, 2019. He documented that Claimant had ongoing problems with irritability and overstimulation, as well as concentration and memory. However, due to her breast feeding her baby, Dr. House was unable to recommend Claimant for medication therapy. Prior to her pregnancy Claimant was on Depakote for irritability, Nuedextafor for pseudobulbar effect, and Ritalin for cognition and speed of processing. He noted that all of those medications were providing a significant therapeutic effect. Dr. House recommended Claimant continue with her treatment with Dr. Gray at that time.

35. Claimant was attended by PA Woodke on August 20, 2019 who reported that Claimant had seen Dr. House who was holding meds secondary to breast feeding and would be working on diet changes and alternative treatments. She noted that treatment with Dr. Grey continued. She was able to change her prism on lenses to 3 from 6 and was noticing a difference. She was doing vision "therapy everyday" [sic.]. Claimant's neck was still bothering her but the lidocaine patches helped take the edge off. She had been doing physical therapy to increase range of motion with good success. She continued to diagnose diplopia, incomplete lesion at the C6 cervical level with ongoing sequelae, TBI, cervicalgia, visual disturbances and headaches. She recommended that Claimant return to physical therapy to see if she could get more pain relief. She noted that Claimant still had a long way to go to reach MMI. She recommended that Claimant continue to follow up with Drs. Gray and House as well as with vision therapy.

36. Claimant restarted physical therapy on August 28, 2019 with Tanaye Maez, PT, DPT at SLV Health Pro Therapy Monte Vista. Ms. Maez noted that Claimant had neck pain, stiffness, weakness, intermittent numbness in right hand and fingers, difficulty sleeping and finding a comfortable position. She assessed that Claimant presented with symptoms consistent with facet joint dysfunction of C4-C7, hypomobility, impaired AROM of cervical spine, impaired posture and postural control, generalized weakness in bilateral upper extremities and cervical spine.

37. Claimant returned to see Dr. House on October 18, 2019 but he was unable to restart medications as Claimant continued to breastfeed her child. Instead he recommended Claimant continue with neuropsychology and biofeedback. He showed Claimant how to do ischemic compression and applied pressure of trigger points.

38. On October 28, 2019 she was evaluated by PA Woodke noting that Claimant had seen Dr. House, continued with neck pain, which was being addressed in physical therapy and with vision therapy, neuropsych. counselling, and neurofeedback.

39. Mr. Maez noted on December 10, 2019 that Claimant continued to report and demonstrate a pinching and pain on the right side of her neck though felt better after treatment.

40. On February 5, 2020 PA Woodke noted that Claimant noticed improvement with physical therapy as they were working on her balance and knots in her neck as well as needling, traction and cupping. PA Woodke issued another physical therapy prescription and stated she was awaiting the EMG as Claimant continued to have hand numbness, which would lessen with the splints, though she noted that they may need to progress to another MRI of the cervical spine. On March 5, 2020 she again requested an EMG as Claimant continued to have tingling in her hands. Notes from PT noted that it increased with traction.

41. On May 6, 2020 Dr. Sheryl Belanger noted that Claimant had had the EMG by Dr. Cooper on April 8, 2020 which showed severe carpal tunnel syndrome on the right and mild to moderate on the left. She made comment that she would progress to an MRI of the cervical spine and may refer Claimant to an orthopedic specialist. On June 2, 2020 Ms. Woodke noted that the MRI had been obtained and would be sent to Dr. Trippi for evaluation. She noted that follow up appointments were difficult since COVID-19 was limiting availability.

42. Physical therapy continued through June 30, 2020, at which time Claimant was demonstrating continued tightness in cervical paraspinals but improving cervical spine ROM without dizziness. Her posture was slowly but consistently improving at that time. The records seem to indicate that PT stopped at this point after another 58 visits between August 28, 2019 through June 30, 2020.

43. Respondents scheduled an independent medical evaluation (IME) with Dr. Nicholas Olsen for July 23, 2020. He took a history and noted her list of concerns in order of priority for Claimant as vision complaints including double vision, brain injury, neck pain, CTS, psychological problems and depression. He reviewed a significant amount of medical records. On exam, Dr. Olsen found that Claimant had neutral low back mechanics, no tenderness with right or left lateral bending, negative SLR, negative Gaenslen's. With regard to the neck, Claimant had a forward head posture, but full range of motion except for mild loss in extension. Facet loading and Spurling's were negative, Lhermitte's phenomenon was absent. Dr. Olson's opinion was that Claimant was at MMI and stable. He opined that the CTS was not related to the motor vehicle accident, that Claimant had an impairment for the cervical and lumbar spine of 13% whole person impairment. However, he did not rate the TBI or the vision problems as he required further evaluations of Claimant. He recommended new neuropsychological testing to assess ongoing cognitive problems, if any, and an ophthalmology test to determine a rating for the diplopia, if any.

44. Dr. Dwight Caughfield performed a Division Independent Medical Examination on November 17, 2020 and issued a report the next day. He took a history consistent with the above testimony and reports. He emphasized that Claimant had had to stop prescribed medications due to her pregnancy, which produced significant problems with irritability and decreased concentration. He noted that claimant had continued issues with compulsivity, short term memory and impaired sleep. He also

documented in his record review that Claimant was deemed to have cognitive-communication difficulties secondary to the brain bleed and TBI. He observed that the nerve conduction study which was performed on April 8, 2020 did not include an EMG needle examination, which was considered substandard care because the NCS alone could not determine the absence of cervical pathology contributing to arm symptoms.

45. Dr. Caughfield noted on exam that Claimant had posterior tenderness at C6 to deep palpation that was intensified with cervical extension, all planes of motion produced a pulling sensation in her neck with some tightening of the upper traps and posterior neck musculature palpated on rotation and lateral flexion. He found that Hoffman's was positive bilaterally but greater on the right and that she had abnormal range of motion. Dr. Caughfield place Claimant in the Moderate/Severe TBI category in light of the Claimant's initial unconscious state 15 minutes after accident and subsequent GCS of 11 assessed by EMS, as well as post traumatic amnesia of several days. He also diagnosed as related the C6 spinous process fracture and subsequent chronic neck pain as well as the lumbar spine transverse process fractures (not addressed in the DIME report).

46. Dr. Caughfield found Claimant not to be at MMI at this stage since she required further correction of her prismatic lenses, further psychological care due to the TBI and treatment of her cervical spine pain. He recommended cervical facet blocks to address the Claimant's neck pain in light of his examination and the records from physical therapy suggesting facet syndrome. He specifically stated that first Claimant required "medial branch block and then assess as to whether she can perform a lift in an excess of 25 pounds. As increase in lifting tolerance would indicate a reasonable expectation of functional improvement with a medial branch ablation which can then be considered." He provided an impairment rating for specific disorder of the cervical spine as well as TBI for a 30% whole person impairment.

47. Kevin Reilly, Psy.D. evaluated Claimant upon Respondents' request on March 24, 2021. Dr. Reilly took a history and demographic information. He reviewed medical records tendered. Dr. Reilly opined that Claimant sustained a mild traumatic brain injury but that testing indicated she did not have a continuing cognitive disorder as the neuropsychometric testing was within normal limits. He opined that Claimant had an adjustment disorder with mixed anxious and depressed mood. He opined that Claimant was at maximum medical improvement.

48. On May 12, 2021, Ms. Woodke made a referral to a physiatrist for the possibility of cervical blocks as per the recommendation of the Division Independent Medical Examiner, Dr. Caughfield.

49. Claimant restarted physical therapy on June 8, 2021 due to continued complaints of neck and upper back pain. Claimant was having continued pinching pain in her right side neck and said she had more soft tissue damage on that side. Claimant stated that her low back pain had improved since her last bout of PT. She said sitting and standing greater than two hours bothered her neck and she had to get up and move. She advised that seeing the massage therapist for cupping on her upper back and neck helped her sleep better. She still struggled with diplopia, but had discontinued therapy. She was having tension headaches less often, but they lasted for hours and ran from her occipital

protuberance to her eye. She stated that she was still breastfeeding her two year old daughter and had not been doing the exercises previously discussed at termination of last the PT session. Therapy again continued through August 23, 2021 for an additional 17 sessions.

50. On August 11, 2021 Ms. Woodke noted that Claimant had regressed somewhat due to unavailable psychological and vision services related to COVID-19. Claimant was encouraged to keep trying to obtain follow up appointments with Dr. Gray and Dr. House. Ms. Woodke stated that Claimant "is still severely impacted by the traumatic brain injury, resulting in cognitive issues. She continues to have neck pain from the fracture sustained in mvc.[7]"

51. On August 24, 2021 Claimant was evaluated by Ronald Wise, M.D. at Respondents' behest. His clinical impression was that Claimant had a mild traumatic brain injury from the MVA and now had symptomatic diplopia in dextroversion, secondary to a left cranial nerve IV paresis. He diagnosed left-sided trochlear nerve paresis that required prismatic glasses to correct. He provided an impairment rating of 3% whole person impairment and stated that Claimant was at MMI.

52. Claimant participated in another session of PT beginning on January 11, 2022 as recommended by Ms. Woodke for the cervical spine as Claimant's neck was really bothering her. Ms. Maez noted that it was likely due to postural dysfunction, causing pain in the neck as well as into the levator scapula. She noted that Claimant would benefit from a series of manual therapy, integrative dry needling (IDN), cupping, breathing education, and strengthening and balance exercises. Therapy continued for 12 more visits.

53. Ms. Woodke noted that Claimant was status post carpal tunnel release of the bilateral wrists on January 20, 2021. Claimant continued with neck pain and headaches and Ms. Woodke recommended Claimant return to Dr. House for recommendation of reinitiating medications. On April 3, 2021 Ms. Woodke stated that Claimant was "still severely impacted by the traumatic brain injury, resulting in cognitive issues." She continued to have neck pain from the fracture sustained and was to continue with Dr. Gray, the eye specialist and establish a replacement neurologist for Dr. House, who was moving out of state. She was requesting copies of the IME reports noting that Claimant was getting increasingly frustrated with her lack of understanding regarding the workers' compensation system, likely due to the sequelae of the TBI.

54. On May 12, 2021 Ms. Woodke reviewed both the IME and the DIME reports noting that the DIME physician, Dr. Caughfield, recommended further work up regarding the cervical spine and vision issues, including possible medial branch blocks and/or facet injections at the C6 level where the fracture occurred, with blocks done with an eye towards functional improvements. He recommended further work up with regard to the psychological problems caused by the TBI. She also reviewed the IME by Dr. Olsen who stated Claimant was at MMI and that any further problems caused by the TBI could be addressed under maintenance. Pursuant to the DIME's recommendation, Claimant was referred to an interventional medicine physiatrist for injections. Review of the extensive

[7] MCV is an abbreviation for motor vehicle collision.

medical records (over 1600 pages of exhibits) shows that Claimant never attended a physiatrist for consideration of injections.

55. Dr. Olson provided an addendum report on December 16, 2021, after he reviewed Dr. Wise's evaluation. He noted Claimant had a diagnosis of left trochlear nerve paresis caused by the MVA. As Dr. Wise provided an impairment rating of 3% of the visual system, converted to 3% of the whole person, Dr. Olson combined it with the rating he had previously provided for a total impairment of 16% whole person.

56. On December 29, 2021 Ms. Woodke noted that Claimant had anger issues and that medication had not stabilized her mood, including outbursts, anxiety and anger. Physical therapy was helping until it was terminated and the same goes regarding the vision therapy. Ms. Woodke noted that Claimant had slid backwards on vision and prism as well. She stated that Claimant continued to be unable to work due to the TBI. She ordered an MRI of the cervical spine as Claimant's neck problems continued to deteriorate without physical therapy. While Claimant had avoided taking pain medications she now requested some to relieve her of some of the pain. She put in another order for PT and prescribed a neuropathic pain medication as well as a muscle relaxer and submitted a new request for approval of prism lenses. Lastly, she ordered trigger point injections for the cervicalgia.

57. On January 5, 2022 Claimant had a new MRI of the cervical spine. Dr. Michael Kershen read the films as showing mild degenerative changes at the C5-C7, but no significant spinal or neural foraminal stenosis, with unchanged reversal of lordosis with trace anterolisthesis at the C5-C6 level.

58. Ms. Woodke performed trigger point injection on January 11, 2022. She also referred Claimant for another EMG and to physical therapy due to severe neck pain and radiating complaints.

59. On the same day, Claimant was seen by Ms. Maez of Pro Therapy with "signs and symptoms consistent with postural dysfunction, intense cervical pain, cervical and 1st rib hypomobility, headaches, vision problems, and postural abnormalities." Ms. Maez recommended manual therapy, IDN, cupping, breathing education, and strengthening and balance exercises to address cervical pain and other complaints.

60. Claimant returned for examination by the DIME physician, Dr. Caughfield, on January 19, 2022, who found Claimant to have reached MMI as of August 24, 2021. Following examination that showed that Claimant had improvements with physical therapy, psychological therapy and changes in prism glasses, Dr. Caughfield determined that Claimant did not require any active medical care. Claimant had a negative Hoffman's and negative Spurling's, negative facet load test other than some myofascial tension, with good short-term and long-term memory on casual conversation. He reviewed the neuropsychological testing and documented normal neurocognitive function with adjustment disorder and chronic pain. He continued to diagnose cervical pain with spinous process fracture, left cranial nerve IV paresis, adjustment disorder with chronic pain and history of moderate TBI with resolved neurocognitive defects.

61. Dr. Caughfield concluded that the date of MMI was based on the IME performed by Dr. Wise, who determined that Claimant's vision had been fully corrected

but the cranial nerve palsy was permanent. He no longer recommended cervical facet injection as Claimant's examination was consistent with myofascial pain, not facet pain, and would be unlikely to improve function with interventional medicine. He recommended follow up with the ophthalmologist for continued need for prism lenses assessment and adjustment, psychological follow up maintenance care for the adjustment disorder and chronic pain. He provided a 17% whole person impairment.

62. Ms. Woodke issued an MMI report on March 10, 2022. She specifically stated "MMI as determined by Level 2 physician 8/24/21. She has permanent medical impairment and will require maintenance care." She noted that Claimant required maintenance care, including physical therapy, psychological care, and vision evaluations. She also provided work restrictions of no lifting over 25 lbs., sit/stand for up to 1 hour with a 15 minute break. She continued to diagnose cervicalgia, C6 lesion and sequelae, diplopia, visual disturbance, TBI with loss of consciousness, and adjustment disorder.

63. Claimant was again examined by Dr. Olson on April 4, 2022 at Respondents' request, at which time he reviewed Dr. Kevin Reilly's neuropsychological evaluation. His physical examination is consistent with his prior exam of Claimant. He opined that Claimant had a 5% mental impairment which he stated should be combined with the 10% cervical spine rating and the 3% vision impairment for diplopia. Dr. Olsen disagreed with Ms. Woodke's recommendations for an EMG and spine consult. He specifically noted that Claimant had a benign MRI in January 2022 and has no significant findings of radicular symptoms related to the upper extremities. He recommended an FCE to determine work restrictions, and maintenance care in the form of follow up ophthalmologic evaluations to assess strength of the prism glasses as well as ongoing psychological follow-ups with Dr. Gray.

64. On May 4, 2022 Ms. Woodke noted that Claimant's

> … worsening of pain with change of medicine. merits further f/u. Start on low dose of gabapentin to see if helps with the neck pain that has worsened. I think it merits evaluation by pain management to determine if spinal injections, tens unit, or if there is another option to help with the cervical neck pain. I am not convinced that *we have met MMI in this area*.
>
> …
>
> Adjustment disorder, unspecified
>
> This has been present since beginning. She started on medications and then became pregnant. She just recently started medications again.
>
> Started on gabapentin and became sluggish and felt overmedicated. This was stopped and she was placed on duloxetine. This has been a game changer. She states she actually started conversation with someone in waiting room. She has been able to focus more clearly and tune out distractions. She has been more tolerant, less reactive to her family members and most importantly her daughter.
>
> *I think given the significant improvement we have not met MMI* in this area as well. I think titrating medication will be of great benefit to this woman's quality of life.

65. Claimant returned to Ms. Woodke on June 1, 2022 where she stated as follows:

> She has been making improvements with different therapies. She is requesting a letter stating why and where I see possible improvements on her case.
>
> She is in physical therapy and has been able to get and wear prism glasses. Both of which she is feeling better on.
>
> She was having relief of pain with the gabapentin just side effect of drowsiness. Switched to Cymbalta and seems to have helped with mood disorder. however neck pain has increased, making her realize that the gabapentin was doing something. We have since started on low dose of gabapentin. She has continued to see Dr. Grey and feels like she is making improvements.

66. Dr. Gray noted in May 2022 and June 2022 that Claimant continued to have ongoing struggles with anxiety and consternation regarding her future. She questioned her cognitive, physical and emotional capacity to re-enter the work force. Dr. Gray requested authorization for ongoing care at that time. Diagnosis continued to be mild neurocognitive disorder due to TBI which was improved, personality change due to a medical condition, which was resolved, adjustment disorder with mixed anxiety and depressed mood, improved, posttraumatic musculoskeletal injuries and posttraumatic vision changes.

67. Dr. Olsen testified at hearing as Respondents' board-certified expert in physical medicine and rehabilitation, interventional medicine and EMG/nerve conduction studies. He regularly treats patients with manipulations, spinal injections and other procedures. Dr. Olson stated he evaluated Claimant on July 2020 and April 4, 2022. He authored four reports in this matter as listed above. Dr. Olsen testified that he agreed with Dr. Caughfield's assessment that Claimant reached MMI for the vision component of her work injury. Dr. Olsen noted that when he initially saw Claimant, he had recommended that she obtain an ophthalmological consultation to determine the cause of her vision issues. Given the fact that Dr. Wise had performed this evaluation and diagnosed her with left-sided trochlear nerve paresis that was treatable by her prism lenses, she was at MMI for that vision component.

68. Dr. Olsen also agreed with Dr. Caughfield's assessment that Claimant reached MMI for her psychological condition related to the work injury. As Dr. Olsen explained, there was a concern to what extent Claimant's cognitive complaints were based on any kind of traumatic brain injury versus a psychological sequelae of the work injury. Given the fact that Dr. Reilly's evaluation determined that there was no cognitive impairment as a result of the work injury, and that Dr. Gray had been treating Claimant for quite some time, it was appropriate to place her at MMI for her psychological component.

69. Dr. Olsen agreed with Dr. Caughfield that Claimant had reached MMI for her cervical condition. Dr. Olsen noted that despite Dr. Caughfield, during his first evaluation, recommending that Claimant be considered for cervical facet blocks, he in essence changed his mind by the second evaluation. Dr. Olsen is an expert in the field of interventional medicines, including performing many epidural injections and facet blocks. As an expert in his field, Dr. Olsen did not believe that Claimant was a candidate for any

cervical facet blocks. In that regard, Dr. Olsen noted that Claimant had a CT scan and two MRIs of her cervical spine that showed no evidence of moderate or severe facet arthrosis. Dr. Olsen noted that, the Medical Treatment Guidelines requires that before facet blocks are considered, there must be evidence of moderate to severe facet joint disease, as well as a clinical examination that supports facet pain, to proceed with these kind of injections. During Dr. Olsen's April 4, 2022, evaluation, Dr. Olsen noted that the motion in Claimant's cervical spine was fluid, she did not have any crepitus, and her facet loading was considered negative. Dr. Olsen also noted that Dr. Caughfield's examination during the January 19, 2022, evaluation showed negative facet loading. As such, Dr. Olsen's opinion was that neither in diagnostic imaging nor in clinical examination did Claimant demonstrate that there was a facet component to her cervical complaints.

70. Dr. Olsen noted that PA Woodke had recommended a repeat EMG. It was Dr. Olsen's opinion that PA Woodke's recommendation for a repeat EMG would not change his mind that Claimant had reached MMI. Dr. Olsen noted that Claimant had previously undergone an EMG which demonstrated carpal tunnel syndrome. Inasmuch as Claimant's carpal tunnel problems were not a component of the claim, it would not make any sense to do a repeat the EMG.

71. This ALJ makes the following findings and inferences regarding the facts and issues in this matter:

a. Claimant has failed to overcome the DIME physician's finding that Claimant reached MMI based on the fact that the evidence does not show that Claimant has made any significant improvements in function over the last year. The treatment Claimant has received since August 2021, specifically the trigger point injections performed by PA Woodke, the physical therapy, the psychological care, and the prism lenses corrections have simply maintained Claimant from further worsening as documented by PA Woodke above. The same goes with psychological treatment from Dr. Gray. Claimant has reached a level of stability and has failed to advance and make any further functional gains, but has had to return for care to maintain her gains related to her ongoing adjustment disorder with anxiety and depressed mood. Also, Dr. Wise's opinion that Claimant is stable with regard to her permanent ocular nerve injury, which causes diplopia and is resolved by use of prism lenses is persuasive. Claimant reached MMI on August 24, 2021 as concluded by the DIME physician, Dr. Caughfield. PA Woodke's opinion that Claimant may not be at MMI because she assessed that Claimant was making "significant improvement" with regard to both the physical therapy and psychological care is merely a difference in opinion and does not show that the DIME physician has made any errors in his determination. PA Woodke's opinion is simply that, an opinion, and does not rise to the level of showing by clear and convincing evidence that Claimant is not at MMI.

b. Also, as found, Claimant has failed to show that Claimant's care since August 24, 2021 is anything other than appropriate maintenance care to keep Claimant at the point of stability that she achieved by August 24, 2021. Claimant symptoms may wax and wane over time. Therefore, maintenance care,

as admitted by the Final Admission of Liability of February 16, 2022 is appropriate and continuing.

c. Claimant has shown by a preponderance of the evidence that Claimant requires ongoing maintenance care for her vision diplopia, her cervical spine pain and for her adjustment disorder. Claimant will require rechecks of her prism lenses from time to time, to make sure they are appropriate for her ongoing condition and that the required strength has not changed. Dr. Wise and PA Woodke are persuasive in this matter. Claimant also continues to require follow up with PA Woodke or her other authorized treating providers for her cervical spine condition including occasional physical therapy. It is clear from both Dr. Woodke's records above and the physical therapy records from Pro Therapy reviewed in this matter, that Claimant has waxing and waning of her symptoms in her neck. This is demonstrated by loss of range of motion and function as documented by the therapist, Ms. Maez and by PA Woodke in their reports of December 29, 2021 through January 11, 2022. Claimant also had declining depressed mood which needed to be stabilized in order to prevent any further deterioration.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME

Claimant seeks to overcome Dr. Caughfield's determination of maximum medical improvement in this matter. Claimant must prove that the DIME physician's determination of MMI was incorrect by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998). A fact or proposition is proven by clear and convincing evidence if, after considering all of the evidence, the trier of fact finds it to be highly probably and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's determination, the Colorado Court of Appeals has

recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Maximum Medial Improvement is defined at 8-40- 201(11.5), C.R.S. as: "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. See, *Reynolds v. ICAO,* 794 P.2d 1080 (Colo. App.1990).

Here, Claimant has failed to overcome the DIME physician's opinion with regard to maximum medical improvement. As found, Claimant presented PA Woodke's opinion that Claimant required continuing treatment, including trigger point injections and facet blocks or interventional medicine in order to reach a point of stability. However, Claimant has had significant treatment, including over a hundred sessions of physical therapy, manual therapy, occupational therapy, speech therapy, psychological therapy and other modalities over the approximately three and a half years before she was placed at maximum medical improvement on August 24, 2021.

While the records show that Claimant continues to have waxing and waning symptoms, this does not mean she is not at maximum medical improvement. It is common for symptoms to wax and wane and require maintenance care in order not to deteriorate, especially when there was such a significant mechanism of injury as the motor vehicle accident in question. PA Woodke is not even certain whether Claimant is at MMI or is not at MMI according to her March 10, 2022 report and the May 4, 2022 report. PA Woodke could have, at any time prior to MMI, ordered the treatment for injections and trigger points. In fact, as early as May 11, 2018 PA Reinking suggested interventional medicine such as injections. PA Woodke also provided Claimant with trigger point injections on January 11, 2022 as part of Claimant's maintenance care program, which she could have performed at any time. PA Woodke's opinions are a mere difference of medical opinion and does not constitute, or rise to the level of, clear and convincing evidence that the DIME physician was incorrect.

Claimant has failed to provide any persuasive evidence that would show that Dr. Caughfield was incorrect in his assessment with regard to MMI. In the DIME physician's first report, when he stated Claimant was not at MMI, there were signs and symptoms present that were not present on the follow up visit, such as a negative Hoffman's and

negative Spurling's, negative facet load test, and only some myofascial tension. Further, Dr. Olsen was persuasive in regard to his opinion that Dr. Caughfield was correct in his opinion with regard to MMI. Claimant has failed to show that she is not at maximum medical improvement.

C. Medical benefits

As Claimant failed to overcome the DIME's opinion by clear and convincing evidence, Claimant has failed to show that medical care to cure and relieve Claimant's injuries in order to achieve MMI is reasonably necessary.

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*.

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

An injured employee must also establish by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal*

Indemnity Co., supra, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable and necessary medical treatment to prevent deterioration of her conditions related to this March 8, 2018 work related injury, including treatment for the cervical spine injury, the TBI and adjustment disorder, and the diplopia. Respondents stipulated that the Final Admission of Liability dated February 16, 2022 admitted to ongoing reasonably necessary and related medical benefits provided by an authorized treating physician pursuant to Sec. 8-43-207(8)(f), C.R.S. Neither party indicated that there were any medical benefits in dispute in this matter. Therefore this issue is determined by the stipulation of the parties, which is approved.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has failed to overcome the DIME physician's determination of maximum medical improvement and Claimant was at MMI as of August 24, 2021.

2. Pursuant to the Stipulation of the parties, Respondents shall pay for all reasonably necessary and related medical care prescribed by the authorized treating physicians that are attributable to the admitted claim.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 25th day of August, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-143-923-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to additional temporary partial disability (TPD) benefits in the amount of $665.95 for the period 4/22/2021 through 6/15/2021.

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from 6/16/2021 and ongoing.

III. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for her termination under §§8-42-105(4) & 8-42-103(1)(g) C.R.S., and thus not entitled to TTD benefits from 6/16/2021 and ongoing.

IV. Whether Respondents proved by a preponderance of the evidence Claimant is not entitled to TTD benefits from 9/14/2021 through 10/9/2021 due to an intervening event.

V. Whether Respondents are subject to penalties under to §8-43-304(1), C.R.S. for failure to pay admitted TPD benefits in accordance with the statutory formula set forth in §8-42-106(1), C.R.S.

VI. Whether Respondents are subject to penalties under §8-43-304(1), C.R.S. for failure to produce the claim file within 15 days of her request for the file, pursuant to §8-43-203(4), C.R.S.

FINDINGS OF FACT

1. Claimant has worked for Employer as a store manager since September 2018. Claimant worked approximately 50-70 hours per week.

2. Claimant sustained an admitted industrial injury on July 4, 2020 when she rolled her ankle on the edge of missing tile and fell.

3. Claimant underwent surgery on her left ankle on October 14, 2020. She subsequently developed CRPS in her left ankle and foot.

4. As of January 12, 2021, authorized treating physician (ATP) Hyeongdo Kim, D.O. restricted Claimant to 10 lbs. lifting; 5 lbs. repetitive lifting; 10 lbs. carrying; 5 lbs. pushing/pulling; walking and standing no more than 30 minutes/hour; minimal kneeling; and no squatting or climbing.

5. Claimant worked modified duty for Employer from January 18, 2021 to March 28, 2021. Claimant earned TPD benefits during this time period, during which time her wage loss varied. Insurer correctly calculated and paid TPD benefits for this time period.

6. Claimant continued to experience left foot pain and symptoms and her work restrictions were increased to no weight bearing more than 15 minutes/hour. She subsequently was unable to perform her modified job duties and TTD benefits were reinstated.

7. Employer utilizes [Redacted, hereinafter REA], a third party company, to arrange volunteer positions at nonprofits for employees who are on temporary modified duty. Neither [Redacted]REA nor the nonprofit employ the worker. The worker remains an employee of Employer and Employer is responsible for the payment of wages to the worker.

8. Employer, through [Redacted]REA, offered Claimant a written modified duty placement as a volunteer at [Redacted, hereinafter ATS], to begin on April 21, 2021. The offer was for 40 hours per week at $18.75 per hour ($750.00/week). The offer was within Claimant's current work restrictions of lifting/carrying up to 10 lbs.; repetitive lifting up to 5 lbs.; pushing/pulling up to 5 lbs.; walking/standing no more than 15 minutes/hour; minimal kneeling; and no squatting or climbing.

9. Claimant appeared at [Redacted]ATS on April 21, 2021 to work; however, she was sent home by Employer as [Redacted]ATS had not been notified of the arrangement. Claimant began the modified duty position at [Redacted]ATS the following day, April 22, 2021.

10. On April 22, 2021, Insurer filed a General Admission of Liability (GAL). The admitted average weekly wage (AWW) is noted as $1,583.32. Insurer terminated Claimant's TTD benefits as of April 21, 2021, noting Claimant returned to work earning full wages on April 22, 2021.

11. [Redacted, hereinafter BS] is the adjuster on Claimant's claim. [Redacted]BS testified at hearing that she filed the April 22, 2021 GAL terminating Claimant's TTD benefits as of April 21, 2021 because she did not notice there was a difference between Claimant's admitted AWW of $1,583.32 and the temporary modified volunteer offer for $750.00.

12. On May 10, 2021 DOWC issued a letter notifying Insurer that TPD benefits were owed to Claimant effective the date of her return to work, as Claimant's modified job offer weekly wage of $750.00 was less than the admitted AWW of $1,583.32.

13. Insurer filed an amended GAL on May 12, 2021 admitting for TPD from April 22, 2021 ongoing at $555.55 per week ($1,583.32 –$750.00 x 2/3).

14. Respondents failed to pay Claimant for lost time on May 5 and 6, and June 2 and 3, 2021 for authorized lumbar blocks, as well as lost time on May 7, 11-13, 21, and 24 and June 11, 2021 due to medical appointments.

15. Claimant notified Employer in advance of her scheduled medical procedures and appointments. Insurer authorized Claimant's medical treatment. As such, Respondents were aware of lost time that Claimant incurred as a result of the work injury.

16. [Redacted]BS testified that she paid TPD Claimant based on the modified offer at [Redacted]ATS of 40 hours per week and that, it was not her responsibility to request payroll or monitor Claimant's lost time, which was to be handled by Employer, Claimant, and [Redacted]REA. She further testified that there was no need for her to request payroll records during that time because she was paying a set rate based on the hours specified in the Rule 6 job offer. She stated that Claimant was expected to deal directly with Employer if there was a reason why she was not getting her full 40 hours at [Redacted]ATS. [Redacted]BS has been an adjuster since 2012 and is familiar with Section 8-42-106, C.R.S, which provides that in cases of TPD, the employee shall receive 66 and 2/3rds percent of the difference between the employee's AWW at the time of injury and the employee's AWW during the continuance of the TPD.

17. [Redacted]BS acknowledged that Claimant was due TPD for lost time due to the work injury, including related medical procedures and appointments. [Redacted]BS was aware that Claimant was attending authorized medical appointments, and that Insurer was responsible for that lost time. She testified that she, nonetheless, put Claimant on a "fixed" offer based on the number of hours of the placement at [Redacted]ATS.

18. [Redacted, hereinafter NA] works for Employer as a worker's compensation adjuster. [Redacted]NA handled Claimant's wages and worker's compensation claim for Employer. [Redacted]NA testified to her understanding that Insurer would have paid Claimant for the lost time due to work-related medical procedures. [Redacted]NA testified that Claimant sent her a list of dates of lost time, which included dates related to medical procedures and appointments, as well as missed time unrelated to the work injury, including time taken off to attend court dates, address plumbing issues at home, and non-work-related sick time. [Redacted]NA testified that, sometime in June 2021, she went through Claimant's list and reconciled everything. She testified she then forwarded the information to payroll to include wages on Claimant's next paycheck.

19. Claimant sent various emails to Respondents' counsel requesting TPD for lost time due to medical procedures and medical appointments. Claimant sent emails to Respondents' counsel on 5/19/2021, 6/3/2021 and 6/18/2021 regarding the missed time on 5/5/2021 and 5/6/2021. Emails dated 6/10/2021, 6/18/2021 and 7/1/2021 added requests for missed time on 6/2/2021 and 6/3/2021 as well as the lost time due to medical appointments. Notice of Claimant's claim for TPD was also provided to Respondents in a chart attached to Claimant's Applications for Hearing on 7/15/2021 and on 8/16/2021.

Claimant submitted her lost time again on 10/18/2021, including all supporting medical records and payroll.

20. On 5/14/2021 and 6/3/2021, Claimant submitted her lost time to Employer in the form of lists. Employer forwarded the lists to Insurer and Respondent's counsel. The first list included the first block as well as lost time due to medical appointments. Claimant also lost time for a doctor's appointment on 6/11/2021.

21. [Redacted]BS testified that she was in regular communication with Respondents' counsel and that she was aware Claimant had been requesting payment for time lost while volunteering at [Redacted]ATS. She testified that it was her belief Respondents' counsel was in communication with Claimant's counsel to reach an agreement to pay the additional TPD in one payment.

22. Claimant alleges that she is owed an additional $665.95 in TPD for the time period April 22, 2021 through June 15, 2021. As the date of the amended GAL was 5/12/2021, due dates for unpaid benefits were 5/12/2021, 6/9/2021, and 6/23/2021. The total of $665.95 was due as of 6/23/21.

23. Respondents do not dispute that Claimant is owed TPD in the amount of $665.95. Respondents counsel represented at hearing that Respondents would be issuing a check to Claimant to cover such amount.

24. Respondents issued a check for the TPD owed to Claimant on June 13, 2022.

25. Claimant testified that wage payments from Respondents had often been late or incomplete. She testified that the late and/or unpaid TPD payments caused her frustration and worry regarding paying her bills.

Termination of [Redacted]ATS Position

26. While working at [Redacted]ATS on June 11, 2021, Claimant's left foot struck the bottom of a clothing rack, causing Claimant to fall forward onto her left foot. Claimant experienced pain in her left ankle. She reported the incident to [Redacted]ATS' assistant manager as well as to store manager, [Redacted, hereinafter AJ].

27. Claimant sought treatment with Dr. Kim that same day. Dr. Kim noted that Claimant's exam findings were consistent with acute left foot contusion and placed Claimant on temporary restrictions of no lifting/carrying/pushing/pulling of more than 2 lbs. and no walking or standing for more than 15 minutes/hour.

28. Claimant returned to work at [Redacted]ATS on June 14, 2021 and provided the assistant manager a written copy of her June 11, 2021 work restrictions. Claimant performed seated tasks for the day. She returned to [Redacted]ATS the following day, June 15, 2021, and performed another seated task until store manager, [Redacted]AJ, called Claimant into her office. At that time, [Redacted]AJ notified Claimant that her

position at her [Redacted]ATS had ended because they could not accommodate Claimant's work restrictions for mostly seated duty.

29. [Redacted]AJ notified [Redacted, hereinafter JF], Director of Volunteers at [Redacted]ATC, of the decision. [Redacted, hereinafter MS] sent an email to [Redacted, hereinafter AH] at [Redacted]REA at 1:11 p.m. on June 15, 2021. [Redacted]JF that Claimant was on seated duty only restrictions due to the June 11, 2021 incident. She wrote, "At [t]his time we don't have seated work for her at [Redacted]ATS. We will be terminating her volunteer opportunity today based on her new restrictions." (Cl. Ex. 1, p. 1).

30. [Redacted]JF sent a second email to [Redacted]AH at 4:45 p.m. on June 15, 2021. She stated, "I would like to let you know [Claimant] came back to the store and asked the store manager for a written letter to give her lawyer. We do not give those out and explained to her she was released because of her new restrictions." (Id. at. p. 2).

31. On June 16, 2021, [Redacted, hereinafter AT] of [Redacted] REA sent an email to [Redacted]BS stating that [Redacted]ATS was in the process of accessing video surveillance of the June 11, 2021 incident. She stated, "No one witnessed what happened and [Claimant] has been vague with the details so they are reviewing to see if there is any further info on video. (R. Ex. D, p. 27). [Redacted]AT also noted that Claimant requested [Redacted]ATS complete a letter for her attorney stating they cannot accommodate her restrictions. She wrote, "At this point [Redacted]ATS no longer want to host, not due to restrictions but due to [Claimant's] behavior and concerns that she is not being truthful about the alleged incident in addition to trying to be flexible and putting her at 2 of their locations." (Id.)

32. [Redacted]AJ testified at hearing that Claimant's volunteer opportunity at her [Redacted]ATS ended because her store could not accommodate Claimant's new work restrictions. She testified that Claimant's placement did not end due to any purported vagueness regarding the June 11, 2021 incident, issues with behavior, or requests for transfers.

33. [Redacted]JF explained that [Redacted]ATS considers requiring a worker to be seated for all but 15 minutes/hour a mainly seated position. She testified that there were no such seated duty positions available for Claimant at [Redacted]ATS based on the work restrictions imposed on June 11, 2021. [Redacted]JF testified that it was her understanding Claimant requested a letter stating why she had been released. She further testified that Claimant's placement with [Redacted]ATS did not end due purported vagueness regarding the June 11, 2021 incident, issues with behavior, or requests for transfers.

34. [Redacted]BS requested that [Redacted]ATS provide a summary of the reasons for Claimant's termination of placement. An unidentified individual at [Redacted]REA drafted a discharge summary dated July 12, 2021. [Redacted]AJ nor [Redacted]JF made any changes to the content of the letter. [Redacted]AJ signed the letter. The letter states

that Claimant alleged she tripped and fell on the bottom of a rolling rack on June 11, 2021 and notified [Redacted]ATS. It further states that Claimant reported to [Redacted]ATS on June 15th claiming that she had seated restrictions and requested that [Redacted]ATS create and sign a document for her attorney stating that [Redacted]ATS could not accommodate her restrictions. The letter does not refer to any alleged issues with Claimant's behavior or requests for transfers.

35. Claimant testified that [Redacted]AJ informed her that her position with [Redacted]ATS ended due to her new work restrictions. Claimant testified she was never informed by [Redacted]ATS that she was vague about the June 11, 2021 work incident.

36. Regarding alleged issues with behavior, Respondents note that while working at the first [Redacted]ATS, a customer alleged that Claimant smelled like marijuana. Claimant does not use marijuana and underwent at least two drug tests at the start of her worker's compensation claim which were negative. Claimant was also accused of being confrontational with someone regarding a transfer request. Claimant acknowledges she did have a heated discussion with someone from [Redacted]REA regarding payment of wages. There is no evidence Claimant was given any warnings for the aforementioned behavior. Claimant was subsequently transferred to a second [Redacted]ATS location approximately six weeks prior to the end of her placement. There is no evidence of any purported behavioral issues during that time period.

37. Regarding Claimant's request for transfers, Claimant first requested to be transferred to an [Redacted]ATS location closer to her medical providers in an attempt to reduce travel time. [Redacted]ATS approved a transfer, but to a different location than the location Claimant specifically requested. Claimant again requested another transfer to the location she requested initially. Claimant addressed the second transfer request with [Redacted]REA, not [Redacted]ATS. Claimant was not informed by Employer, [Redacted]REA, or [Redacted]ATS regarding any policy prohibiting her from requesting transfers and was not informed that her transfer requests were an issue.

38. Claimant has not been terminated by Employer and remains on a workers' compensation leave of absence.

39. Respondents did not offer Claimant any other temporary placements or modified duty work after June 15, 2021. Claimant has not been released to full duty or been placed at maximum medical improvement (MMI).

<u>COVID-19 Event</u>

40. On September 14, 2021 Claimant was hospitalized with COVID-19. She was thereafter transferred to a rehabilitation facility at which she stayed until October 9, 2021.

41. At the time she was hospitalized, Claimant had been in active treatment for her work injury with ATPs Drs. Kim, Wakeshima, Chan, and DiSorbio. An appointment with ATP Dr. Barolat was also pending to evaluate Claimant for a stimulator implant. As of late

August and early September 2021, Claimant continued to report left ankle and foot pain and other symptoms. As of August 20, 2021, Dr. Kim placed Claimant on restrictions of 20 lbs. lifting/repetitive lifting/carrying/pushing/pulling, and walking and standing no more than 45 minutes/hour.

42. [Redacted]AJ testified that Employer was unable to accommodate these restrictions.

43. Claimant resumed treatment with her ATPs upon her release from the hospital on October 9, 2021. She saw Dr. Kim on 10/20/2021. CE p 249. On 11/19/2021 Dr. Wakeshima prescribed Claimant an electrical sock for her CRPS. Dr. Wakeshima recommended that Claimant consult with her personal physician to see if she needed to continue with a medication called Eliquis in anticipation of surgical implantation of a stimulator. needed to be off the Eliquis before she could be considered for a surgical procedure to implant a stimulator. On 12/15/2021 Dr. Barolat recommended a peripheral stimulator.

44. Dr. Wakeshima testified by deposition on behalf of Claimant as a Level II accredited expert in physical medicine and rehabilitation and chronic pain. He testified that at the time Claimant was hospitalized for COVID-19, there was no expectation or contemplation that she would be placed at MMI in the near future; there was no significant indication that her condition was resolving or abating; and no indication that she should be released to full duty with no restrictions. Dr. Wakeshima testified that Claimant remained impaired by her work injury during the time she was hospitalized for COVID-19. Dr. Wakeshima's testimony is found credible and persuasive.

Requests for Claim File

45. Claimant's counsel submitted a written request for Claimant's updated claim file to Respondents' counsel via email on July 15, 2021. Claimant's counsel repeated her requests on July 31, 2021, September 7, 2021, September 8, 2021, September 15, 2021 and October 18, 2021.

46. Claimant served interrogatories to Respondents on or around July 15, 2021, connected to a prior Application for Hearing, and on or around August 16, 2021 in connection with the current Application for Hearing. Respondents provided answers to the first set of interrogatories on September 8, 2021. Claimant requested that Respondents supplement their interrogatories and answer her replacement interrogatories.

47. On October 25, 2021, Claimant submitted Motion to Compel Answers to Discovery and to Produce the Updated Claims File. On October 26, 2021, Respondents requested a prehearing conference (PHC) to address Claimant's motion. Respondents did not file a written objection to Claimant's motion or produce the claim file at the time because they were waiting for a Prehearing Administrative Law Judge ("PALJ") to rule on the motion at

the PHC set for November 10, 2021. Respondents were of the understanding that the issues would be discussed and ruled on at the PHC.

48. PALJ Laura Broniak was unaware the parties had scheduled a PHC for November 10, 2021. As such, on November 5, 2021, PALJ Broniak issued an order ordering Respondents to, among other things, provide Claimant an updated claim file within seven days of the date of service of the order. She denied Claimant's motion to require the claim file to be produced without a privilege log. The order was served November 8, 2021.

49. The parties subsequently attended a PHC before PALJ Broniak on November 10, 2021 at which time the parties addressed, *inter alia*, Respondents' motion for an extension of time to comply with PALJ Broniak's order. PALJ Broniak issued an order dated November 10, 2021 ordering Respondents to provide an updated copy of the claim file on or before November 18, 2021.

50. Respondents attempted to produce the claim file on November 18, 2021, but were unable to do so due to technical issues with the electronic file. Respondents notified Claimant's counsel of the technical issue and Claimant's counsel agreed to accept the claims file on November 19, 2021. Respondents provided the claim file to Claimant on November 19, 2021.

Ultimate Findings

51. Regarding Claimant's termination from the [Redacted]ATS position, the ALJ finds the testimony of Claimant, [Redacted] AJ and [Redacted]JF more credible and persuasive than the testimony of [Redacted]NA and [Redacted]MS.

52. Claimant proved it is more probable than not she is entitled to additional TPD benefits in the amount of $665.95 for the 4/22/2021 through 6/15/2021.

53. Claimant proved it is more probable than not she is entitled to TTD benefits from 6/16/2021 and ongoing.

54. Respondents failed to prove it is more probable than not Claimant was responsible for termination from employment.

55. Respondents failed to prove it is more probable than not Claimant is not entitled to TTD benefits from 9/14/2021 through 10/9/2021 due to an intervening event.

56. Claimant proved that Respondents violated §§8-42-106(1) & 8-43-203(4), C.R.S. Respondents failed to prove their actions were objectively reasonable. Accordingly, Respondents are subject to penalties under §8-43-304(1), C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC

4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

The termination statutes are not applicable when there is no "employment" to terminate. In *Blocker v. Express Personnel*, WC 4-622-069 (ICAO, Nov. 27, 2006), the claimant was employed by a temporary agency who placed Claimant at a third party company for a temporary work assignment. The third party company alleged various infractions of their rules, for which they terminated the claimant's temporary work assignment. The ALJ determined that the termination statutes were inapplicable. The ALJ found that there was no contract of hire between the third party and the claimant and, thus, no employment by the third party within the meaning of the termination statutes. The

Panel affirmed the ALJ, noting that, because the claimant's employment with the respondent employer was not terminated, the ALJ correctly ruled that the termination statutes were not a bar to his receipt of temporary total disability benefits. *Id.*

Here, as in *Blocker,* the termination of Claimant's temporary volunteer placement at [Redacted]ATS did not constitute termination of employment within the meaning of the termination statutes. It is undisputed [Redacted]REA nor [Redacted]ATS were Claimant's employers. Employer utilized [Redacted]REA to place Claimant on a temporary volunteer assignment with [Redacted]ATS for Claimant's modified duty work. [Redacted]REA and [Redacted]ATS are third parties that did not have any contract of hire with Claimant. Employer continued to employ Claimant and remained responsible for payment of Claimant's wages. Although [Redacted]ATS terminated Claimant's temporary volunteer placement, it is undisputed that Claimant's employment has not been terminated by Employer. As of the date of hearing, Claimant remained employed by Employer and was on a worker's compensation leave of absence. It is also undisputed that after [Redacted]ATS terminated Claimant's temporary placement, Employer did not offer Claimant any further modified duty work at Employer or through [Redacted]REA. [Redacted]NA credibly testified that Employer has been unable to accommodate Claimant's work restrictions. There is no evidence indicating Claimant is at fault for Employer's failure to offer her modified work or another temporary volunteer position at another organization. As Claimant has not been terminated from her employment with Employer, the termination statutes do not preclude Claimant's entitlement to temporary indemnity benefits.

Even assuming, *arguendo*, that the termination statutes applied in this case, the preponderant evidence does not establish that Claimant was responsible for the termination of her temporary placement at [Redacted]ATS. Contrary to Respondents' contention that Claimant was terminated due to some behavior issues or requests for transfers, [Redacted]NA and [Redacted]JF credibly and persuasively testified that Claimant was terminated from her position with [Redacted]ATS because [Redacted]ATS could not accommodate work restrictions imposed on June 11, 2021. Claimant was not at fault for being placed on the work restrictions, which were imposed by her ATP due to sustaining a temporary increase in symptoms after striking her left foot while working.

TPD and TTD

To prove entitlement to temporary indemnity benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity

element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

TPD

As found, Claimant proved she is entitled to additional TPD benefits in the amount of $665.95 from April 22, 2021 through June 15, 2021. Claimant's work injury caused disability which resulted in Claimant being placed on modified duty and undergoing medical treatment. Claimant lost time and wages from work due to undergoing certain medical procedures recommended by her ATP. *See Boddy v. Sprint Express Inc.*, WC 4-408-729 (ICAO, Feb. 17, 2000) (noting that because the ATP required the claimant to undergo the specific medical treatment and the claimant could not be at work at the same time he was attending medical appointments, the ATP implicitly imposed "medical restrictions which precluded the claimant from performing his regular work on the days of the appointments.) Respondents do not argue that the medical treatment resulting in the missed time from work and wage loss was not reasonably necessary and related to Claimant's work injury. The preponderant evidence demonstrates that the medical treatment required for the industrial injury is the cause of Claimant's wage loss. Respondents do not dispute that Claimant is owed $665.95 in additional TPD from April 22, 2021 to June 15, 2021.

TTD

Claimant proved by a preponderance of the evidence she is entitled to TTD benefits beginning June 16, 2021 and ongoing. Claimant sustained a temporary aggravation of her left ankle and foot condition due to striking her left foot while performing her volunteer duties at [Redacted]ATS on June 11, 2021. As a result, Claimant's ATP increased Claimant's work restrictions, which impaired Claimant's ability to perform the duties of her volunteer position and her regular work for Employer. Both [Redacted]ATS and Employer have been unable to accommodate Claimant's restrictions since June 16, 2021, which has resulted in actual wage loss for Claimant. The work restrictions are the result of Claimant's industrial injury and temporary aggravation of that industrial injury. As of the date of hearing, Claimant had not yet been placed at MMI, returned to regular or modified employment, been given a written release by her ATP to return to regular employment, or been given a written offer of modified employment from Employer and failed to begin such employment. Accordingly, Claimant has proven it is more probable than not she is entitled to TTD benefits from June 16, 2021 and ongoing.

Intervening Event

Respondents argue that, if Claimant is found entitled to TTD benefits beginning June 16, 2021, she is not entitled to TTD benefits from September 14, 2021 to October 9, 2021 because her hospitalization for COVID-19 constitutes an independent intervening event.

An intervening injury or condition does not sever the causal connection between the industrial injury and the claimant's wage loss unless the claimant's disability is triggered by the intervening event. *See Travelers Insurance Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). This is true because the claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *See Horton v. ICAO*, 942 P. 2d 1209 (Colo. App. 1996). The existence of an "intervening event" is an affirmative defense to the respondent's liability. Consequently, it is the respondent's burden to prove that the claimant's wage loss is attributable to the intervening injury or condition and not the industrial injury. *See Atlantic and Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983).

In *Horton,* the claimant was receiving TTD benefits and awaiting surgery when she suffered a non-injury related fall. The injuries from the fall necessitated postponement of a work-related surgery. The ALJ concluded that the fall was an intervening event and suspended TTD benefits. ICAO reversed the ALJ, and the Court of Appeals affirmed ICAO, explaining:

> [P]etitioners admitted liability for temporary total disability benefits and they did not contend that the claimant's disability abated prior to the fall…Since the claimant was already totally disabled by the injury at the time of the alleged 'intervening event,' the subsequent wage loss was necessarily caused to some degree by the injury. Thus the ALJ's findings establish that claimant's injury contributed in part to the subsequent wage loss.

> Therefore, under *PDM Molding v. Stanberg, supra*, claimant was entitled to temporary disability benefits for the disputed period.

Horton, supra at 1211.

Leading up to Claimant's hospitalization, Claimant was on work restrictions preventing her from performing her regular job duties and Employer was unable to accommodate those restrictions. Thus, although her hospitalization for COVID-19 essentially precluded Claimant from working her regular employment, Claimant was already temporarily disabled and unable to perform her regular work duties as a result of the industrial injury. Had Claimant not been hospitalized for COVID-19, she still would have been temporarily disabled during such time period due to the industrial injury. No evidence was offered indicating that Employer was or would have been able to accommodate Claimant's work restrictions during her time of hospitalization. Here, because Claimant was already temporarily disabled as a result of the industrial injury, the hospitalization was not an intervening cause of her wage loss. *See Saenz-Rico v. Yellow Transportation, Inc*., WC 4-547-185 (ICAO Sept. 11, 2003) (Because the claimant was already temporarily totally disabled as a result of the industrial disability the claimant's resumption of insulin shots precluding him from performing his regular work was not an intervening cause of his wage loss). Throughout Claimant's hospitalization for COVID-19 the industrial injury contributed to a large degree to her wage loss. Accordingly, Respondents failed to prove Claimant's wage loss from September 14, 2021 to October 9, 2021 is attributable to an intervening injury or condition and not the industrial injury.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim*

Appeals Office, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

Failure to Pay TPD

As found, Claimant established that she is entitled to additional TPD benefits from April 22, 2021 through June 15, 2021 due to lost time related to the work injury. Respondents do not dispute that Claimant is owed $665.95 in TPD from April 22, 2021 through June 15, 2021.

Nonetheless, Respondents argue that no violation occurred because benefits were paid in accordance with the GAL. Respondents further contend that they have a rational argument based in law or fact for paying TPD according to the GAL, as Claimant also took time off for various personal matters unrelated to the work injury, which contributed to the confusion over how much TPD may have been owed.

Section 8-42-106(1), C.R.S. provides:

> In case of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week. Temporary partial disability shall be paid at least once every two weeks.

Respondents payment of TPD to Claimant solely based on the [Redacted]ATS volunteer position of 40 hours per week without including other lost time due to the work injury was a failure to pay Claimant TPD benefits to which she was entitled, thus constituting a violation of the Act.

Respondents failed to prove that their actions were objectively reasonable under the circumstances. Here, Employer and Insurer failed to properly address the payment of wages and TPD to Claimant when utilizing a third party company. [Redacted]NA testified that she thought Insurer would pay Claimant, while [Redacted]BS testified that her understanding was that Employer would pay Claimant and that it was not her responsibility to collect payroll or attempt to reconcile any of that information. Both [Redacted] NA and [Redacted]BS were aware that Claimant was entitled to temporary indemnity benefits for lost time related to the work injury. As an experienced adjuster, [Redacted]BS was aware of the applicable rules and statutes. Employer and Insurer's indifference as to who was responsible for keeping track of and paying Claimant for her related lost time was objectively unreasonable.

Both Employer and Insurer were aware of Claimant's lost time due to medical procedures and appointments related to the work injury, as Insurer authorized such treatment, and Claimant gave prior notice to [Redacted]NA of the procedures and appointments. Claimant and Claimant's counsel sent multiple emails to [Redacted]NA and Respondents' counsel detailing the lost time and specifically requesting payment. While Respondents were not required to simply rely on Claimant's allegations and calculations, they were responsible for timely conducting their own investigation and reconciliation.

Respondents offered no explanation as to the significant delay in paying Claimant additional TPD to which they admit is owed to Claimant. [Redacted]NA's testimony that she reconciled the information in June 2021 does not explain why payment of TPD owed to Claimant was not made until June 2022. [Redacted]BS testified that she was in regular communication with Respondents' counsel and was aware that Claimant had been requesting payment of TPD but was under the impression an agreement between the parties would be reached. Respondents were notified of a discrepancy in TPD payments and were repeatedly asked to address the discrepancy. As of the date Claimant filed the Application for Hearing, Respondents had been given multiple opportunities over the course of several months to remedy the underpayment. Based on the totality of the evidence, Respondents failed to prove their actions were objectively reasonable.

In determining the appropriate amount of the penalty, the ALJ has considered the harm to Claimant, the significant length of the time period of the violation, and penalties awarded in comparable cases. Respondents offered no evidence or argument regarding their ability to pay any imposed penalties.

Accordingly, the ALJ concludes that Respondents are subject to a penalty of $10/day from May 12, 2021 to June 13, 2022. May 12, 2021 to June 13, 2022 is a period

of 395 days. As each day is a separate offense under the statute, Respondents shall pay a penalty of $10.00 per day, totaling $3,950.00 in penalties.

Failure to Produce the Claim File within 15 Days

Section 8-43-203(4), C.R.S. provides,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

Claimant submitted written requests for the claim file to Respondents on multiple occasions, beginning on July 15, 2021. Based on the date of the initial request, the deadline for production was August 1, 2021.[1] It is undisputed that Respondents did not produce the claims file to Claimant until November 19, 2021. Respondents' failure to produce the claims file within 15 days of the written request constitutes a violation of Section 8-43-203(4), C.R.S. As Claimant made a prima facie showing that Respondents failed to comply with the provisions of Section 8-43-203(4), C.R.S., Respondents bear the burden to prove their inaction was objectively reasonable.

Respondents argue that the claim file request was a discovery issue that was resolved by PALJ Broniak. Respondents note that they objected to Claimant's motion on October 26, 2021, attended a PHC and then received an order from PALJ Broniak permitting Respondents until November 18, 2021 to provide the updated claim file. Respondents made reasonable attempts to provide the claim file to Claimant as ordered on November 18, 2021, but was unable to do so until November 19, 2021 because of technical issues outside of their control. While Respondents failure to produce the claim file from October 26, 2021 through November 19, 2021 was reasonable, Respondents failure to do so prior was objectively unreasonable.

Claimant submitted repeated requests to Respondents for an updated claim file on 7/31/2021, 9/7/2021, 9/8/2021, 9/15/2021 and 10/18/2021. It was not until October 26, 2021 that Respondents filed an objection to Claimant's motion regarding discovery and requested a PHC. There is no evidence that, prior to October 26, 2021, Respondents filed any objections to producing the updated claim file or made any requests for a PHC to

[1] Fifteen days later was a Saturday, so the deadline for production would have been (Monday) August 1, 2021.

address production of the updated claim file. The email correspondence entered into the record does not show any attempts to provide the updated claims file to Claimant prior to November 18, 2021, nor do Respondents allege they attempted to do so. Reasonable respondents who received multiple requests for an updated claim file would either provide the claim file by the requisite deadline, come to an agreement with the claimant for additional time to provide the claim file, timely object to the request, or timely request a prehearing conference to address any perceived issues. Here, Respondents waited until October 26, 2021 to address Claimant's request, which was objectively unreasonable.

Respondents offered no evidence or argument regarding their ability to pay any imposed penalties. In determining the appropriate amount of the penalty, the ALJ has considered the harm to Claimant, the length of the time period of the violation, and penalties awarded in comparable cases.

Accordingly, the ALJ concludes that Respondents are subject to a penalty of $10/day from 8/2/2021 to 9/7/2021, a period of 37 days ($370); $20/day from 9/8/2021 through 10/18/2021, a period of 41 days ($820); and $25/day from 10/19/2021 to 10/26/2021, a period of 7 days ($175), totaling $1,365.00. The above penalties shall be apportioned 75% paid to Claimant and 25% to the Colorado Uninsured Employer Fund.

ORDER

1. Respondents failed to prove Claimant was responsible for termination from employment.

2. Respondents failed to prove an intervening event.

3. Respondents shall pay Claimant additional TPD benefits from April 22, 2021 through June 15, 2021 in the total sum of $665.95.

4. Respondents shall pay Claimant TTD benefits beginning June 16, 2021 and ongoing, until terminated by operation of law, subject to any applicable offsets or credits.

5. Respondents shall pay penalties of $3,950.00 and $1,365.00, apportioned 75% to Claimant and 25% to the Colorado Uninsured Employer Fund.

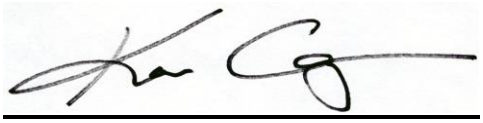
6. Respondents shall pay statutory interest of 8% per annum on all temporary disability benefits that were not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 25, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable injury on January 21, 2022?

STIPULATIONS

If the claim is compensable, the parties stipulated that: (1) Claimant's average weekly wage is $721.52; (2) Claimant is entitled to TPD benefits from January 22, 2022 through February 16, 2022. The specific amount of TPD is reserved; (3) Claimant is entitled to TTD benefits commencing February 17, 2022; and (4) Concentra is the primary authorized provider.

FINDINGS OF FACT

1. Employer is a contractor for FedEx. Claimant worked for Employer as a package delivery driver. She began her employment in November 2021. Claimant's route served a mixture of residential and commercial addresses, using a small Penske box truck. It was the smallest of Employer's routes, having been created during the peak season to relieve pressure on other routes and drivers. Claimant typically delivered 40-60 packages each day, although she averaged 70-80 packages on busier days. Because of the structure of the route, "there's more driving than there is delivering." The vast majority of packages weighed 5 pounds or less. A small percentage of packages were heavier, and some weighed as much as 80 pounds. Very large packages were generally delivered with a "team" approach. She usually drove a.

2. On January 21, 2022, Claimant was delivering a small, one-pound package to a residential address. The residence had a front porch with four or five steps. When she stepped up to the first step, Claimant felt a painful pop in her right hip. She fell to the ground and lay there for several minutes. She then returned to her vehicle and texted her fiancée about the incident.

3. Shortly thereafter, Claimant coincidentally received a call from her manager, Mr. D[Redacted]. Claimant stated she had injured her hip. Mr. D[Redacted] asked if Claimant could finish her shift, and she replied in the affirmative. Mr. D[Redacted] was a relatively new manager at the time so he told Claimant he would discuss the matter with Mr. A[Redacted].

4. Claimant finished her deliveries and returned to Employer's home terminal. She spoke briefly with Mr. A[Redacted] about the injury. Mr. A[Redacted] asked how she injured herself and Claimant replied, "Which time?" Claimant stated, "something had happened" to her hip a couple of weeks ago outside of work, and she had "re-agitated" it that day on the customer's porch. Mr. A[Redacted] did not direct Claimant to seek medical treatment because she did not appear in obvious distress. Mr. A[Redacted] relayed the

information to Mr. D[Redacted] , but neither had the impression that Claimant's medical condition was serious.

5. Claimant's hip pain intensified that evening and she went to the Parkview Medical Center emergency room. Claimant reported "persistent" soreness and tingling in her right leg for "about three weeks," and was "having trouble moving her leg the past few days." Claimant further stated, "She is a FedEx driver and today as she was stepping up onto a porch she heard a pop in her right hip with pain on the right side of her groin." X-rays of the right hip were negative. The ER physician diagnosed a right hip "strain." He also suspected a labral tear and thought Claimant may require an MRI. She was advised to follow up with orthopedics and released.

6. Employer referred Claimant to Concentra. She saw Dr. Leah Johansen at her initial appointment on January 22, 2022. Claimant reported that she "took one step up on a porch and felt a pop in my thigh and it dropped me to my knees." Examination of the right hip showed very limited range of motion and tenderness to palpation of the inguinal area. Dr. Johansen ordered physical therapy and would consider an MRI if Claimant made no progress. Claimant was given crutches and put on work restrictions including five pounds maximum lifting, sitting 90% of the time, no driving, and no stairs.

7. Claimant worked intermittent modified duty over the next few weeks.

8. Claimant underwent a right hip MRI on February 12, 2022. It showed a stress fracture of the right femoral neck.

9. Claimant saw PA-C Mitchell Dawson at the Colorado Center for Orthopedic Excellence ("CCOE") on February 17, 2022. Mr. Dawson thought the stress fracture would not heal properly on its own and recommended immediate surgery. Claimant was taken off work pending surgery.

10. On February 22, 2022 Dr. Geoffrey Doner performed a right femoral neck open fixation with hardware placement. Dr. Doner opined, "I do believe this was a Workers' Compensation related injury due to overuse causing the femoral neck stress fracture and she did require urgent surgery to get this fixed."

11. The last record from a treating provider is Mr. Dawson's report dated May 24, 2022. Claimant described ongoing right groin pain with popping and catching. Labral impingement sign and FABER test were positive. X-rays showed the hardware is in good position with no evidence of loosening or failure. Mr. Dawson opined the stress fracture was healing well and Claimant's ongoing pain may be related to a right hip labral tear. He noted the prior hip MRI was done without contrast, and ordered a MR arthrogram for a more definitive look at the labrum.

12. Claimant had started having problems with her right leg a few weeks before the January 21, 2022 incident at work. Multiple coworkers and managers observed her limping and favoring the right leg before January 21. Claimant conceded she had been limping before the alleged injury.

13. Mr. T[Redacted] had noticed Claimant limping on the morning of the alleged injury before she left the terminal to start her route. He asked why she was limping, and she replied he did not need to be concerned about it because "it happened at home." Mr. D[Redacted] was also present during Mr. T[Redacted]' exchange with Claimant. Although he could not recall the exact conversation, he corroborated that "she said something along the lines of don't worry about it. And she might have said that she didn't hurt it at work."

14. Claimant had a history of using pain medication before January 21, 2022. She testified she started taking Tramadol in April 2021 for plantar fasciitis. She continued refilling the Tramadol monthly through January 2022. The prescription doubled from 60 pills per month to 120 pills per month on January 3, 2022, three weeks before the alleged injury. This coincides with the onset of right leg symptoms approximately three weeks before the incident at work.

15. Claimant testified she was filling the Tramadol prescriptions but not taking the medication. She testified her PCP continued to write the prescriptions even though she knew Claimant was "stockpiling" the medication. Respondents' expert, Dr. Lesnak, credibly testified that such a prescribing practice by the PCP would be unethical, and is therefore improbable.

16. Claimants' testimony regarding the Tramadol is not credible.

17. Claimant saw Dr. Lawrence Lesnak on May 11, 2022 for an IME at Respondents' request. Claimant confirmed to Dr. Lesnak that she had started limping 2-3 weeks before January 21, 2022 because of right groin and leg pain. Dr. Lesnak questioned Claimant in detail about the event on January 21. Claimant described no twisting or awkward hip motion. Rather, "she merely began to ascend 1 step on the stairs leading to the client's front porch when she developed an acute pop/click in her right proximal groin region." Dr. Lesnak opined Claimant's right femoral neck fracture was unrelated to her work. He noted Claimant is 5' 6" tall and weighs 255 pounds, and is therefore considered morbidly obese. He stated morbid obesity is a predisposing risk factor irrespective of Claimant's work activity. Dr. Lesnak opined Claimant was developing a right femoral stress fracture before January 21, 2022, as evidenced by progressive symptoms and limping. He opined that merely stepping up one step involved no trauma or other forces sufficient to cause or aggravate a stress fracture. Although the surgery was reasonably necessary, it was not causally related to Claimant's work.

18. Claimant attended an IME with Dr. Miguel Castrejon on May 24, 2022 at the request of her counsel. Claimant told Dr. Castrejon she typically delivered "100+" packages per day, which "usually" weighed between 50-80 pounds. Claimant also stated the job required "constant" walking. She described repeatedly stepping up into the rear of the delivery truck and into the driver's section using primarily her right leg. Claimant said she developed "very mild" right hip pain approximately three weeks before the alleged work injury, which progressively worsened with climbing in and out of her vehicle and walking. She described the January 21 incident in a manner generally consistent with her statements to Dr. Lesnak and at hearing. Crediting Claimant's account of her job

activities, Dr. Castrejon concluded the right femoral neck stress fracture was caused by cumulative exposure at work. He explained that stress fractures develop over a period of many days, weeks or even months," and are caused by "repetitive and excessive stress placed on a bone with limited rest." Dr. Castrejon thought the typical course of stress fractures fit the "timeline" of Claimant's progressive symptoms over several weeks. He opined the stress fracture was caused by "continuous trauma" to which Claimant was exposed "from the date of hire."

19. At hearing, Dr. Lesnak agreed that most stress fractures develop over a prolonged period. He stated that "traumatic" stress fractures are most common in long-distance runners, for example while training for or participating in a marathon. Non-traumatic stress fractures most often occur in elderly patients with osteoporosis. In non-geriatric patients such as Claimant, stress fractures are generally caused by poor conditioning and obesity. He noted both of those factors are at play here. Dr. Lesnak reiterated that merely stepping up one step on January 21, 2022 did not cause, aggravate, or accelerate Claimant's femoral neck stress fracture.

20. Employer's lay witnesses were generally credible. The ALJ credits Employer's witnesses over Claimant's testimony to the extent of any conflicts, particularly regarding the physical demands of Claimant's job work and her pre-existing right hip and leg issues.

21. Dr. Lesnak's opinions regarding causation are credible and more persuasive than any contrary opinions in the record.

22. Claimant failed to prove she suffered a compensable injury on January 21, 2022.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A pre-existing condition does not disqualify a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms during or after work activity does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In

evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant failed to prove she suffered a compensable injury on January 21, 2022. As an initial matter, it bears repeating that the primary documented pathology in this case is a *stress* fracture, which by nature are not usually associated with a discrete, isolated activity. Claimant's stress fracture was probably present for at least several weeks before January 21, as evidenced by progressive right groin and leg pain, visible limping, and doubling her pain medication.[1] Multiple individuals heard Claimant say something happened at home involving her leg or hip a few weeks before the alleged injury, which is a more likely explanation for the pathology than the innocuous work activity on January 21, 2022. As for the opinion evidence, Dr. Lesnak's analysis and conclusions are persuasive. There is no credible evidence of any biologically plausible mechanism by which merely stepping up a single step while carrying a 1-pound package would cause or aggravate a stress fracture or a labral tear. Even Dr. Castrejon did not appear particularly impressed by the specific event on January 21, and his analysis is most consistent with an occupational disease theory of causation. Similarly, Dr. Doner considered the stress fracture an "overuse" injury, with no mention of any specific inciting event. Dr. Castrejon's opinion was influenced by Claimant's embellishment of the physical demands of the job. Dr. Doner performed no detailed evaluation of causation, and appears to have simply accepted Claimant's statement that "this happened due to the work she does." The fact that Claimant's pain became severe at work on January 21, 2022 was probably coincidental, with no causal nexus to her job beyond the fact that she just happened to be at work when the symptoms manifested. The development of severe groin and hip pain on January 21 reflected the natural progression of Claimant's underlying pre-existing condition without contribution from her work.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You

[1] The pre-existing right groin and leg pain would also be consistent with a torn labrum, should the MR arthrogram reveal a tear.

must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 25, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-154-681-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that surgery recommended by Dr. Rauzzino is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

2. Whether Claimant has established by a preponderance of the evidence that medical treatment rendered during a hospitalization from November 23, 2020 to December 2, 2020 was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and whether the treatment was authorized or exempt from authorization as "emergency" treatment.

3. Whether Claimant has established by a preponderance of the evidence that medical treatment rendered during a hospitalization from October 23, 2021 to October 28, 2021, was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and whether the treatment was authorized or exempt from authorization as "emergency" treatment.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from October 23, 2021 and continuing until terminated pursuant to § 8-42-105, C.R.S.

FINDINGS OF FACT

1. On July 8, 2020, Claimant sustained an admitted lower back injury arising out of the course of her employment with Employer while assisting a patient who had fallen in the shower at Employer's facility.

2. Following the injury, Claimant began conservative treatment at Colorado Occupational Medicine Partners ("COMP") under the care of authorized treating physician (ATP) Robert Broghammer, M.D. Dr. Broghammer diagnosed Claimant with lumbar and sacroiliac sprains, and iliotibial band syndrome. (Ex. H).

3. Claimant saw Dr. Broghammer, or others at his office, multiple times between the July 8, 2020 injury and November 23, 2020. During this time, Claimant reported left sided lower back pain, with some radiation into the gluteal musculature, weakness in the left leg, and difficulty walking due to pain and spasms. Claimant reported improvement in her symptoms with physical therapy, and chiropractic care. (Ex. H).

4. At Claimant's November 23, 2020, visit with Dr. Broghammer's physician assistant, Buddy Leckie, PA-C, Claimant presented disheveled and tachycardic, with a pulse rate of 161, and a low pulse oximetry score of 88 (*i.e.*, hypoxia). Mr. Leckie referred Claimant

to the Parker Adventist Emergency Room due to her tachycardia, hypoxia, and overall appearance. (Ex. H).

5. Claimant went to the Parker Adventist ER on November 23, 2020, where she was evaluated for alcohol intoxication; sinus tachycardia; lactic acidosis; hypoxia; and bilateral hip pain. After an evaluation in the ER, Claimant was admitted to Parker Adventist for monitoring due to tachycardia and the risk for severe alcohol withdrawal. The ER physician, Andrew Knaut, M.D., noted the "etiology of her tachycardia is unclear but given its persistence, she will need hospital admission for continued monitoring and evaluation of her hypoxia." (Ex. F).

6. Claimant remained hospitalized at Parker Adventist until December 2, 2020. Claimant was evaluated and treated for, among other things, bilateral hip pain and pain radiating into her feet with foot numbness. Claimant had right hip and pelvic MRIs for the evaluation of right hip pain. The MRI showed evidence of osteonecrosis of the right femoral head. Claimant had an orthopedic evaluation by Steven Arbour, PA-C, who indicated Claimant's symptoms could be treated nonoperatively, and she should schedule a follow up "in the coming weeks." Claimant was also evaluated by Derrick Winckler, PA-C, (physician assistant for neurosurgeon Michael Rauzzino, M.D.), after a November 24, 2020 MRI demonstrated a large L5-S1 disc hernia. For this, Claimant received an epidural steroid injection during the hospitalization. Claimant also had multiple other imaging studies during the hospitalization, including a CT of the abdomen and pelvis for evaluation of a possible abdominal infection; CT of the chest for chest pain; bilateral leg venous ultrasounds for leg swelling; echocardiogram for tachycardia; and an abdominal ultrasound. (Ex. F). The majority of treatment Claimant received during her hospitalization was unrelated to her work injury. No credible evidence was presented that Claimant's work-related treatment at Parker Adventist during the November 23, 2020 hospitalization was recommended by her ATP, Dr. Broghammer.

7. Following her December 2, 2020 discharge from Parker Adventist, Claimant saw Dr. Broghammer on December 8, 2020. Dr. Broghammer indicated the right hip issues identified at Parker Adventist were unrelated to her work injury. Dr. Broghammer referred Claimant to Dr. Rauzzino for evaluation of her left leg pain and radiculopathy. (Ex. H). After December 8, 2020, Dr. Rauzzino became an ATP within the chain of referral from Dr. Broghammer. Prior to December 8, 2020, Dr. Rauzzino was not an ATP.

8. Claimant followed up with Dr. Rauzzino on December 21, 2020, reporting pain in the low back radiating to the back of her left leg with numbness and tingling into her left foot. Dr. Rauzzino noted that Claimant's lumbar MRI showed a large, herniated disc at L5-S1 producing severe left foraminal narrowing and nerve root impingement. Dr. Rauzzino recommended an L5-S1 TLIF (transforaminal lumbar interbody fusion), and submitted a request for authorization to Insurer. (Ex. 3).

9. On January 21, 2021, Dr. Rauzzino performed the TLIF surgery. Over the following four to six months, Claimant reported improving lower back symptoms to Dr. Broghammer and Dr. Rauzzino. (Ex. G & 3).

10. On August 31, 2021, Claimant returned to Dr. Broghammer, and reported a return of her lower back pain, left leg radiating pain and numbness in her left foot over the previous few weeks not caused by any specific incident. Dr. Broghammer recommended a lumbar MRI to evaluate Claimant's condition. (Ex. G).

11. On September 14, 2021, Claimant had a lumbar MRI which showed a spinal lipomatosis located at the L4-L5 level with a narrowing of the thecal sac. (Ex. 6). After reviewing the MRI results, Dr. Broghammer referred Claimant to Dr. Rauzzino for evaluation for potential further surgery. (Ex. G).

12. Dr. Rauzzino evaluated Claimant on September 28, 2021. Claimant reported left lower back pain radiating into her left leg with numbness and weakness. Dr. Rauzzino recommended a lumbar CT scan and x-rays to evaluate Claimant's lumbar fusion, and referred Claimant to a pain management provider. (Ex. D).

13. On October 7, 2021, Claimant saw Dr. Broghammer reporting that her back pain had significantly increased. Dr. Broghammer referred Claimant to Scott Primack, D.O., for an EMG and indicated that Claimant should follow up in two weeks. As of October 7, 2021, Dr. Broghammer recommended that Claimant return to work in modified duty, with restriction including mostly seated sedentary work and to change positions as necessary. Dr. Broghammer also indicated Claimant was to follow up in two weeks. (Ex. G).

14. A lumbar CT was performed on October 12, 2021, which demonstrated "prominent dorsal epidural adipose tissue most pronounced at the L4-5 level," with mild canal narrowing. Lumbar x-rays demonstrated no abnormal motion and no evidence of pseudoarthrosis at the L5-S1 fusion. (Ex. I).

15. Over the two weeks following Claimant's October 7, 2021 visit with Dr. Broghammer, Claimant testified her leg weakness began to increase. No evidence was offered indicating that Claimant contacted Dr. Broghammer or Dr. Rauzzino to seek treatment or evaluation for the increasing pain. Claimant testified that on Friday, October 22, 2021, her leg weakness became severe. On the morning of Saturday, October 23, 2021, Claimant made the decision to go to the hospital for her leg weakness.

16. On October 23, 2021, Claimant self-presented at the Parker Adventist Emergency Room reporting increasing weakness in both legs. At the time of admission, Claimant reported she had developed sciatica one month earlier and her symptoms had progressed over the previous two weeks. Claimant reported that "she did not know what else to do," so she came to Parker Adventist. No credible evidence was admitted that Claimant contacted her ATPs any time between October 7, 2021 and October 23, 2021, or that an ATP referred Claimant to Parker Adventist or recommended she seek treatment at a hospital. (Ex. 8 & E).

17. Although the records in evidence indicate Dr. Rauzzino performed surgery in January 2021, the records do not mention that Claimant was under the active care of Dr. Broghammer for her workers' compensation claim. Instead, the hospital records indicate

Claimant “has filed for workman’s comp, which is pending.” (Ex. E, p. 0087). Claimant reported that she had no primary care provider.

18. After evaluation in the emergency department, Claimant was admitted to Parker Adventist for leg weakness, severe sepsis, and septic shock due to a urinary tract infection, and chronic tachycardia. Claimant remained hospitalized until October 28, 2021. The differential diagnosis provided in the ER was lumbosacral strain, herniated disc, radiculopathy, renal stone, pyelonephritis, epidural abscess, cancer, fracture, AAA, and cauda equina syndrome. (Ex. 8 & E).

19. During her hospitalization, Claimant was evaluated by neurosurgeon Kevin Boyer, M.D., who determined there was no findings suggesting a structural origin for her pain. Dr. Boyer’s lower extremity examination, suggested “mild generalized weakness bilateral with symmetrical findings.” He recommended a neurology evaluation and psychological evaluation, and an MRI of the head, cervical spine, and thoracic spine. While hospitalized, Claimant underwent numerous diagnostic tests (presumably to rule out potential differential diagnoses). These diagnostic tests included a brain MRI; abdominal/pelvic CT scan; right thigh MRI; cervical MRI; thoracic MRI; lumbar MRI; EKG; and lumbar puncture. Claimant was also provided pain medication which resulted in some improvement of her pain. (Ex. 8 & E).

20. On October 28, 2021, Claimant was discharged from Parker Adventist. The relevant discharge diagnosis included a primary diagnosis of leg weakness of both legs; severe sepsis with septic shock; essential hypertension; severe anxiety; chronic tachycardia; and acute bilateral low back pain with bilateral sciatica. (Ex. 8 & E). At discharge, Claimant’s leg weakness and back pain were not resolved. Claimant testified at hearing that her symptoms today are unchanged.

21. Claimant testified that the week prior to October 23, 2021, her back pain rapidly increased, and was very intense on Friday, October 22, 2021. Claimant testified that the morning of October 23, 2021, she felt she needed to go to the hospital and chose Parker Adventist because she was experiencing the same symptoms as after her injury and before the November 2020 hospitalization, and she knew her surgeon (presumably Dr. Rauzzino) was at Parker Adventist. No testimony or evidence was presented to indicate whether Claimant attempted to contact either Dr. Broghammer’s office of Dr. Rauzzino’s office at any time between October 7, 2021 (the date of her last appointment with Dr. Broghammer) and her decision to go to Parker Adventist.

22. On November 1, 2021, Claimant returned to Dr. Rauzzino. Dr. Rauzzino noted that Claimant continued to have diffuse weakness in the lower legs, but he did not believe it to be a true motor deficit. He noted that the imaging studies demonstrated a significant epidural lipomatosis above the level of her fusion, and that the existing nerve roots were not well visualized on the imaging studies. He noted that while he was concerned about performing surgery, her bilateral leg radiculopathy could be related to the imaging findings of lipomatosis. He recommended a minimally invasive decompression to address the lipomatosis, with a partial laminectomy and removal of the epidural lipoma tissue. (Ex. 3).

23. On November 2, 2021, Claimant returned to COMP, and saw Matthew Lugliani, M.D., because Dr. Broghammer was no longer with the clinic. Dr. Lugliani noted that Claimant had undergone an EMG with Dr. Primack which was normal. He recommended that Claimant follow up with Dr. Rauzzino. Dr. Lugliani assigned a full work restriction (i.e., unable to work) from November 2, 2021 until November 16, 2021. (Ex. G).

24. Claimant returned to Dr. Lugliani on November 16, 2021, December 14, 2021, January 18, 2022, February 22, 2022, April 5, 2022, and May 24, 2022. During these visits, Claimant's full work restriction was consistently in place. At the most recent documented visit, on May 24, 2022, Dr. Lugliani extended Claimant's full work restriction to July 12, 2022. No credible evidence was admitted indicating Claimant's work restrictions have been changed. (Ex. G).

25. At hearing, Dr. Rauzzino was admitted as an expert in neurosurgery. Dr. Rauzzino compared Claimant's September 14, 2021 lumbar MRI to her November 24, 2020 lumbar MRI. Copies of relevant images are included in Exhibit 10. A comparison of the MRIs shows a clearly visible change at the L4-5 level on the September 14, 2021 MRI compared to the November 24, 2020 MRI. The September 14, 2021 MRI shows a narrowing of the spinal canal and the presence of a mass at the L4-L5 level compressing the nerves that was not present on the November 24, 2020 MRI. Dr. Rauzzino credibly opined that the MRI showed the development of a post-surgical lipomatosis at the L4-5 level. Although it is a rare complication, Dr. Rauzzino testified it is more likely than not that Claimant developed the lipomatosis as a result of the January 21, 2021 TLIF surgery he performed. Dr. Rauzzino testified it is unlikely the lipomatosis is congenital because the lipomatosis only exists at the L4-5 level, and was not present prior to the January 21, 2021 surgery. Dr. Rauzzino's opinion is credible and persuasive. Dr. Rauzzino further testified that Claimant's lipomatosis can be addressed through a minimally invasive surgery which would remove fatty tissue and release pressure on the spinal sac and nerves.

26. As part of its determination whether to authorize the surgery proposed by Dr. Rauzzino, Insurer submitted the request to Maya Babu, M.D. Dr. Babu reviewed Claimant's medical record and a letter from Dr. Rauzzino explaining the rationale for the surgery. In a letter dated January 13, 2022, Dr. Babu opined that "epidural lipomatosis is not considered a recognized, common sequelae of fusion surgery, thus the request cannot be supported." (Ex. C). Dr. Babu's opinion is unpersuasive, given Dr. Rauzzino's credible testimony that epidural lipomatosis is rare, but recognized sequelae of fusion surgery. The fact that it is not "common" does not render it unrelated or render treatment for the complication unreasonable or unnecessary.

27. Neurosurgeon Neil Brown, M.D., performed an independent medical examination of Claimant on May 5, 2022, at Respondents' request. Dr. Brown was admitted as an expert in neurosurgery and testified through a pre-hearing deposition. Dr. Brown testified he agrees Claimant has a lipomatosis at the L4-5 level, but does not believe the presence of the lipomatosis explains Claimant's symptoms. Consequently, he does not believe the surgery proposed by Dr. Rauzzino is reasonably necessary or causally related to Claimant's industrial injury. Dr. Brown's testimony is not persuasive.

28. Lawrence Lesnak, D.O., performed a record review of Claimant's treatment at Respondent's request on April 14, 2022. Dr. Lesnak was admitted as an expert in physical medicine and rehabilitation. Dr. Lesnak testified at hearing that the treatment Claimant received during her November 23, 2020 directed at her lower back (*i.e.*, MRI, injections), was not "emergency" treatment and could have been performed in an outpatient setting. Dr. Lesnak's opinion in this regard is credible. Dr. Lesnak further testified that Claimant's October 23, 2021 hospitalization was unrelated to her work injury. Dr. Lesnak's testimony in this regard was credible as it relates to Claimant's sepsis diagnosis, but his opinion that Claimant's leg weakness was "completely unrelated" to her work injury is not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

In addition to being "reasonable and necessary," treatment must be "authorized." "'Authorization' and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); *see also*, *One Hour Cleaners*, 914 P.2d at 504 ("authorized medical benefits" refers to legal authority of provider to deliver care). All treatment provided by an "authorized treating physician" is "authorized." *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). "However, treatment is not compensable unless it is also 'reasonable and necessary' to cure or relieve the effects of the industrial injury." *Id*.

An employer is liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm'n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not "authorized," a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Standard For "Emergency" Care

"A claimant may obtain 'authorized treatment' without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency." *In re Claim of Baker*, W.C. No. 4-993-326-004 (ICAO Apr. 20, 2021), *citing Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* W.C.R.P. 8-3. The "emergency exception is not necessarily limited to situations where life is threatened."

Bunch v. Indus. Claim Appeals Office, 148 P.3d 381 (Colo App. 2006). But "[t]here is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case." *In re Claim of Delfosse*, W.C. No. 5-075-625-001 (ICAO Apr. 26, 2021); *Timko v. Cub Foods*, W. C. No. 3-969-031 (Jun. 29, 2005). The claimant, as the party seeking benefits, bears the burden of establishing the entitlement to benefits, including either authorization or the existence of a bona fide emergency by a preponderance of the evidence. § 8-43-201, C.R.S.

For the emergency exception to apply, a causal relationship must exist between the need for emergency treatment and the claimant's work-related injury or work incident. *See In re Claim of Madonna*, W.C. No. 4-997-641-02 (ICAO Aug. 21, 2017). The emergency exception does not apply where the emergency treatment is not reasonably needed to cure or relieve the claimant from the effects of a compensable injury. *See Hoffman v. Wal-Mart Stores, Inc.*, W.C. No. 4-774-720 (ICAO Jan. 12, 2010). Moreover, "when the 'emergency' has ended, the claimant must notify the employer of the need for continuing medical services so that the employer may then exercise its right of selection." *Delfosse, supra*; W.C.R.P. 8-3 (A).

November 2020 Hospitalization

Claimant has failed to establish by a preponderance of the evidence that the treatment she received during her November 23, 2020 Parker Adventist hospitalization was reasonably necessary to cure or relieve the effects of her industrial injury, or that work-related treatment received was authorized or subject to the "emergency" exception. As found, Claimant was referred to the Parker Adventist emergency department because of concerns related to tachycardia, low blood oxygen levels, and intoxication. Claimant was then admitted to monitor her tachycardia and hypoxia. No credible evidence was admitted establishing these conditions were caused by or related to Claimant's industrial injury, or that a causal nexus existed between Claimant's July 8, 2020 work injury and the need for emergency care. Consequently, the "emergency exception" is not applicable to Claimant's November 23, 2020 hospital admission. That PA Leckie referred Claimant to the emergency room out of concern for unrelated conditions does not render care for unrelated conditions "authorized" within the meaning of the Act.

Claimant did receive care related to her work-related back injury during her admission, including a lumbar MRI, evaluation by Dr. Rauzzino's physician assistant, and lumbar epidural injection. However, no credible evidence was admitted demonstrating the care directed toward Claimant's back injury was necessitated by a *bona fide* medical emergency. As a result, Claimant's work-related care required "authorization." Because Claimant's then-ATP, Dr. Broghammer, did not refer Claimant to Parker Adventist for evaluation or treatment for her work-injury, the care was not "authorized," and Respondents are not obligated to pay for the treatment or the hospital admission.

October 2021 Hospitalization

Claimant has failed to establish by a preponderance of the evidence that her admission to Parker Adventist Hospital on October 23, 2021 was authorized or the result of a *bona fide* medical emergency. While the ALJ finds that Claimant's leg weakness was, more likely than not, causally related to her work injury, Claimant failed to present sufficient evidence to establish that a *bona fide* medical emergency existed necessitating emergency treatment on October 23, 2021. Claimant leg weakness was not sudden, and gradually developed over a period of two weeks before October 23, 2021. The record contains no evidence that Claimant attempted to contact her ATPs or why she could not have contacted her ATPs during this two-week period to seek treatment or a referral for additional care. The evidence presented is insufficient to establish the existence of a true medical emergency related to Claimant's work injury necessitating emergency treatment without authorization from an ATP.

The evidence presented is also insufficient to establish which of the treatment Claimant received during this admission was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Numerous diagnostic tests were performed during Claimant's admission unrelated to her lower back issues, such as a brain MRI, cervical and thoracic MRIs, pelvic and abdominal scans, and EKGs. Based on the evidence presented at hearing, the physicians at Parker Adventist were not aware Claimant was actively treating for her work injury, and none of Claimant's ATPs were advised or consulted regarding her hospital admission. Consequently, the evidence is insufficient to determine if a subset of Claimant's treatment would have been foregone had Claimant's ATPs been consulted during her six-day hospitalization. The evidence is insufficient to establish which specific treatments rendered during Claimant's hospitalization were reasonable, necessary, and related to Claimant's industrial injury and which were to address unrelated conditions.

Recommended Surgery

Claimant has established by a preponderance of the evidence that the spinal surgery recommended by Dr. Rauzzino to address the lipomatosis at the L4-5 level is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. The ALJ credits Dr. Rauzzino's testimony that it is more likely than not that Claimant developed a lipomatosis at the L4-L5 level as the result of her January 2021 spinal surgery, and that the lipomatosis is, more likely than not, a cause of Claimant's ongoing lower extremity symptoms. Dr. Rauzzino's recommendation of surgery to correct this condition is reasonable and necessary to cure or relieve the effects of Claimant's July 8, 2020 work injury. Claimant's request for authorization of the recommended surgery is granted.

Temporary Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,*

102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits beginning October 23, 2021. The ALJ finds credible Claimant's testimony that her leg pain became severe on October 22, 2021. Hospital records from Parker Adventist support that Claimant had significant leg weakness. Moreover, Dr. Lugliani imposed a full work restriction on November 2, 2021, which continued through, at least, July 12, 2022. No credible evidence was presented establishing that Claimant's inability to work is the result of any medical issue other than her work-related injury. Claimant is entitled to temporary total disability benefits from October 23, 2021 until terminated pursuant to statute.

ORDER

It is therefore ordered that:

1. Claimant's request that Respondents pay for her November 23, 2020 hospitalization at Parker Adventist is denied and dismissed.

2. Claimant's request that Respondents pay for her October 23, 2020 hospitalization at Parker Adventist is denied and dismissed.

3. Claimant's request for authorization of surgery to correct the L4-L5 lipomatosis recommended by Dr. Rauzzino is granted.

4. Claimant's request for temporary total disability benefits is granted. Respondents shall pay Claimant temporary total disability benefits beginning October 23, 2022, until terminated pursuant to statute.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 26, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The issues set for determination were:

- Did Claimant establish by a preponderance of the evidence that he is entitled to TTD or TPD benefits from his date of injury, November 6, 2021, until terminated by operation of law?

STIPULATION

Counsel for the parties stipulated that the General Admission of Liability ("GAL") filed on February 22, 2022 resolved the issue concerning compensability, as well as medical benefits issues (including authorized treating physician).

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the undersigned ALJ enters the following Findings of Fact:

1. Claimant is the owner of the [Redacted, hereinafter SE] franchise located at [Redacted] in Denver, Colorado, which he has owned since 2020. Claimant testified there is a franchise agreement which governs his ownership and he does business under KS[Redacted] d/b/a SE.

2. Claimant testified he receives one-half of the gross profits each month-generally 14%-16% of sales in a payment from the franchisor. SE[Redacted] receives the other half of the profits. Claimant said some of the money goes back into the business and is put in an escrow account. There was no evidence in the record whether Claimant received any portion of the profits as remuneration and how often he received such payments.

3. Claimant was also paid a weekly salary of $1,000.00 per week.

4. Claimant testified that he typically would come in to the store at 3:30 a.m. and worked every day. Prior to the injury, he performed various job duties at the store including the duties of cashier, as well as managerial duties and stocking merchandise. This last duty included stocking shelves, the cooler and restocking merchandise at various locations in the store. Claimant also ordered the merchandise for the store and was certified to issue money orders.

5. On November 6, 2021, Claimant suffered an admitted injury at work when he twisted his knee and ankle in the stockroom.

6. Claimant treated with Carrie Burns, M.D. at Concentra on November 9, 2021. Dr. Burns issued work restrictions including no lifting and carrying greater than 15 pounds, pushing/pulling limited to 20 pounds and no kneeling, crawling or bending.

7. The November 9, 2021 medical record was the only medical record admitted into evidence. This record did not establish Claimant was taken off work for any period of time.

8. A paycheck for the period of December 17-23, 2021 was admitted into evidence. This showed Claimant was paid $1,000.00 for this period and the pay date was December 30, 2021.[1]

9. No pay records after December 30, 2021 were admitted into evidence.

10. On February 22, 2022, a General Admission of Liability was filed on behalf of Respondent-Insurer. The GAL admitted for medical benefits only and noted that a Notice of Contest was previously filed.

11. Claimant underwent surgery on his ankle and was off work for a period of time. The exact date of the surgery was not in the record. Claimant testified that as a result of his surgery, he lost income. From March 18, 2022 until the middle of May 2022, Claimant did not come into work, as he couldn't drive. Claimant testified he had restrictions during this time.

12. The ALJ found there was no evidence in the record that an ATP took him off work in the March to May time frame. The ALJ was unable to conclude that Claimant's restrictions required him to be completely off work during this period of time.

13. Claimant testified he did not receive his salary of $1,000.00 per week when he was not working. On cross-examination, Claimant admitted that in his Interrogatory Responses, he stated he continued to receive his salary after the injury. The ALJ credited Claimant's testimony that he was not paid the $1,000.00 per week.

14. The record was unclear whether Claimant has resumed receiving weekly payments of the $1,000.00 salary.

15. Claimant testified that prior to the injury, there were seven or eight total employees in the store. Claimant said he hired employees in February or March. Claimant testified that when he returned to work he has not been doing heavier duties like stocking merchandise. The ALJ inferred that part of his claim for loss of earnings related to higher costs due to more employees and hence lower net monthly profits paid by the franchisor. The ALJ declines to find that a loss of profits constituted a wage loss.

16. No ATP has placed Claimant at MMI.

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[1] Exhibits A and 2.

17. Claimant sustained of loss of earnings attributable to the work injury.

18. Claimant did not prove he was entitled to TTD benefits.

19. Claimant proved he was entitled to TPD benefits.

20. The ALJ was unable to determine what Claimant's earnings were in 2022, as no payroll records after December 30, 2021 were admitted into evidence. There was insufficient evidence in the record to calculate Claimant's TPD benefits.

21. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of Claimant's entitlement to benefits turned on his testimony, as well as the documentary evidence in the record.

Temporary Total Disability Benefits

Claimant is required to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. § 8-42-103(1)(a), C.R.S. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair Claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) [citing *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991)]. In some circumstances, Claimant's testimony alone can be sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). See also *Sanchez v. Indus. Claim Appeals Office of Colo.*, *supra*, 411 P.3d at 249 (TTD/TPD denied where ALJ concluded Claimant's back pain was not related to work injury and he continued to work.)

In the case at bench, Claimant had the burden of proving he was entitled to temporary total disability benefits. Although there was evidence in the form of Claimant's testimony that he was off work after his surgery, no medical evidence was introduced to establish the Claimant was completely off work because of the surgery. (Finding of Fact 11). The sole medical record admitted into evidence did not show Claimant was taken off work. Claimant's testimony alone was insufficient in this instance to meet his burden of proof. (Finding of Fact 12). The other evidence in the record was insufficient to establish his entitlement to TTD benefits. (Finding of Fact 18). Therefore, ALJ concluded Claimant did not meet his burden of proof with regard to TTD benefits.

When coming to this conclusion, the ALJ considered Claimant's argument that he had work restrictions and because he could not do all of his job functions, he was entitled to TTD benefits. Given the state of the evidence, the ALJ determined Claimant was not entitled to TTD benefits.

Temporary Partial Disability Benefits

In order to receive TPD benefits, Claimant must establish that the injury has caused the disability and consequent partial wage loss. § 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

The recent case of *Montoya v. Indus. Claims Appeals Office of Colo.*, 488 P.3d 314, 318 (Colo. App. 2018) is apposite to the considerations here. In that case, Claimant suffered an admitted work injury and was returned to work with no restrictions by the ATP. Claimant's income was entirely based on commissions. While she was undergoing treatment for her work-related injuries, she was required to schedule some

medical appointments during her normal working hours. Because of the appointments, she was absent from the showroom floor and could not meet potential or current clients. The ALJ concluded Claimant sustained a wage loss attributable to her work injury (i.e. commissions) and awarded TPD benefits. The ICAO set aside the award of TPD benefits, which was then reversed by the Court of Appeals. The Court considered that was required to prove the disability claim when TPD benefits were sought. Writing for the majority, Judge Taubman stated:

> "[T]he "disability concept is a blend of two ingredients, whose recurrence in different proportions has received a great deal of legislative and judicial attention. The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is wage-earning incapacity evidenced by an employee's inability to resume his or her prior work. *Culver v. Ace Elec.* , 971 P.2d 641, 649 (Colo. 1999) [quoting 4 Arthur Larson, *Larson's Workers' Compensation Law* § 57.11, at 10-16 (1994)].
>
> Although the *Culver* court described "disability" as having both medical and wage loss components, it does not necessarily follow that both elements must be met to justify a disability award."

With the holding that it was an error to require both medical incapacity and earning wage loss, the Court held that disability can be found with either the medical or wage loss component. In *Montoya*, the Court of Appeals found there was sufficient evidence to award TPD benefits to Claimant. *Montoya v. Indus. Claims Appeals Office of Colo.*, *supra*, 488 P.3d at 318.

As determined in Findings of Fact 2-3, Claimant was the franchise owner and was paid a weekly salary, well as a percentage of the gross profits. Claimant was paid a weekly salary of $1,000.00. (Finding of Fact 3). The ALJ found the record did not establish whether Claimant received any portion of the profits as remuneration (wages) before his work injury. *Id.* Although the evidence was not completely clear, the ALJ credited Claimant's testimony that after his injury and during the time he was recovering from surgery, he did not receive his $1,000.00 per week salary. (Finding of Fact 13). Based upon Claimant's testimony, the ALJ found there was a period (in the March-May 2022 timeframe) that he did not work and had restrictions. No ATP placed him at MMI. (Finding of Fact 16). Accordingly, the ALJ concluded Claimant sustained a wage loss that was attributable to his work injury. (Finding of Fact 17). Claimant is therefore entitled to TPD benefits. (Finding of Fact 19).

However, from the evidence adduced at hearing, the ALJ was unable to conclude the precise amount of TPD benefits to which Claimant is entitled. Accordingly, counsel for the parties will be ordered to confer, as well as to exchange Claimant's payroll information in order to try to ascertain this amount and reach an agreement.

The ALJ further determined that Claimant's loss of earnings is limited to wages paid. (Finding of Fact 15). There was no evidence Claimant's wages included payment

for the profits of the business. Also, there is no authority which would allow Claimant to recover a loss of profits as part of his claim for temporary disability benefits and the ALJ declines to include same.

ORDER

It is therefore ordered:

1. Claimant's request for TTD benefits is denied and dismissed.

2. Respondent-Insurer shall pay Claimant TPD benefits.

3. Since the ALJ was unable to determine the amount of Claimant's wage loss after March 18, 2022 in order to calculate TPD benefits, counsel for Claimant and Respondent shall confer regarding the amount of TPD benefits. This conferral shall include the exchange of Claimant's payroll records and any other documentary evidence regarding his earnings in 2022. If the parties are unable to resolve this issue, either Claimant or Respondents may file an Application for Hearing.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 26, 2022

STATE OF COLORADO

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-174-263-001

PROCEDURAL ISSUE

At hearing, Respondent indicated that they would be proceeding on the issue of compensability, requesting the Administrative Law Judge find that Claimant did not sustain an injury on June 7, 2021 – withdrawing their admission of liability. Respondent, however, withdrew that issue in its post-hearing position statement.

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the need for the total hip arthroplasty arose out of and in the course of Claimant's employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant has worked for Employer as a mechanic welder for approximately 15 years. It is undisputed that prior to June 7, 2021, Claimant had no problems with his left hip.
2. At approximately 12:30 a.m. on June 7, 2021, Claimant was inspecting a clogged pipe as part of his job duties. The pipe was one of a set of four pipes which ran horizontal from one building to another building over a paved area, approximately 30 feet above the paving/ground. [Exhibit 12]. Claimant first donned a full-body harness and tied himself to a beam as a safety measure to prevent a fall from the beam [Transcript, p. 63:9-22]. Claimant then crawled through a handrail and continued to crawl and walk over two pipes, to get to the third pipe. [Transcript 65:19-21]. Thereafter, Claimant moved horizontally along the pipes in a "crouched over" position" to get to the area where part of clogged pipe had been removed to inspect the pipe. [Transcript, p. 71:12-16]. Upon reaching the area of the clogged pipe, Claimant then moved some tools and harnesses placed on the pipes by another work crew. [Transcript, p. 71:17-19]. Claimant then removed a "super sucker" hose which had been placed inside the clogged pipe. [Transcript, pp. 71:23 – 72:1].
3. Once Claimant moved everything out of the way, he was standing with both of his feet on a 4-inch beam in front of the area he needed to inspect, with the pipe directly in front of him in a position that he would have been straddling the pipe if that section of pipe had not been removed. [Transcript, p. 72:6-14]. Claimant "crouched down" in an "awkward position" to look into the pipe when he felt pain in his left leg. [Transcript, pp. 66:5-10, 72:20 – 73:1].
4. As soon as Claimant bent or crouched down to inspect the open end of the pipe, he felt a sharp, shooting pain down his left leg from his waist to his knee. [Transcript 67:7-8]. Immediately following the injury, Claimant had trouble walking – Claimant had a

bad limp. [Transcript 67:13-20]. Then, the next morning he could not get off the toilet because he had so much hip pain. [Transcript 67:7-16]. This is when he decided to go to the doctor.

5. On June 8, 2021, Claimant sought medical treatment from Memorial Regional Rapid Care the day after the incident at work, where he was examined by Patrick Machacek, PA-C. Claimant complained of "severe left lateral leg pain from his hip radiating down to his knee…tingling down into his lower leg and foot… no groin numbness." [Ex. 6, p. 17]. Thus, Claimant was complaining of pain in his left hip the day after the incident at work. Musculoskeletal examination showed "Left hip flexion, extension, abduction, adduction intact." Dr. O'Brien testified that "intact" range of motion means full range of motion of the hip. [Transcript, p. 30:5-6]. Mr. Machacek opined that since the "mechanism of injury was very low consequence and suggests root compression, possible disc herniation or nerve entrapment elsewhere . . ." Claimant was "better evaluated in the ER and consideration given to urgent imaging." [Ex. 6, p. 20]. An MRI of the lumbar spine in the emergency department showed "[m]ildly degenerated intervertebral discs at L2-3 through L4-5 and moderately degenerated LS-S1 intervertebral disc. There are no focal disc protrusions and there is no significant central or foraminal stenosis." [Ex B, p. 28].

6. Mr. Machacek documented that "Dr. G was called and given report." [Ex. B, p. 20]. Matthew Grzegozewski, M.D., completed a Physician's Report of Workers' Compensation Injury dated June 8, 2021, which diagnosed Claimant with a lumbar radiculopathy. [Ex. 6, p. 21].

7. On June 10, 2021, Claimant returned to Memorial Regional Hospital where he was examined by Jessica Nyquist, PA-C. Ms. Nyquist documented that Claimant was "unable to use his left leg. I am unable to explain these symptoms from a lumbar spine MRI; it is essentially normal today." [Ex. 6, p. 23]. Ms. Nyquist's report does not document that she examined the range of motion of Claimant's left hip. Ms. Nyquist's impression was "1. Diffuse left lower extremity weakness. 2. Cervical spondylosis with myelopathy. 3. Thoracic spondylosis with myelopathy." [*Id.*]. Ms. Nyquist referred Claimant for cervical and thoracic MRIs, and MRI of the brain, and various blood tests, clearly indicating that she could not determine the cause of Claimant's report of pain.

8. In an "ADDENDUM" dated June 11, 2021, Nurse Nyquist documented Claimant underwent MRI of the brain, cervical spine, and thoracic spine, all of which essentially were normal. [*Id.*].

9. On June 16, 2021, Claimant was seen by Natana E. Machacek, DO. Dr. Machacek documents that Claimant had "[f]ull active ROM" of the back but did not document examination of range of motion of Claimant's left hip. [Ex. 6, p. 26]. Dr. Machacek's assessment was "left leg pain". [*Id.*].

10. On June 21, 2021, Claimant was seen by Alexis Tracy, D.O., of Steamboat Orthopedics. Dr. Tracy described Claimant's position at the time he experienced pain as "[h]is left leg was outstretched with an extended knee and abducted hip in a splits like position." [Ex. 7, p. 40]. Thus, Dr. Tracy described Claimant being in an awkward position at the time of the incident. Dr. Tracy opined that Claimant "likely suffered a labral tear in this position…" and recommended left hip arthrogram for further

evaluation. [*Id.*] Dr. Tracy also performed a left intra-articular hip injection, stating that Claimant "will let us know how he responds over the next few days…" [Ex. 7, p. 41]. Dr. Tracy's note does not document that she examined the range of motion of Claimant's left hip.

11. On June 28, 2021, three weeks after his work incident, and due to ongoing pain, Claimant underwent an MRI of his left hip.

12. On July 2, 2021, Claimant returned to Steamboat Orthopedics and was examined by Michael Sisk, M.D. Dr. Sisk documented complaints of 8/10 pain but unequivocally stated that examination of the left hip revealed "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42]. Dr. Sisk reviewed the report of the MRI of the left hip taken on June 28, 2021, which revealed "mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change. Nondisplaced partially contrast-filled detachment of the anterior superior right [sic] acetabular labrum at 2:00 position. Incompletely evaluated lower lumbar degenerative disc disease. There is a 9 mm well-defined lesion in the meduallary bone of the left intertrochanteric femur without aggressive features which suggests a small enchondroma." [*Id.*]. Dr. Sisk opined that Claimant had an "acute labral tear in the left hip" and referred Claimant to Brian White, M.D. [Ex. 7, p. 43]. Dr. Sisk's report does not document the results of the left intra-articular hip injection performed by Dr. Tracy on June 21, 2021.

13. Respondent filed a General Admission of Liability dated July 13, 2021, attaching Dr. Grzegozewski's Physician's Report of Workers' Compensation Injury dated June 8, 2021, which diagnosed Claimant with a lumbar radiculopathy. [Ex. 2, p. 4].

14. Brian White, M.D., examined Claimant on August 4, 2021. Documentation of Dr. White's left hip examination is limited to four sentences (only three relating to the left hip): "On examination of his hip, he can barely move his hip. It is severely painful and quite uncomfortable. His right hip moves much better. He has significant pain with anterior impingement maneuver." [Ex 8, p. 47]. Dr. White did not document any groin pain. Dr. White's documentation of the MRI was even more cursory, limited to just three sentences: "[h]is MRI shows a labral tear. He does not have any significant bruising or edema in the bone or anything concerning for infection. The labrum ls torn." [*Id.*]. Significantly, Dr. White fails to mention the mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change seen on MRI on June 28, 2021. [Ex. B, p. 21]. Dr. White's report states that Claimant's hip showed underlying CAM-type femoroacetabular impingement with reasonable acetabular coverage, but this information comes from the x-ray taken on June 21, 2021, not the MRI of the same date. [Ex. B, p. 23].

15. Under plan, Dr. White stated "I think moving forward with hip arthroscopy is appropriate. He is in severe pain. I do not think there is any benefit to waiting. He cannot do physical therapy. He wants this fixed, and he wants it fixed as soon as possible. His MR was with an arthrogram, but even with that, I do not see significant concern for infection around this hip joint. I think he probably just has a displaced labral tear that has just become acutely quite symptomatic." [*Id.*]. Dr. White's report

does not document the results of the left intra-articular hip injection performed by Dr. Tracy on June 21, 2021. Dr. White requested prior authorization for left hip labral repair on August 5, 2021.

16. On August 19, 2021, Dr. White performed a left hip labral repair. [Ex. 8, pp. 49-50]. In his operative report, in the section labeled Presenting Problems/History of Present Illness, Dr. White documented "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Furthermore, Dr. White did not reference the MRI of June 28, 2021, showing mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic changes. Instead, Dr. White's "Presenting Problems/History of Present Illness states "Tonnis *grade zero for no significant radiographic osteoarthritis*." [Ex. 8, p. 50]. Dr. O'Brien explained that Tonnis scale applies to plain radiographs, not MRI scans. [Transcript, p. 40:11-20]. This shows Dr. White was unaware of the significant chondromalacia of the hip joint seen on the MRI shortly after the accident.

17. In a telephone call with Claimant on October 24, 2021, Dr. White documented that Claimant "is not doing as well as I had hoped." [Ex. 8, p. 52]. Dr. White recommended additional time to see if Claimant's pain lessens, but "[u]ltimately, if this is not going in a good direction, he knows that the only surgery I have left for him is a total hip replacement" in order to address Claimant's hip pain.

18. On December 7, 2021, Claimant reported to Shawn Karns, MPA, PA-C that "overall he feels like the hip continues to regress. He just does not feel like he is making any progress with physical therapy... He does get a catching sensation in the joint, which is a very sharp pain that sometimes makes him feel like his hip wants to give way" [Ex. 8, p. 53]. X-rays taken that date showed "some mild narrowing over the lateral aspect of the joint, but his femoral and acetabular osteoplasties have healed in very nicely. No acute findings are appreciated. He did have an MRI performed earlier today, a non-arthrogram study, which shows the labral graft overall to be intact. He does have advanced grade 2/3 chondromalacia in the left hip without a focal chondral defect or loose body. He does have some capsular edema as well as some gluteal tendinosis. No other significant acute findings are appreciated." [Ex. 8, p. 53]. Mr. Karns options include an intra-articular steroid injection for diagnostic and therapeutic purposes (which previously had been performed by Dr. Tracy on June 21, 2021, apparently without Dr. White's knowledge).

19. A "Note for Chart" dated December 8, 2021, indicates that Mr. Karns reviewed the case and imaging with Dr. White, who believed that the labral repair "appears to be intact without any evidence of re-tear" but "overall, it does look like he has had some progression of some degenerative arthritis to the acetabulum with grade 2/3 chondromalacia changes to the cup." [Ex. 8, p. 55]. Dr. White recommended either a left hip intra-articular diagnostic injection or intra-articular steroid injection and that Claimant would be a candidate for total hip replacement if Claimant experienced "some temporary relief." Again, Dr. White appears to have been unaware that Dr. Tracy previously performed a left intra-articular hip injection on June 21, 2021.

20. In a telephone call on December 29, 2021, Claimant informed Mr. Karns that he did not notice a significant decrease in his overall pain and that his hip was "bothering him with everything he does." [Ex. 8, p. 56]. Despite previously opining that Claimant would be a candidate for total hip replacement with some temporary relief from the injection, Dr. White indicated Claimant is a candidate for total hip replacement - even though Claimant did not notice any pain relief from the injection.

21. In a note dated January 3, 2022, Dr. White documented that Claimant's condition has continued to deteriorate and "I do not know what else this could be….I think the only option for his hip now is to replace it." [Ex. 8, p. 57]. Thus, after a failed labral repair, Dr. White decided to perform a total hip replacement because he was at a loss as to what to do to treat Claimant's hip pain that was caused by the work accident. Thus, the failure of the labral repair made it more likely that Claimant's pain was coming from the arthritis in his hip and that it was aggravated by his work accident.

22. At the request of Respondent, Timothy O'Brien, M.D., performed an Independent Medical Examination of Claimant on February 18, 2022. Dr. O'Brien has been Board-certified in orthopedic surgery since 1994 and completed two fellowships (one in adult hip and knee reconstruction and the other in foot and ankle) and has performed approximately 1,500 total hip arthroplasties in his surgical career.

23. Dr. O'Brien authored a report dated February 18, 2022, in which he opined that (1) Claimant did not sustain an acute torn labrum in the incident on June 7, 2021, as the MRI established the labral tear was chronic and Claimant did not experience any pain relief from the labral repair; (2) Claimant's pain beginning on June 7, 2021, was caused by the grade 2 and grade 3 chondromalacia of his left femoral head and of the acetabular surfaces in the hip joint; (3) the condition of Claimant's hip joint was chronic and not aggravated or accelerated by the incident on June 7, 2021, because the multiple mechanisms described in the medical records were not sufficient to change the anatomy of Claimant's preexisting left hip osteoarthritis. [Ex. A, pp. 8-9].

24. In response to Dr. O'Brien's IME report, Dr. White authored a letter to Claimant's counsel dated April 27, 2022, in which he again stated that he "cannot state why" Claimant did not respond well to the labral reconstruction. In the letter, Dr. White opined that Claimant was referred to him for a "symptomatic labral tear that resulted from the work injury. We performed his hip arthroscopy. He had a little bit of wear of the cartilage, but it certainly was in no way, shape or form advanced arthritic change that required a total hip replacement. He had an absolutely shredded labrum." [Ex. 8, p. 58]. Dr. White's opinion as it relates to the labral tear being the pain generator is not found to be persuasive since it appears to be inconsistent with his own medical records and operative report for the labral reconstruction on August 19, 2021:

    - As to the age of the labral tear, Dr. White's operative report specifically opines that Claimant had a "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Extensive tearing and shredding and an extremely degenerative labrum is not consistent with an injury caused by simply squatting down on June 7, 2021;

- As to the condition of Claimant's hip joint, Dr. O'Brien's statement that Claimant "had a little bit of wear of the cartilage" is inconsistent with the MRI dated June 28, 2021, objectively documenting mild to moderate grade 2/3 chondromalacia in the left acetabulum.

25. Dr. O'Brien testified that the medical records establish that Claimant did not sustain an acute labral tear on June 7, 2021. First, Dr. O'Brien testified that an acute labral tear "always localizes pain to the groin area." [Transcript, p. 26:5-6]. Moreover, the medical records establish that Claimant did not complain of groin pain following the incident on June 7, 2021:

    - Memorial Regional Rapid Care records dated June 8, 2021, document complaints of "severe left lateral leg pain from his hip radiating down to his knee…tingling down into his lower leg and foot… *no groin numbness*," indicating a specific focus on groin issues during the examination. [Ex. 6, p. 17] (emphasis added);
    - Return visits with Memorial Regional Hospital result in MRIs of the cervical, thoracic and lumbar spines to rule out disc injury, MRI of the brain, multiple blood tests, ultrasound and x-rays, consistent with Dr. O'Brien's testimony that "it is almost impossible to confuse the symptomatology and clinical presentation of a labral tear, an acute tear, if it has occurred, and they're incredibly rare, with an acute disk herniation. They are different animals. It is like comparing a zebra to a duck." [Transcript, p. 28:7-18];
    - Dr. Sisk's report dated July 2, 2021, documented "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42].

26. As further evidence that Claimant did not sustain an acute labral tear, Dr. O'Brien testified that the physical examinations performed by the treating providers were not consistent with an acute labral tear. Specifically, Dr. O'Brien testified that a person with an acute labral tear would not have full range of motion of the hip because that person would be in extreme pain, but in this case Claimant repeatedly was documented with full range of motion of his hip:

    - Dr. O'Brien testified that the statement in the medical records in the Emergency Department on June 8, 2021, document "hip flexion, extension, abduction, adduction intact" which "means that [Redacted, hereinafter MM] could bring his hip all the way up to his chest, extend it beyond – you know, more toward his buttock, and then he could rotate the hip inward and outward with ab and adduction. Intact meaning normal. That would be nearly impossible to do if there were a labral tear." [Transcript, p. 30:10-22].
    - Dr. Sisk's report dated July 2, 2021, documented "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42].

27. Dr. O'Brien testified that the MRI was not consistent with an acute labral tear, because the MRI did not show any bleeding in the hip: "When tissue tears, blood vessels that keep that tissue alive also tear. And that is why an MRI scan when something is torn acutely always, always, always shows bleeding. And in this case, there was no bleeding." [Transcript, p. 32:8-12]. Dr. O'Brien testified that the MRI showed a

multiplanar labral tear, which is a classic degenerative labral tear over time and not an acute labral tear. [Transcript, pp. 31:18 – 32:18]. This testimony is consistent with Dr. White's operative report, which opined that had "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Dr. White did not explain how the process of crouching down in an awkward position could result in an "absolutely shredded" acute labral tear or aggravate a preexisting asymptomatic labral tear.

28. Dr. O'Brien's testimony that Claimant's pain beginning on June 7, 2021, was not coming from the chronic, degenerative labral tear is supported by the fact that the labral reconstruction surgery did not alleviate Claimant's pain complaints. Dr. O'Brien testified that "if the torn labrum had been the factor generating pain and Dr. White took that pain generator out and replaced it with new -- you know, new tissue and tied all that new tissue down to bone, then that surgery should have worked. But in [Claimant's] case, very early on it was evident that this surgery had failed. So that is kind of proof positive that the labrum was not a pain generator." Any opinion from Dr. White to the contrary is not persuasive since Dr. White twice stated he did not know why the labral reconstruction surgery was not successful, which is not surprising given that Dr. White appears to have just addressed the labral tear and did not assess and address the grade 2/3 osteoarthritis of the left hip noted on the MRI.

29. As it relates to the labral tear not being the pain generator, the ALJ finds Dr. O'Brien's opinions to be persuasive. That being said, the labral tear surgery was still performed as an attempt to cure and relieve Claimant from his hip pain that was caused by the work accident.

30. Dr. O'Brien testified that, considering all of the evidence (most of which Dr. White was either unaware or failed to appreciate), the most likely pain generator was the osteoarthritis in Claimant's hip. Dr. O'Brien testified that the MRI dated June 28, 2021, showed grade 2, 3 chondromalacia "in both the cup, that is the socket, and then he had it in the ball. So if you look at the original MRI interpretation by the radiologist, grade 2 and 3 chondromalacia, and even more important is the presence of subchondral cysts. So there is enough pathoanatomy, enough altered anatomy in the cartilage, that it is not protecting that underlying bone. So the joint reactive forces are moving through incompetent cartilage into bone and actually resulting in bone death because the cyst is the loss of bone cells being replaced by fluid, typically synovial fluid, or necrotic on bone cells. So this is not insignificant arthritis as Dr. White would like everybody to believe when he talks about the Tönnis scale being zero. And it was. But that -- what gives you the true flavor of how bad the arthritis is, in this case isn't determined on a plain radiograph. We have much more elegant imaging study information based on the MRI scan, and it clearly shows moderately advanced arthritis, which Dr. White will ignore before his labral surgery and then use as a rationale to perform his total hip replacement. So it doesn't make sense. That inconsistency is unreconcilable." [Transcript, pp. 39:23 – 40:24].

31. Claimant testified that he crouched down in an awkward position to look into a pipe when he experienced pain. Dr. O'Brien testified that the act of crouching down on June 7, 2021, did not aggravate Claimant's preexisting degenerative osteoarthritis or accelerate the need for a total hip arthroplasty: " . . . the only injuries that can

aggravate and accelerate that arthritis and thus make a person a candidate for a hip replacement more prematurely than they otherwise would have been, are injuries that fracture into a joint, an arthritic joint, or injuries that tear multiple ligaments. We have already talked about the fact in this case that MM[Redacted] didn't sustain a hip injury of any variety on the date in question. So there is no way what MM[Redacted] was doing could aggravate or accelerate any labral pathology or aggravate or accelerate any underlying cartilage pathology. It couldn't happen. There just wasn't enough trauma." [Transcript, p. 45:24 – 46:12]. Dr. O'Brien testified that if there is preexisting arthritis, the only type of injuries that can aggravate and accelerate the arthritis and cause the need for a hip replacement – more prematurely than they otherwise would have needed one – if the injury fractured the arthritic joint or tore multiple ligaments of the joint. The ALJ does not, however, find Dr. O'Brien's testimony regarding the type of injury necessary to aggravate preexisting osteoarthritis and necessitate the need for medical treatment – including surgery – to be persuasive. Especially in this case, where Claimant did not have any hip pain before the work incident, and then due to the incident he developed unrelenting hip pain that continued until after Claimant underwent hip replacement surgery.

32. Dr. O'Brien testified that because Claimant experienced symptoms after crouching down at work does not mean that crouching down caused or aggravated Claimant's degenerative osteoarthritis, because the nature of osteoarthritis is such that people will experience pain simply from the surfaces of the joint rubbing together. Dr. O'Brien testified that it is not unusual for people with osteoarthritis to wake up from sleeping and complain of pain because "Arthritis doesn't need an injury to make it hurt. Arthritis hurts because the joint is arthritic. It is just how that pathology manifests itself is with pain." [Transcript, p. 47:2-5]. In other words, simply because Claimant experienced pain while at work does not mean that work caused the pain. Rather, the simple fact that Claimant's cartilage naturally deteriorated over time resulted in the two joint surfaces rubbing together, causing the pain. Again, the ALJ, does not find this portion of Dr. O'Brien's opinion to be credible and persuasive. Claimant did not just wake up with hip pain. Claimant developed consistent and relentless hip pain that started while Claimant was awkwardly crouched and bent over working on the pipe at work. Thus, the ALJ finds that Claimant's pain did not merely occur while at work, but occurred at work due to his work activities.

33. On April 26, 2022, Dr. White performed a total left hip replacement. The hip replacement has relieved Claimant's hip pain. According to Claimant, he is feeling "great" since the hip replacement surgery. [Transcript 70:4:15].

34. The ALJ finds that Claimant suffered a compensable injury to his left hip on June 7, 2021, when he bent down in an awkward position to work on a pipe at work. The ALJ finds that the injury was in the form of a significant and permanent aggravation of Claimant's preexisting asymptomatic hip arthritis. Immediately after the accident, Claimant developed unrelenting left hip pain. Although Dr. White originally thought Claimant' pain was coming from his labrum, surgery to repair the labrum did not help, demonstrating the labrum was not the pain generator. Thereafter, Claimant underwent a left total hip replacement – which relieved Claimant's hip pain – establishing the pain generator that was caused by the work accident.

35. Based on the evidence submitted at hearing, the ALJ finds that Claimant suffered a substantial and permanent aggravation of a preexisting condition – his hip arthritis. The ALJ finds that Claimant's asymptomatic left hip arthritis was substantially and permanently aggravated and accelerated when he bent down in an awkward position to work on the clogged pipe at work.

36. The ALJ further finds that the need for the hip replacement surgery was caused by Claimant's work injury and that the surgery was reasonable and necessary to cure and relieve Claimant from the effects of his work injury. This supported by the fact that Claimant's work injury caused unrelenting hip pain that was not relieved until Claimant underwent the left hip replacement surgery.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936);

CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the need for the total hip arthroplasty arose out of and in the course of Claimant's employment.

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

On June 7, 2021, Claimant was inspecting a clogged pipe as part of his job duties. The pipe was one of a set of four pipes which ran horizontal from one building to another building over a paved area, approximately 30 feet above the paving/ground. Claimant first donned a full-body harness and tied himself to a beam as a safety measure to prevent a fall from the beam. Claimant then crawled through a handrail and continued to crawl and walk over two pipes, to get to the third pipe. Thereafter, Claimant moved horizontally along the pipes in a crouched over position to get to the area where part of clogged pipe had been removed to inspect the pipe. Upon reaching the area of the clogged pipe, Claimant then moved some tools and harnesses placed on the pipes by another work crew. Claimant then removed a "super sucker" hose which had been placed inside the clogged pipe.

Once Claimant moved everything out of the way, he was standing with both of his feet on a 4-inch beam in front of the area he needed to inspect, with the pipe directly in front of him in a position that he would have been straddling the pipe if that section of pipe

had not been removed. Claimant crouched down in an awkward position to look into the pipe and then developed excruciating pain in his left leg.

As soon as Claimant bent or crouched down to inspect the open end of the pipe in an awkward position, he felt a sharp, shooting pain down his left leg from his waist to his knee. Immediately following the injury, Claimant had trouble walking – Claimant had a bad limp. Then, the next morning he could not get off the toilet because he had so much hip pain. This is when he decided to go to the doctor.

At first, the doctors thought Claimant's hip and leg pain was coming from his back. Therefore, Claimant underwent an MRI of his lower back. When that was negative, they took additional MRIs of Claimant's thoracic and cervical spine as well as his brain. When those were also negative, they evaluated Claimant's left hip.

On June 28, 2021, Claimant underwent an MRI of his left hip. Dr. Sisk reviewed the report of the MRI, which revealed mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change. He also noted nondisplaced partially contrast-filled detachment of the anterior superior right [sic] acetabular labrum. He further noted a 9 mm well-defined lesion in the meduallary bone of the left intertrochanteric femur without aggressive features which suggests a small enchondroma. As a result, Dr. Sisk opined that Claimant had an acute labral tear in the left hip and referred Claimant to Brian White, M.D.

Dr. White also concluded that Claimant's left hip pain was being caused by the torn labrum. As a result, Claimant underwent surgery by Dr. White to repair his torn labrum. When the surgery did not relieve Claimant's hip pain, Dr. White concluded that Claimant required a total hip replacement to cure and relieve him from the effects of his work injury.

On April 26, 2022, Dr. White performed a total left hip replacement. The hip replacement relieved Claimant's hip pain. Since having the hip replacement surgery, Claimant's left hip pain has subsided and he feels great.

Dr. O'Brien testified that June 7, 2021, incident did not result in a torn labrum. Regarding that issue, Dr. O'Brien might be right since the surgery performed by Dr. White did not resolve Claimant's hip pain. Regardless, the labrum surgery was still performed to address Claimant's hip pain that was caused by the work accident.

Dr. O'Brien also concluded that Claimant bending down to work on the clogged pipe could not have aggravated Claimant's arthritic hip and necessitated the need for the hip replacement. According to Dr. O'Brien, the only injuries that can aggravate and accelerate joint arthritis and thus make a person a candidate for a hip replacement more prematurely than they otherwise would have been, are injuries that fracture into a joint that is arthritic joint, or an injury that tears multiple ligaments. Thus, Dr. O'Brien appears to conclude that Claimant's arthritic hip just started hurting without any contribution from Claimant's work activities. But, based on the lack of hip pain before the incident, the immediate onset of hip pain while bending down in an awkward position, and the continuation of the pain until the hip replacement surgery, the ALJ finds and concludes that Claimant injured his hip due to his work activities on June 7, 2021, and such injury necessitated the need for the hip replacement. Thus, the ALJ does not find Dr. O'Brien's

opinions regarding causation of Claimant's hip pain and need for the hip replacement to be persuasive.

The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship as explained in *Scully v. Hooters of Colorado*, W.C. No. 4-745-712 (October 27, 2008). In *Scully* the claimant twisted to place dishes then felt an immediate onset of low back pain and spasms. The claimant had serious and chronic pre-existing low back problems. The ALJ, determined that the claimant did not suffer a new injury but merely experienced continuing symptoms from her chronic pre-existing condition. In *Scully* the claimant contended that because her back spasms occurred in the act of bussing tables and the spasms were immediately preceded by the claimant's twisting her back in the performance of an essential job function that the back spasm must have been caused by her twisting her back. The Panel found that this argument committed the logical fallacy of mistaking temporal proximity for a causal relationship. The Panel noted that correlation is not causation and in *Scully* the ALJ essentially concluded that there merely existed a coincidental correlation between the claimant's work and her symptoms. *See Scully v. Hooters of Colorado*, W.C. No. 4-745-712 (October 27, 2008).

However, the ALJ finds that this is not a case of mere temporal proximity, but rather temporal synchrony. (*See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539 (D. Colo. Feb. 25, 2010)) (To the extent certain events occur nearly simultaneously, the causal connection between them becomes quite strong.) In this case, in light of the close temporal relationship between Claimant's work activities of bending over in an awkward position, and the immediate onset of unrelenting hip and leg pain, the MRI findings, and Claimant's pain relief after the hip replacement surgery, and a lack of persuasive evidence of any preexisting hip pain, Claimant has established that he injured his hip due to his work activities on June 7, 2021, and such injury caused the need for the hip replacement surgery performed by Dr. White – thus making the hip replacement surgery reasonably necessary to treat Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes that Claimant suffered a compensable injury to his left hip that caused the need for the hip replacement surgery. The ALJ further finds and concludes that the hip replacement surgery was reasonably necessary to cure and relieve Claimant from the effects of his work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent is liable for the hip replacement surgery performed by Dr. White. Therefore, Respondent shall pay for the surgery pursuant to the Colorado Workers' Compensation fee schedule.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-429-491-002

ISSUES

I. Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw the admission for maintenance care pursuant to the Final Admission of Liability dated May 27, 2003.

II. Whether Claimant has proved by a preponderance of the evidence that certain maintenance medical care continues to be reasonable, necessary and related to the admitted August 9, 1999 workplace injury.

III. Whether pursuant to C.R.S. § 8-42-101(5) Claimant is entitled to reasonable costs incurred in pursuing the deposition of L. Barton Goldman to maintain his entitlement to maintenance medical benefits.

STIPULATIONS

Claimant stipulated at hearing that he is no longer requesting the following as maintenance care: Vitamin D, Fluticasone, Ferritin and Testosterone. Claimant further stipulated that no ongoing maintenance treatment recommended by an ATP had been denied or unpaid by Respondents as of the date of hearing.

FINDINGS OF FACT

1. Claimant is 67 years old. Claimant worked for Employer as a roofer.

2. Claimant has longstanding pre-existing history of asthma, diagnosed at age three. Claimant has treated with prednisone or other medications, inhalers and allergy shots. Claimant was hospitalized for asthma complications in middle school and experienced multiple episodes of sinusitis. Claimant testified that, prior to his industrial injury, he would use his inhaler if he was exposed to irritants such as cotton or crop spray.

3. Claimant also has a pre-existing history of obesity.

4. Claimant sustained an industrial injury while working for Employer on August 9, 1999. Claimant fell through the cutout in a roof, falling 22-27 feet. Claimant was rendered unconscious and when he awoke reported experiencing some trouble breathing.

5. Claimant was hospitalized for a period of one month following the injury. He testified that during this time he was paralyzed and felt like he was unable to use the lower part of his chest to breathe.

6. Claimant has primarily undergone medical treatment for his industrial injury with authorized treating physicians ("ATPs") L. Barton Goldman, M.D., Lisa Maier, M.D. and Arash Babaei, M.D.

7. Dr. Maier first evaluated Claimant at National Jewish Medical Center on September 13, 2000. Claimant reported that while in the hospital he noted that he was unable to use the lower part of his chest to breathe and felt that he was only using his upper respiratory muscles. Claimant reported shallow breathing and tightness. Dr. Maier documented Claimant's history of asthma. She noted that, leading up to the work injury, Claimant had been able to work as a roofer, lifting heavy amounts and replacing roofs without any significant symptoms except the occasional wheezing and shortness of breath and exacerbations of wheezing with a respiratory infection. Claimant did not seek medical attention for those episodes. Dr. Maier further noted that, leading up to the work injury, Claimant was not using his inhalers more than regularly. She documented that Claimant was using 2 puffs of Vanceril and 2 puffs of albuterol in the morning, and occasionally use albuterol throughout the day, especially if he had a respiratory infection. Claimant reported that, at night, he used his Vanceril again along with his albuterol, 2 puffs from each inhaler. Dr. Maier noted that, while on steroids, Claimant experienced recurrent sinus infections that would often lead to pulmonary infections.

8. Dr. Maier noted that Claimant now required the use of oxygen, which he had not required in the past. In addition to performing a physical examination, Dr. Maier reviewed Claimant's medical records dating back to the date of the work injury. Her impression included, *inter alia*:

> 1) Hypoventilation with resultant hypoxemia, as evidenced on arterial blood gas in October 1999 and currently. This is not accounted for by [Claimant's] underlying lung disease, as he was never a smoker and had asthma and should not develop significant hypoventilation. In addition, he has a normal A-a gradient, which again would suggest that the problem does not lie within the lung parenchyma but may be neurologic in origin from diaphragm paralysis for example.
>
> 2) Shortness of breath. Again, this may be multifactorial. I am concerned that [Claimant] has hypoventilation related to a neurologic process such as diaphragm paralysis. The shortness of breath may also be contributed to by [Claimant's] underlying asthma. At this point, there is no evidence that there is a cardiovascular problem contributing to shortness of breath.
>
> 3) Asthma. [Claimant] has had a long history of asthma. He has evidence of significant obstructive lung disease on his spirometry, however, he had been well controlled prior to his fall and, as a result, I am concerned that his increasing shortness of breath is not related to his asthma.

> 4) Status post fall with cervical spine fracture and evidence of a contusion in the cervical cord on MRI initially. This certainly is concerning for a possible neurologic problem which may be resulting in hypoventilation and shortness of breath. Specifically, the diaphragm is innervated through the cervical cord and its innervation may have been affected by the fall.
>
> 5) Sleep disorder, as related by symptoms and with nocturnal pulse oximetry. [Claimant] may have a component of obstructive sleep apnea, but likely has worsening hypoventilation at night possibly related to the underlying neurologic process. This will need further evaluation, as it may certainly be contributing to some of his daytime symptoms.
>
> 6) History of allergies. These certainly may worsen [Claimant's] asthma, but are unlikely to cause worsening to the point of causing hypoventilation.

(Cl. Ex. 2, p. 9).

9. Dr. Maier noted that, prior to Claimant's work injury, his long-standing history of asthma was well under control, noting that Claimant was on minimal medications leading up to the work injury. She stated that, since Claimant's work injury, he had a marked increase in symptoms of shortness of breath, primarily dyspnea on exertion, chest tightness and a sensation of being unable to breathe with the bottom part of his chest. Dr. Maier further noted that as a result of the work fall, Claimant sustained a cervical spine vertical fracture with evidence on an MRI of contusion to the spinal cord. Dr. Maier remarked that, since October 1999, Claimant had evidence of hypoventilation on arterial blood gas, which was confirmed during her exercise testing. A chest radiograph did not reveal significant parenchymal abnormality. She noted that Claimant developed a rib fracture initially which may have partially contributed to hypoventilation, though not to the level noted at the time.

10. She concluded that her evaluation suggested that Claimant was unable to increase ventilation, even during exercise. Specifically, Claimant's pCO2 rose as he was unable to hyperventilate during exercise. She stated that this limited her differential diagnosis of the source of Claimant's hypoventilation. Dr. Maier explained,

> For example, in obesity hypoventilation syndrome which might be considered in [Claimant's] case, individuals are able to hyperventilate during exercise so they can physically have a normal ventilatory response, just 'won't' usually. However, in hypoventilation from a neuromuscular problem, individuals are unable to hyperventilate or normally ventilate during exercise. In [Claimant's] case this is concerning for a cervical cord lesion that may have resulted in either unilateral, or potentially even bilateral, diaphragm paralysis.

(Cl. Ex. 1, p. 10).

11. Dr. Maier remarked that evaluation of Claimant's diaphragm was needed, including a SNIF test and possibly nerve conduction studies or EMGs of the phrenic nerve. She noted that Claimant had some symptoms that could be consistent with obstructive sleep apnea and recommended a formal sleep study. Dr. Maier was concerned that Claimant's hypoventilation was primarily the result of his work fall, and that it was contributing to his sleep disorder. She remarked that she needed to definitively establish this relationship and its impact on Claimant's sleep disorder.

12. Claimant was placed at maximum medical improvement ("MMI") on June 4, 2002. Respondents filed final admissions of liability, admitting for maintenance medical treatment.

13. On January 24, 2003 Dr. Maier created a "life care plan" for Claimant. She wrote, in pertinent part:

> It would be expected that I would need to see him at approximately six month intervals for his severe central alveolar hyperventilation, obstructive sleep apnea, asthma, and pulmonary hypertension which has resulted from the latter.
>
> * * *
>
> [Claimant] will require lifelong treatment of his medical problems as outlined above. This will include medications such as Serevent, meter dose inhaler to be used 2 puff b.i.d., Flovent meter dose inhaler 220 micrograms to be used 2 puffs twice a day, both of which should be equivalent to approximately one inhaler a month. He will also need an albuterol meter dose inhaler to be used as needed and this also should be equivalent to one inhaler a month. In addition he will require on-going treatment with CPAP at 14cm of water with one liter of supplemental oxygen or potentially BiPAP in the future along with oxygen to be used at four liters at rest and six liters with exertion. It is expected that he will continue to need all of these medications and treatments throughout his life.
>
> In addition, it is likely that [Claimant] may have an aggravation of his respiratory diseases. Specifically, he is more likely than not to develop bronchitis at least yearly which would require treatment with antibiotics, and possibly a prednisone burst on nebulizer to dispense albuterol. In addition he has greater than 50% risk for having an aggravation of his asthma on an at least yearly basis whether attributable to infection such as bronchitis or pneumonia or due to other cause. This will likely require treatment with Prednisone and may require intermittent treatment with nebulized medications such as albuterol. He also is likely to develop a pneumonia approximately every five to ten years which would require evaluation with a chest radiograph and treatment with a antibiotic. This also could necessitate

> inpatient care if severe enough. Other complications of his respiratory problems could include cor pulmonale or right heart failure which would necessitate treatment with other medications such as Lasix or other diuretic and increased oxygen therapy. In addition as a preventive measure, he should have year flu vaccine and pneumonia vaccine every five to ten years to help prevent the above problems. The risk of his developing these complications is high and greater than 50% for all of those listed above . . .
>
> In evaluation of these problems and/or routine care of [Claimant], it is likely that he will need to have a yearly chest radiograph obtained, especially to insure that he does not have pneumonia should he have a bout of bronchitis. To monitor his asthma, he will need to have spirometry performed at least twice a year along with pulmonary function tests obtained on average on a yearly basis. To monitor his response to his sleep treatment whether it be CPAP or BiPAP, he is likely to need a nocturnal pulse oximetry performed in his home on an every other year basis alternating with a formal sleep study within the laboratory on an every other year or every 24 month's basis. He will also likely require an echocardiogram to evaluate his pulmonary hypertension and the status of his right ventricle to determine if he does have evidence of right heart failure on an every 12 to 24 month basis . . .

(Cl. Ex. 5, pp. 117-118).

14. On March 3, 2003, Claimant saw Lawrence Repsher, M.D. at the emergency department of Exempla Lutheran Medical Center. Dr. Repsher stated,

> The patient has been evaluated and is followed at National Jewish Hospital by Lisa Meyer, MD, pulmonary disease. He has well documented primary alveolar hypoventilation. This has been suspected to be due to the cervical injury at least according to [Claimant], although since the respiratory control center is in the roof of the 4th ventricle, that is no where near the cervical spine, I don't understand this speculation. He has also been suspected of having left diaphragmatic paralysis. However, his SNIF tests and actual nerve conduction and muscle conduction studies of the diaphragm have been 'inconclusive.' At any rate, he has chronic CO2 retention but probably no intrinsic lung disease other than his reactive airways disease.

(R. Ex. F, pp. 925-926).

15. Dr. Repsher's impression included, *inter alia*, unusual neurologic symptoms and signs of unclear etiology; status post multiple orthopedic injuries related to work related injuries of a fall from a roof, stable; obstructive sleep apnea, on CPAP therapy; primary alveolar hypoventilation, "doubt any relationship to his cervical spine injury"; and possible but not documented left diaphragmatic paralysis.

16. Claimant continued to treat with Drs. Goldman, Maier, Repsher and various other physicians. On March 23, 2003 it was noted that Claimant was recently diagnosed as a diabetic. On November 7, 2007, Dr. Maier opined that Claimant developed pulmonary hypertension secondary to Claimant's central hypoventilation and hypoxemia, which was the result of his work injury and asthma.

17. Claimant has been diagnosed with somatic symptom disorder. Dr. Ron Carbaugh said of claimant, "In additional to the role of personality and unrelated psychosocial stressors on [Claimant's] presentation at this time, there are clinical signs as part of this pain psychology assessment that his 'symptom magnification' is on a conscious basis and related to compensability issues." (R. Ex. H, p. 955). In 2009, Dr. Robert Kleinman reported after interview and testing, "He has some magical thinking. This is seen in schizotypal personality, Schizotypal personality has some features of paranoia." (R. Ex. G, pp. 945, 949).

18. On September 18, 2013, cardiologist Douglas Martel, M.D. remarked, "[Claimant] is however morbidly obese with risk factors for CAD. His exertionally medicated hypoxemia despite supplemental oxygen could be an angina equivalent, but I suspect is more related to obesity hypoventilation syndrome." (R. Ex. J, p. 973). At the time of this evaluation, Claimant had a body mass index of 48.3, up 13 pounds from his prior visit with Dr. Martel. At one point, Claimant's BMI was 47.7, which Dr. Martel continued to opine was the cause of Claimant's medical issues.

19. In August and October 2016, Dr. Goldman noted that Claimant's work-related conditions and non-work related comorbidities were becoming "murky." He remarked that the work injury was certainly contributing to Claimant's left knee issues, but that the possible need for a total knee arthroplasty was likely outside the scope of the claim. Dr. Goldman's medical records from 2018 document Claimant's continued reports of various musculoskeletal complaints, including back, left hand, left shoulder, left knee and right knee complaints.

20. Claimant weaned himself off of opioids as of November or December 2018.

21. On March 21, 2019, Dr. Goldman noted that Claimant's left knee degenerative changes were likely substantially impacted by the work injury, but were also due to the aging process.

22. On October 16, 2019, Dr. Maier noted that Claimant had lost 79 pounds and reported some improvement in his breathing, but experienced continued issues.

23. On December 19, 2019, Dr. Goldman noted that he supported Dr. Maier's recommendations to include pulmonary hypertension as being a work-related condition in light of the central apnea and respiratory depression issues that have been considered claims related ever since Claimant negotiated his MMI and post-MMI status.

24. Dr. Goldman documented that Claimant had been prescribed benzoyl peroxide topical wash for his acne as well as selenium sulfite lotion, noting that Claimant takes this medication due to dermatitis around his CPAP mask and occasionally when he has dermatitis from his AndroGel. Dr. Goldman further noted that Claimant continued on 3 L of oxygen per minute at rest and 5L/mim with CPAP and up to 6L/min with exertion. Claimant remained on inhalers and on Combivent and Singulair and was continuing to use Flonase, Mucinex, Diltizaem and Nifedipine. He wrote,

> Due to his mildly elevated creatinine and increased GERD symptoms I have asked [Claimant] to utilize the ibuprofen sparingly, no more than 600 mg 1 tablet per day at most with food. He should only use it when his knee or back pain increased over a 6/10 level and he is not having any gastric symptoms. He may continue polyethylene glycol no more than once a day as long as his gastroenterologist concurs. We will repeat serum creatinine/chemistry and hemogram. [Claimant] will remain on his AndroGel 2 pumps per day, CBD (but I have discouraged the medical marijuana in light of his psychosocial diagnosis and medical condition complexity), MiraLAX once a day, vitamin D and B12, and ibuprofen 600 mg no more than once a day. He may continue to take melatonin 3 mg at bedtime but generally at this dosage no more than 2 out of every 3 weeks so as not to further depress pineal gland function endogenous melatonin secretion. Otherwise he will remain on medications as prescribed by his other physicians as well as his CPAP and oxygen supplementation.

(Cl. Ex. 2, pp. 20-21).

25. Claimant attended a follow-up visit with Dr. Goldman via telephone on August 10, 2020. Dr. Goldman noted that a July 20, 2018 consultation note from a Dr. Ku documented that Claimant's dysphagia and GERD were substantially due to opioid-induced gastro-paresis and esophageal dysmotility. Dr. Goldman noted that Dr. Babei's recent consultation supported that causation assessment. Dr. Goldman referenced a December 16, 2019 evaluation note from Dr. Dalabih who opined that Claimant's primary respiratory issues were due to obesity hypoventilation syndrome and not a work-related injury.

26. Respondents dispute the relatedness of Claimant's pulmonary and cardiac conditions. Respondents also request an order regarding what, if any, of Claimant's current medical treatment is reasonable, necessary and related to the work injury.

27. On August 10, 2020, Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. D'Angelo conducted a comprehensive review of Claimant's medical records and physically examined Claimant. Dr. D'Angelo found the following work-related diagnoses: cervical spine fractures; lumbar spine trauma; left knee trauma; left shoulder trauma; left hip acetabular fracture; rib fractures; multiple contusions; and secondary hypogonadism. She concluded that the following were non-work-related diagnoses: essential hypertension; obesity; type 2

diabetes; atypical chest pain; degenerative spine disease; degenerative joint disease; and asthma.

28. Dr. D'Angelo opined that Claimant no longer required any medical maintenance treatment as related to the work injury, including treatment for his musculoskeletal injuries and pulmonary conditions. Dr. D'Angelo noted that the pulmonary function tests performed at National Jewish Medical Center by Dr. Maier were not consistent with a severe restrictive pattern as one might anticipate with diaphragmatic paralysis. She stated that, furthermore, Claimant's obesity at the beginning and middle of his course of treatment might have caused the alveolar hypoventilation. Dr. D'Angelo concluded that she could not find a causal connection between Claimant's respiratory issues and the work injury, given what she perceived to be the lack of evidence for diaphragmatic paralysis. Dr. D'Angelo opined that Claimant's underlying and pre-existing asthma, pulmonary status, and acquired pulmonary hypertension were all causally unrelated to the work injury.

29. Claimant attended a follow-up evaluation with Dr. Maier on September 16, 2020. Claimant reported that he experienced no change in recent years and that continued to have all of the medical problems Dr. Maier had previously noted. Dr. Maier gave the following assessment, in pertinent part:

> 1) Chronic alveolar hypoventilation secondary to spinal cord injury which he sustained during his work injury which has resulted in hypoxemia, as well as central apnea, and clear worsening of obstructive airways disease.
>
> 2) Asthma, obstructive airways disease. These have been accepted as work-related conditions and clearly were markedly worsened after his injury in 1999. Prior to that he had had only mild asthma that had not required treatment and following his injury he had severe asthma that required multiple medications which he has continued to require to this day. These issues are well outlined in my evaluation of [Claimant] when I first started seeing him in 2000 throughout my notes in the early 2000 and more recently. On review of my notes it is clear that his spirometry at that time and ongoing has been out of proportion to his asthma that he had prior.
>
> 3) Central and obstructive sleep apnea, currently treated with CPAP and supplemental oxygen at night, which is also work related. Again prior to his injury while he had some obstructive sleep apnea it had been mild and he did not have evidence of chronic alveolar hypoventilation that we have documented over the years and that clearly was due to an (*sic*) caused by his injury from August 1999.
>
> 4) Pulmonary hypertension which is work-related as it is due to and a result of his chronic alveolar hypoventilation, hypoxemia, and central apnea with a medical degree of probability in my opinion and as documented in my notes dating back to 2000.
>
> * * *

7) Obesity with marked weight loss. His obesity has certainly been caused and/or contributed by his work-related diagnosis as he has been unable to exert himself and/or even move appropriately because of his severe injuries that he is sustained years ago. This certainly may have aggravated the above medical problems.

(Cl. Ex. 3, pp. 26-27).

13. Dr. Maier opined:

> 1. [I]t is still my opinion with a reasonable degree of marked medical that the above illnesses are and were work-related and were due to his severe injury that he sustained as a roofer while failing 2 flights years ago as outlined in my numerous prior notes dating back to 2000. Specifically he sustained a spinal cord injury and developed chronic alveolar hypoventilation as well as central apnea that have clearly caused and aggravated his prior history of very mild asthma and very mild sleep apnea and hypoxemia. I had outlined my recommendations dating back to 2000 and my notes as well as in the care plan dated January 24, 2003 in regards to [Claimant's] ongoing need for treatment for these medical conditions to include inhalers, treatment for central and obstructive sleep apnea, antibiotics for infections that he is at increased risk for as well as flares of his underlying disease, other testing including x-rays pulmonary, pulmonary function tests, echocardiograms as well as follow-up with other providers based on his ongoing problems. While certainly some improvement may be seen in some of these medical problems as he has lost some weight, interestingly his weight is similar to what it was when I evaluated him back in early 2000. This supports my ongoing medical opinion with a reasonable degree of medical that the medical problems he sustained due to his injury in 1999 are still in place and do to that same injury today. This has been incredibly hard for him because of his inability to move with his severe pain and has actually contributed to his weight gain over the years. The constellation of problems that he has including his chronic alveolar hypoventilation, central sleep apnea are due to his cervical spine injury from the fall and then in turn have resulted in pulmonary hypertension as well as worsening of a number of other problems as have been outlined over the years. His obstructive airways disease also from a historical standpoint and in my opinion with a reasonable degree of medical probability significantly worsened and became severe after

> his injury. I am happy to provide additional specific comments or address specific issues.

(Cl. Ex 3, p. 27).

30. Dr. Maier opined that Claimant required continued use of oxygen; inhalers; Singulair; treatment with Dr. Goldman; Flonase and alkolol nasal washes; weight management; follow-up with pulmonary hypertension team due to hypoventilation due to his work-related conditions of obstructive lung disease, central apnea and hypoxemia; a cardiologist follow up; and treatment for sleep apnea.

31. On June 3, 2021 Dr. Goldman issued a Special Report after reviewing Dr. D'Angelo's IME report. He disagreed with Dr. D'Angelo that all of Claimant's medical treatment was no longer reasonable, necessary and related to the work injury. He did, however, note that he shared Dr. D'Angelo's "concern and skepticism" regarding the relationship of Claimant's pulmonary issues to the work-related injury. Dr. Goldman explained,

> In reviewing and re-reviewing his records, I have been able to determine that predominantly his pulmonary, cervical, low back, left knee and left shoulder and in addition to opioid-induced GERD, gastroparesis, constipation, and hypogonadism have been most consistently documented both at the time of [Claimant's] injury and ever since as being ongoing and accepted work-related conditions. From the very beginning of assumptions of [Claimant's] care I was skeptical in terms of how much of his pulmonary issues were specifically due to a centrally mediated spinal cord injury in the absence of other obvious objective signs of upper cervical/brainstem compromise in addition to his already overweight to obese status and pre-existing history of reactive airway disease; nevertheless, Dr. Steig…and the parties to this claim all agreed to include [Claimant's] pulmonary complaints as managed by Dr. Meier at National Jewish as part of his settlement. I have therefore supported and relied up Dr. Meier's care of [Claimant's] pulmonary conditions and complications thereof and within the context of this claim accordingly.

(R. Ex. D, p. 851).

32. Dr. Goldman further wrote,

> Although there are clearly worsening, non-work-related, age-related conditions impacting [Claimant's] current presentation and work-related maintenance care, there has never been a lapse in his consistent complaining of symptoms relative to those work-related conditions that were accepted by [Insurer] at the outset of this claim, that I have consistently documented for approximately 20 years, and have even been noted as being claims related by Dr. D'Angelo.

(Id. at p. 855).

33. Dr. Goldman opined that Claimant's GERD, gastroparesis and constipation were likely opioid-initiated and that such conditions were ongoing and unrelenting sequela of Claimant's work injury. He further noted,

> I am well aware [that Claimant's] obesity and the aging process are also highly contributory to particularly his low back, knee, GERD, and hypogonadal conditions as well as likely to the obstructive components of his sleep apnea; nevertheless, there is also no doubt that his approximately 2 decades of chronic opioid management was a significant aggravating and/or accelerating work-related treatment leading to additional medically necessary work related treatment of these conditions.

(Id. at p. 852).

34. On September 7, 2021, Dr. D'Angelo issued an addendum to her IME report after reviewing Dr. Goldman's June 3, 2021 medical report. Dr. D'Angelo reiterated her opinion that Claimant's pulmonary issues are not causally related to the work injury. She explained that, if Claimant did have centrally mediated hypoventilation syndrome due to a spinal cord injury, she would anticipate Claimant also having concomitant physical signs of upper cervical and or brainstem dysfunction, which he does not. Dr. D'Angelo noted that Claimant has issues with obesity which is known to be a direct cause of hypoventilation, and that Claimant had pre-injury airways spasms and reactivity, which are unrelated to the work injury. Dr. D'Angelo continued to opine that Claimant's ongoing medical treatment for his cardiopulmonary condition, as well as any need for supplemental oxygen, is not related. She noted that Claimant's current issues of diabetes and obesity are significant causes of gastrointestinal concerns in patients of Claimant's age.

35. Dr. D'Angelo testified by deposition on December 23, 2021. Dr. D'Angelo testified on behalf of Respondents as a Level II accredited expert in internal medicine. Dr. D'Angelo testified consistent with her IME reports and continued to opine that Claimant's current medications and treatment are not reasonable, necessary and related to his August 1999 work injury. Dr. D'Angelo testified that she did not see any evidence in the medical records of a brain or spinal injury that caused hypoventilation. She further testified that she did not see any evidence of a left hemidiaphragm collapse, stating that the x-rays and CT scans did not demonstrate any findings of unilateral diaphragm palsy. Dr. D'Angelo testified that the phrenic nerve controls the diaphragm, whose roots from C3, C4 and C5, and there was no evidence of any disruptions in the nerves at those levels. She explained that she did not see findings consistent with unilateral diaphragmatic paralysis on any of Claimant's neck MRIs.

36. Dr. D'Angelo testified that Claimant underwent a sleep study in July 1990 which showed mild obstructive sleep apnea prior to the work injury and severe baseline hypoxemia as well as severe oxygen desaturation. Dr. D'Angelo explained that obesity-

related hypoventilation is very common in patients who have BMIs in the mid-30s to high 40s, such as Claimant.

37. Dr. D'Angelo explained the purpose of each of Claimant's current medications and/or treatments and gave her opinion as follows:

a. Albuterol sulfate, a bronchodilator used for treatment of asthma and/or COPD. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. Dr. D'Angelo explained that Claimant had a preexisting history of asthma and medications for this condition before the work injury and, to her knowledge, has not been diagnosed with COPD.

b. Rabeprozole/Aciphex – a protein pump inhibitor used to decrease the acidity of gastric acid. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. She explained that although it was initially believed that Claimant's GERD was due to his opioid medication, since Claimant has not taken opioids for three years, his current GERD symptoms would not be related to the opioids taken under this claim. She testified to a different theory that Claimant's GERD was due to inappropriate muscle spasm of the esophagus caused by the spinal cord or the brain. Dr. D'Angelo opined that there was no physiological rationale for Claimant's GI issues to be considered work-related.

c. Combivent – a two-component inhaler, for bronchospasm that can also inhibit secretions. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

d. Serevent diskus/Salmeterol – a bronchodilator, long-acting beta agonist for decreasing bronchospasm. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

e. Prednisone – a steroid that decreases inflammation. Dr. D'Angelo opined that this medication is no longer reasonable, necessary or related, as it caused side effects for Claimant.

f. Flovent – a steroid inhaler that decreases inflammation in asthmatics to help them better oxygenate. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

g. Ibuprofen – an anti-inflammatory pain and fever reliever. Claimant is not using ibuprofen every day. Claimant takes this medication for pain. Dr. D'Angelo opined that Claimant's degenerative spine disease and degenerative joint disease are not work related and the ibuprofen is not reasonable, necessary or related to Claimant's work injury.

h. Polyethylene glycol – a laxative prescribed by Claimant's gastroenterologist Dr. Babaei. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. She testified that, in the absence of opioids being taken under this claim, there is no clear purpose for this drug as related to the work injury.

i. Benzoyl peroxide wash - dermatologic for rashes. Claimant testified that he uses this because of skin irritation from his oxygen and CPAP mask. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as medications to resolve the effects of Claimant's pulmonary treatment is unrelated to the claim.

j. Selenium sulfide - rrescribed for skin fungal infections after antibiotics. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as it is also associated with the uses of the CPAP and oxygen, which she deems unrelated to the work injury.

k. Azithromycin - antibiotics for respiratory tract and lower respiratory tract infections. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury.

l. Diltiazem – a calcium channel blocker used as an antihypertensive. Dr. D'Angelo opined that this medication is not related, reasonable, or necessary at this time to maintain MMI for the work injury of August 9 1999. Dr. Martel attributes Claimant's cardio conditions to his obesity.

m. CPAP machine and associated hardware and supplies. Dr. D'Angelo opined that this medical equipment is not related, reasonable, or necessary at this time to MMI for the work injury. She testified that, based on the 1990 sleep study, Claimant had issues with sleep apnea prior to the work injury. She further testified that Claimant has been and continues to be obese, which is a well-known cause of sleep apnea.

n. Medication for cough or chest congestion. Dr. Maier opines that every bacterial or viral infection claimant experiences is due to claimant's fall in 1999, ignoring any other possible intervening exposure or cause. Based upon her opinion that the pulmonary conditions are not work-related, Dr. D'Angelo opined that this medical equipment is not related, reasonable, or necessary to maintain Claimant at MMI for the work injury.

o. Nifedipine – a calcium channel blocker being used for dysphagia, or painful swallowing due to esophageal muscle spasm, prescribed by gastroenterologist Dr. Babaei. Dr. D'Angelo opined that this medication is not related, reasonable, or necessary to maintain MMI for the work injury. Dr. D'Angelo testified that she did not see any physiological connection, reiterating her opinion that Claimant's GERD is unrelated to the work injury.

p. Oxygen and oxygen related equipment. Dr. D'Angelo noted that a 1990 sleep study noted at baseline, Claimant had hypoxia. Dr. D'Angelo opined that this medical equipment is not related, reasonable, or necessary at this time to maintain MMI for the work injury, as Claimant's pulmonary condition is due to his pre-existing co-morbidities.

q. Treatment for hypertension. Dr. D'Angelo testified that there is no link between Claimant's injuries and essential hypertension. Dr. D'Angelo opined that this medical treatment is not related, reasonable, or necessary at this time to maintain MMI for the work injury.

r. Treatment for diabetes. Dr. D'Angelo opined that this medical treatment is not related, reasonable, or necessary at this time to maintain MMI for the work injury.

38. Regarding Claimant's orthopedic issues, Dr. D'Angelo testified that early records do not show fractures at the levels that now appear to be the source of cervical complaints. She explained that Claimant's left shoulder was part of his initial work injury. She noted that a surgery consult was performed, and the only treatment available at this time would be a reverse left shoulder joint replacement. Dr. D'Angelo testified that, due to Claimant's underlying medical conditions, this was not pursued, and Claimant indicated he did not want this surgery. There is no current left shoulder treatment recommended. She stated that Claimant's left knee was a part of his original work injury and there is no current treatment recommended for his left knee.

39. Dr. Maier reviewed Dr. D'Angelo's deposition testimony and issued a letter dated January 19, 2022. She wrote,

> I have reviewed a deposition by Dr. D'Angelo who claims that [Claimant] does not have any work related lung diseases. This is contrary to the evidence that not only I but also my colleagues here at National Jewish Health in my division and in our pulmonary division have provided. From a historical standpoint whether [Claimant] had asthma as a child or not, he was not requiring regular use of inhalers prior to his injury and did require them on a regular basis to control his lung disease after his hospitalizations and his injury. He also has required them ever since for treatment of asthma that was clearly at the least aggravated by his prolonged hospitalization and workplace accident. In addition, he underwent evaluation here by myself and with one of our world renown neuromuscular pulmonary experts Dr.

> Barry Make who confirmed my opinion that [Claimant] had chronic alveolar hypoventilation and central apnea due to and consequential to his accident and injury which resulted in permanent damage to his cervical spine. Specifically, Dr. Make and I both opined that he sustained a spinal cord injury and developed chronic alveolar hypoventilation as well as central apnea that were clearly caused and aggravated compared to his prior history of very mild asthma and very mild sleep apnea and hypoxemia before his injury. Again he was not requiring ongoing treatment and has required significant and sustained treatment since his injury. Thus, it is still my opinion with a reasonable degree of medical probability that his respiratory illnesses are and were work-related and were due to his severe injury that he sustained as a roofer while falling 2 flights in 1999 as outlined in my numerous prior notes dating back to 2000.
>
> * * *
>
> While certainly some improvement may be seen in some of these medical problems as he has lost some weight, interestingly his weight is similar to what it was when I evaluated him back in early 2000. This supports my ongoing medical opinion with a reasonable degree of medical that the medical problems he sustained due to his injury in 1999 are still in place and due to that same injury today. This has been incredibly hard for him because of his inability to move with his severe pain and has actually contributed to his weight gain over the years. The constellation of problems that he has including his chronic alveolar hypoventilation, central sleep apnea are due to his cervical spine injury from the fall and then in turn have resulted in pulmonary hypertension as well as worsening of a number of other problems including aggravation of asthma and causing and or aggravating gastroesophageal reflux disease. His obstructive airways disease also from a historical standpoint and in my opinion with a reasonable degree of medical probability significantly worsened and became severe after his injury.

(Cl. Ex. 6, pp. 120-121).

40. Dr. Goldman testified by deposition on January 25, 2022. Dr. Goldman testified as a Level II accredited expert in physical medicine, rehabilitation and IMEs. Dr. Goldman testified that he initially referred Claimant to Dr. Maier and that he has deferred to Dr. Maier regarding Claimant's pulmonary condition due to Dr. Maier's significant amount of expertise in that area and Claimant's particular diagnosis. Dr. Goldman continues to support Dr. Maier's recommendations to include pulmonary hypertension as being a work-related condition and continues to defer to Dr. Maier regarding whether certain medications and treatment remain reasonable, necessary and related to Claimant's work injury. Dr. Goldman testified that, although Claimant has developed other complications from a pulmonary perspective, "[t]hey can all be considered accelerated or aggravated because of the work-related decreased ventilatory and oxygen capacity that he's demonstrated consistently ever since [the work injury], in the absence of any other injuries

to his brain or his neck or lungs or phrenic nerve of which I am aware." (Goldman Dep. 26:11-16).

41. Dr. Goldman testified that Claimant's current medications remain reasonable, necessary and related. He testified that, with respect to the pulmonary medications, anything beyond what Claimant was taking before his work injury would likely represent a cascading set of complications from the injury of 1999 that depressed his ventilatory capacity…" (Goldman Dep. 15:4-9). He remarked that Claimant's presentation has been unwavering in terms of his breathing and that has played out just as Dr. Maier has outlined. Dr. Goldman further testified that, but for the work injury, he doubts Claimant would be on these medicines, noting that some of the inhalers represent a "substantial escalation" in dosage and frequency compared to Claimant's usage prior to the work injury.

42. Dr. Goldman testified that Claimant represents a rather unique case in terms of types of situations he generally sees. He explained that he has observed Claimant consistently over the course of 20 years and during that time Claimant's respiratory rate did not change with the use of opioids. Regarding Claimant's orthopedic issues, Dr. Goldman opined that Claimant continued to experience work-related orthopedic issues, but at this time, due to his comorbidities, further treatment such as surgery is too dangerous and thus not recommended. Dr. Goldman explained that Claimant's opioid-related GERD is likely work related. He testified that gastrointestinal issues usually improve once a patient stops taking opioids. He explained, however, that this was not the case for Claimant, considering his age and the extensive amount of time Claimant was on opioids. Dr. Goldman opined that Claimant's obesity was in part self-imposed and in part not self-imposed, noting that Claimant had attempted to be more active than many other chronic pain patients he'd seen. Dr. Goldman acknowledged that obesity can cause sleep apnea, cardiac issues, hypoxemia, joint pain and pulmonary hypertension.

43. Dr. Goldman testified that Claimant's left shoulder, neck, low back, left knee and decreased ventilatory capacity, hypoxemia have been ongoing issues not associated with reinjury or other non-work related issues. Dr. Goldman further testified that, although [Claimant] has developed other complications from a pulmonary perspective, the work injury accelerated or aggravated Claimant's respiratory and pulmonary conditions, which has been demonstrated consistently ever since the work injury. Dr. Goldman testified that there is objective evidence of post traumatic degeneration in Claimant's spinal cord.

44. On cross-examination, Respondents' counsel addressed references in Dr. Goldman's records that Insurer had purportedly waived their right to argue the reasonableness, necessity and relatedness of medical benefits at this time. Dr. Goldman clarified that he was not indicating Respondents waived their right to contest liability, and that to his knowledge there was no settlement agreement between Claimant and Respondents. He stated that it was his understanding pulmonary treatment would be included in Claimant's maintenance plan. Dr. Goldman testified,

> My position, and I think I put it in even to my last report of June of 2021 that, you know, I understand the controversies here, but to override the precedent of my treating this patient in good faith, and I think in a fairly cost effective and safe way compared to how most of these cases go, that we would need a much higher level of pulmonary and probably neurological independent medical examination expertise to be persuasive for me not to continue to treat [Claimant] or support his treatment in good faith.

(Goldman Dep. 30:4-13).

45. When asked if he continued to be skeptical about Dr. Maier's theory regarding the relatedness of Claimant's pulmonary condition, he testified:

> I would say now having reread her original consult in preparation for today's testimony that I think that she makes the most medically probable case for why [Claimant] required ongoing oxygen since this injury and his need thereof has been due to this injury as a matter of exclusion. Yes, I understand the controversies, and my skepticism is a healthy one, but I think my position has always been, we'll need to have someone of equal or greater stature as a pulmonologist and perhaps a neurologist to allow me to contravene or contradict Dr. Maier's opinion in this regard for the last 20 years.

(Goldman Dep. 35:15-25, 36:1).

46. Claimant testified at hearing that his current medications and treatment assist with his respiratory, cardiopulmonary, and gastrointestinal issues. He explained that he requires dermatologic washes due to rashes produced by his CPAP and oxygen machines, as well as the use of certain related antibiotics. Claimant testified that he was weighed approximately 256 lbs. prior to the injury, and over the course of the last several years has fluctuated up to 335 lbs. Claimant currently weighs approximately 276 lbs. Claimant's symptoms have remained relatively the same throughout the course of his maintenance treatment.

47. The ALJ finds the opinion and/or testimony of Drs. Maier and Goldman, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions/testimony of Drs. D'Angelo, Martel and Repsher.

48. Respondents failed to prove by a preponderance of the evidence medical treatment is no longer reasonable, necessary and related to Claimant's work injury such that they are permitted to withdraw their admission of liability.

49. Claimant proved by a preponderance of the evidence that the current medications at issue are longer reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawal of an Admission

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-

838-01 (ICAO, Oct. 1, 2013). The statute serves the same function in regard to maintenance medical benefits. Notably, where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden pursuant to §8-43-201(1), C.R.S. to prove that the treatment is not related and reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the claimant's condition. See *Salisbury v. Prowers County School District*, *supra*.

As acknowledged by Dr. Goldman, Claimant presents a unique case and the combination of his pre-existing conditions, severity of the work injury, and passage of time resulting in other non-work related conditions complicate the determination of what medical treatment, if any, remains reasonable, necessary and related to Claimant's August 9, 1999 work injury. Respondents do not argue, nor is there any evidence, that an intervening injury severed the causal connection between the injury and Claimant's disability and need for treatment. Here, the relevant consideration is not whether the work injury is the sole cause of Claimant's need for treatment but, rather, if the work injury remains a significant cause of Claimant's need for treatment. *See, e.g., H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *In re Claim of Serrano*, WC No. 5-112-470-002 (ICAO, May 27, 2021.

Respondents argue that there is insufficient evidence supporting Dr. Maier's opinions regarding the relatedness of Claimant's respiratory and cardiopulmonary conditions, and that Claimant's ongoing need for treatment is the result of non-work related pre-existing conditions. Respondents further contend that no further treatment is reasonable or necessary for Claimant's work-related orthopedic conditions. As found, the preponderant evidence fails to demonstrate that medical maintenance benefits are no longer reasonable, necessary or related to the work injury.

It is undisputed that Claimant has a pre-existing history of obstructive lung disease/asthma, obstructive sleep apnea and obesity. Dr. Maier addressed each of these conditions in her initial evaluation and multiple subsequent reports. Both Claimant and Dr. Maier acknowledge that, prior to the work injury, Claimant was using inhalers to manage his asthma. However, there is no evidence refuting Claimant's report and Dr. Maier's determination that, leading up to the work injury, Claimant's asthma was well controlled without the need for additional treatment. Dr. Maier credibly opined that, while Claimant had some obstructive sleep apnea prior to the work injury, it was mild and there was no evidence of chronic alveolar hypoventilation that was noted soon after the work injury and consistently thereafter.

Dr. Maier addressed Claimant's obesity as a potential cause of his hypoventilation syndrome but, based on her testing, credibly differentiated between obesity hypoventilation syndrome and hypoventilation syndrome resulting from a neuromuscular issue as in Claimant's case. Claimant was obese at the time of the work injury but did not require the significant respiratory and pulmonary treatment that he did after the work injury. Despite losing and gaining weight throughout the course of his treatment, Claimant has continued to require ongoing respiratory and cardiopulmonary treatment, as noted by Drs. Maier and Goldman. Thus, while other non-work related conditions (pre-existing

respiratory conditions, obesity, age) may be contributing to Claimant's need for treatment, the preponderant evidence establishes that the work injury was and remains a significant cause of Claimant's ongoing symptoms and need for treatment.

Dr. D'Angelo opines that Claimant's continued gastrointestinal issues and need for treatment are no longer work related, as Claimant ceased taking opioids over three years ago. While Dr. Goldman acknowledges that it typically would be expected for opioid-induced gastrointestinal issues to subside with the cessation opioid use, he credibly explained that, with age and Claimant's chronic opioid use over the course of 20 years, the opioids are likely a significant aggravating factor in Claimant's gastrointestinal issues. Regarding Claimant's orthopedic issues, Dr. Goldman credibly testified that Claimant's neck, left shoulder, left knee and low back conditions remain work-related; however, considering his comorbidities, there is no further treatment being recommended at this time.

Respondents further argue that Dr. Goldman's opinion that Respondents are liable for Claimant's pulmonary complaints is not based on medical principles, but instead on his assertion that Respondents legally waived the right to argue against their liability. Dr. Goldman clarified in his deposition testimony that it was not his belief that Respondents waived any right to challenge the maintenance medical treatment. The ALJ is not persuaded that Dr. Goldman's opinion is solely rooted in trepidation about "overriding" the precedent of Claimant's prior treatment. Dr. Goldman credibly testified that Dr. Maier's opinion regarding Claimant's cardiopulmonary conditions and need for treatment is the most medically probable. He specifically opined that additional pulmonary and possibly neurological examinations would need to take place for him to conclude that Claimant's medical treatment is no longer reasonable, necessary and related. Dr. Goldman very clearly continues to defer to Dr. Maier's opinion and recommendations based on her expertise and the medical findings. Dr. Maier has credibly and persuasively explained her findings and basis for her conclusions in multiple reports. Both Drs. Maier and Goldman, who have treated Claimant for over 20 years, continue to opine that there remains reasonably necessary medical treatment to relieve the effects of Claimant's work injury and maintain Claimant at MMI.

Based on the totality of the evidence, Respondents failed to prove it is more probable than not no further medical treatment is reasonable, necessary or related to Claimant's work injury. The preponderant evidence establishes that the work injury remains a significant cause of Claimant's respiratory, cardiopulmonary, orthopedic and gastrointestinal issues and need for ongoing treatment. Accordingly, Respondents are not permitted to withdraw their admissions of liability admitting for maintenance treatment.

Medical Treatment

The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits

is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

As discussed, Claimant experiences ongoing respiratory, cardiopulmonary, orthopedic and gastrointestinal issues related to the work injury. The preponderant evidence demonstrates that he continues to need treatment to relieve the effects of his injury and to prevent deterioration of his condition. Since sustaining the work injury, Claimant's ATPs have managed Claimant's symptoms with medications, oxygen and the use of a CPAP machine. Claimant credibly testified, and the medical records support, that this treatment has been helpful in maintaining Claimant's condition. Drs. Goldman and/or Maier have credibly opined that the medications at issue are related to Claimant's work injury and reasonably necessary to maintain Claimant at MMI.

Accordingly, the ALJ concludes that the following treatment is reasonable, necessary and related to relieve and prevent the deterioration of Claimant's respiratory and cardiopulmonary conditions: (1) Albuterol sulfate; (2) Combivent; (3) Serevent diskus/Salmeterol; (4) Flovent; (5) Prednisone; and (6) Diltiazem; (7) Alkalol; (8) Oxygen and related equipment; and (9) CPAP machine and related equipment.

Dr. Maier credibly opined that Claimant was likely to experience aggravations of respiratory diseases due to his condition, necessitating the use of antibiotics and/or cough and chest medicines. While other non-work related causes could contribute to aggravations of respiratory diseases, the preponderant evidence does not establish that Claimant's work-related condition is not a significant causal factor as well. Accordingly, Azithromycin and cough and chest medicines are deemed reasonable, necessary and causally related to Claimant's work injury. Claimant has developed skin rashes due to the use of oxygen and CPAP machines, as well as antibiotics, all related to the work injury. Benzoyl peroxide wash and Selenium sulfide, used to treat these effects, are reasonable, necessary and causally related to the work injury.

As discussed above, Dr. Goldman credibly opined that Claimant continues to experience gastrointestinal issues as a result of the work injury. As such, Raberprozole/Achiphex, Polythylene glycol, and Nifedipine prescribed to treat Claimant's related gastrointestinal symptoms are reasonable and necessary.

Lastly, Claimant continues to take ibuprofen for its anti-inflammatory and pain relieving properties. The ALJ acknowledges that there are non-work related factors contributing to Claimant's orthopedic pain, including age and natural degeneration, as well as pain resulting from non-work related body parts (i.e. the right shoulder). Nonetheless, the effects of the work related injury continue to be a significant cause of Claimant's pain, necessitating the use of ibuprofen. Accordingly, ibuprofen is deemed reasonable, necessary and related maintenance treatment.

To the extent Claimant seeks maintenance treatment for his diabetes, the preponderant evidence does not establish that any treatment for diabetes is reasonable, necessary and related to the work injury.

Claimant's Request for Costs Pursuant to §8-42-101(5), C.R.S.

Section 8-42-101(5), C.R.S. provides:

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

Claimant requests cost for the deposition of L. Barton Goldman, M.D. which was taken on January 25, 2022 and necessitated by Respondents' Application for Hearing dated October 4, 2021 requesting that maintenance care be discontinued.

Here, Respondents contest Claimant's entitlement to ongoing medical maintenance benefits, seeking an order permitting them to withdraw their FALs admitting for general maintenance care or, in the alternative, specifying what treatment remains reasonably necessary and related to the work injury. Respondents have not denied nor failed to pay for any requested authorized treatment recommended by an ATP. Claimant continued to receive the recommended treatment under the claim throughout Respondents' challenge of their liability for the treatment. As no recommended treatment has been unpaid, Respondents are not liable for reasonable costs incurred in pursuing the medical benefit under §8-42-101(5), C.R.S.

ORDER

1. Respondents failed to prove by a preponderance of the evidence that maintenance medical treatment is no longer reasonable, necessary and related to Claimant's August 9, 1999 work injury. Respondents' request to withdraw their admission of liability is denied and dismissed.

2. Respondents are liable for the following medical treatment recommended by Claimant's ATPs and deemed reasonable, necessary and related to the August 9, 1999 work injury: (1) Albuterol sulfate; (1) Combivent; (3) Serevent diskus/Salmeterol; (4) Flovent; (5) Prednisone; (6) Diltiazem; (7) Alkalol; (8) Oxygen and related equipment; (9) CPAP machine and related equipment; (10) Azithromycin and cough and chest medicines; (11) Benzoyl peroxide wash; (12) Selenium sulfide; (13) Raberprozole/Achiphex; (14) Polythylene glycol; (15) Nifedipine; and (16) Ibuprofen.

3. As stipulated to by the parties, Fluticasone, Ferritin and Testosterone are no longer reasonable, necessary or related to Claimant's work injury.

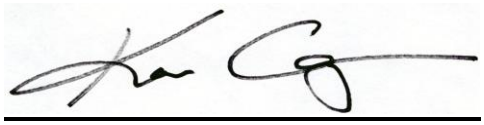
4. Respondents proved by a preponderance of the evidence that Claimant's diabetes and need for treatment is unrelated to the work injury.

5. Claimant's request for reasonable costs under Section 8-42-101(5), C.R.S. is denied and dismissed.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondents prove Claimant's impairment rating and associated PPD award should be apportioned based on the rating Claimant received in a prior workers' compensation claim?
- Did Claimant prove the admitted 17% scheduled ratings should be "converted" to the equivalent 10% whole person rating?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Disfigurement.
- The parties stipulated to an increased AWW of $881.58 effective January 1, 2022.

FINDINGS OF FACT

1. Claimant works a heavy equipment operator for Employer's Road and Bridge Department. He suffered an admitted injury to his right shoulder on February 21, 2020 while shoveling asphalt.

2. An MR arthrogram on May 14 2020 showed a right posterior labral tear and possible anterior extension of a SLAP tear.

3. Dr. Robert Hunter performed a Reverse Bankart posterior labral reconstruction on November 18, 2020. The anterior labrum was stable and intact.

4. Claimant continued to have problems with his shoulder after surgery, so he sought a second opinion from Dr. David Weinstein. Dr. Weinstein concluded Claimant's persistent symptoms were primarily related to inflammation of the rotator cuff, glenohumeral joint, and biceps.

5. On July 8, 2021, Dr. Weinstein performed a right arthroscopic subacromial decompression, extensive glenohumeral debridement with synovectomy, and a right open biceps tenodesis revision.

6. Claimant participated in several months of PT. At his final PT session on November 22, 2021, the therapist noted "good strength and PROM right shoulder despite persistent symptoms reported." No further sessions were scheduled, pending a follow-up appointment with Dr. Weinstein.

7. Claimant had his final appointment with Dr. Weinstein on November 24, 2021. Dr. Weinstein noted diffuse tenderness over the scapular rotators and pectoralis major, and focal tenderness over the right biceps and triceps. Claimant had no neck pain

and full cervical ROM. Examination of the right shoulder showed reduced range of motion, but no sign of impingement or instability and good improvement in strength. Dr. Weinstein opined Claimant's rotator cuff and biceps had improved following surgery, and his residual symptoms were primarily related to right upper extremity myofascial inflammation. He gave Claimant a prescription for Voltaren gel (NSAID) with no refills. Dr. Weinstein opined Claimant was at MMI. He stated, "I do not see any other treatment that would be beneficial at this time, other than continuing his home exercises, and the use of anti-inflammatory medication. I told the patient even if he has pain, he is doing no harm as this is due to the myofascial component."

8. Claimant completed a Functional Capacity Evaluation (FCE) on January 7, 2022. He reported ongoing right shoulder pain, reduced ROM, and loss of strength, and sleep disturbance because of pain. The FCE showed Claimant can work at the light exertional level with no overhead reaching with the right arm, no crawling, and no climbing ladders.

9. Claimant's primary ATP, Dr. Thomas Centi, put Claimant at MMI on January 7, 2022 after he completed the FCE. Physical examination showed point tenderness with palpation to the anterior and lateral capsule and "somewhat limited" shoulder ROM. Dr. Centi provided a right shoulder impairment rating of 17% extremity/10% whole person. Dr. Centi opined Claimant required no maintenance treatment and released him from care.

10. Respondents filed a Final Admission of Liability (FAL) on January 13, 2022 admitting for the 17% scheduled extremity rating assigned by Dr. Centi. The FAL denied medical benefits after MMI.

11. Claimant timely objected to the FAL and requested a hearing. Claimant endorsed "Permanent Partial Disability Benefits" on the Application for Hearing.

12. Respondents filed a timely Response to Application for Hearing on February 16, 2022. Respondents endorsed "apportionment" as an affirmative defense to Claimant's request for additional PPD benefits.

13. Claimant had a prior work-related injury to his right shoulder on March 12, 2006, while working for Employer. His diagnoses from that injury included rotator cuff tendinosis, impingement, and a labral tear. Claimant underwent multiple right shoulder surgeries for the 2006 injury. The first surgery was a subacromial decompression, bursal resection, and debridement of the posterior labrum. The second surgery was an arthroscopic rotator cuff repair and distal clavicle resection. Claimant also had a biceps tenodesis related to the 2006 work accident.

14. Claimant underwent a DIME with Dr. Thomas Higginbotham on June 17, 2009. Dr. Higginbotham's physical examination showed persistent tenderness to palpation over the AC joint, the coracoid process, and the bicipital grove. Dr. Higginbotham assigned a rating of 22% upper extremity/13% whole person for the right

shoulder. The rating was based on shoulder ROM deficits combined with 10% for the distal clavicle resection and subacromial decompression.

15. Respondents filed a FAL on July 16, 2009 admitting for the 22% extremity rating assigned by the DIME. For unknown reasons, and despite being represented by counsel, Claimant did not challenge the FAL and seek compensation based on the 13% whole person equivalent rating.

16. Dr. Nicholas Olsen performed an IME for Respondents on June 13, 2022. The significant findings on physical examination were tension and pain with deep palpation of the supraspinatus and infraspinatus, pain over the biceps tendon attachment, and reduced shoulder ROM. Dr. Olsen agreed with Dr. Weinstein and Dr. Centi that Claimant needs no maintenance care besides continuing his home exercise program. Dr. Olsen opined the rating from Claimant's prior injury needs to be apportioned from his current impairment, although he did not have the records available to perform the computation.

17. Claimant credibly testified his injury causes pain in the anterior and lateral aspect of his right shoulder. This testimony is corroborated by clinical findings documented in the medical records.

18. Claimant also testified he experiences pain in his right scapula and right trapezius, extending to his neck. He testified these symptoms limit his ability to perform various activities such as reaching, lifting, and driving. Claimant conceded he never mentioned scapular pain to Dr. Olsen or any treating provider. Multiple providers documented a lack of neck symptoms and full cervical range of motion. There is no credible evidence of trapezius pain in the medical records at or near MMI.

19. Respondents proved Claimant previously received a PPD award for a permanent impairment rating for the "same body part." The prior impairment from the 2006 injury must be subtracted from the current impairment. Because the prior rating was higher than the current rating, the compensable rating from the 2020 injury is 0%.

20. Claimant's request for "conversion" of the rating is moot.

21. Claimant failed to prove he needs additional medical treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required.

22. Claimant has injury-related surgical scarring about his right shoulder consisting of: (1) a 2-inch long by ¼ inch wide surgical scar; (2) two ½-inch diameter arthroscopic portal scars; and (3) a 1-inch by ½ inch surgical scar on the right anterior axilla. The ALJ finds Claimant should be awarded $1,400 for disfigurement.

CONCLUSIONS OF LAW

A. The issue of apportionment is not closed

Claimant asserts the issue of apportionment is closed by the FAL because his request for hearing was limited to the issue of "conversion," and therefore did not "open the door" for a broader challenge to the PPD award. The ALJ disagrees with this argument. Claimant's February 10, 2022 Application for Hearing specifically endorsed the issue of "Permanent Partial Disability benefits." The sub-issue of "whole person conversion" is subsumed by the broader issue of "PPD benefits." Indeed, the conversion issue only impacts the amount of PPD benefits to which a claimant is entitled. Claimant's separate reference to "conversion" in the "other issues" section of the application was not necessary keep PPD open, nor did it otherwise limit the effect of checking the box for "PPD benefits." Under Colorado's "notice pleading" regime, checking a box on the application for hearing is sufficient to prevent closure of that issue. *E.g., Command Communications, Inc. v. Fritz Companies*, 36 P.3d 182 (Colo. App. 2001) ("Colorado has a liberal notice pleading rule"); *Calkins v. DFC Ceramics, Inc*., W.C. No. 3-631-704 (September 18, 1992). Because the issue of PPD is not closed, Respondents may defend the claim for additional PPD benefits on any basis appropriate under the circumstances, including apportionment for a prior rating. *E.g*., *Barela v. CMHIP*, W.C. No. 4-842-938-03 (July 29, 2013); *Franco v. Denver Public Schools*, W.C. No. 4-818-579-01 (April 23, 2013); *Fausnacht v. Inflated Dough, Inc*., W.C. No. 4-160-133 (July 20, 1999).

B. Respondents proved apportionment is required

Section 8-42-104(5)(a) provides that a claimant's PPD award "shall be reduced" if the claimant "has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under [the Act]." The statute requires that the "the permanent medical impairment rating applicable to the previous injury" be subtracted from the "permanent medical impairment rating for the subsequent injury to the same body part." Apportionment is an affirmative defense that the respondents must prove. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Bradford v. Nationsway Transport Service*, W.C. No. 4-349-599 (March 16, 2000).

As found, Respondents proved Claimant had a previous impairment to the "same body part" in his 2006 claim for which he received "an award." First, from a basic "common sense" perspective, the injuries and impairments in both cases affected Claimant's "right shoulder." More important, there was substantial overlap between the specific pathology and surgical procedures in both claims. Both injuries resulted in surgery directed to the posterior labrum. Both required subacromial decompressions. Both required a biceps tenodesis. The impairment ratings for both injuries were primarily based on right shoulder range of motion deficits. Additionally, the only physician to address the issue (Dr. Olsen) opined apportionment of the prior rating is required.

Claimant's argument that apportionment is precluded because he was only paid for a scheduled rating in the 2006 claim is unpersuasive. The purpose of the apportionment statute is to prevent claimants from being paid twice for the same

impairment. *King v. Starbucks*, W.C. No. 4-802-142 (March 28, 2011). It is unlikely the General Assembly intended to create an exception whereby claimants with shoulder injuries can receive two awards for the same shoulder simply by characterizing one impairment as scheduled and the other as whole person.

Admittedly, the rating for the 2006 injury included a diagnosis-based component for the distal clavicle resection, which has no analogue in the rating for the 2020 injury. But the current version of the apportionment requires that the prior "rating" be subtracted from the current "rating." It provides no discretion to parse the components of the underlying "impairment" when applying apportionment. *Compare Nunez-Talavera v. Pipeline Industries, Inc*., W.C. No. 4-679-964 (January 4, 2008) (decided under previous version of the statute that required apportionment of previous "impairment," rather than the prior "rating").

Claimant was previously compensated for an impairment of his right shoulder. Therefore, Respondents are entitled to apportionment. Because his prior rating of 22% extremity/13% whole person was higher than 17% extremity/10% whole person rating from the 2020 claim, Claimant is entitled to no additional PPD benefits.

C. Claimant failed to prove entitlement to medical benefits after MMI

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove he needs additional treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required. Claimant testified he would like to return to an ATP "to see if they can explain to me why I still have so much pain." But Claimant previously acknowledged that Dr. Weinstein explained "it may take a year for all to heal up, and that he may not get the arm back fully." Dr. Weinstein and Dr. Centi were both aware of Claimant's ongoing symptoms but neither thought he needed any further treatment. There is no persuasive evidence of any change in Claimant's condition

or other factor that would reasonably be expected to change his ATPs minds on that subject. Nor is there any persuasive reason to expect additional PT would be ordered, given that Claimant has been provided a home exercise program.

D. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,400 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $881.58, effective January 1, 2022.

2. Claimant's request for additional PPD benefits is denied and dismissed.

3. Claimant's request for a general award of medical benefits after MMI is denied and dismissed.

4. Insurer shall pay Claimant $1,400 for disfigurement. Insurer may take credit for any disfigurement benefits previously paid in this claim.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 29, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1. If Claimant suffered compensable injuries to his bilateral feet and ankles, his medical treatment was reasonable, necessary and causally related.

2. The parties will resolve issues related to payment, reimbursement and/or lost wages as necessary.

FINDINGS OF FACT

1. Claimant is a 51-year-old helicopter pilot for Employer's police department. He asserts that he sustained a bilateral foot/ankle occupational disease as a result of piloting a police helicopter. Claimant has worked for Employer since September 2006 and started flying air support in 2011. He is currently the Chief Pilot in Employer's police force.

2. Claimant's shifts typically begin at 4:00 p.m. and last approximately eight hours. During the period, Claimant and another Officer fly two shifts ranging between one and one-half and two hours. If the other Officer is a certified pilot, they will trade serving as the pilot and the Tactical Flight Officer (TFO) between flights. Claimant testified he has amassed approximately 4,500 hours of flight time during the course of his employment.

3. Since the fall of 2020 Claimant has flown a Bell 407-GXI helicopter. Prior to the fall of 2020, he flew a standard Bell 407 helicopter. In his current Bell 407-GXI helicopter, there are two anti-torque pedals that are operated in tandem. The pedals operate the rear tail rotor to counteract the torque that is brought through the blades into the fuselage and control the direction of the fuselage. The pedals use hydraulic servos that are designed to make them easier to operate. During normal flight operations, Claimant keeps his feet on the pedals at all times and exerts pressure of 3-5 pounds. Claimant did not testify to resting the backs of his heels on the pedals or feeling pressure from the pedals onto the backs of his heels.

4. Claimant explained that he performs aerial surveillance, tracking fleeing suspects, perimeter containment and searches. [Redacted, hereinafter AC], previously a Flight Officer for Employer from 2005 until 2012, further detailed the police flight operations. AC[Redacted] testified that police flight can be different from normal helicopter operations. For example, orbiting a traffic stop would require taking the aircraft out of trim so the TFO can observe what is happening. He clarified that operation during the preceding maneuvers usually does not require much force on the pedals.

AC[Redacted] agreed with Claimant that normal operation only requires 3-5 pounds of pressure on the helicopter pedals.

5. Claimant explained that his symptoms began about five or six years ago when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter that required even more use of the ankle to operate the pedal assembly. Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain in his heels, stiffness and burning sensations. He thus sought medical treatment in January, 2021. Claimant initially obtained conservative care through Employer's in-house physical therapy department.

6. Claimant first visited [Employer in-house PT, Redacted, hereinafter PDT] on January 5, 2021. He reported bilateral heel pain for three months without improvement. He attributed his symptoms to the use of pedals while flying Employer's helicopter. Claimant was assessed with "achilles tendinopathy secondary to muscular tightness, weakness and overuse."

7. Between January 2021 and July 10, 2021 Claimant attended 12 sessions of physical therapy with PDT[Redacted]. At each session, the provider remarked that Claimant was improving and responding to therapy. However, on July 16, 2021 PDT[Redacted] noted Claimant had reported that his symptoms were not improving and his personal physicians had recommended surgery. Moreover, because his condition was work-related he should follow-up with the occupational medicine provider.

8. While receiving treatment with PDT[Redacted], Claimant also sought medical advice from primary care physician New West Physicians. Claimant first visited Kristine Thorne, PA at New West Physicians on February 12, 2021. X-rays revealed "mild OA without fracture or arosion and small traction enthesophyte of the calcaneus bones." PA Thorne referred Claimant for a podiatry consultation.

9. On February 16, 2021 Claimant visited Julia K. Riley, DPM at New West Physicians. Dr. Riley determined Claimant suffered from insertional tendonitis and recommended continued physical therapy in an attempt to avoid surgery. At a March 16, 2021 follow-up appointment Dr. Riley diagnosed Achilles tendinits of the left and right lower extremities. She commented that Claimant was not improving and suggested a boot for three weeks.

10. On July 13, 2021 Claimant visited Brett D. Sachs, DPM, at Rocky Mountain Foot & Ankle. Claimant reported his lower extremity symptoms were aggravated with activity and ambulation. He specifically noted that using the pedals on his helicopter aggravated his symptoms. Dr. Sachs also diagnosed Claimant with Achilles tendinitis. He explained that Claimant had not responded to conservative measures and recommended possible surgical intervention. However, like Dr. Riley, Dr. Sachs made no connection between Claimant's occupation and diagnosis.

11. On July 14, 2021 Claimant reported his symptoms to Employer. Claimant specifically stated he was "sitting in the helicopter for thousands of hours with his feet on the anti-torque pedals caused the bone spurs." Claimant selected Denver Health – Center for Occupational Safety and Health (COSH) as his Authorized Treating Physician (ATP).

12. On July 15, 2021 Claimant visited ATP Elizabeth Esty, M.D. at COSH. Claimant reported worsening bilateral heel and distal posterior lower leg pain that began in October 2020. Dr. Esty noted that Claimant had over 8,000 hours of flight time and flying the helicopter required extended periods of exerting almost continuous foot pressure of three to five pounds. Dr. Esty did not provide a detailed diagnosis and did not assess causation. Instead, because Dr. Sachs had already proposed surgery, Dr. Esty referred Claimant to Stuart Myers, M.D. for a second surgical opinion.

13. Dr. Myers at Orthopedic Centers of Colorado evaluated Claimant on July 27, 2021. He explained that Claimant had suffered the progressive worsening of posterior heel and Achilles pain that began in the fall of 2020. Dr. Myers noted Claimant flies a helicopter and began to notice pain after holding his foot in a dorsiflexed position for several hours at a time while flying. He also remarked that Claimant's pain increased after activity and limited his ability to run and participate in sports with his children. Dr. Myers commented that conservative care had failed. He recommended surgical intervention and a preoperative MRI.

14. On August 17, 2021 Claimant returned to Dr. Myers for an examination. After reviewing MRIs, Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." He concluded that Claimant's symptoms "were precipitated and exacerbated by work activity." Dr. Myers recommended surgery including "excision of the enthesophyte, debridement of the Achilles with repair and reattachment."

15. In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They jointly concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present."

16. On December 13, 2021 Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel. Dr. Meyers subsequently operated on Claimant's right heel on February 28, 2022.

17. Respondent retained Paul Stone, DPM to perform a records review and independent medical examination. Dr. Stone authored a report dated January 21, 2022 and testified at the hearing in this matter. On physical examination, Dr. Stone found pain at Claimant's Achilles insertion or in the middle portion of the heel bone. He diagnosed insertional Achilles tendinitis and determined that the condition was not related to Claimant's operation of the helicopter at work.

18. Dr. Stone explained that Claimant's insertional Achilles tendinitis is not related to his job duties. He cited W.C.R.P 17-5, Exhibit 6, (E)(1)(a)(ii) of the Colorado

Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) to support his position. The preceding section addresses traumatic and repetitive Achilles injuries. It provides:

> Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders.

19. Dr. Stone discussed that the occupational relationship between Claimant's condition and employment usually involves walking on hard surfaces or repetitive motion such as jumping or climbing up and down ladders. The preceding mechanisms involve a straight knee that causes loading onto the Achilles tendon. Loading onto the Achilles tendon then causes Achilles tendonitis. However, when Dr. Stone reviewed images of the helicopter cockpit and later watched over 100 minutes of Claimant's flight operation, he observed Claimant sitting in a relaxed position with his knee bent and ankles flexed downward. The preceding posture releases the tension on the Achilles tendon and thus makes it improbable that operation of helicopter pedals will cause tendinitis.

20. Dr. Stone reasoned that, in order for Claimant's pedal operation to cause tendinitis, he would have to move his foot up during flight. The movement would place a load on the Achilles tendon that could lead to tendinitis. While Claimant moved his foot in an upward direction during flight operations, his feet were never past 90 degrees or neutral (dorsiflexed) that would case loading of the Achilles tendon. Dr. Stone concluded that Claimant's Achilles tendinitis was likely either caused by age-related degeneration or the result of recreational activities such as exercising at the gym or hiking.

21. Claimant retained John Hughes, M.D. to provide a medical opinion regarding causation. Dr. Hughes performed a records review and physical evaluation on February 15, 2022. He remarked that Claimant had accumulated 4,000 hours of flight time and tactical flight operation of a helicopter required a forceful give and take of the pedals. Dr. Hughes commented that Claimant presented with a complex history of Achilles tendon injuries sustained while operating a helicopter in a tactical fashion. Claimant described that "much of his helicopter operation involves quick turns and control operation becomes complex in the course of chasing a fleeing vehicle or participating in other tactical activities using a helicopter." Dr. Hughes noted that Claimant's helicopter operation differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties."

22. Dr. Hughes remarked that in over 30 years of caring for commercial aviators, including many rotary wing pilots, he had not observed Claimant's condition. Nevertheless, he concluded that "it appears to be biologically plausible in [Claimant's] case given his history of overexertion on these controls. His description of operation of the antitorque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." Dr. Hughes agreed with Dr. Esty's opinion on the issue

of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

23. After reviewing the video of Claimant flying, Dr. Hughes also responded to questions from Claimant's counsel in a letter dated March 8, 2022. In addition to mentioning that he observed some dorsiflexion of Claimant's feet during flight, he noted that: (1) Claimant "may press down firmly during tactical maneuvering;" and (2) "tactical rotary-wing operation is an athletic event compared to point-to-point operation."

24. On March 21, 2021 Dr. Myers authored a supplemental report on causation. He had reviewed video of Claimant flying the Bell 407 GXI helicopter as well as the independent medical examination reports from Drs. Stone and Hughes. Dr. Myers agreed with Dr. Hughes that flying the helicopter necessitated the reasonable and necessary medical treatment that Claimant had received. In the report, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Notably, the portion of the *Guidelines* that Dr. Myers referenced involves conditions of the upper extremities and does not contain either the word "foot" or "ankle." Dr. Meyers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantarflexion while operating the helicopter, but the the real culprit is pressure over the Achilles insertion.

25. In commenting on the video of Claimant flying the Bell 407 GXI helicopter Dr. Myers explained: "it is clear that [Claimant] has constant pressure on his Achilles insertion via the anti-torque pedal apparatus while operating the helicopter. This compression causes increased discomfort related to the underlying diagnosis, retrocalcaneal bursitis and Achilles tendinitis/tendinosis."

26. Dr. Myers explained that Dr. Stone was "focusing on the wrong potential pathomechanical connection between use of the anti-torque paddles and the exacerbation of [Claimant's] symptoms." He detailed that constantly applying pressure to the pedals in the helicopter drives the heel into the support platform and causes constant pressure over the Achilles insertion.

27. Dr. Stone responded to Dr. Myers' March 21, 2021 Supplemental report. He testified that Dr. Myers should have relied on the *Lower Extremity Guidelines* instead of the *Cumulative Trauma Guidelines* in assessing causation. The *Cumulative Trauma Guidelines* fail to mention causation for a specific diagnosis in the lower extremities. Dr. Stone also addressed Dr. Myers' citation of the Roche article by explaining that it is inapplicable to the present matter because Claimant's flight operation does not place loading on the Achilles tendon. Finally, Dr. Stone challenged Dr. Myers' assertion that dorsiflexion was present while not actually finding Claimant's feet were dorsiflexed past 90 degrees or neutral.

28. Claimant has failed to demonstrate that it is more probably true than not that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of her employment with Employer. Initially, Claimant explained that his symptoms began about five or six years earlier when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter and Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain, stiffness and burning sensations in his heels. He thus sought medical treatment in January, 2021. Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." After conservative treatment failed, Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel on December 13, 2021. Dr. Myers subsequently operated on Claimant's right heel on February 28, 2022.

29. Dr. Myers reasoned that Claimant's symptoms "were precipitated and exacerbated by work activity." In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present." In his analysis, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Dr. Myers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantar flexion during helicopter operation, but the real culprit is pressure over the Achilles insertion.

30. Similarly, Dr. Hughes concluded that Claimant's "description of operation of the anti-torque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." He noted that Claimant's helicopter use differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties." Dr. Hughes agreed with Dr. Esty's opinion on the issue of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

31. In contrast, Dr. Stone persuasively concluded that Claimant's work activities as a helicopter pilot did not cause an occupational disease to his bilateral feet and ankles. Dr. Stone supported his diagnosis and conclusions by relying on The *Lower Extremity Injury* portion of the *Guidelines* (section E.1.A.). Section E.1.A specifically references Claimant's diagnosed condition of Achilles tendinitis. The *Guidelines* provide "Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping, or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders." Dr. Stone explained the preceding actions

cause Achilles tendinitis because the knee is straight and thus places a load on the Achilles tendon. Claimant described no similar activities as part of his employment.

32. Dr. Stone detailed that neither Claimant's seated position while flying nor movement in flight caused loading. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone remarked that the likely cause of Claimant's condition was either age-related degeneration or recreational activities outside of employment.

33. The record reveals that the opinions of Drs. Hughes and Myers are not based on a proper causation analysis and do not sufficiently connect Claimant's work activities as a helicopter pilot to an occupational disease involving his bilateral feet and ankles. Initially, Dr. Hughes' causation assessment is based on Claimant's helicopter flight consistently involving quick turns and forceful pressure on the pedals or "tactical flying." However, the preceding assumption contradicts the testimony from both Claimant and Lt. Carry. They did not use the term "tactical flying" or describe such severe flight operations. Furthermore, Dr. Hughes' causation opinion is further undercut by his description of the mechanism of injury as uncommon, if not unique and biologically plausible, instead of medically probable.

34. In formulating his causation opinion Dr. Myers relied on a portion of the *Guidelines* that do not involve an assessment of the lower extremities, but only address cumulative trauma conditions to the upper extremities. Because Claimant's injuries involve the lower extremities, Dr. Myers' analysis is misplaced. Furthermore, Dr. Myers provided his initial opinion on August 18, 2021 regarding Claimant's dorsiflexed feet while flying absent an actual understanding of helicopter operation. After reviewing a video of Claimant flying, Dr. Myers focused on Claimant's foot movement through degrees of dorsiflexion. However, he did not state that the feet are dorsiflexed during flight.

35. In contrast, Dr. Stone persuasively determined that Claimant's seated position and movement during flight did not cause loading of the Achilles tendon. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone's opinion is supported by *The Lower Extremity Injury Guidelines* because the document specifically lists activities with a straight knee that place a load on the Achilles tendon as the likely cause of tendinitis. The opinions of Drs. Esty, Myers and Hughes do not provide an adequate causation analysis directly linking Claimant's symptoms to his piloting duties. Although Claimant attributed his symptoms to flying a helicopter for Employer, the record reveals that his condition did not follow as a natural incident of his work activities that can be fairly traced to his employment as a proximate cause. It is thus speculative to connect Claimant's bilateral foot and ankle injuries to flying a helicopter for Employer. Claimant's job duties did not likely cause, intensify, or, to a reasonable degree, aggravate his condition and cause the need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a

preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, it does not follow that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

9. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that

test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of her employment with Employer. Initially, Claimant explained that his symptoms began about five or six years earlier when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter and Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain, stiffness and burning sensations in his heels. He thus sought medical treatment in January, 2021. Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." After conservative treatment failed, Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel on December 13, 2021. Dr. Myers subsequently operated on Claimant's right heel on February 28, 2022.

11. As found, Dr. Myers reasoned that Claimant's symptoms "were precipitated and exacerbated by work activity." In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present." In his analysis, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Dr. Myers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantar flexion during helicopter operation, but the real culprit is pressure over the Achilles insertion.

12. As found, similarly, Dr. Hughes concluded that Claimant's "description of operation of the anti-torque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." He noted that Claimant's helicopter use differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties." Dr. Hughes agreed with Dr. Esty's opinion on the issue of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

13. As found, in contrast, Dr. Stone persuasively concluded that Claimant's work activities as a helicopter pilot did not cause an occupational disease to his bilateral feet and ankles. Dr. Stone supported his diagnosis and conclusions by relying on The *Lower Extremity Injury* portion of the *Guidelines* (section E.1.A.). Section E.1.A specifically references Claimant's diagnosed condition of Achilles tendinitis. The *Guidelines* provide "Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping, or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders." Dr. Stone explained the preceding actions cause Achilles tendinitis because the knee is straight and thus places a load on the Achilles tendon. Claimant described no similar activities as part of his employment.

14. As found, Dr. Stone detailed that neither Claimant's seated position while flying nor movement in flight caused loading. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone remarked that the likely cause of Claimant's condition was either age-related degeneration or recreational activities outside of employment.

15. As found, the record reveals that the opinions of Drs. Hughes and Myers are not based on a proper causation analysis and do not sufficiently connect Claimant's work activities as a helicopter pilot to an occupational disease involving his bilateral feet and ankles. Initially, Dr. Hughes' causation assessment is based on Claimant's helicopter flight consistently involving quick turns and forceful pressure on the pedals or "tactical flying." However, the preceding assumption contradicts the testimony from both Claimant and Lt. Carry. They did not use the term "tactical flying" or describe such severe flight operations. Furthermore, Dr. Hughes' causation opinion is further undercut by his description of the mechanism of injury as uncommon, if not unique and biologically plausible, instead of medically probable.

16. As found, in formulating his causation opinion Dr. Myers relied on a portion of the *Guidelines* that do not involve an assessment of the lower extremities, but only address cumulative trauma conditions to the upper extremities. Because Claimant's injuries involve the lower extremities, Dr. Myers' analysis is misplaced. Furthermore, Dr. Myers provided his initial opinion on August 18, 2021 regarding Claimant's dorsiflexed feet while flying absent an actual understanding of helicopter operation. After reviewing a video of Claimant flying, Dr. Myers focused on Claimant's foot movement through degrees of dorsiflexion. However, he did not state that the feet are dorsiflexed during flight.

17. As found, in contrast, Dr. Stone persuasively determined that Claimant's seated position and movement during flight did not cause loading of the Achilles tendon. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone's opinion is supported by *The Lower Extremity Injury Guidelines* because the document specifically lists activities with a straight knee that place a load on the Achilles tendon as the likely cause of tendinitis. The opinions of Drs. Esty, Myers and Hughes do not provide an adequate causation analysis directly linking Claimant's symptoms to his piloting duties. Although Claimant attributed his

symptoms to flying a helicopter for Employer, the record reveals that his condition did not follow as a natural incident of his work activities that can be fairly traced to his employment as a proximate cause. It is thus speculative to connect Claimant's bilateral foot and ankle injuries to flying a helicopter for Employer. Claimant's job duties did not likely cause, intensify, or, to a reasonable degree, aggravate his condition and cause the need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: August 30, 2022.

_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant provided clear and convincing evidence to overcome Dr. Green's DIME opinion that Claimant sustained 0% permanent impairment of the cervical spine.

FINDINGS OF FACT

1. Claimant worked for Employer as a general manager.

2. Claimant sustained an admitted industrial injury on October 1, 2019. Claimant was loading a bedroom set of furniture into a box truck. While holding her right hand up against the stacked furniture, she reached down for a strap to secure the furniture when the wooden headboard fell and hit her on the back of the head and neck. Claimant testified that she was knocked unconscious and, upon regaining consciousness, she was bleeding from her head, and experienced pain in her head and neck as well as flashes in her vision.

3. Claimant was taken to North Suburban emergency department. She reported she had lost consciousness from the blow to her head and neck and was experiencing dizziness, nausea, headache and neck stiffness. The exam showed a laceration to her scalp, dried blood and a hematoma. Her principal diagnoses were a head injury with a laceration to her scalp and loss of consciousness. Imaging of her neck showed degenerative changes and no acute findings. Her scalp laceration was closed with five staples, and she was prescribed pain medication.

4. On October 2, 2019 Claimant was seen at authorized treating provider (ATP) Concentra by Lacie Esser, PA-C. Claimant reported that she was unsure if she as completely unconscious after the work incident. She complained of throbbing pressure in her head and neck stiffness. The physical examination of Claimant's cervical spine showed tenderness in her neck into her upper back muscles and limited range of motion in her cervical spine with pain in all directions. Cervical strain was added as a diagnosis and Claimant was prescribed a muscle relaxer.

5. Claimant returned to Concentra on October 4, 2019 and was seen by Alan Shackelford, M.D. Claimant continued to complain of headache with a pressure sensation, pain at the site of her injury, as well as neck pain and stiffness. Dr. Shackelford's examination of Claimant's neck documented tenderness from the base of her head, occipital level, down to C4-7 and in her upper back. He also documented limited and painful range of motion. Under psychiatric, Dr. Shackelford listed poor recent memory and depressed mood. He referred Claimant for a neurologic examination and removed Claimant from work. On October 7, 2019, Paula Pook, M.D. at Concentra referred Claimant for physical therapy.

6. On October 14, 2019 Claimant returned to Concentra and was seen by PA-C Esser. She reported that the muscle relaxer was not helping. Physical examination documented tenderness in the upper level of her cervical spine, upper level of her left and right paraspinal muscles and left and right trapezius with limited range of motion and pain in all directions. Claimant was referred to a physiatrist.

7. Claimant began physical therapy with Brittany Comer, PT at Concentra later that day with a diagnosis of cervical strain and a goal to improve cervical rotation. Claimant attended nine sessions of physical therapy and her cervical improvement was "as expected" and it was noted that active treatments would be continued through chiropractic treatment and acupuncture for her cervical and upper spine.

8. On October 29, 2019 Claimant was examined by physiatrist, John Sacha, M.D. Dr. Sacha noted Claimant presented mildly anxious and tearful after the physical examination. His cognitive examination noted excellent recall, although slow processing, and had to think about things temporarily, but would remember her entire injury, both pre and post injury. His neck exam showed cervical paraspinal spasm and segmental dysfunction in the mid to upper cervical spine. With deep palpation of her cervical facets, Dr. Sacha objectively reproduced her headaches as well as dizziness. Claimant had pain with cervical extension, external rotation in the right greater than the left side and showed a positive Tinel's test over the occipital nerve. Dr. Sacha diagnosed Claimant with cervical facet syndrome; whiplash-associated disorder; and occipital neuralgia. He noted the could not rule out possibility of a minimal concussion but there was no evidence of a closed head injury or residual from this. Dr. Sacha recommended chiropractic care and acupuncture.

9. Claimant underwent eight chiropractic sessions with Don Aspergren, D.C. from November 5, 2019 through February 14 2020 and four acupuncture therapy sessions from December 11, 2019 to January 8, 2020. Her chief complaints were head and neck pain. She described her pain as stabbing and aching, rating her pain 6/10, and had sleep disturbances. Dr. Aspergren's physical examination reported neck tenderness and limited range of motion, with an absence of Waddell's signs, non-organic signs, and pain behaviors.

10. Claimant returned to Dr. Sacha on November 13, 2019. She reported temporary improvement with chiropractic and acupuncture treatments, but continued neck pain. On exam, Dr. Sacha noted cervical paraspinal spasm and segmental dysfunction in the mid to upper cervical spine, pain with extension and external rotation and diminished range of motion. Dr. Sacha subsequently referred Claimant for a cervical spine MRI.

11. At a follow-up evaluation on November 20, 2019 Claimant reported increased anxiety and depression related to her physical symptoms. Dr. Sacha noted that the cervical spine MRI revealed straightening of her cervical lordosis and was otherwise negative. He added the diagnosis of adjustment disorder. Dr. Sacha recommended that Claimant undergo bilateral C2-C5 facet injections plus bilateral third occipital nerve

blocks. He discontinued the muscle relaxers, Diclofenac and Robaxin, and ordered Gabapentin 300 and Paxil, both for adjustment disorder but also to help with pain and headaches.

12. On December 2, 2019, Dr. Pook noted examination of Claimant's cervical spine showed tenderness in her upper cervical spine, upper left and right paraspinal and bilateral trapezius muscles. Palpation revealed bilateral muscle spasms with pain in all directions. She continued the diagnoses cervical strain, concussion and acute head injury.

13. On December 10, 2019 Claimant presented to neurosurgeon Michael Rauzzino, M.D. He reviewed Claimant's November 15, 2019 cervical MRI and did not see any reason for surgical intervention. He diagnosed Claimant's neck injury as a soft tissue injury and agreed with Dr. Sacha's recommendation for cervical injections.

14. On December 12, 2019 Dr. Sacha performed bilateral C2-3 intraarticular facet injections, bilateral C3-4 intraarticular facet injections and bilateral third occipital nerve blocks. Prior to the injections, Claimant's pain scale was 7/10 at rest and 8/10 with provocative maneuvers. Thirty minutes after the procedure Claimant reported 100% relief of her headaches and neck pain, which Dr. Sacha noted indicated a diagnostic response and involvement of posttraumatic facet syndrome at those levels.

15. Claimant returned to Dr. Sacha on January 3, 2020 reporting lasting relief from the injections of 40% on the left side and 20% on the right side. Claimant reported experiencing ongoing anxiety and night terrors, which increased with taking Gabapentin. Dr. Sacha removed Claimant from Gabapentin and referred her for a psychological evaluation to determine whether she was psychologically stable to advance treatment with a medial branch nerve block and radiofrequency neurotomy. He continued his diagnosis of cervical facet syndrome and added anxiety to the previous adjustment disorder diagnosis.

16. On January 17, 2020 Claimant made a trip to Nebraska. On that day she took Gabapentin, Lyrica and her depression and anxiety medications. She also took a Percocet, which she had been prescribed by her OBGYN doctor in 2017 and also by her dentist the year before because she had pain that morning and knew it was going to be a long trip. Claimant testified that, at the time, she did not realize that Percocet contained Oxycodone. While in the car, Claimant went into cardiac arrest and respiratory failure, which led to her 6-day hospitalization. During her hospital stay, Claimant was prescribed Clonazepam and Prazosin at bedtime for complaints of panic and nightmares.

17. On January 28, 2020 Claimant transferred to a new ATP, Matt Miller, M.D. Dr. Miller reviewed Claimant's prior medical, social and work history and noted Claimant's complaints of fainting, headaches, loss of balance and coordination and motor weakness. On physical examination Dr. Miller noted neck tenderness with range of motion slightly limited and pain with loading of facets. He diagnosed Claimant with a concussion and

cervical sprain and strain and referred Claimant to see Kevin Reilly, Psy.D., a neuropsychologist, to assess Claimant's cognitive and emotional status.

18. Claimant saw Dr. Reilly on January 31, 2020 and February 14, 202. Dr. Reilly concluded,

> The results of this evaluation are strongly indicative of non-organic factors mediating symptom production and/or maintenance. Performance validity testing indicated negative response bias (poor effort). Symptom validity testing indicates exaggeration. The patient's clinical presentation was suggestive of medication seeking for reported anxiety and stress symptoms. Objective measures of emotional functioning were invalid and unreliable.

(R. Ex. H, p. 204).

19. On February 4, 2020 Dr. Miller recommended six additional visits of chiropractic/acupuncture treatment. He diagnosed a sprain of cervical spine and concussion.

20. On February 17, 2020 Claimant was at home washing dishes when she felt dizzy and fainted. She was taken by ambulance to St. Anthony North Hospital and after testing was found to have low blood pressure and low potassium. She was diagnosed with low potassium.

21. Claimant presented to Samuel Y. Chan, M.D. at Mile High Sports and Rehabilitation Medicine on February 21, 2020. He reviewed her January and February emergency room/hospital records and Dr. Reilly's neuropsychological evaluation in which Dr. Reilly considered Claimant's testing invalid for lack of effort and symptom magnification. Claimant reported that she was unable to recall if the cervical injections were helpful. Dr. Chan later noted in his report that Claimant noted the injections offered no significant benefits. Claimant reported that her headaches and dizziness were worsening and identified her cervical spine as the source of her headaches and dizziness. On examination, Dr. Chan noted cervical spine range of motion was slightly limited in flexion and extension due to pain, as well as tenderness over the cervical paraspinal musculature. Dr. Chan diagnosed Claimant with post-concussion headache; cervical facet joint syndrome; migraine syndrome; and myalgia. He referred Claimant for a neurologic consultation.

22. Claimant presented to Gary Gutterman, M.D. for a psychiatric examination on March 2, 2020. Dr. Gutterman noted Claimant's history of significant family dysfunction in her early years, including sexual abuse. She had been treated with anti-anxiety medication in 2008 and briefly received psychotherapy in 2010 without medication. She related that her work injury made her anxious and depressed because she now had to rely upon other people when she had been self-reliant and in full control before the accident. Dr. Gutterman opined that Claimant likely experienced a concussion/mild

traumatic brain injury as a result of the work injury. He further opined that Claimant experienced Adjustment Disorder with Mixed Emotional Features, both associated with her concussion as well as her inability to maintain a sense of control. Due to Claimant's persisting anxiety and depression, he recommended that Claimant increase her Clonazepam to .5 mg and increase her Prazosin to 2 mg tablets, one to two at night to control her nightmares which included falling and losing control. He started her on Escitalopram, 10 mg, to treat anxiety and depression.

23. Claimant returned to Dr. Chan on March 18, 2020. Claimant continued taking panic and nightmare medications, Clonazepam and Prazosin, and except for Lidothol patches and Tylenol, she was not taking any pain medication. On examination, Dr. Chan noted significant limitation of cervical range of motion and tenderness to palpation of her cervical spine and paraspinal muscles. He noted that Claimant reported the prior facet injections had no benefit at all whatsoever. Dr. Chan remarked that Claimant's reported worsening symptoms were nonphysiologic.

24. On March 19, 2020 Claimant presented to Haley Burke, M.D. for a neurologic examination. On examination, Dr. Burke noted non-painful cervical range of motion with tenderness to palpation throughout the occipital, suboccipital and cervical paraspinal muscles. Exams were unremarkable from a neurologic standpoint. Dr. Burke diagnosed Claimant with chronic post-traumatic headache, not intractable, and anxiety. She opined that further interventions for Claimant's neck pain are unlikely to be helpful. Dr. Burke noted that Claimant's headache symptoms were not characteristic of cervicocranial syndrome from acute trauma. She opined that there is the possibility that Claimant's underlying anxiety and PTSD from her past personal history may be magnifying Claimant's symptoms.

25. Claimant returned to Dr. Gutterman on March 19, 2020. Her mood was more stable with less anxiety since an increase of her Clonazepam dosage and the addition of Escitalopram. Dr. Gutterman increased her dosage of Escitalopram to 20 mg daily and recommended she take Clonazepam, 0.5 mg one tablet during the day and two tablets at night since she was experiencing early morning awakening. Her nightmares which had previously abated were returning to some degree, so Dr. Gutterman increased her Prazosin to 5 mg.

26. Claimant saw Dr. Miller on March 31, 2020 via a telehealth appointment. On examination Dr. Miller noted that Claimant showed "decent" range of motion with minimal pain. He continued Claimant's physical therapy.

27. On April 15, 2020, Claimant's physical therapist noted that Claimant's signs and symptoms were "more consistent with chronic pain behaviors rather than actual limitations in Cervical ROM or function. When pressed, she demonstrates pretty good ROM in the C Spine." (R. Ex. R, p. 512).

28. Claimant returned to Dr. Gutterman on April 16, 2020. Dr. Gutterman started Claimant on Propranolol 20 mg for Claimant's persistent anxiety. Her nightmares persisted but Dr. Gutterman did not increase her Prazosin.

29. On April 23, 2020 Claimant saw Dr. Chan via a telehealth appointment. Claimant reported soreness and tightness over the posterior cervical spine area and occipital-type headaches. He noted that further interventions may consider the use of a beta block or a biofeedback program. Dr. Chan remarked,

> There are definitely findings on clinical examinations, as well as reports, that do not completely coincide with a diagnosis of cervicogenic syndrome or postconcussive syndrome. Thus, there is certain embellishment. The concern is whether this is magnified from underlying psychological issues such as anxiety or even PTSD that the patient does not want to disclose.

(R. Ex. J, p. 223).

30. Claimant returned to Dr. Miller on April 28, 2020 via a telehealth appointment. On examination Dr. Miller noted that Claimant appeared to have very good cervical range of motion with no obvious pain. Dr. Miller informed Claimant that they were running out of treatment options. He noted that there was not much more to offer in terms of treatment for Claimant's neck, as Claimant had injections in the past and reported that they made her worse. He instructed her to continue to see Dr. Gutterman and Dr. Chan and he would contact Dr. Gutterman to see if there was anything further to offer. He planned to move to MMI with an impairment rating and to return Claimant to work in mid-May at full duty.

31. On May 13, 2020 Claimant was seen again by Dr. Chan via a telemedicine appointment. Claimant continued to complain of headaches. On examination Dr. Chan observed limited cervical spine range of motion. He again reviewed Claimant's November 15, 2019 cervical MRI, noting there was no specific pathology except for diffuse degenerative changes. Dr. Chan opined that Claimant had come to a plateau from a physical medicine and neurological standpoint. Claimant did not wish to participate with any medicinal usage for her physical condition. Dr. Chan noted that she should continue with psychological care with Dr. Gutterman until she reached MMI and to follow up with Dr. Miller.

32. Claimant was again seen by Dr. Miller on May 13, 2020, via a telehealth appointment. She continued to complain of pain in her neck, headaches, anxiety and panic attacks. Dr. Miller returned Claimant to work at four hours per day, and 20-pounds maximum lift and 20-pounds pushing and pulling.

33. Claimant returned again to Dr. Gutterman on May 14, 2020. Her mood was more stable since increasing the dosage of Escitalopram. She continued to experience anxiety and would scratch her arms and legs during these episodes. Dr. Gutterman recommended that Claimant increase her Propranolol to 20 mg. She stated she was sleeping better, and her nightmares were less frequent and intense.

34. Claimant saw Dr. Miller on June 2, 2020. Claimant had experienced headaches for the past three days at a pain level 6/10. She had not started biofeedback because of COVID-19. Dr. Miller noted good cervical range of motion.

35. Claimant continued to treat with Dr. Gutterman. On June 9, 2020 Dr. Gutterman noted that he planned to place Claimant at MMI in the next couple of months to give her enough time to adapt to return to work. Due to her persisting anxiety, Dr. Gutterman prescribed Claimant Aripiprazole 5 mg ½ tablet on June 29, 2020.

36. Claimant was again seen by Dr. Miller on July 30, 2020. Claimant complained of 6/10 pain. She was working 12 to 13 hours per day at regular duty and reported not being happy with her role at work. Dr. Miller noted that he was waiting for Dr. Gutterman to complete treatment before he placed Claimant at MMI.

37. On August 5, 2020 Robert Kleinman, M.D. performed a psychiatric IME at the request of Respondents. His report included a review of Claimant's medical records for her injury, including Dr. Reilly's report, as well as a review of Claimant's pre-injury psychological treatment, social and family history. Dr. Kleinman diagnosed Claimant with adjustment disorder with anxiety and depressed mood resolved with medications**;** mild neurocognitive disorder secondary to traumatic brain injury, resolved; psychological factors affecting medical condition; and factitious disorder. Dr. Kleinman opined that Claimant is an unreliable historian and that only her objective findings should be treated and rated. He noted that Claimant's mental health complaints and report of cognitive deficits were undermined by the psychological and neurocognitive testing. Dr. Kleinman explained that there was evidence of exaggerated symptom reporting and symptom magnification and nonorganic factors influencing her neuropsychometric performance. He concluded that Claimant did not have posttraumatic stress disorder related to her injury and that she was at MMI. Dr. Kleinman wrote that Claimant had a minimal mental health impairment of 3% related to being on psychiatric medications after the injury and at the time of MMI.

38. Dr. Gutterman reevaluated Claimant on August 19, 2020. Dr. Gutterman noted that Claimant's mood was more stable, and that her outlook more positive since the last increase of medication. He remarked that her anxiety remained reasonably under control and that her nightmares had abated. She continued to report some short term memory difficulties. Based on her neuropsychological evaluation by Dr. Reilly which showed exaggerated responses, Dr. Gutterman did not believe there was an organic explanation for her complaint of short term memory difficulty and denied Claimant a rating for concussive syndrome. Dr. Gutterman concluded that Claimant's psychiatric symptoms had significantly abated, and placed Claimant at MMI. He recommended that Claimant continue on psychotropic medications for an additional three to six months as well as psychiatric follow-up as maintenance treatment. Dr. Gutterman wrote, "I believe that [Claimant] has experienced a 3% permanent partial mental impairment as a result of her continuing on psychotropics at the time that she has reached psychiatric maximum

medical improvement. The Division of Labor encourages a minimal mental impairment of 1 to 3% in such instances." (R. Ex. G, p. 174).

39. Dr. Miller placed Claimant at MMI at a September 30, 2020 evaluation. Claimant reported 8/10 pain with neck stiffness and headaches. On examination Dr. Miller noted diffuse tenderness of the neck with no spasm. He noted the following maximum cervical ranges of motion: flexion 46 degrees, extension 52 degrees, right lateral flexion 50 degrees, left lateral flexion 47 degrees, right rotation 61 degrees and left rotation 50 degrees. Dr. Miller's final diagnosis was concussion, sprain of cervical spine and adjustment disorder. He noted that Claimant had diffuse degenerative changes of the cervical spine but no focal disc herniations. Dr. Miller assigned 4% whole person rating under Table 53(II)(B) of the AMA Guides for a soft tissue lesion, unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity. He further assigned 5% whole person impairment for range of motion deficits, totaling 9% whole person impairment of the neck. Dr. Miller noted that Dr. Gutterman performed a psychological rating of 3% as Claimant was on medication, and further noted that combining these ratings would yield a final rating of 12% whole person. Dr. Miller recommended maintenance care in the form of psychological medications and treatment with Dr. Gutterman for one year and six sessions of biofeedback.

40. Respondents requested a DIME. On the DIME Application, Respondents checked only Region 4: Spine; Cervical. Respondents did not check Region 3 Psychological or Traumatic Brain Injury.

41. Dr. Green performed the DIME on January 18, 2021. He noted that, per the request for a DIME, the cervical region was the area to be evaluated. Dr. Green reviewed Claimant's medical records. He listed various records under the heading "Pertinent Medical Records were identified to include the following…" (R. Ex. C, p. 48). Dr. Green did not list any of Dr. Gutterman's records. He did note that he reviewed Dr. Miller's September 30, 2020 report. Under the section of his DIME report title "Psychological Evaluation If Applicable" Dr. Green wrote, "Performed, per review of medical records, however, not evaluated within the context of this Examiner's report." (R. Ex. C, p. 50).

42. Dr. Green noted that the cervical MRI revealed multilevel cervical spondylosis without other focality or significant stenosis. Claimant reported to Dr. Green 7-8/10 pain described as constant shooting stabbing, occasionally burning, dull achy pain from her midline occiput down to approximately her cervicothoracic junction. On examination, Dr. Green noted mild pain behaviors and sighing, occipital tenderness and muscle tightness and spasm over both upper trapezium. Dr. Green performed cervical range of motion measurements on January 18, 2021 and January 25, 2021. The cervical range of motion measurements from January 18, 2021 were as follows: flexion 30 degrees, extension 27 degrees, right lateral flexion 22 degrees, left lateral flexion 16 degrees, right rotation 24 degrees, and left rotation 14 degrees. He noted the following cervical range of motion measurements on January 25, 2021: flexion 28 degrees, extension 33 degrees, right lateral flexion 25 degrees, left lateral flexion 25 degrees, right rotation 37 degrees, and left rotation 33 degrees.

43. Dr. Green diagnosed Claimant status post 10/1/2019 work injury with head contusion/cervical strain; no evidence for clinical upper extremity radiculopathy; nonphysiological pain presentation per review of medical records; and mild pain behavior on exam. He agreed with Dr. Miller's MMI date of September 30, 2020. Based on the AMA Guides, he assigned 4% cervical impairment under Table 53(II)(B), combined with cervical range of motion impairment of 5%, totaling 9% whole person impairment. He chose to use Dr. Miller's range of motion measurement due to the discrepancy between his range of motion measurements taken on January 18 and January 25, 2021. He explained, "Due to nonphysiologic character and history noted in the records, I would elect to use Dr. Miller's range of motion measurements of 5% impairment from 09/30/2020." (R. Ex. C, p. 51). Regarding the rationale for his decision, Dr. Green wrote, "The claimant did have a documented contusion to her head with ER documentation of complaints of neck pain at the onset of her work-related injury." (Id.) Dr. Green did not specifically address a psychological impairment rating. He opined that Claimant did not require work restrictions or maintenance care.

44. On April 23, 2021 John Raschbacher, M.D. performed an Independent Medical Examination (IME) at the request of Respondents. Claimant reported neck discomfort with pain and achiness as well as headaches more severe than what she experienced prior to the work injury. Dr. Raschbacher reviewed Claimant's medical records, including records predating the work injury. Claimant reported midline posterior lower cervical tenderness to palpation and some mild bilateral upper medial scapular tenderness. Dr. Raschbacher noted shoulder forward flexion of 144 degrees on the right and 152 degrees on the left; active cervical range of motion forward flexion 29/2, 28/0, and 19/0; cervical extension 36/5,37/2 and 32/4; right lateral bend 27/4, 30/4 and 27/0; left lateral bend 30/2, 28/3 and 25/1; and cervical right rotation 40, 38, and 32, left 47, 32 and 33.

45. Dr. Raschbacher opined that Claimant did not sustain any permanent impairment of the cervical spine. He explained that Claimant "had scattered and mild degenerative changes of the cervical spine, pre-existing and not work-related, and had no clear objective basis at the cervical spine for an impairment rating…" (R. Ex. A, p. 9). Dr. Raschbacher opined that there was no clear objective pathology stemming from the October 1, 2019 work incident. He noted that, at his evaluation, Claimant had significant reduction of range of motion without any clear basis. He further noted that at Dr. Green's DIME evaluation, Claimant had 18% range of motion with a great deal of limitation of motion in all planes that has not been substantiated by any objective findings and that would not be expected medically for a cervical strain, even if still symptomatic. He opined that Claimant was likely volitionally restricting her range of motion for the DIME as well as at his evaluation. Dr. Raschbacher further relied on Dr. Kleinman's findings of somatization and significant items that affect Claimant's reports of subjective complaints. He noted Dr. Reilly also found symptom magnification and an inconsistent or poor effort made, which he felt to be strongly indicative of nonorganic factors mediating Claimant's reporting of symptoms. Dr. Raschbacher opined that Claimant reached MMI on September 30, 2020 with no permanent impairment at any body part, including the cervical spine.

46. Dr. Raschbacher testified by deposition on June 4, 2021 as a Level II accredited expert in occupational medicine. He explained that Claimant's cervical MRI showed some preexisting non-work related degenerative findings with no acute findings. Dr. Raschbacher testified that the work injury did not aggravate or accelerate those findings. He stated that, considering the mechanism of injury and history, it was appropriate to assess Claimant as having a work related cervical strain, but that she did not sustain any permanent impairment of the cervical spine. Dr. Raschbacher explained that Claimant did not have any pathology or other diagnosis than the a cervical strain, and that the cervical strain would be expected to heal and not result in permanent restriction or symptomatology.

47. Dr. Raschbacher testified that the Division of Workers' Compensation Desk Aid #11 - Impairment Rating Tips provide that an impairment rating should be given when there is a specific diagnosis and objective pathology. Dr. Raschbacher explained that Claimant's observed range of motion was better when she was not being formally measured. He testified that Claimant's exam findings were not fairly reproducible as required by the Impairment Rating Tips and the AMA Guides. Dr. Raschbacher opined that Claimant does not have a ratable impairment under Table 53 of the AMA Guides. He testified that there are no objective findings for Claimant's neck other than preexisting mild degenerative changes. Dr. Raschbacher acknowledged that you can give a rating for soft tissues lesions under Table 53 of the AMA Guides, but explained that Claimant's neck strain was a temporary soft tissue lesion. He testified that, although the medical records document more than six months of treatment, Claimant's providers were purely treating her subjective complaints and not an anatomic lesions other than a temporary cervical strain.

48. Dr. Green testified by deposition on November 1 and 8, 2021 as a Level II accredited expert in physical medicine and rehabilitation. Dr. Green testified that, at the time of his DIME report, he had not reviewed Dr. Kleinman's report. During the deposition, Dr. Green reviewed the reports of Drs. Kleinman and Raschbacher, which detailed significant concerns with exaggerated symptom reporting and symptom magnification. Based on the new information he review, Dr. Green changed his opinion and opined that Claimant sustained 0% impairment of the cervical spine. Dr. Green testified that his range of motion measurements over the course of two days were consistent with impairment ratings of 18% and 9% for range of motion deficits, which were significantly different from those of Dr. Miller's, which were consistent with a 5% impairment rating for loss of range of motion. Dr. Green testified that he did not have a "good explanation" for the discrepancy in Claimant's presentation and measurements. Dr. Green explained that, based on his review of the new information, he was concerned there was not an accurate reflection of Claimant's range of motion and, possibly, her reports of symptomatology. Dr. Green agreed that the mild degenerative changes of the cervical spine were preexisting and not work related.

49. Dr. Green opined that Claimant remained at MMI with a 0% impairment rating. On cross-examination, Dr. Green acknowledged that cervical facet syndrome and cervical

strains can be specific diagnoses for the purpose of rating under the AMA Guides. He explained that the only objective pathology he documented was loss of cervical range of motion, which Dr. Green now called into question. Dr. Green testified that he conducted his examination and ratings pursuant to the AMA Guides and Impairment Rating Tips. He further testified that he was now unable to correlate. Claimant's her symptomatic reports with his findings. Dr. Green explained that, even if physician obtains valid range of motion measurements, the physician still must consider other factors in terms of interpreting a patient's reported symptomatology. Dr. Green did not address any psychological condition or psychological impairment in his testimony.

50. Claimant testified at hearing that she had a 20-year history of migraines prior to the work injury. She testified that the nature of her headaches changed before and after the work injury. Claimant attributes the difference in the range of motion measurements of Drs. Miller and Green to the fact that she was more "constricted" when she saw Dr. Green because she was no longer undergoing chiropractic treatment or wearing pain patches. Claimant testified that she continues to be prescribed medications by Dr. Gutterman. She stated that she currently experiences daily headaches which begin in her neck and radiate upwards. Claimant testified that she has a history of dizzy spells due to low blood pressure and that she passed out in 2009 and 2010. She acknowledged that she was on anxiety medication for certain periods prior to the work injury.

51. The ALJ finds the opinions and/or testimony of Drs. Green, Kleinman and Raschbacher more credible and persuasive than the opinions of Drs. Miller and Gutterman.

52. Claimant failed to prove it is highly probable Dr. Green's DIME on opinion on permanent impairment is incorrect.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it

is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000); *Stephens v. North & Air Package Express Services*, W.C. No. 4-492-570 (February 16, 2005), aff'd, *Stephens v. Industrial Claim Appeals Office* (Colo.App. 05CA0491, January 26, 2006) (NSOP). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo.App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo.App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo.App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported).

The party seeking to overcome the DIME physician's finding regarding whole person permanent impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the

DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

As found, Claimant failed to prove it is highly probable Dr. Green's DIME opinion on permanent impairment is incorrect. Although Dr. Green initially opined that Claimant sustained 9% whole person impairment of the cervical spine, he subsequently withdrew his original opinion and assigned Claimant a 0% permanent impairment rating. Dr. Green provided justification for the 0% rating in his deposition testimony. He explained that, at the time of his initial opinion, he had not reviewed the reports of Drs. Kleinman and Raschbacher, which detailed significant pre-existing issues and issues of symptom magnification. Dr. Green further explained that, based on his review of the additional information, he did not deem Claimant's reports of symptomatology and her range of motion findings accurate. Dr. Green acknowledged that a cervical strain can be a specific diagnosis under Table 53(II)(B). Nonetheless, he credibly testified that he was unable to correlate Claimant's symptomatic reports with objective findings. Dr. Green testified that he did not have a good explanation for the significant discrepancy in his range of motion measurements taken over the course of two days. Dr. Green did not deem six months of medically documented pain and rigidity in Claimant's records accurate in light of Claimant's symptom exaggeration and non-organic issues.

Dr. Green's opinion is supported by the opinions of Drs. Kleinman and Raschbacher. Numerous treating physicians found that Claimant's physical presentation was exaggerated and not medically based, including a physical therapist, Dr. Chan and Dr. Reilly. IME physicians Drs. Kleinman and Raschbacher credibly determined that Claimant had a factitious disorder and other non-organic issues. Multiple physicians also opined that Claimant's reports of ongoing and worsening symptoms several months after the work injury were not in line with the expected course of an individual who sustained a cervical strain. Claimant has a significant history of preexisting issues with headaches and neck pain, as well as a history of anxiety treated with medication and other non-work related issues which caused syncopal events.

Claimant argues in part that, in addition to being diagnosed with a cervical spine strain, the diagnosis of cervical facet syndrome also constitutes a specific diagnosis for purposes of assigning an impairment under Table 53(II)(B). That Claimant was once diagnosed with cervical facet syndrome does not provide a basis to overcome Dr. Green's opinion. As noted in the medical records, despite reporting to Dr. Sacha experiencing initial and lasting relief from the cervical facet injections, Claimant repeatedly reported to

other physicians that the cervical facet injections provided no relief. More importantly, Drs. Miller and Green did not include cervical facet syndrome in their final diagnoses. Both physicians were aware of Claimant's prior diagnoses and determined that Claimant's final diagnoses included cervical spine strain, not cervical facet syndrome. Accordingly, Dr. Green electing to not assign an impairment rating based on a prior diagnosis of cervical facet syndrome is not highly probably in error.

Based on the totality of the evidence, there is insufficient evidence establishing that it is highly probable Dr. Green erred in his opinion on permanent impairment. To the extent Drs. Miller and Gutterman provided different impairment ratings, their opinions represent mere differences of opinion that do not rise to the level of clear and convincing evidence.

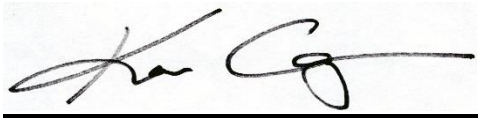
ORDER

1. Claimant failed to overcome Dr. Green's DIME opinion on permanent impairment by clear and convincing evidence.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

STIPULATIONS

Respondents stipulated that should this court find Claimant sustained a worsening of condition and that the requested surgery is reasonable, necessary, and related, that Dr. Craig Davis is as an authorized treating physician.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she suffered a worsening of condition sufficient to reopen her claim for benefits.

II. Whether Claimant proved by a preponderance of the evidence that the requested right shoulder surgery proposed by Craig Davis, M.D., is reasonable, necessary, and related to the July 10, 2020, work injury.

FINDINGS OF FACT

1. Claimant, a 60-year-old female, sustained an admitted right shoulder injury on July 10, 2020. RHE F at 34. Claimant presented for treatment at Concentra Medical Centers on July 13, 2020. *Id*. Claimant reported that she was carrying a box that weighed about 58 pounds when she tripped over a plastic strap on the floor. *Id*. Claimant said that she fell to her knees. *Id*. "A remote hx of right shoulder fracture…" was reported. *Id*.
2. Upon examination of the right shoulder, tenderness in the rhomboids, scapula and supraspinatus were noted with limited range of motion. *Id*. at 35. Claimant was diagnosed with a right shoulder strain, right wrist sprain, lumbar sprain, and a right knee injury. *Id*. at 36. Claimant was prescribed Cyclobenzaprine, Ibuprofen, Lidocaine patches, and referred for physical therapy. *Id*. Claimant started physical therapy on July 13, 2020, with Concentra. RHE G at 63.
3. According to the July 13, 2020, physical therapy notes, Claimant's active range of motion goal for the right shoulder was "Flex 170 or greater Abd 170 or greater…" *Id*. at 64. Claimant's current flex value was noted as 120 and her abd value was reported as 90. *Id*.
4. On August 4, 2020, Claimant attended physical therapy. *Id*. at 75. Claimant's current range of motion for the right shoulder was noted as "Flex 145 ABD 145 Goal Status: Making moderate progress toward goal." *Id*.
5. On August 5, 2020, Claimant attended physical therapy. *Id*. at 78. Claimant's active range of motion goal continued to improve. *Id*. It was noted as "Flex 160 ABD 155 Goal Status: Making significant progress toward goal."

6. On August 11, 2020, Claimant attended physical therapy. *Id*. at 81. Claimant's active range of motion was noted as "Flex 160 ABD 160…" *Id*. Her active range of motion goal was 170. *Id*.

7. Claimant attended a routine appointment at Concentra on August 11, 2020. RHE F at 57. PA Bodkin noted a normal appearance of the right shoulder with full range of motion and motor strength. *Id*.

8. On August 25, 2020, Dr. Carrie Burns placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment rating and no work restrictions – full duty. *Id*. at 62. Maintenance medical care was recommended, specifically, to finish remaining physical therapy sessions. *Id*.

9. On September 10, 2020, Respondents filed a Final Admission of Liability. RHE B at 6. Respondents admitted to an MMI date of 8/25/2020, and reasonable, necessary, and related maintenance medical care. *Id*.

10. Claimant did not object to Respondents' Final Admission of Liability, file an application for hearing, or pursue a Division Independent Medical Examination.

11. Claimant did not seek treatment for her right shoulder injury until approximately August 2021 with Dr. Franck Belibi. RHE I at 86. Claimant underwent a right shoulder MRI. *Id*. The MRI revealed the following impressions: 1. Focal full thickness to near full thickness tearing of the supraspinatus tendon involving the middle third fibers at the junction of the footprint and critical zone.; 2. Overall mild to moderate rotator cuff tendinosis.; 3. Mild tendinosis of the intra-articular long head biceps tendon.; 4. Mild subacromial/subdeltoid bursitis. *Id*.

12. Claimant met with Dr. Belibi on September 14, 2021. RHE H at 83. Dr. Belibi discussed the MRI results with Claimant. *Id*. A shoulder brace was recommended. CHE 5 at 25.

13. On November 15, 2021, Claimant attended a visit at New West Physicians. RHE J at 94. Claimant reported she was advised to wear a shoulder brace after performance of the MRI and did not see orthopedics. *Id*. Claimant was referred to orthopedics. *Id*.

14. On February 7, 2022, Claimant met with Craig Davis, M.D. RHE K at 98-99. Dr. Davis recommended surgery to repair the rotator cuff. *Id*. at 99. A detailed causation assessment was not performed by Dr. Davis in this report. He merely stated that "Because this happened at work, she will try to get this covered under Workmen's Compensation." *Id*.

15. On March 23, 2022, Claimant returned to Dr. Davis. *Id*. at 104. Claimant reported she was working full duty. *Id*. at 105. Claimant also reported that the initial injury "occurred at work months ago." *Id*.

16. A Rule 16 Independent Medical Examination (IME) was performed by Dr. Mark Failinger at Respondents' request on March 3, 2022. RHE L at 107. Dr. Failinger performed a comprehensive review of Claimant's medical records and performed an examination. *Id*. Dr. Failinger concluded that the request for a repair, rotator cuff; arthroscopy, shoulder with Biceps Tenodesis for the right shoulder was unrelated to the July 10, 2020, incident. *Id*. Respondents denied the request for surgery on March 25, 2022, per Rule 16, WCRP. *Id*.

17. Dr. Failinger concluded that "[a]ccording to the records, and according to the clinic note by Hannah Bodkin, PA-C, on 8-25-2020, the patient had full range of motion with normal strength and had significant improvement in her symptoms. There was a recommendation that the patient finish out her physical therapy sessions to ensure she had a reasonable home therapy program. The patient did not return…for an entire year. With the resolution of the initial symptoms within six weeks after an initial fall, it is with reasonable medical probability that the patient sustained a shoulder sprain only, and it is unlikely that she sustained any significant tearing nor acceleration of previous rotator cuff pathology. That is to say, it is not with reasonable medical probability that she sustained an initial tearing of the rotator cuff in the right shoulder in the fall of 07-10-2020. *Id*. at 120.

18. Dr. Failinger further concluded that "it would not be medically probable that the patient's symptoms would essentially completely resolve, with full shoulder range of motion and full strength, within six weeks following the incident if, in fact, further acceleration of rotator cuff pathology occurred." *Id*. at 120. Moreover, Dr. Failinger explained "[h]er resolution of symptoms are most reasonably explained by a sprain of the structures of the shoulder, and it is not medically probable that tearing of the rotator cuff occurred at the work incident of 07-10-2020, or it would be unlikely the patient would have had resolution of symptoms in such a quick post incident timeframe." *Id*.

19. Dr. Failinger also indicated that when he examined Claimant's left shoulder to test abduction and strength, at best it exhibited 4/5 abduction strength. *Id*. at 121. This indicates and supports "the ongoing nature of a rotator cuff degenerative tearing and disease, and it is with medical probability that she has a tear in the left rotator cuff as well, despite no symptoms." *Id*.

20. Dr. Failinger opined that Claimant's "right shoulder symptoms likely resumed in the summer of 2021 causing her to seek further treatment for the right shoulder. Those recurrent symptoms were not reasonably due to pathology created in the work incident of 07-10-2020, but rather due to ongoing degeneration, with a recurrent flare of symptoms." *Id*.

Testimony of Dr. Failinger

21. Dr. Failinger is a Colorado licensed physician with Level II accreditation by the Colorado Department of Labor. Dr. Failinger is also board certified in orthopedic surgery and sports medicine. Dr. Failinger routinely performs causation assessments in compliance with his Level II accreditation. Dr. Failinger was admitted as an expert witness in orthopedic surgery and sports medicine, and as a Level II accredited physician. Tr. at 36-37.

22. Dr. Failinger testified that Claimant was diagnosed with a right shoulder strain as a result of the July 10, 2020, incident. Tr. at 38. Dr. Failinger testified that his diagnosis was appropriate based on the reported mechanism of injury, a fall to the knees with only a contusion sustained to the right shoulder. *Id*. Dr. Failinger testified that the forces of the fall would be absorbed by the knees. *Id*. *see also* Tr. at 42. Dr. Failinger

testified that he could not identify a mechanism of injury for the right shoulder to support a torn rotator cuff. *Id*.

23. Dr. Failinger credibly and persuasively testified that Claimant's injury was more consistent with a sprain based on her improvement in physical therapy and that Claimant progressed through treatment as anticipated for a strain, which is resolution within approximately six weeks as compared to a tear. *Id*. Dr. Failinger testified Claimant reached full range of motion in the right shoulder within four weeks, and only exhibited minimal tenderness. *Id*. Dr. Failinger testified that Claimant returned to full duty as well. *Id*.

24. Most importantly, Dr. Failinger credibly and persuasively testified that the sequence of events as reported by Claimant with a very high probability was a sprain, "meaning if you had actually torn the rotator cuff and there's a small partial tear noted later on the MRI a year later, she would not reasonably have been able to recover that quickly. She would not reasonably be able to go back to a job of lifting up to…70 pounds based on her previous work position. But even 10, 20 pounds and reaching shoulder level or above, there would have been persistent pain and symptoms that wouldn't have resolved in four weeks, much less fully resolved at six weeks." Tr. at 40.

25. Dr. Failinger testified that it is extremely difficult to tear a rotator cuff. Tr. at 42. Dr. Failinger testified that a healthy rotator cuff is difficult to tear, and that ligaments and bones would tear and or break prior to tearing a rotator cuff. *Id*. Dr. Failinger, however, testified that that is relatively easy to tear a diseased or partially torn rotator cuff. *Id*.

26. Dr. Failinger testified that Claimant's August 2021 MRI of the right shoulder revealed chronic findings. Tr. at 45. Specifically, Dr. Failinger testified that the MRI revealed degeneration in acromioclavicular joint and fraying/degenerative findings of the labrum. *Id*. Dr. Failinger further testified that Claimant sustained only a partial tear of the rotator cuff. Tr. at 45, *51*.

27. Dr. Failinger credibly testified that it is not medically probable that the Claimant tore her rotator cuff as a result of July 10, 2020, incident. Tr. at 48.

28. Dr. Failinger credibly testified that is not medically probable that the Claimant sustained an aggravation or acceleration of a preexisting rotator cuff pathology as a result of the July 10, 2020, incident based on the early resolution of her symptoms. Tr. at 48-49.

29. Dr. Failinger credibly testified that based on a reasonable degree of medical probability the Claimant's current symptoms are not the result of the July 10, 2020, incident. Tr. at 49. Dr. Failinger testified that Claimant's symptoms are the classical presentation of rotator cuff disease. *Id*.

30. Dr. Failinger credibly testified that when an acute injury occurs to a rotator cuff, symptoms do not occur and then hide for years. Tr. at 49. Dr. Failinger testified that the symptoms from an acute injury would persist for months after the event – which they did not in this case. Tr. at 50. Dr. Failinger further testified that it would be difficult for an individual to lift items of approximately 10-15 pounds from chest level and above if they had a torn rotator cuff. *Id*.

31. Dr. Failinger also testified that cumulative trauma to the right shoulder would not be related to the July 20, 2020, incident. Tr. at 62.

32. Dr. Failinger testified that Claimant reached MMI on August 25, 2020, with full strength, full range of motion, and full function as documented in the report. Tr. at 63.

33. Dr. Failinger credibly and persuasively testified that the surgery recommended by Dr. Davis is unrelated to the July 10, 2020, incident.

Testimony of Claimant

34. Claimant returned to full duty employment after being placed at MMI on August 25, 2020. Tr. at 12. Claimant did not continue with any physical therapy after being placed at MMI because she was unaware of the recommendation. Tr. at 13.

35. Claimant kept working after being placed at MMI until the present. Tr. at 19.

36. Claimant tripped over plastic binding on the floor causing her to fall onto her knees and on top of the large box she was carrying on July 10, 2020. Tr. at 20. When she fell, the box went into her pit area of the right shoulder. *Id*. at 21.

37. During her treatment at Concentra, Claimant worked in a modified capacity. Tr. at 22. In such capacity, she was not lifting as much, and instead was doing more computer work. *Id*. at 22-23.

38. After being placed at MMI, released to full duty, and working full duty, Claimant was still required to, and did, lift packages that weighed between 10 and 30 pounds without assistance. Claimant also had to lift packages that weighed 40 pounds, but did so with assistance. She was also able to maneuver packages that weighed 70 pounds. *Id*. Claimant did this without seeking medical treatment for her left shoulder until almost one year after being placed at MMI, when she sought treatment for her right shoulder in July 2021. *Id*. at 28.

Ultimate Findings of Fact

39. Claimant suffered a compensable shoulder strain on July 10, 2020. Claimant underwent conservative treatment and her condition improved. Due to the improvement of her condition, Claimant was returned to full duty and placed at MMI on August 25, 2020.

40. After being placed at MMI, Claimant returned to work and worked full duty. Claimant kept working full duty without seeking medical treatment until July 2021, when she had an increase in shoulder symptoms.

41. Claimant's July 10, 2020, injury did not leave Claimant's shoulder in a weakened condition. Thus, the need for additional medical treatment is not a compensable consequence of the industrial injury.

42. Claimant's increase in shoulder symptoms, which occurred after being placed at MMI, are unrelated to her July 10, 2020, work injury – a shoulder strain.

43. Claimant's July 10, 2020, work injury - shoulder strain - has not worsened.

44. Claimant's right shoulder symptoms, that developed after being placed at MMI, are not causally related to her July 10, 2020, work injury.

45. Claimant's rotator cuff tear, for which surgery has been recommended, is a distinct condition that is unrelated to her shoulder strain.

46. Claimant's need for medical treatment is not causally related to her July 10, 2020, work injury.

47. Claimant's need for shoulder surgery is not causally related to her July 10, 2020, work injury.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936);

CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that she suffered a worsening of condition sufficient to reopen her claim for benefits.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and her entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Reopening of the claim is unwarranted as Claimant's current complaints and conditions are not causally connected to the July 10, 2020, incident. At the time of MMI, Claimant exhibited full range of motion and strength in the right upper extremity. Claimant returned to full duty employment and testified that she was capable of lifting packages up to 30 pounds and able to maneuver packages weighing 70 pounds. Dr. Failinger credibly testified that the Claimant's symptoms resolved as expected for a strain type injury within about six weeks. Dr. Failinger testified that if an acute injury to the rotator cuff occurred,

the Claimant would be unable to return to full duty employment. Dr. Failinger credibly testified that if an individual has a torn rotator cuff it would be difficult to even lift to shoulder level and above packages weighing even 10 pounds. Claimant continues to work full duty and continues to lift packages weighing up to 30 pounds.

Dr. Failinger credibly testified that the mechanism of injury as reported by Claimant regarding the July 10, 2020, incident based on a reasonable degree of medical probability would not create a rotator cuff tear.

Claimant failed to establish a change in her shoulder condition, a sprain, since reaching MMI on August 25, 2020. As found, the rotator cuff tear is a distinct and unrelated condition for which surgery has been recommended.

Claimant desires reopening for additional treatment for the right shoulder because her symptoms increased about one year after being placed at MMI. Dr. Failinger credibly and persuasively opined and testified that Claimant's symptoms result from degeneration which naturally occurs with rotator cuff disease and not the shoulder strain that occurred in July 2020. This is evidenced by the lack of treatment for approximately one year after reaching an end point in treatment in August 2020.

Therefore, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that her July 10, 2020, work injury has worsened and that such worsening is causally related to her July 10, 2020, work injury.

II. Whether Claimant proved by a preponderance of the evidence that the requested right shoulder surgery proposed by Craig Davis, M.D., is reasonable, necessary, and related to the July 10, 2020, work injury.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *City of Durango v. Dunagan*, 939 P.2d (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims* Office, 989 P.2d 251 (Colo. App. 1999).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003); *Snyder v. Industrial Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). In a dispute over medical benefits that arises after filing an admission of liability, Respondents may assert, based upon subsequent medical reports, that workers' compensation claimant did not establish a

threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

In this case, Claimant failed to establish by a preponderance of the evidence a causal connection supporting the relatedness of the request for surgery from Dr. Davis to the July 10, 2020, work incident, when she suffered a shoulder strain. It was not until Claimant was diagnosed with a partial tear to the rotator cuff one-year post MMI that Claimant required surgery. Dr. Failinger credibly and persuasively testified that Claimant did not sustain a rotator cuff tear as a result of the July 10, 2020, work incident based on the mechanism of injury. Nor did the Claimant sustain an aggravation of preexisting rotator cuff disease as a result of the July 10, 2020, work incident. This is evidenced by the Claimant's ability to return to full duty employment after being placed at MMI in August 2020. Although the requested procedure may be medically necessary, it is unrelated to the July 10, 2020, work incident. In the end, Dr. Failinger credibly and persuasively concluded that the proposed surgery is due to the degenerative process of the shoulder, and not the original work injury.

The ALJ further finds and concludes that Claimant's July 10, 2020, work injury did not result in Claimant being in a weakened condition and more susceptible to a rotator cuff tear for which surgery has been recommended.

As a result, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that the need for shoulder surgery is causally related to her July 10, 2020 work injury.

ORDER

1. Claimant failed to sustain her burden of proof that she suffered a worsening of condition sufficient to reopen her claim for benefits for the right shoulder and the Petition to Reopen is DENIED.

2. Claimant failed to sustain her burden of proof that the right shoulder surgery

requested by Dr. Craig Davis is reasonably necessary and related to the July 10, 2020, work injury and the procedure is DENIED.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 2, 2022

/s/ Glen Goldman

_____

Glen Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

➢ Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule adopted by Employer for the safety of the employees?

FINDINGS OF FACT

1. Claimant was employed with Employer as a driver. Claimant sustained injuries arising out of and in the course and scope of his employment on December 20, 2021 when he approached a commercial customer to empty the trash container and noticed the enclosure containing the trash container had extra debris which Claimant testified was wooden pallets, hanging out of the container and in front of the container. Claimant testified he needed to stop the vehicle and move the debris before he could empty the container.

2. Claimant exited the truck and proceeded to the area between the truck and the garbage container when the truck rolled forward and pinned Claimant between the truck and the garbage container. Video of the accident from the truck was entered into evidence at hearing.

3. Claimant testified he recalls that he exited the vehicle, and was removing the debris when he heard the truck rev as if someone was in the vehicle. Claimant testified he then tried to make himself small and found himself trapped under the truck.

4. Claimant was taken by ambulance to the hospital where he was admitted and eventually air lifted to Denver for further treatment. Claimant remained in the hospital for six (6) weeks.

5. Claimant testified at hearing that he does not recall what caused the truck to roll forward. Claimant testified that when he got out of the truck, he went through his usual protocol when getting out of his truck. Claimant testified he has been employed with employer for 25 years and has used the truck he was driving on December 20, 2021 the majority of his time while employed by Employer. Claimant testified his typical protocol when exiting his vehicle is to stop, analyze the situation, apply the parking brake, take the truck out of gear, unlatch his safety belt, open the door and exit the vehicle with three points of contact.

6. Claimant testified he needs to keep a certain pace in order to complete his route during his work day. Claimant testified when he has to deal with extra debris, it takes extra time to service the route. Claimant testified he attempts to work as quickly, efficiently and safely as possible.

7. Claimant testified he had been written up for violating safety rules in the past, including one for backing into a parked vehicle in 2015 and for having food and drink in his truck in 2019. Claimant also testified he had been written up for using an electronic device while driving in May 2021. Claimant testified he was aware that he needs to set the parking brake when he gets out of the vehicle and is aware that he is to take the truck out of gear when getting out of the vehicle.

8. Respondents presented the testimony of TP[Redacted], the head technician for Employer. Mr. TP[Redacted] testified that on December 20, 2021 he proceed to the accident site after hearing of the accident. Mr. TP[Redacted] testified he climbed into the cab of the truck at the accident site and noted that the key was on and the lights for the truck were on. Mr. TP[Redacted] testified that the shift pad read 6 and 1 and the gear box showed that the truck was in 1st gear and the vehicle was on. Mr. TP[Redacted] testified that with the vehicle in question, if you turn off the vehicle, the truck automatically goes into neutral.

9. Mr. TP[Redacted] testified that Employer has a list of "life critical rules." A copy of the Employer's Operation and Safety Rules was entered into evidence at hearing. Operation and Safety Rule 1.21 provides that when leaving a vehicle unattended, the employee should always do the following: (1) Put the transmission in neutral; (2) Set the parking brake; (3) Shut off the ending and remove the key from the ignition; (4) Activate the battery disconnect.

10. Operation and Safety Rule 3.0 provides that an employee should "Always apply parking brakes when parking. Ensure parking brakes are holding the vehicle from moving before exiting the tuck. Do not use a hand control valve or work brake for parking. Do not use the parking brake to restrain a vehicle with the engine running and the transmission in a forward or reverse gear. Do not leave the vehicle's transmission in gear when parking."

11. Respondents presented the testimony of Adam Michener, an engineer with Delta V Forensic Engineering. Mr. Michener testified as an expert in forensic engineering and accident reconstruction. Mr. Michener testified he was provided videos from the truck and examined the truck and visited the accident site in connection with his accident reconstruction report that was entered into evidence.

12. Mr. Michener testified that it was his conclusion that Claimant did not put the truck and neutral and did not engage the parking brake when he exited the vehicle. Mr. Michener testified the truck was on a slight incline at the accident site, so if the truck was in neutral, the truck would have rolled backwards. Mr. Michener testified that if the parking brake had been applied, it would have been sufficient to sop the vehicle from rolling forward.

13. Mr. Michener testified he did not interview Claimant of any other witnesses to the accident in preparing his report. Mr. Michener testified he did not have an opinion as to whether the accident was intentional or accidental.

14. Respondents presented the testimony of TS[Redacted], the District Operations Manager for Employer. Mr. TS[Redacted] testified Employer offers safety training at least once per week and additional safety meetings if necessary. Mr. TS[Redacted] testified Employer holds "life critical rules" as being the most critical rules for employees because these rules are based on fatalities that have occurred on the job.

15. Mr. TS[Redacted] testified that Claimant had previously been written up on May 21, 2021 for a violation of a "life critical rule" for using an electronic device while actively driving a commercial vehicle. Claimant was provided with a final written warning for this safety rule violation.

16. Mr. TS[Redacted] testified Claimant was subsequently provided with additional coaching on June 22, 2021 for issues with his following distance and another coaching session on September 27, 2021 for failing to come to a complete stop at an intersection.

17. Mr. TS[Redacted] testified that Claimant's actions in failing to put his vehicle in neutral and failing to set the parking brake violated "life critical rule #1 0" which states that employees should "always apply parking brakes when exiting a vehicle." Mr. TS[Redacted] further testified Claimant's actions violated Employer's safety rule 1.21 regarding unattended vehicles and rule 3.0 involving brakes and gauges.

18. The ALJ credits the testimony of Mr. Michener as being credible and persuasive as to the circumstances that occurred that caused the truck to roll forward and cause the injuries in this case and finds that Respondents have established that Claimant violated a safety rule set forth by the employer that resulted in Claimant sustaining injuries. Specifically, the ALJ finds that Respondents established by a preponderance of the evidence that Claimant failed to take the truck out of gear and apply the parking brake which resulted in the truck rolling forward and striking Claimant.

19. Claimant argued at hearing that there was insufficient evidence that Claimant's actions in this case were willful or that Claimant deliberately violated the Employer's safety rule. Claimant argues that while his actions may be negligent, they are not willful and therefore, the 50% reduction of benefits allowed pursuant to Section 8-42-112(1)(b) would be improper.

20. Respondents argued at hearing that Claimant had a history of violating safety rules in the past and noted that the safety rule violated by Claimant in this case was a "life critical rule" that is given special attention by Employer due to the importance of following these rules. The ALJ agrees that the evidence in this case establishes that it is more probable than not that Claimant's actions in getting out of the truck and failing to take the truck out of gear and set the parking break were willful.

21. The ALJ credits the evidence presented at hearing, including the testimony of Mr. TS[Redacted] regarding the instruction regarding the safety rules by Employer and finds that Respondents have established that it is more probable than not that Claimant willfully violated a reasonable safety rule set forth by the Employer when

he removed himself from the cab of his truck without taking the truck out of gear or setting the emergency brake.

22. The ALJ notes that the evidence in this case, which includes the testimony of Mr. Michener, establishes that Claimant violated at least two safety rules when he got out of the truck without setting the parking brake or taking the truck out of gear and finds that the actions of Claimant in getting out of the truck without following the appropriate procedure to ensure that the truck did not move while Claimant was out of the truck represents a willful action on Claimant's part.

23. The fact that Claimant needed to disregard multiple safety rules in order to leave the cab of the truck in a manner in which the truck was still able to roll forward and strike Claimant, this evidence demonstrates that the actions of Claimant was willful and not a result of mere carelessness, negligence, forgetfulness, remissness or oversight. The ALJ further finds that Claimant's history of violating safety rules, including his safety rule violation in May 2021 for using an electronic device while operating a vehicle is further evidence that Claimant's actions in this case were willful in nature and not the result of mere carelessness, negligence, forgetfulness, remissness or oversight.

24. Because the evidence establishes Claimant's injury resulted from actions where Claimant willfully failed to obey a reasonable safety rule adopted by Employer for the safety of employees, Respondents are entitled to reduce his non-medical benefits by 50% pursuant to Section 8-42-112(1)(b).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2021. However, in cases in which an employer alleges a safety rule violation under Section 8-42-112(1)(b), the burden of proof rests with respondents to establish that claimant willfully violated a reasonable safety rule established by the employer. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. As found, the testimony of Mr. Michener is found to be credible and persuasive that the injury in this case resulted from Claimant's failure to take the vehicle out of gear and apply the parking brake when he removed himself from the vehicle. As found, Claimant's failure to take the truck out of gear and apply the parking break resulted in the truck proceeding forward where Claimant had positioned himself to remove the pallets, and resulted in the truck striking Claimant and trapping Claimant between the truck and the garbage container. The ALJ credits the testimony of Mr. TS[Redacted] that Employer established the "life critical rules" for the purpose of protecting employees as these safety rules had been developed after accidents that had led to deaths. Therefore, Respondents have proven by a preponderance of the evidence that Claimant's failure to obey a reasonable safety rule that was established for the safety of the employees resulted in Claimant's injury.

6. As found, the ALJ credits the testimony of Mr. TS[Redacted], which was corroborated by Claimant's testimony and finds that Claimant had a history of safety rule violations which included a violation of a "life critical rule" in May 2021. As found, the evidence establishes by a preponderance of the evidence that Claimant's actions on December 20, 2021 in which he got out of the cab of the truck without taking the truck out of gear or setting the parking break represented a willful violation of Employer's safety rule.

7. Because Respondents have established that Claimant's injury resulted from a willful violation of a safety rule established by Employer for the safety of employees, Respondents are allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

ORDER

It is therefore ordered that:

1. Respondents are allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

2. All matters not determined herein are reserved for future determination.

DATED: September 2, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her need for a left shoulder arthroscopic rotator cuff repair, subacromial decompression, biceps tenodesis and posterior labral repair surgery, is causally related to her August 6, 2020 work-related fall.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted injury to her left shoulder on August 6, 2020. Claimant explained that a bucket placed under a leaking drinking fountain overflowed, spilling water onto a concrete floor, which caused her to slip and fall onto her left shoulder.

2. Claimant reported her fall immediately. She was given a choice of authorized providers to attend to her injuries. She chose to treat with the providers at Centura Centers for Occupational Medicine (CCOM). Claimant was initially evaluated by Nurse Practitioner (NP) Brendon Madrid at CCOM on August 7, 2020 – the day after her fall.

3. During Claimant's initial evaluation at CCOM, she completed a pain diagram endorsing aching pain on the right side of her head, the left side of her neck, the left shoulder, left hip and buttock, left calf, left lower arm, left wrist, left hand, chest, and mid and lower back. NP Madrid diagnosed Claimant with strains, including a left shoulder strain, placed her on modified duty, and prescribed over-the-counter (OTC) Tylenol.

4. Claimant returned to CCOM for a follow-up appointment on August 12, 2020. During this appointment, Claimant reported that the sitting associated with her modified duty was aggravating her pain. She requested a trial of full duty work so she could move about a bit more. NP Madrid released Claimant to full duty work without restriction.

5. Claimant testified that the week after the fall, her shoulder pain was "not [in] a pinpoint spot, it's a generalized spot when it hurt. . . I mean, it hurts along the back in the back muscles, but it ties into the shoulder." (Hrg. Tr., p. 21:18-20).

6. Claimant continued working without restriction and returned to CCOM on August 18, 2020. During this encounter, Claimant reported tightness in her mid-back and neck. She also complained of headaches but denied any numbness or tingling

radiating down her arms. Physical examination was limited to the neck and shoulders, which revealed "tightness and tenderness to the musculature on the right and left side of the neck as well as the right and left trapezius muscles". Claimant was able to "interlock her fingers behind her head and behind her back without difficulty". (Resp. Ex. C, p. 21.) NP Madrid referred Claimant for three sessions of massage therapy and scheduled a follow-up appointment for August 25, 2020.

7. Claimant saw NP Madrid in follow-up on August 25, 2020 for what he documented as a neck strain, thoracic strain and low back strain. Claimant reported feeling "very tight" but denied any numbness or tingling down her upper or lower extremities. Physical examination was limited to the neck, thoracic and lumbar spine. NP Madrid added Meloxicam and Tizanidine to Claimant prescription medications and scheduled a follow-up visit for September 1, 2020.

8. Claimant testified generally that after her date of injury (DOI) the nature of her multiple body part pain changed in that it became less generalized and more focused. (Hr. Tr., p. 23:10-14).

9. Claimant returned to CCOM on September 1, 2020 where she was once again seen by NP Madrid who noted she was "in for follow-up visit status post neck strain, low back strain". (Resp. Ex. C, p. 26). Claimant continued to complain of 4/10 pain with "tightness to the musculature around the neck area and trapezius muscles bilaterally". *Id*. Examination of the shoulders was limited to a range of motion test for abduction against resistance. No other provocative testing maneuvers directed to the shoulder(s) were completed. (Resp. Ex. C, p. 27). NP Madrid noted he spent 50 minutes with Claimant with more than 50% of this time being spent in education with her on the plan of care, which included, completing massage therapy and continuing OTC Tylenol and her home stretching program. *Id.*

10. Claimant saw NP Madrid in follow-up on September 10, 2020. She reported 7/10 pain including stabbing pain in her neck, burning pain in the left thoracic area and aching pain in her low back and sciatic area. NP Madrid limited his physical examination to the neck, thoracic and lumbar spine. He discontinued massage therapy and ordered seven sessions of physical therapy. He also instructed Claimant to return to the clinic for a follow-up appointment. (Resp. Ex. C, p. 31).

11. Claimant saw NP Madrid on September 16, 2020. Claimant's reports of aching pain persisted and her examination was again limited to her neck, thoracic and lumbar spine. X-rays of the cervical, thoracic and lumbar spine were obtained and demonstrated no acute findings. A follow-up appointment was made.

12. After seven appointments with NP Madrid and approximately 2 months after her August 6, 2020 slip and fall, Claimant had her first appointment with Dr. Centi on October 1, 2020. Dr. Centi noted that Claimant's primary problem continued to be focused on her cervical and lumbar strains. He documented that there was "no other arm or leg involvement". He noted no abrasions, bruising, erythema, swelling rashes or

wounds on the upper extremities. He also indicated that there was no pain with palpation to the upper extremities. He recommended continued prescriptions/physical therapy and ordered a TENS unit.

13. On October 15, 2020, Claimant returned to Dr. Centi who documented that Claimant's primary problem is "F/U cervical and lumbar strain, neck is still stiff and sore. . ." (Resp. Ex. C, p. 42).

14. On October 27, 2020, Claimant's pain diagram specifically documented aching in the posterior aspect of the left shoulder. (Resp. Ex. C, p. 49). Despite this Dr. Centi's October 27, 2020, medical report is largely unchanged from his previous reports of October 1, and 15, 2020. While Dr. Centi may have visually inspected the upper extremities for abrasions, bruising, redness, swelling, rashes and wounds, careful review of the October 1st, 15th and 27th, 2020 reports fails to document any indication that a physical examination was directed to the left shoulder. (resp. Ex. C, pp. 38-49).

15. Between October 1, 2020, when Claimant saw Dr. Centi for the first time and October 27, 2020, when she clearly depicted in her pain diagram that she was having posterior left shoulder pain, Claimant was participating in physical therapy (PT). (Resp. Ex. F). PT treatments were focused on Claimant's cervical and lumbar spine; however, on October 26, 2020, one day before her 10/27/20 appointment with Dr. Centi, she reported that her left shoulder had "been *more* sore", suggesting that she had previous symptoms in the left shoulder. (Resp. Ex. F, p. 99) (emphasis added).

16. Claimant returned to NP Madrid for a follow-up visit on November 5, 2020. During this encounter, Claimant reported she had experienced "discomfort in her left shoulder when she was lying on her stomach on her phone". (Resp. Ex. C, p. 50). Despite her complaint of left shoulder pain, the physical examination directed to the shoulders by NP Madrid consisted of performing one provocative testing maneuver, i.e. testing Claimant's range of motion to 90 degrees of abduction against resistance. (Empty Can Test). *Id.* No other provocative examination testing focused to the left shoulder was completed. Indeed, outside of testing Claimant's shoulder abduction, the remaining physical examination findings documented in the November 5, 2020 report by NP Madrid concerning Claimant's shoulders amounts to a recitation of what was previously recorded by Dr. Centi, namely that there was no bruising, erythema, wounds or swelling in the upper extremities.

17. Claimant returned to Dr. Centi in follow-up on November 19, 2020. As part of her examination, Claimant completed a pain diagram, which clearly depicted aching pain in the posterior left shoulder. In the examination section of his November 19, 2020 report, Dr. Centi simply reiterated the upper extremity findings originally documented in his October 1, 2020 report, i.e. there was no bruising, erythema, or swelling present in the left upper extremity and no pain to palpation of the left upper arm. (Resp. Ex. C, p. 55). Despite Claimant clearly indicating that she had aching pain in the posterior aspect of the left shoulder, Dr. Centi performed no meaningful shoulder

examination or provocative testing. Instead, he placed Claimant at maximum medical improvement (MMI) on 11/19/2020.[1]

18. Claimant testified that once she was placed at MMI by Dr. Centi her access to treatment was terminated. (Hrg. Tr., p. 24:6-9). Claimant testified that her neck, back, left hip and left shoulder were still painful at the time of MMI and she did not agree with her release from care. *Id.* at pp. 23:21-25; 24:1-5. Consequently, Claimant attempted to treat with her primary care provider (PCP) at Paladina Health. (Resp. Ex. G).

19. On February 17, 2021, Claimant presented to NP Jennifer Becker with Paladina Health for additional treatment. NP Becker informed Claimant that because her treatment was necessitated by a workers' compensation injury she could not assume care. (Resp. Ex. G, p. 121). NP Becker advised Claimant to discuss reopening her case with Broadspire or pursue an independent medical examination. *Id.*

20. Claimant requested a Division Independent Medical Examination (DIME) and Dr. Matthew Brodie completed the same on August 2, 2021. During her DIME appointment, Claimant reported that she slipped and fell on water at work, landing on her left shoulder and hip. (Resp. Ex. H, p. 129). She reported that she developed "back pain, neck pain, left shoulder pain and left hip pain". *Id.* Dr. Brodie documented that Claimant treated under the workers' compensation system but did not undergo any surgical intervention and was released at MMI "following conservative care on November 19, 2020 with 0% impairment, no work restrictions, no maintenance treatment, and no medical follow-up". *Id.*

21. Dr. Brodie reviewed Claimant's medical records that documented a several year history of right, as opposed to left shoulder pain resulting in diagnostic workup and subsequent arthroscopy. He noted further that Claimant had undergone nerve conduction testing of the upper extremities, which revealed bilateral sensory carpal tunnel syndrome, mild left ulnar neuropathy, chronic denervation in the bilateral triceps muscle, and possible bilateral C6-7 radiculopathy. He also noted that Claimant underwent an MRI of the cervical spine in 2012, which revealed arthritis at C5-6. (Resp. Ex. H, p. 131). In addition to her prior right shoulder, neck and upper extremity treatment, Claimant has also been diagnosed with and treated for degenerative joint disease (DJD) in both knees. *Id*. at pp. 131-132. As noted, there is no history of prior symptoms/complaints concerning the left shoulder. Nor is there any history of treatment directed to the left shoulder.

22. During her DIME, Claimant reported, "*Continued* left-sided neck and upper shoulder pain". (Resp. Ex. H, p. 134) (emphasis added). She was "unsure whether her left shoulder pain [was] independent of the neck and left upper shoulder girdle pain", but

[1] Although not provided as part of the exhibits admitted into evidence, Dr. Brodie references that he reviewed a WC 164 form as part of his medical records review during the DIME, which released Claimant at MMI with no impairment and no need for maintenance care. (Resp. Ex. H, p. 134).

felt that her neck and upper shoulder pain may be "interconnected" because she had pain in both areas simultaneously. *Id.*

23. Dr. Brodie's physical examination revealed pain localized diffusely in multiple regions of the left shoulder as well as reduced active range of motion in most planes. Provocative testing was performed and noted to be "[e]quivocal/unreliable but potentially positive" for drop arm testing, empty can sign, crossed arm/chest sign and shoulder impingement testing. (Resp. Ex. H, p. 136).

24. Dr. Brodie diagnosed Claimant with left shoulder pain of unclear etiology. According to Dr. Brodie, "[d]iagnostic considerations [included] intrinsic disorder of the left shoulder [and] myofascial pain. (Resp. Ex. H, p. 136). He noted that Claimant had a new onset of left shoulder symptomology that [had] not been sufficiently evaluated". Consequently, Dr. Brodie opined that Claimant was not at MMI. *Id*. at pp. 136-137. Dr. Brodie recommended "additional diagnostic testing, and specialist evaluations . . . prior to reconsideration for the assignment of maximum medical improvement". *Id*. at p. 138. Specifically, Dr. Brodie recommended that Claimant proceed with an orthopedic shoulder surgical consultation along with further diagnostic testing to include injections, MRI and MR arthrogram.

25. Following Dr. Brodie's DIME, Claimant began treatment at Concentra Medical Centers (Concentra) under the direction of Dr. Douglas Bradley. (Resp. Ex. I). On September 9, 2021, Dr. Bradley noted that he had reviewed Dr. Brodie's DIME report. He noted further that the claim had been "reopened" for an evaluation of Claimant's "neck, left wrist, left shoulder, low back and left hip". (Resp. Ex. I, p. 144). On September 20, 2021, Dr. Bradley referred Claimant to Dr. Jennifer Fitzpatrick for an orthopedic evaluation of her left shoulder. *Id*. at p. 149. Claimant was also referred for an MRI, without contrast on October 4, 2021 by Concentra NP Jennifer Livingston. *Id*. at p. 154.

26. Claimant underwent a left shoulder MRI without contrast on October 25, 2021. This imaging revealed tendinitis of the supraspinatus tendon, a 20% under surface partial tear of the anterior leading edge of the supraspinatus tendon of unknown age, arthrosis of the acromio-clavicular joint, mild subacromial-subdeltoid bursitis and a suspected tear in the posterior labrum for which MR arthrography was recommended. (Resp. Ex. L, p. 269).

27. Claimant presented to the offices of Dr. Fitzpatrick on November 1, 2021 for review of her left shoulder MRI results. (Resp. Ex. J, p. 225). During this encounter, Claimant reported anterior lateral left shoulder pain and pain with reaching overhead and behind her back. *Id*. Physical examination of the left shoulder revealed positive provocative testing, including a positive speeds test. Dr. Fitzpatrick successfully administered 40 mg of Kenalog mixed with 6 cc of 0.5% Marcaine to the posterior glenohumeral joint (GHJ) of the left shoulder. *Id.* at. pp. 226-227. Claimant was instructed to return to the clinic in six weeks for a follow-up. *Id.* at p. 227.

28. Claimant returned to Dr. Fitzpatrick on December 13, 2021. Dr. Fitzpatrick documented that Claimant had experienced no relief in her left shoulder symptoms after "conservative treatments of PT (physical therapy), HEP (home exercise program), injections, OTC anti-inflammatories, Rx anti-inflammatories and activity modification". (Resp. Ex. J, p. 229). She requested an MRI arthrogram to evaluate for a labral tear. *Id.*

29. Claimant had an MRI Arthrogram of the left shoulder on December 23, 2021. The results of this imaging demonstrated anterior and superior rotator cuff tendinopathy, a full thickness, partial width tear to the ventral aspect of the supraspinatus tendon, a partial thickness tear involving the joint surface of the subscapularis tendon, moderate degenerative changes of the AC joint and degenerative tearing involving the posterior and inferior aspects of the labrum. (Resp. Ex. L, pp. 271-272).

30. On January 14, 2022, NP Debra Anshutz evaluated Claimant during a follow-up appointment at Concentra. (Resp. Ex. I, p. 187). Claimant reported that her left shoulder symptoms were worsening. She reported 5-6/10 pain. *Id*. Shoulder flexion was limited to 95 degrees otherwise. *Id.* at p. 188. Claimant expressed frustration in obtaining "insurance approvals and delayed treatments". *Id*. at p. 190.

31. Claimant returned to Dr. Fitzpatrick in follow-up on January 19, 2022 to discuss the results of her MRI arthrogram. (Resp. Ex. J, p. 231). During this appointment, Claimant reported continued pain with reaching overhead and behind her back. *Id.* Active left shoulder range of motion was limited to 100 degrees of forward flexion and 50 degrees of external rotation. *Id*. at p. 132. Dr. Fitzpatrick recommended an "arthroscopic rotator cuff repair with evaluation of the biceps tendon that is in the concurrent space [along] with a subacromial decompression".[2] *Id*. at p. 233.

32. Respondents requested a Workers' Compensation Rule 16 peer review of Dr. Fitzpatrick's request for authorization to proceed with left shoulder surgery. (Resp. Ex. A). Dr. Jon Erickson completed the requested Rule 16 review on February 3, 2022. As part of his review, Dr. Erickson was asked whether Claimant's rotator cuff pathology could be caused by Claimant's described mechanism of injury (MOI). Dr. Erickson responded as follows:

> An obese individual slipping on a wet floor and landing on their left side could certainly cause enough force to cause a rotator cuff tear.[3]

[2] The ALJ finds Dr. Fitzpatrick's reference to the MR arthrogram being performed on the right shoulder a likely typographical error since Claimant has never reported symptoms in the right shoulder since her August 6, 2020 slip and fall and there is no record supporting that imaging of the right shoulder has been performed during the pendency of this case. (*See* Hrg. Tr. p. 26:6-9).

[3] At the time of his Rule 16 review, Dr. Erickson documented Claimant's height at 5 feet 5 inches tall and her weight at 277 pounds. She had a BMI of 46.1, which places her in the obese weight category. (*See* Resp. Ex. C).

(Resp. Ex. A, p. 5).

33. While Dr. Erickson opined that the described MOI might be causative of Claimant's left shoulder rotator cuff tear, he concluded that the available documentation failed to support the existence of left shoulder complaints until "almost three months from the date of [Claimant's] injury. He also concluded that there had been "multiple normal examinations" of the left shoulder during that same period. (Resp. Ex. A, p. 5). Finally, Dr. Erickson noted that the delay (16 months from the date of injury) in completing the MR arthrogram eliminated the ability to determine the age of the left shoulder pathology. Although the rotator cuff tearing was age-indeterminate, Dr. Erickson opined that it was "most consistent with degeneration" and "part of the normal aging process".[4] *Id.*

34. Dr. Erickson concluded that while the recommended surgery may be "indicated", it was unrelated to Claimant's August 6, 2020 slip and fall. In support of his opinion, Dr. Erickson noted, "if [Claimant] had sustained a rotator cuff tear at the time of her fall on 8/6/2020, she most certainly would have mentioned her symptoms to her care providers". (Resp. Ex. A, p. 5). Accordingly, Dr. Erickson opined that the "damage" visualized on imaging, more likely than not, resulted from a "progressive degenerative process". *Id*.

35. Based upon Dr. Erickson's Rule 16 review, Respondents stood on their denial for prior authorization prompting Claimant to file an Application for Hearing on February 22, 2022. (Clmt's. Ex. 1, pp. 1-4).

36. On July 13, 2022, Claimant demonstrated active forward flexion of the left shoulder to 30 degrees with pain during a follow-up visit at Concentra with Dr. Kathryn Murray. (Clmt's. Ex. 3, p. 8). She also had active movement in abduction of the left shoulder to 100 degrees*. Id.* At hearing, Claimant demonstrated very limited active shoulder flexion during the hearing and she testified that her range of motion was progressively getting worse. She reported that while she could move her left arm to the side, she could not move it straight up in front of her body much. (Hrg. Tr. p. 26:16-25, 27:1). Based upon the evidence submitted, the ALJ finds Claimant's testimony regarding her worsening range of motion credible and persuasive. (*See supra*, ¶¶ 21, 28, 29).

37. Dr. Erickson testified as a Level II accredited expert in orthopedic surgery with significant experience treating shoulder conditions. During his testimony, Dr. Erickson reiterated his opinion that a traumatic injury to a rotator cuff causes significant pain either immediately or within the next couple of days – 24 to 48 hours. (Hrg. Tr., p. 36:21-25, 37:1-16). He testified that a traumatic tear to the shoulder would cause limitation in range of motion and loss of strength also occurring within a few days of the tear. *Id.* Consistent with Claimant's description of escalating symptoms, Dr. Erickson testified that the pain, the range of motion deficits, and the loss of strength associated

[4] Claimant was 48 years old when Dr. Erickson completed his Rule 16 review.

with a traumatic injury to the rotator cuff would progressively worsen over time. (Hrg. Tr., p. 52:7-11).

38. Focusing on the timeline for the development of rotator cuff tear symptoms and Claimant's pain diagrams, Dr. Erickson testified that there was "no justification for calling this, i.e. Claimant's left shoulder condition, a workers' comp injury from a fall on 8/6/2020". (Hrg. Tr. p. 38:7-14). Instead, Dr. Erickson reiterated his opinion that the "problem is more likely due to degenerative change". *Id*. at p. 38:7-11. In support of his opinion, Dr. Erickson testified that for a "period of literally almost three months", the record is devoid of any complaints of pain in the left shoulder and during this same period, no abnormalities were documented as part of the physical examination directed to the left shoulder. (Hrg. Tr., p. 38:1-5). Because the specific tests for determining the presence of a rotator cuff tear did not seem to be positive during examination and because her symptoms were exacerbated by cervical movements, Dr. Erickson suggested that the shoulder aching Claimant endorsed on her 8/7/2020, 10/27/2020 and 11/19/2020 pain diagrams probably represented radicular pain emanating from her neck rather than from a discrete tear to the rotator cuff. (Hrg. Tr., p. 54:5-20).

39. Claimant testified that she completed pain diagrams at the outset of all of her appointments at CCOM. (Hrg. Tr. p. 31:2-4). The record contains pain diagrams dated: 8/7/2020, 8/12/2020, 8/18/2020, 8/25/2020, 9/1/2020, 9/10/2020, 9/16/2020, 10/1/2020, 10/15/2020, 10/27/2020, 11/5/2020 and 11/19/2020. Of the 12 pain diagrams, Claimant clearly marked pain in the left shoulder in addition to pain in the cervical and upper thoracic spine on 8/7/2020, 10/27/2020 and 11/19/2020. Moreover, the pain diagrams dated 10/1/2020 and 11/5/2020 appear to depict aching pain in the upper and middle aspect of the left scapula/shoulder in addition to the cervical and thoracic spine.

40. The ALJ has carefully considered Dr. Erickson's opinions and has weighed them against the balance of the competing evidence, including Claimant's testimony and the medical records as a whole. In this case, the ALJ credits the testimony of Dr. Erickson to find that the described MOI, i.e. a hard fall to a concrete floor probably transferred sufficient force to the left shoulder to injure/tear the rotator cuff and aggravate an otherwise pre-existing, yet asymptomatic condition in Claimant's cervical spine. Nonetheless, Dr. Erickson's suggestion that the physical examinations directed to Claimant's left shoulder support a finding that her rotator cuff tear is degenerative in nature is unconvincing. Indeed, the medical records demonstrate the following regarding the quality and thoroughness of the physical examinations directed to Claimant's left shoulder by NP Madrid and Dr. Centi:

- On 8/7/2020, Claimant specifically reported pain in the left shoulder and depicted aching pain in the anterior aspect of the shoulder in her pain diagram. Nonetheless, the examination of the left shoulder was limited to a visual inspection of the boney prominences and single provocative maneuver, an Empty Can test. No other provocative testing was completed and no imaging of the shoulder was requested.

- On 8/12/2020 and 8/18/2020 a physical examination of the shoulder, limited to one provocative test, was performed suggesting that Claimant was reporting pain in the shoulder. No other provocative testing such as that completed during Claimant's DIME appointment with Dr. Brodie or her appointments with Dr. Fitzpatrick was performed despite left "arm" pain being included in Claimant's chief complaints. Again, no imaging of the shoulder was requested.

- The medical record from 8/25/2020 is devoid of any evidence that NP Madrid performed a physical examination of Claimant's left arm/shoulder.

- As part of Claimant's 9/1/2020 appointment, NP Madrid simply repeated the narrative he had documented from 8/7/2020 regarding the examination findings of the left shoulder. While it is possible that Claimant's shoulder abduction against resistance was 90 degrees again, it is unclear to the ALJ whether an actual examination was directed to the shoulder or whether the documentation concerning Claimant's empty can test result is a carryover from 8/7/2020. Regardless, even if NP performed an empty can test, he did not follow-up with additional provocative testing.

- The medical records from 9/10/2020 and 9/16/2020 demonstrate that NP Madrid did not perform an examination of the left shoulder. Rather, the examination and treatment focused on Claimant's cervical, thoracic and lumbar spine complaints. Even Centi failed to perform a thorough left shoulder examination on 10/1/2020. Indeed, the documentation from his examination supports a finding that provocative testing maneuvers to determine rotator cuff pathology were not performed. Rather, the entire examination of the left arm, per the 10/1/2020 report consists of the following passage: "An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. Pain to palpation is not present. A rash is not present. Swelling is not present". (Resp. Ex. C, p. 39). The ALJ finds that simple visual inspection and straightforward palpation is not a substitute for provocative maneuver testing to determine the integrity of the shoulder. Moreover, it is unlikely to catch any internal lesions involving the rotator cuff.

- On 10/15/2020, Dr. Centi simply copied his narrative examination findings from his 10/1/2020 report. Even after Claimant specifically documented posterior pain in the left shoulder on her 10/27/2020 pain diagram, Dr. Centi documented that Claimant's "primary problem is F/U cervical and lumbar strain, neck is still stiff and sore, hurts with motion . . ." (Resp. Ex. C, p. 46). Rather than performing a physical examination of the left shoulder on 10/27/2020, Dr. Centi elected to copy the physical examination findings he documented in his 10/15/2020 report to his 10/27/2020 report. Based upon the content of the 10/27/2020 report, the

ALJ finds it probable that Dr. Centi did not direct any examination to Claimant's left shoulder on 10/27/2020.

- On 11/5/2020, Claimant was evaluated by NP Madrid. Assuming that NP Madrid actually performed a physical examination directed to Claimant's left shoulder and did not simply carry over the findings from his previous examinations to his 11/5/2020 report, the examination again appears to be limited to one provocative test to determine the presence of lesions in the left shoulder.

- Claimant was evaluated by Dr. Centi on 11/19/2020. As referenced above, Claimant completed a pain diagram at the outset of this appointment. Despite clearly indicating that she was experiencing aching pain in the posterior aspect of the left shoulder, it appears that Dr. Centi failed to perform any provocative maneuver testing of Claimant's shoulder during this visit. Indeed, the physical examination findings from this visit appear simply to be a repeat of findings Dr. Centi documented in prior reports suggesting that he did not perform any examination directed to the left shoulder.

41. In stark contrast to the examinations performed by NP Madrid and Dr. Centi, the left shoulder examination performed by Dr. Brodie included not only a visual inspection and a palpatory exam, but also provocative testing to include a drop arm test, an empty can test, a crossed arm/chest test and an impingement (Hawkins) test. Because the results of these provocative tests were equivocal, but potentially positive, Dr. Brodie recommended imaging. Dr. Fitzpatrick also performed various provocative testing maneuvers during her examinations. Based upon the evidence presented, the ALJ finds the quality and thoroughness of NP Madrid's and Dr. Centi's shoulder examinations wanting. Accepting the records as an accurate picture of the examinations completed by NP Madrid and Dr. Centi supports a finding that on at least three occasions no examination of the left shoulder was performed. Moreover, at no time while Claimant was under their care did NP Madrid or Dr. Centi perform more than one provocative testing maneuver. Accordingly, the ALJ finds Dr. Erickson's reliance on Claimant's early examinations, as proof that the rotator cuff tear is degenerative, unconvincing. Had more thorough examinations of the left shoulder been performed and an earlier recommendation for imaging made, the ALJ finds it reasonable to conclude that Claimant's rotator cuff tear would, more probably than not, have been identified much earlier. Claimant is not responsible for the quality of her provider's examinations nor the delay in obtaining imaging to evaluate the integrity of the shoulder, a fact with which Dr. Erickson emphatically agreed. (Hrg. Tr., p. 67:11-18).

42. Dr. Erickson also relied on Claimant's completed pain diagrams as evidence that her left shoulder rotator cuff tear is degenerative in nature and unrelated to her August 6, 2020 slip and fall. Indeed, Dr. Erickson testified that because "there are no markings over the left shoulder, either anteriorly or posteriorly" on most of

Claimant's pain diagrams, she probably did not suffer a traumatic tear or injury to her shoulder during the 8/6/2020 fall. (Hrg. Tr., p. 39:11-25; 39:1-25 - 50:1-14).

43. On October 27, 2020, Claimant completed a pain diagram that Dr. Erickson agreed contained a "discrete" pain marking over the posterior aspect of the left shoulder. (Hrg. Tr., p. 50:18-22). She also completed a pain diagram with similar markings on the posterior aspect of the left shoulder on November 19, 2020. (Resp. Ex. C, p. 57). Nonetheless, Dr. Erickson testified that he did not believe that Claimant had sustained a left shoulder injury because she was working regular duty and by her admission, her pain was minimal.[5] (Hrg. Tr., p. 53:6-14). Dr. Erickson also testified that while Claimant marked pain over the posterior aspect of the left shoulder on November 19, 2020, her physical examination from this date indicated that there was no pain present. *Id*. Review of the 11/19/2020 report of Dr. Centi indicates simply that there was no pain to palpation of the left upper arm. (Resp. Ex. C, p. 55). The indication "pain to palpation is not present" appears to be a simple carryover from previous documentation. Indeed, both NP Madrid and Dr. Centi noted the same in their 10/1/2020, 10/15/2020, and 11/5/2020 reports. Importantly, Dr. Centi noted the same "pain to palpation is not present" passage in his 10/27/2020 report despite Claimant clearly marking aching pain in the left shoulder. Accordingly, the ALJ questions the reliability of Dr. Centi's remarks concerning the absence of pain as documented in his 11/19/2020 report.

44. Based upon the evidence presented, the ALJ credits Claimant's testimony, including her report to Dr. Brodie, to find that she was probably still having pain in her left arm/shoulder at the time Dr. Centi released her at MMI on November 19, 2020. Indeed, the ALJ is convinced that Claimant was probably reporting pain in her left shoulder verbally during the entire time she was under the care of NP Madrid and Dr. Centi. If, as Dr. Erickson suggests, Claimant was not reporting shoulder pain because the written reports from NP Madrid and Dr. Centi are devoid of such complaints, why did NP Madrid and Dr. Centi direct any attention, as limited as it was, to the left shoulder on 8/12/2020, 8/18/2020 and 9/1/2020? Here, the evidence presented persuades the ALJ that both NP Madrid and Dr. Centi largely ignored Claimant's left shoulder complaints to focus on her "primary" problem, specifically her cervical and lumbar strains which were causing more intense symptoms including substantial stiffness and pain with movement. (Resp. Ex. C, pp. 26, 30, 34, 38, 42, 46, 50, 54). For these reasons, Dr. Erickson's reliance on the CCOM reports and the pain diagrams as proof that Claimant's left shoulder rotator cuff tear is degenerative is unconvincing

45. Based upon the evidence presented, the ALJ finds that Claimant's current

[5] While he explained that Meloxicam, Tizinadine and over-the-counter medications such as Tylenol would not completely mask, i.e. eliminate the pain associated with an acute rotator cuff tear, Dr. Erickson testified that he expected that such medications would help "decrease the pain level." (Hrg. Tr., p. 40:19-23). Consequently, the ALJ is not surprised that Claimant may have reported minimal pain during some of her medical appointments.

pain complaints are likely multifactorial in nature and caused by a combination of an acute injury to the rotator cuff and an aggravation of a pre-existing condition in the cervical spine. Here, the evidence presented supports a finding that Claimant's early treatment focused almost exclusively on her neck, mid and low back rather than her left shoulder despite her August 7, 2020 pain diagram clearly depicting aching pain in the left shoulder. The evidence presented persuades the ALJ that Claimant has proven that there is a causal connection between her August 6, 2020 slip and fall, her rotator cuff tear and her need for surgery. Accordingly, Respondents are liable for such treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's current pain complaints are likely emanating from both an injury to the rotator cuff and an aggravation of a pre-existing cervical spine condition caused directly by Claimant's fall to a concrete floor on August 6, 2020 after slipping in a puddle of water.

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo.App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such medical benefits if the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999). In this case, there is no dispute surrounding the question of whether the surgery

recommended by Dr. Fitzpatrick is reasonable and necessary. Rather, the question is whether Claimant's need for such surgery is causally related to her August 6, 2020 slip and fall. As found, the evidence presented persuades the ALJ that based on Claimant's described MOI; she probably suffered an acute tear of the rotator cuff when she fell to the concrete floor on August 6, 2020. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including Dr. Fitzpatrick's recommended surgery. As found above, the contrary conclusions of Dr. Erickson are unconvincing. Although Claimant's imaging does not contain edema consistent with an acute injury, it is important to note that this imaging was done months after the initial trauma to the shoulder at a point where any edema would likely have resolved. Accordingly, the ALJ concludes that Claimant has established that the surgical procedure recommended by Dr. Fitzpatrick is causally related to her August 6, 2020 work-related slip and fall. Moreover, even if contested on reasonable and necessary grounds, the totality of the evidence presented establishes that the recommended surgery represents the last best resort to cure and relieve Claimant from her ongoing injury related pain and shoulder dysfunction. Consequently, the ALJ concludes the procedure is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the surgery recommended by Dr. Jennifer Fitzpatrick.

2. All matters not determined herein are reserved for future determination.

DATED: September 2, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2)

That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-039-027-003

ISSUES

The issues set for determination included:

- Is Respondent precluded from litigating the issue of causation concerning Claimant's low back injury based upon the prior Order issued by ALJ Peter Cannici?

- Did Respondent overcome the opinions of the physician who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") [David Yamamoto, M.D.] regarding permanent medical impairment by clear and convincing evidence?

PROCEDURAL STATUS

The undersigned ALJ issued a Summary Order on December 27, 2021, which was mailed on December 27, 2021. Respondent requested a full Order on January 5, 2022. Full Findings of Fact, Conclusions of Law and Order was issued on June 21, 2022 and mailed on June 22, 2022. Respondent filed a Motion for Corrected Order, but the undersigned was not able to issue an Order on the Motion within thirty days as set forth in § 8-43-302(1), C.R.S.

On or about July 6, 2022, Respondent filed a Petition to Review. Respondent filed a Brief in support of the PTR. This Order is issued pursuant to § 8-43-301(5), C.R.S, to address an issue raised in the PTR, namely Claimant's impairment rating and PPD benefits portion of the Order. (See Respondent's Brief in Support of Petition to Review pp. 1-2)

FINDINGS OF FACT

1. There was no evidence in the record that prior to February 2017, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

2 On February 2, 2017, Claimant was injured when he slipped and fell on black ice while in the course and scope of his employment. Claimant injured his low back and right hip as a result of the fall. Claimant was transported by ambulance to the Emergency Department of Good Samaritan Hospital.

3. Claimant was hospitalized at Good Samaritan Hospital where x-rays showed he had a comminuted intertrochanteric and subtrochanteric fractures of the right hip with displacement and varus angulation.

4. On February 3, 2017, Claimant underwent surgery for the intertrochanteric and subtrochanteric fractures, which was performed by George Chaus, M.D. The surgery included open reduction internal fixation of the fractures with an intramedullary implant. Dr. Chaus noted the characterized the fracture was "significantly more difficult for fixation and reduction than a standard intertrochanteric or subtrochanteric hip fracture with significant deforming forces requiring an open reduction, cerclage cable wiring and advanced trauma techniques.

5. Claimant was hospitalized at Good Samaritan through February 6, 2017. Claimant was evaluated by ATP Dean Prok, M.D. at SCL Broomfield on March 10, 2017. Claimant, who was using a wheelchair and cane, reported right upper/lateral leg pain. Dr. Prok diagnosed Claimant with right hip pain, right knee pain and acute intractable tension-type headaches.

6. Claimant was at a skilled nursing facility (Advanced Health Care) for approximately one month before he returned home.

7. The medical records admitted at hearing showed Claimant continued to use a wheelchair and a cane. On March 17, 2017, Claimant returned to Dr. Chaus. Claimant described weight bearing status as "toe touch weight bearing". Claimant did not report lumbar pain. Dr. Chaus also evaluated Claimant on April 18, 2017, who noted he was still using a wheelchair. Dr. Chaus said Claimant was to transition to weight bearing.

8. On April 11, 2017, Claimant returned to light duty work with Employer. He had restrictions of no lifting or carrying more than two (2) pounds, and no walking, crawling, kneeling, squatting, climbing, or driving. Claimant was directed to use the wheelchair for movement a maximum of 2-4 minutes per hour. X-rays taken on April 28, 2017 documented the fact that the hip fracture was healing well.

9. On May 19, 2017 Claimant returned to Dr. Prok for an examination. Claimant did not report any lower back pain. He utilized a walker instead of a wheelchair. Claimant advised Dr. Prok that he would be leaving soon for a one month-long vacation in the Philippines. Dr. Prok referred Claimant to Nicholas K. Olsen, D.O. for an examination.

10. On June 29, 2017 Claimant was evaluated by Dr. Olsen. Claimant mentioned the recent trip to the Philippines with his family. While in the water he was able to walk with a normal gait and significantly reduced pain. Claimant noted a marked increase of pain with a single-legged stance on the right lower extremity, difficulty walking upstairs and relief when sitting in a recliner or propping his leg up with pillows in bed. Dr. Olsen noted mild forward flexed posture and moderate range of motion deficits in both flexion and extension. Dr. Olsen prescribed land-based physical therapy and pool therapy because of Claimant's good experience with water walking while in the Philippines.

11. Over the next four months, Claimant received treatment including physical therapy ("PT") and his treatment was overseen by Dr. Prok. Claimant's initial visit at

CACC Physical Therapy was on July 10, 2017. He advised the therapist that his greatest difficulty was with walking; that dressing himself was a challenge, especially putting on his right sock and shoe; that sitting and driving for long periods aggravated his pain; and that he utilized a chair lift at home. The initial PT exam revealed deficits in strength, flexibility, and walking tolerance, which limitations restricted his ability to perform usual work and activities of daily living (ADL-s). Claimant received PT at CACC until August 31, 2017.

12. On August 24, 2017 Claimant visited Dr. Olsen for an examination. Claimant was using a straight cane mostly at work but less at home. He reported anterior right groin pain when weight-bearing as well as pain in his right knee and hip. Claimant did not mention pain in his lumbar spine or SI joint. Dr. Olsen noted "neutral mechanics" in the lumbar spine and full range of motion ("ROM").

13. Dr. Prok saw Claim at regular intervals from September 22, 2017 through March 5, 2018. Claimant reported right knee pain and Dr. Prok included "acute pain of right knee" in his diagnoses. These records reflected Claimant's continued use of a cane.

14. On February 5, 2018 Dr. Olsen added, "acute deep vein thrombosis (DVT) of the distal vein of right lower extremity" to his diagnoses. He noted that Claimant's personal physician was managing the DVT with blood thinners.

15. Dr. Prok concluded Claimant reached MMI on March 5, 2018. At that time, Claimant was reporting right hip, right knee and right thigh pain. Claimant was using a cane to ambulate. Dr. Prok assigned Claimant a 21% lower extremity impairment and 20% for the implant arthroplasty, pursuant to Table 45 of the *AMA Guides*.

16. Respondent filed a Final Admission of Liability ("FAL") on March 22, 2018, admitting to Dr. Prok's impairment rating.

17. On September 7, 2018 Claimant underwent a DIME that was conducted by David Yamamoto, M.D. Claimant reported pain in the right hip, right leg, right knee and low back. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination, Dr. Yamamoto diagnosed Claimant with the following: (1) right hip intertrochanteric fracture/subtrochanteric fracture with extension to the proximal right femur requiring an intramedullary implant; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) DVT following the right hip fracture, lengthy immobilization and inactivity post-injury.

18. Dr. Yamamoto stated Claimant's continuing antalgic gait was secondary to his work injury, which resulted in persistent lower back pain and dysfunction that had not been formally treated. This conclusion regarding causation was persuasive to the ALJ. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond to treatment, Dr. Yamamoto suggested he be referred to a physiatrist for further evaluation and treatment.

19. After a hearing was conducted on February 7, 2019, ALJ Cannici issued Findings of Fact, Conclusions of Law and Order, dated March 19, 2019, which was mailed March 20, 2019.[1] More particularly, on the causation question, ALJ Cannici found: "[B]ased upon the medical evidence in the record, the ALJ determined Claimant suffered an injury to his lumbar spine as a result of his February 2, 2017 work injury". Judge Cannici found Respondent did not meet its burden of proof to overcome Dr. Yamamoto's opinion on MMI:

> "Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports".[2]

20. The ALJ determined the issues adjudicated at the February 7, 2019 hearing were different than those at the instant hearing. In particular, the first hearing involved the issue of MMI, while the latter concerned the question of Claimant's permanent medical impairment.

21. Respondent filed a General Admission of Liability ("GAL") on May 3, 2019, referencing Dr. Yamamoto's determination that Claimant was not at MMI, as well as ALJ Cannici's Order.

22. Claimant returned to Dr. Prok on May 24, 2019. It was noted he was working with permanent restrictions and used a cane for support. He reported low back pain above the hip, along with aching/burning in that area, as well as the right hip area. On examination, Dr. Prok noted Claimant reported pain in the hip, lower leg and knee areas diffusely. Pain was also present in the right low back, with tenderness to palpation in the right lumbosacral and thoracic region and SI area. Dr. Prok referred Claimant to Scott Primack, D.O. and for PT.

23. Claimant underwent seven treatment sessions at CACC Physical Therapy beginning on June 21, 2019, with modalities including deep tissue massage and neuromuscular treatments. The massage therapist who assessed Claimant found he had hypertonicity or tension in his quadratus lumborum, glutes, and lumbar paraspinals at

[1] This Order was admitted into evidence as part of Exhibit KK, pp. 350-360.

[2] Exhibit KK, p 356.

each of the seven (7) visits. By the end of therapy on August 16, 2019, Claimant's left and right quadratus lumborum muscles were still hypertonic. The ALJ noted these treatments were in connection with low back pain and the physical therapist's findings of hypertonicity.

24. On July 12, 2019, Claimant was evaluated by Dr. Prok. His pain complaints were similar to the previous evaluation, including right low back, gluteal and hip pain. On examination, Dr. Prok noted mild decreased ROM at the hip, with minimal soreness in the knee and hip area. Right and left low back pain was present on movement at end range. Dr. Prok's assessment was: S/P ORIF fracture; acute pain of right knee; pain and swelling of left lower leg; fall; closed fracture of the right hip with routine healing; chronic right-sided low back pain without sciatica; acute DVT of the distal vein of right lower extremity.

25. On July 19, 2019, Claimant was evaluated by Dr. Primack. He reported a 20% improvement in connection with his lumbar spine, with increased pain with sitting and improvement with walking. Dr. Primack noted on examination that Claimant had a Trendelenburg gait pattern without the cane, which was an issue of hip mechanics as compared to spine mechanics. The Trendelenburg gait pattern was still present with the cane, but less so. Dropping of the right pelvis was present, which was consistent with a gluteus medius level weakness. Lumbar flexion was 40°, extension was 20°, with some discomfort with extension noted. (The ALJ found these measurements showed restrictions in ROM). Right and left lateral side bending or within normal limits.

26. Dr. Primack's diagnoses were: pelvis and hip intertrochanteric and subtrochanteric hip fracture, which resulted in an intra-medullary implant, with a significant breaking the right proximal femur; Claimant had extensive PT and was followed by Dr. Prok, with no report of back pain. Claimant was referred to Dr. Olsen, who managed Claimant's recovery, with neutral mechanics were demonstrated at follow-up appointments; MMI by Dr. Prok on March 5, 2018; DIME on September 7, 2018; subjective symptoms as described. Dr. Primack did not foresee any permanent residual impairment at the level of the lumbar spine, but ordered a lumbar MRI.

27. Claimant underwent a lumbar MRI on July 26, 2019. The films were read by Eduardo Seda, M.D. Dr. Seda's impression was: L1-2 left paracentral extruded free disc fragment, with moderate dural sac narrowing and mild crowding of the cauda equina; degenerative disc joint changes at the other level without dural sac or root sleeve deformity. The ALJ found the MRI provided evidence of objective conditions within Claimant's lumbar spine.

28. Claimant returned to Dr. Primack on August 16, 2019, at which time the MRI was reviewed. On examination, Claimant had 18° of hip extension, 28° abduction, adduction was 20°, internal rotation was 26° and external rotation was 44°. Dr. Primack concluded Claimant was at MMI. He opined there was no specific work-related lumbar spine injury, but lumbar spondylosis was present. Dr. Primack concluded Claimant had a 16% impairment of the lower extremity.

29. On October 4, 2019, Dr. Prok placed Claimant at MMI and noted an impairment rating was previously assigned. Dr. Prok's diagnoses were: closed fracture of right hip with routine healing; chronic right-sided low back pain without sciatica; right hip pain; acute pain of right knee; S/P ORIF fracture; fall subsequent encounter. Dr. Prok stated Claimant had permanent restrictions of no running and use of cane, as needed. The record did not contain ROM testing worksheets for Claimant's hip or lumbar spine performed by Dr. Prok.

30. On November 15, 2019, Claimant returned to Dr. Yamamoto for the follow-up DIME. At that time, Claimant reported right hip, right lower back and right leg pain. Dr. Yamamoto noted decreased ROM in all planes and the left iliac crest was slightly lower than the right. Dr. Yamamoto observed that after the first DIME, the lower back was then marked on all the subsequent pain diagrams and the lower back pain was noted in the physical therapy that was done after the first DIME report.

31. Tenderness was found over the right paraspinal musculature. Decreased ROM of the right hip was found with the following measurements: flexion 90°, extension 20° degrees, abduction 40°, abduction 40°, internal rotation 24°, external rotation 36°. Dr. Yamamoto's diagnoses were: right hip inter-trochanteric fracture, sub trochanteric fracture with extension at right proximal right femur requiring an intramedullary implant; healthy gait requiring frequent use of cane; mechanical low back pain secondary to the antalgic gait; history of DVT following the right hip fracture, causation unclear.

32. Dr. Yamamoto concluded Claimant had a permanent medical impairment for the lumbar spine of 15%, which included 5% from Table 53, IIB of the *AMA Guides*, with 10% assigned for loss of ROM. For the right hip, he was assigned an ROM impairment of 14%, which converted to a 6% whole person impairment. Dr. Yamamoto included worksheets for the impairment rating and reviewed the reports of Dr. Olsen and Dr. Primack. Dr. Yamamoto disagreed that Claimant's low back was not related to the work injury and specifically commented on Dr. Cebrian's conclusions, as follows:

> "He (Dr. Cebrian) opined that through a large portion of the medical care, there was not documentation of any lumbar spine complaints. (*Comment: Mr. [Claimant] states that he did mention the lower back pain on several occasions but it was not documented. The low back pain was not documented at all until after I performed the Division IME and when he returned to treatment the lower back pain was then documented and addressed.)*
>
> "He (Dr. Cebrian) opined on page 22 of his report that the lumbar spine complaints were not causally related to the claim. He noted that I indicated that Mr. [Claimant] used a cane 80% of the time because of his gait abnormality. He stated that the purpose of a cane was to redistribute the weight from the lower leg that is weaker (or) painful and to improve stability by increasing the base of support and by utilizing a cane it takes additional for(ce) (off of) the spine and should lessen any muscular related soreness secondary to a gait abnormality. (*Comment: I certainly am aware of this but Dr. Cebrian also did*

not take into account the fact that the ongoing use (of) the cane clearly showed that his gait was not stable this would strongly indicate that he was having difficulty with pelvic stability which could in my opinion clearly was the cause of ongoing significant mechanical low back pain.)

"He (Dr. Cebrian) also stated that even if Mr. [Claimant] had some lumbar muscular soreness as a result of the gait abnormality, the muscular soreness did not rise to the level of permanent impairment. (*Comment: If this was muscular soreness, I would not expect it to persist for a period of over 2 years.)*[3]

Dr. Yamamoto articulated his rationale for including the lumbar spine as follows:

"With all due respect, I am not in agreement with the findings from Dr. Cebrian. Dr. Cebrian that the hip injury should be a scheduled impairment even though he noted that Mr. [Claimant] required the use of a cane and that a Trendelenburg gait was documented clearly by Dr. Primack. This is clear evidence that the impairment extends above the right hip joint. Dr. Primack also noted back pain even though he did not a pine that this was readable and thought it was more muscular. I would argue that this is more than a muscular problem and rises to the level of a spine impairment. It is clear that the lumbar dysfunction is a chronic condition and is expected to improve. In regard to the DVT, I find it more than a coincidence that this happened on the same side that he had the severe hip fracture. There was a long period of time between the fracture and the DVT and it appeared that this was at least eight months although Mr. [Claimant] reported that it was six months when I first saw him. He does have increased risk because of his age and obesity as Dr. Cebrian pointed out but in my opinion, this is more than coincidence. However, I did not have some of the records from Dr. Olsen, when I did the initial DIME. I will concede that there is not convincing evidence regarding the work relatedness of the DVT although I certainly am of the opinion that the right femur injury played a significant role. I have elected not to rate the DVT. I am strongly of the opinion that the mechanical low back pain is a result of the ongoing altered gait and again have included the lower back as part of the impairment. It is noted that there was a small herniated disc in a one-two which I believe to be an incidental finding".[4]

33. The ALJ credited Dr. Yamamoto's opinion and found it more persuasive than those offered by Dr. Cebrian and Dr. Primack.

[3] Ex. II, pp. 323-325.

[4] Ex. II, pp. 327-328.

34. There was no evidence in the record that Dr. Yamamoto's rating was invalid. The ALJ found that Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment was supported by the medical evidence in the record.

35. On March 20, 2020, Carlos Cebrian, M.D. conducted a follow-up evaluation of Claimant, at the request of Respondent.[5] At that time, Claimant's complaints included: limping while walking; swelling, right leg; pain, right hip; pain, lower back. On examination, Claimant's lumbar spine had no spasms, trigger points or atrophy. Straight leg raise was to 60°, with negative FABER and Patrick signs. ROM with dual inclinometers was: 62° in flexion, 25° in extension, 25° in right lateral flexion and 25° and left lateral flexion. Dr. Cebrian's diagnosis that were claim-related included: right hip fracture, with surgery performed by Dr. Chaus.

36. Dr. Cebrian concluded Claimant's lumbar spine complaints were not causally related to the February 2, 2017 injury, reasoning that there was no documentation of lumbar spine complaints for an extended period of time after the injury. Dr. Cebrian also opined that Claimant's lower extremity DVT was not causally related to the February 2, 2017 injury. He disagreed with Dr. Yamamoto and opined Claimant had a medical impairment rating of his right hip totaling 18% lower extremity impairment, which converted to a 7% whole person impairment.

37. Dr. Cebrian testified at hearing and said his examination of Claimant revealed that when using a cane, Claimant's gait normalized. (The ALJ noted this differed from the opinion offered by Dr. Primack). Without the cane, Claimant had a Trendelenburg gait, which Dr. Cebrian explained occurred due to hip dysfunction, with one hip dropping lower than the other. When using a cane, Claimant's hips stabilized and this was why his impairment was limited to the hip. Dr. Cebrian testified that Claimant did not sustain an injury to the lumbar spine and had no permanent impairment to that area of his body.

38. The ALJ found Respondent failed to overcome the opinions of DIME physician, Dr. Yamamoto. The opinions expressed by Dr. Cebrian differed from Dr. Yamamoto, but did not establish an error. The ALJ concluded Dr. Yamamoto's opinion regarding permanent medical impairment was supported by the medical evidence.

39. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

[5] Dr. Cebrian's prior evaluation was November 29, 2018. In that report, he stated Claimant was at MMI. The ALJ noted Dr. Cebrian's subsequent report reiterated other opinions from the prior report, including his disagreement with Dr. Yamamoto concerning Claimant's date of MMI and whether his low back condition was causally related to the work injury.

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Issue preclusion

Claimant argued that the doctrine of issue preclusion barred Respondent from contesting the issue of causation or relatedness, as this issue was previously litigated. Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien,* 990 P.2d 78, 84-85 (Colo. 1999). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id*. Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). All elements of issue preclusion were not met in the case at bench.

As found, there were not identical issues litigated at the February 7, 2019 and August 20, 2020 hearings, as the former hearing involved the question of MMI and the latter, medical impairment. (Finding of Fact 20). Even though the issue of causation was an intrinsic part of both hearings, the ultimate issues were different. Therefore, the doctrine of issue preclusion does not apply in the case at bar.

Overcoming the DIME

In resolving this issue concerning Claimant's impairment, the ALJ noted the question of whether Respondent overcame Dr. Yamamoto's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In this case, Respondent disputed whether Claimant was entitled to a permanent medical impairment for his lumbar spine and contended the scheduled hip rating (14%) should be converted to the whole person impairment (6%) as an impairment not on the schedule. Respondents cited the opinions of Dr. Cebrian and Dr. Primack to support their argument. Claimant argued that insufficient evidence was introduced to overcome Dr. Yamamoto's opinions and that the clear and convincing evidentiary standard was not met.

There was no dispute about the underlying facts in the case. As determined in Findings of Fact 2-9, Claimant was injured at work on February 2, 2017 when he slipped and fell on icy concrete surface while checking fire extinguishers. He sustained comminuted intertrochanteric and subtrochanteric fractures of the right hip, with displacement and varus angulation. Claimant underwent surgery on February 3, 2017 and underwent an open reduction internal fixation procedure, with an intra-medullary implant performed by Dr. Chaus. Dr. Chaus noted Claimant had a significant break in the right proximal femur. *Id.*

Claimant was released from Good Samaritan Hospital and spent approximately one month in a skilled nursing facility. (Findings of Fact 5-6). Claimant was using a wheelchair and cane, as reflected in the medical records admitted at hearing. *Id.* When Claimant returned to light duty on April 11, 2017, he was using a wheelchair and then also using a walker. The evidence in the record reflected that Claimant continued to use the cane throughout this period of time. (Findings of Fact 9-13). As found, the medical

records reflected Claimant did not report low back pain in the period of time after his surgery, but reported hip and groin pain. *Id.* Claimant's ATP Dr. Prok determined Claimant reached MMI on March 5, 2018. (Finding of Fact 15).

In the first DOWC-sponsored IME, Dr. Yamamoto concluded Claimant was not an MMI. (Finding of Fact 17). Claimant reported low back pain and Dr. Yamamoto opined that as a result of the work injury and resulting altered gait, Claimant had low back symptoms. (Finding of Fact 18). The ALJ credited this opinion. A hearing was held on the question of whether Claimant was at MMI and ALJ Cannici concluded Respondent had not overcome Dr. Yamamoto's conclusions by clear and convincing evidence. (Finding of Fact 19).

As determined in Findings of Fact 22-23, Claimant was evaluated by Dr. Prok and received additional treatment, including PT to address low back complaints. As found, in the subsequent evaluations by Dr. Prok and Dr. Primack, Claimant reported low back pain in pain diagrams following the first DIME and low back pain was included in the assessment by those physicians. *Id.* Dr. Prok then placed him at MMI on October 4, 2019. (Finding of Fact 29).

In the case at bar, the ALJ determined Respondent did not meet its burden of proof. The ALJ's rationale was twofold; first, there was no evidence that Dr. Yamamoto's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. The ALJ found that Dr. Yamamoto's ROM measurements were valid at the time he performed the evaluation and the evidence submitted Respondent did not refute this fact. (Finding of Fact 34). In this regard, Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment in his lumbar spine was supported by the fact that the records showed he had pain and qualified for such an impairment under the *AMA Guides*. (Findings of Fact 33-34).

In addition, Dr. Yamamoto concluded Claimant's mechanical back pain was related to his altered gait. (Findings of Fact 18, 32). As part of his reports for both evaluations, Dr. Yamamoto provided a detailed explanation as to the basis of this opinion. *Id.* In the second DIME report, Dr. Yamamoto specifically addressed the conclusions of Dr. Cebrian and expressed his disagreement. (Finding of Fact 32). Dr. Yamamoto explained his reasoning with regard to the etiology of Claimant's low back pain. *Id.* The ALJ found Dr. Yamamoto's opinion to be persuasive. (Finding of Fact 33).

Second, the evidence adduced by Respondents to contravene Dr. Yamamoto's opinion simply constituted a difference of opinion. Dr. Cebrian disagreed that Claimant had a medical impairment to his lumbar spine, however, the ALJ found Dr. Cebrian did not refute that Claimant's low back condition was causally related to the work injury or that Dr. Yamamoto's rating was valid. (Findings of Fact 36-38). Dr. Cebrian also disagreed that Claimant had a permanent medical impairment related to the industrial injury. Dr. PrimcakThe ALJ determined this did not constitute sufficient evidence to meet the clear and convincing evidentiary standard and Respondent is required to pay PPD benefits based upon Dr. Yamamoto's rating.

ORDER

It is therefore ordered:

1. Respondent did not meet its burden to overcome the DIME physician's findings with regard to Claimant's medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 15% whole person impairment of his lumbar spine and a 14% scheduled impairment of his right hip as a result of his industrial injury.

3. Respondent shall pay PPD benefits based upon Dr. Yamamoto's medical impairment rating. Respondent is entitled to a credit for PPD benefits previously paid.

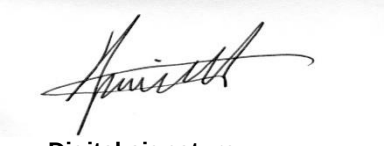
4. Respondent shall pay 8% statutory interest on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 2, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant proved Respondents failed to pay Claimant permanent partial disability (PPD) benefits pursuant to a settlement agreement.

FINDINGS OF FACT

1. Claimant is a 76-year-old accounting clerk who was employed with Employer beginning in October 2018.

2. Claimant sustained a work injury to her right arm while working for Employer on June 17, 2019.

3. Respondents admitted liability for the work-injury and provided worker's compensation benefits to Claimant, which included temporary total (TTD) and temporary partial disability benefits (TPD).

4. Claimant's authorized treating physician (ATP) Lynne Fernandez, M.D. placed Claimant at maximum medical improvement (MMI) on November 2, 2021 with an 8% permanent impairment rating for the right upper extremity.

5. Respondents filed a Final Admission of Liability (FAL) on November 24, 2021 admitting for the 8% scheduled impairment rating provided by Dr. Fernandez. The Benefit Summary specified the following amounts, in relevant part:

- Medical to Date (total) $31,755.66
- Disfigurement (total) $2,000.00
- Temporary Total Disability (total) $7,236.59
- Temporary Partial Disability (total) $1,784.44

Insurer noted an "Amount Overpaid" of $518.48. Respondents admitted for $5,158.40 for the 8% upper extremity impairment and $2,000 for disfigurement. In the remarks sections of the FAL, Insurer wrote, in relevant part: "[Insurer] reserves the right to credit the $518.48 overpayment against future benefits. Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not." (R. Ex. C, p. 8).

6. On December 7, 2021, Respondents and Claimant entered into a settlement agreement, approved by the DOWC on the same date. Paragraph 2 of the settlement agreement provides, in relevant part,

> In full and final settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following Five Thousand Two Hundred Fifty Dollars and No Cents ($5,250.00), and payment of any remained unpaid permanent partial disability benefits in one lump sum without discount, in addition to all benefits that have been previously paid to or on behalf of the Claimant.

(Cl. Ex. 2, p. 3).

7. The parties stipulated and agreed that Claimant's claim would never be reopened except on the grounds of fraud or mutual mistake of material fact.

8. AS[Redacted], claims representative for Insurer, credibly testified at hearing on behalf of Respondents. Mr. AS[Redacted] became the claims representative for Claimant's claim in August 2021. Mr. AS[Redacted] testified that, in September 2021, he became aware that Claimant had returned to modified duty sometime in August 2021; however, TTD continued to be paid. Mr. AS[Redacted] used paystubs of Claimant received from Employer to determine that Claimant returned to modified duty on August 25, 2021 and determined how much to pay Claimant in TPD benefits moving forward.

9. Insurer's total claim payout log indicates Claimant was paid TTD benefits through September 21, 2021; however, Claimant returned to work on August 25, 2021 according to wage records and discussions with Employer. While reviewing the total claim payout log, Mr. AS[Redacted] was able to calculate and confirm that Claimant had actually received a total of $10,215.31 in lost wage benefits through direct deposit., when she was only entitled to a total of $9,021.03 in lost wages. Accordingly, Claimant's actual overpayment of lost wage benefits in the amount of $1,194.28, not $518.48.

10. Mr. AS[Redacted] testified that he, via automated workers' compensation programing software, then credited the overpayment of $1,194.28 against Claimant's award of $5,158.40 for her permanent disability. This resulted in a remaining PPD balance of $3,964.12.

11. One payment for PPD was sent in the amount of $620.00, leaving a remaining balance of $3,344.12 in PPD. The remaining PPD was then paid out in a single check for $5,344.12 (which also included $2,000 in disfigurement). A separate check for full and final settlement in the amount of $5,250 was also sent to Claimant. Claimant received all of the aforementioned payments. Insurer paid Claimant the amounts to which she was owed pursuant to the FAL and settlement agreement.

12. Claimant credibly testified at hearing that, after reaching a settlement with Respondents, she expected to receive the admitted PPD without discount for her admitted scheduled arm injury in the amount of $5,158.40, the admitted disfigurement award of $2,000, and the settlement agreement amount of $5,250 for a total of $12,408.40.

13. Claimant contends that, pursuant to the FAL and settlement agreement, she is entitled to $11,889.92 (the admitted PPD of $5,158.40 less the $518.48 claimed overpayment, plus the disfigurement award of $2,000.00 and the settlement agreement amount of $5,250.00). Thus, Claimant argues that she has not been paid $675.80 in PPD benefits to which she is entitled pursuant to the FAL and settlement agreement.

14. Claimant filed an Application for Hearing on January 13, 2022 endorsing the issue of "Failure to pay admitted PPD." (R. Ex. A, p.1).

15. At hearing, Claimant's identified the issue of Insurer's alleged failure to pay admitted PPD pursuant to the settlement agreement, and requested that the ALJ issue an order directing Insurer to pay the full amount. Claimant's position statement again requests that Insurer be ordered to pay the full amount of PPD pursuant to the FAL and settlement agreement. At no time did Claimant endorse or request reopening of the settlement agreement for fraud or mutual mistake of material fact.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to

conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Failure to Pay PPD Pursuant to Settlement Agreement

A settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. § 8-43-204(1) and § 8-43-303(2)(a) & (b) C.R.S. As found, Claimant did not request to reopen the settlement agreement, failing to allege fraud or mutual mistake of material fact. Instead, in Claimant's Application for Hearing, at hearing, and in her position statement, Claimant argues the issue of failure to pay admitted PPD. Claimant failed to prove Respondents have not paid PPD benefits pursuant to the FAL and settlement agreement.

It is undisputed that Claimant received payment of $5,250.00 and $2,000.00 for disfigurement pursuant to the settlement agreement. Thus, the specific issue is whether Respondents failed to pay Claimant "any remained unpaid permanent partial disability benefits" as stated in the settlement agreement. In its November 24, 2021 FAL, Insurer noted an overpayment of temporary indemnity benefits in the amount of $518.48 and reserved the right to credit such amount against future benefits. Respondents also specifically stated in the FAL that Insurer reserved the right to "claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not." Respondents thus reserved the right to recover additional overpayments.

Section 8-42-105(3), C.R.S. provides that [t]emporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. Claimant was paid TTD benefits to which she was not entitled to after returning to modified duty. Claimant does not dispute the amount overpaid benefits. The preponderant evidence establishes that Claimant received an overpayment of TTD benefits, which Respondents were entitled to against future benefits. Here, Respondents recovered the amount Claimant was overpaid in TTD from the permanent disability award within the statutory time allotted and paid Claimant $5,250.00 in settlement, the $2,000.00 disfigurement award, plus the remaining PPD balance. As such, Respondents paid Claimant in accordance with the terms of the FAL and settlement agreement and Claimant has received all monies which she was entitled to under the settlement agreement.

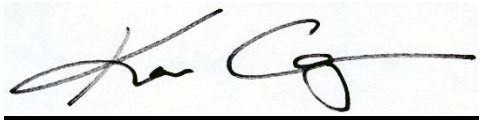
ORDER

1. Claimant’s claim for unpaid PPD benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 6, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-689-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that cervical fusion surgery recommended by Robert Benz, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant has worked as a school resource officer for Employer since August 2019. On April 26, 2021, Claimant sustained an admitted injury arising out of the course of her employment with Employer when she was struck in the head by a basketball that had been kicked by a student from a short distance away.

2. Claimant initially saw providers at Workwell for her work-related injuries. In the first six weeks following the injury, Claimant attended four visits at Workwell, and reported symptoms including headaches, face pain, neck pain, ringing in her ear. (Ex. 4 & H). At her fifth visit, on June 11, 2021, Claimant reported to Amber Payne, PA-C, that she was experiencing occasional tingling in her left upper extremity. Ms. Payne then referred Claimant for a cervical MRI. (Ex. H). Records prior to June 11, 2021 do not document reports of upper extremity symptoms.

3. Beginning May 5, 2021, Claimant received massage and physical therapy through Workwell. Claimant's first course of therapy ran from May 5, 2021 until September 2021. Claimant later had a second round of physical therapy from February 28, 2022 through April 6, 2022. (Ex. 5 & I). Claimant's cervical range of motion and symptoms did not improve through either course of physical therapy.

4. The cervical MRI, performed on June 26, 2021, showed a mild disc bulge at the C4-5 level, and irregular disc bulges at the C5-6 and C6-7 level. The MRI also demonstrated multilevel degenerative changes with associated canal and foraminal narrowing at each level, most significant at the C6-7 level where a left paracentral disc protrusion resulted in mild flattening of the left lateral spinal cord. (Ex. 3).

5. On July 6, 2021, Claimant returned to Workwell and reported to her then-authorized treating physician (ATP) Robert Dupper, M.D., pain in the left upper extremity with a Spurling's test. Dr. Dupper referred Claimant to Robert Benz, M.D., an orthopedic surgeon for further evaluation. (Ex. H).

6. On August 9, 2021, Claimant saw Dr. Benz, who diagnosed Claimant with cervical facet arthritis, degenerative disc disease, and left-sided foraminal stenosis. Dr. Benz recommended Claimant be evaluated for facet or steroid injections to assess and treat her headaches, neck pain and upper extremity symptoms. He was also recommended a

potential trial of a left-sided medial branch block and radiofrequency ablation. He characterized surgery at that point as a "last resort." (Ex. 7).

7. Claimant returned to Dr. Dupper with continued complaints of headaches, neck pain, and left arm pain. On September 2, 2021, Dr. Dupper referred Claimant to physical medicine and rehabilitation physician Eric Shoemaker, D.O., for evaluation of her cervical pain. (Ex. H).

8. Claimant Dr. Shoemaker on September 16, 2021. In his history, Dr. Shoemaker noted that Claimant had immediate neck pain and that she developed pain radiating down the arm with tingling into the 1st -3rd fingers after a couple of weeks. He reviewed Claimant's June 25, 2021 MRI films, and noted that osteophytic stenosis at the C6-7 level with a soft tissue component. He diagnosed Claimant with left C7 and/or C6 radiculitis secondary to prominent disc osteophyte complex causing severe left foraminal stenosis with impingement on the left hemicord. Claimant also had severe left foraminal stenosis at C5-6. He indicated that based on the mechanism of injury and Claimant's underlying arthropathy, he suspected a component of facet pain as well. Dr. Shoemaker opined that it was probable that Claimant's symptoms were the result of her April 26, 2021 work injury. (Ex. 8). Dr. Shoemaker recommended a left C7-T1 epidural steroid injection.

9. On September 17, 2021, Kenneth Morris evaluated Claimant at the UC Health Neurology Clinic. Dr. Morris reviewed Claimant's MRI and indicated that Claimant's left foraminal C6-7 narrowing was consistent with her symptoms of cervicalgia and left-sided cervical radiculopathy. (Ex. 11).

10. On October 5, 2021, Claimant underwent a psychological evaluation with Melanie Heto, Psy.D. Dr. Heto diagnosed Claimant with adjustment disorder with mixed anxiety and depressed mood. Dr. Heto noted Claimant had moderate symptoms of depression and mild anxiety. She recommended Claimant undergo counseling with Workwell's in-house counselor, Maurene Flory, PhD., LPC. (Ex. 9). Claimant had already begun therapy with Ms. Flory, and attended fourteen sessions between September 10, 2021 and March 3, 2022. (Ex. H)

11. On October 11, 2021, Dr. Shoemaker performed a left C7-T1 interlaminar epidural steroid injection. (Ex. K). On October 27, 2021, Claimant followed up with Dr. Shoemaker and reported the injection did not improve her symptoms, and she noted an increase in left hand paresthesia following the injection. (Ex. 8).

12. Claimant returned to Dr. Benz on December 13, 2021. Dr. Benz noted that the injection Dr. Shoemaker performed did not provide significant or lasting relief. Dr. Benz reviewed x-rays of Claimant's cervical spine and noted a "severe disc space collapse at C6-7, [and] moderately severe narrowing at C5-6. Based on the persistence of Claimant's neck and arm symptoms, Dr. Benz recommended an anterior cervical discectomy and fusion (ACDF) surgery at C5-6 and C6-7. He indicated that there was no guarantee that the ACDF would alleviate all of her pain, he believed the procedure was the best option "especially in regard to her ongoing arm symptoms." (Ex. L).

13. **CLAIMANT'S PRIOR INJURY**: Claimant had a prior cervical injury requiring surgery at the C5-6 level in 2004. Claimant had treatment for her cervical spine following surgery, including evaluations in 2008. An August 9, 2008 MRI showed broad-based disc protrusions at C5-6 and C6-7, with mild left sided neural foraminal narrowing at the C6-7 level, without significant stenosis. (Ex. J). No credible evidence was admitted indicating Claimant had any treatment related to her cervical spine between 2008 and her work injury in April 2021.

14. **BRIAN MATHWICH, M.D. (IME)**: In response to Dr. Benz' surgical recommendation, Respondents obtained an independent medical examination (IME) with Brian Mathwich, M.D., on December 30, 2021. Based on his review of medical records and examination of Claimant, Dr. Mathwich opined that Claimant's cervical impingement and radiculopathy was not causally related to Claimant's work injury, nor was Claimant's pre-existing cervical spine pathology exacerbated by the injury. In reaching this opinion, Dr. Mathwich indicated Claimant did not report any radicular symptoms (*i.e*., left arm pain or and numbness) immediately or within a few weeks of the injury "as one would expect if [Claimant's] pre-existing cervical spine pathology were exacerbated by the injury." Dr. Mathwich stated, incorrectly, that Claimant did not report any radicular symptoms until August 25, 2021[1] "over three months after the injury." (Ex. E). Claimant's medical records (including those Dr. Mathwich reviewed) demonstrate that Claimant reported tingling in the left arm on June 11, 2021; radiating symptoms into her left arm on June 28, 2021, July 6, 2021, and August 5, 2021; and an MRI was performed on June 26, 2021, at least in part, to evaluate the cause of these symptoms. (See Ex. H). Dr. Mathwich opined that Claimant's radicular symptoms were "an expected progression of her underlying cervical pathology which would progress whether she was injured or not." (Ex. F).

15. Dr. Mathwich testified at hearing and was admitted as an expert in family and occupational medicine. At hearing, Dr. Mathwich acknowledged that Claimant's left arm symptoms of "tingling" were first reported on June 11, 2021. He opined that "tingling" was not a radicular finding, and that the delay in symptoms indicates the symptoms were not the result of an injury to the C6 nerve. He opined that he would expect to see radicular symptoms much sooner. Dr. Mathwich testified that if Claimant's symptoms were truly radicular, they would have manifested immediately.

16. **SANDER ORENT, M.D. (IME)**: On February 10, 2022, Sander Orent, M.D., issued an IME report at Claimant's request. Dr. Orent reviewed Claimant's medical records and opined that Claimant's had "significant residuals" from her work injury, including a cervical disc herniation. Dr. Orent also opined that Claimant should undergo the surgery proposed by Dr. Benz. Dr. Orent offered no cogent medical rationale for his opinion that Claimant sustained a cervical disc herniation as the result of her work injury. Dr. Orent further opined that Claimant had not had an EMG study performed, which may "help convince someone of the need for immediate surgery." (Ex. 2).

[1] Although Dr. Mathwich indicates Claimant first reported symptoms on August 25, 2021, no medical record from August 25, 2021 was admitted into evidence. The ALJ infers Dr. Mathwich's statement is a typographical error, and his reference is to the August 5, 2021 record from Dr. Dupper.

17. **BRIAN REISS, M.D. (IME)**: On May 10, 2022, Claimant underwent a second IME at Respondents' request with orthopedic surgeon Brian Reiss, M.D. Dr. Reiss opined that Claimant's neck pain and headaches would be unlikely to respond to the ACDF recommended by Dr. Benz. He testified that the proposed ACDF would also not likely improve Claimant's upper extremity symptoms because she did not respond favorably to Dr. Shoemaker's injections. He also indicated that Claimant's left arm "sensory abnormality may represent C6 and C7 cervical irritation secondary to her pre-existing degenerative condition but temporally does not appear to be work incident related." Dr. Reiss also opined that Claimant's symptoms are likely myofascial in origin, and not related to the cervical spine pathology identified on her MRIs. (Ex. F).

18. Dr. Reiss testified in a post-hearing deposition, and was admitted as an expert in orthopedic surgery. Dr. Reiss testified that he believes Claimant's neck pain is myogenic in origin, and it is not clear that her arm pain is radicular. He testified that the surgery proposed by Dr. Benz is not likely to relieve Claimant's neck pain and "it may or may not improve any of her arm pain because it's not clear if it is radicular." He also testified that Claimant's arm issues could reflect issues at C6-7, but "that it could also be due to longstanding sensory changes because of the longstanding changes on her MRI." The record does not reflect that Claimant has "longstanding sensory changes" as suggested by Dr. Reiss. Primarily, Dr. Reiss raised questions about the cause of Claimant's radicular symptoms, but did not offer any cogent, persuasive hypothesis as to why the pain developed six weeks after surgery.

19. Claimant testified at hearing that at the time of her injury, she was working full duty without restrictions. She testified that she had no symptoms or functional limitations since approximately 2008. Claimant testified that she returned to work the day following her injury at full duty. She was experiencing headaches and neck pain. She testified she was experiencing pain in her left arm that she attributed to the 30 pounds of gear she is required to wear as a school resource officer. Claimant testified she did not initially report arm pain because she thought it would go away, and that she ultimately reported it when it did not go away. Claimant's testimony on the timing and progression of her left arm symptoms was somewhat confusing, in that Claimant inferred that Dr. Dupper did not record her arm symptoms, when she did not see Dr. Dupper in person until June 28, 2021, approximately two weeks after first reporting arm symptoms. The ALJ finds credible Claimant's testimony that she had no treatment or symptoms at the time of her injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009)

The evidence demonstrates that Claimant has had cervical pathology including disc bulges at the C5-6, and C6-7 level since at least 2008. Comparison of the MRI reports from 2008 and 2021, shows Claimant's developed cervical spine degenerative pathology over this time period. The MRIs and testimony are insufficient to determine whether the progression of Claimant's disc protrusions was acute or degenerative in nature. The evidence, however, does establish Claimant was under no treatment for her cervical spine condition and had no documented complaints of pain or symptoms for more than twelve years before April 2021. Claimant was also able to work full duty while wearing heavy work gear, without restrictions, prior to April 26, 2021.

Claimant did not report symptoms into her left arm until approximately six weeks following her injury. Claimant's testimony that she discussed left arm symptoms with her physicians prior to June 2021 is not credible, given that Claimant's pre-June 11, 2021 records document a denial of numbness and tingling in the hands and fingers. Nonetheless, Claimant did report radicular symptoms in her left arm approximately six weeks after her injury. Multiple treating providers indicated the symptoms were consistent with her cervical pathology, and none of Claimant's treating providers documented concerns about the timing of the reports.

Dr. Mathwich's opinion that Claimant's symptoms are unrelated to her work injury, and are the result of an expected progression of her long-standing cervical pathology is not persuasive. The ALJ finds Dr. Reiss's opinions that Claimant's symptoms are myofascial in nature also unpersuasive. Dr. Reiss acknowledged that Claimant's left arm symptoms may be the result of C6-7 nerve root irritation, but did not believe the timing to represent a work-related issue. The ALJ finds no credible evidence to suggest Claimant spontaneously developed symptoms independent of her work injury, that began six weeks after her work injury purely by happenstance. Given that Claimant has no documented reports of left arm symptoms for more than twelve years before her admitted injury, and no other medically reasonable explanation for the emergence of such symptoms, the ALJ finds it more likely than not that Claimant's work injury combined with her pre-existing pathology to cause her left arm symptoms.

With respect to the request for ACDF surgery, the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 8, Section 8.b.iii. Spinal Fusion sets out certain "Core Requirements" for performance of cervical fusion surgery. These include a psychological evaluation, and other criteria. Recommendation 145 provides "Spinal Fusion is reserved for patients" who meet the following criteria:

1) Cervical radiculopathy resulting in incapacitating pain;
2) Imaging studies (e.g., MRI) consistent with clinical findings, demonstrating nerve root or spinal cord compromise; AND
3) One of the following:
    a. Progressive functional neurological deficit; or
    b. Persistent motor deficit; or
    c. Persistent or recurrent arm pain with functional limitations, unresponsive to conservative treatment after 6 weeks; or

d. Static neurological deficit associated with significant radicular pain.

While the Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act, it is well settled that they are not definitive. *See Hall v. Indus. Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003); *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (ICAO May 5, 2006). An ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *See Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAO Jan. 25, 2011).

Section 8-43-201(3), C.R.S. provides that when deciding whether certain medical treatment is reasonable, necessary, and related "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations." Instead, whether a particular treatment is reasonable and necessary to treat a workplace injury is a question of fact for the ALJ to decide. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Here, Claimant underwent a psychological evaluation and multiple therapy sessions. While the psychological evaluation was not specifically directed at Claimant's surgery, Claimant was diagnosed with moderate depression symptoms and minimal anxiety. No credible evidence was admitted that Claimant's psychological condition would constitute a counterindication for surgery. Similarly, none of Claimant's treating health care providers have expressed that Claimant's psychological diagnosis disqualifies her from surgery.

Claimant has undergone imaging studies demonstrating cord compression, and Claimant has continued to experience left arm symptoms for more than six months, that have been unresponsive to conservative care. Dr. Reiss's testimony that the surgery could relieve Claimant's arm symptoms, but is unlikely to relieve her neck pain is consistent with Dr. Benz's statement in his surgical recommendation. Accordingly, the ALJ finds Claimant has met her burden to establish that it is more likely than not that the ACDF surgery recommended by Dr. Benz is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

ORDER

It is therefore ordered that:

1. Claimant request for authorization of the ACDF surgery recommended by Dr. Benz is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 6, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant is subject to penalties and sanctions for violations of PALJ Eley's September 28, 2021 discovery order.[1]

FINDINGS OF FACT

1. Claimant is the sole proprietor of Respondent-Employer. Claimant's first language is Spanish. Claimant speaks limited English.

2. Claimant sustained an industrial injury on October 16, 2020. Respondent-Insurer filed admissions of liability in this matter and paid Claimant temporary indemnity benefits.

3. On July 27, 2021 Respondent-Insurer filed an Application for Hearing endorsing multiple issues including, *inter alia*, retroactive withdrawal of admissions regarding temporary total disability (TTD) benefits as void *ab initio*, fraud, and overpayment of benefits.

4. To avoid any potential conflicts of interest, Respondent-Insurer referred the matter out to Douglas Stratton, Esq. to represent Respondent-Employer for the purpose of handling the pending litigation.

5. At the time Respondent-Insurer filed the July 27, 2021 Application for Hearing, Claimant was represented by Stephanie Tucker, Esq. Respondent-Insurer sent interrogatories for Claimant to Ms. Tucker on July 27, 2021.

6. Ms. Tucker subsequently withdrew as counsel for Claimant. OAC records reflect that ALJ Susan A. Phillips issued an order on August 9, 2021 granting Ms. Tucker's Motion to Withdraw as Counsel for Claimant. Claimant was aware Ms. Tucker withdrew as his counsel.[2]

7. On September 28, 2021 a prehearing conference was held before Prehearing Administrative Law Judge (PALJ) Craig C. Eley. Claimant appeared *pro se*. Doug Stratton, Esq. appeared on behalf of Respondent-Employer. Respondent-Insurer appeared through counsel, Tom Stern, Esq. An interpreter was present for Claimant. PALJ Eley addressed Respondent-Insurer's Motion to Compel Interrogatory Responses from Claimant and Respondent-Employer. It was undisputed that interrogatory responses

[1] At the start of the hearing, Respondent-Insurer identified penalties and sanctions as the primary issue and requested sanctions in the form of a default judgment with respect to the other issues endorsed on the Application for Hearing. The parties reserved the other issues endorsed in the Application for Hearing.

[2] At hearing the ALJ took administrative notice of the OAC records, to which neither party objected.

were overdue. Neither Claimant nor Respondent-Employer objected to Respondent-Insurer's motion. Respondent-Employer requested an additional 14 days to submit responses, to which Respondent-Insurer had no objection. PALJ Eley issued a Prehearing Order (PHO) dated September 28, 2021 granting Respondent-Insurer's motion and ordering Claimant and Respondent-Employer to deliver responses to interrogatories no later than October 12, 2021.

8. The parties attended a second prehearing conference before PALJ Eley on December 28, 2021. Mr. S[Redacted] appeared on behalf of Respondent-Insurer and Mr. T[Redacted] appeared on behalf of Respondent-Employer. Claimant did not appear at the prehearing conference. The prehearing conference took place on Respondent-Insurer's Motion to Withdraw the Application for Hearing and Motion to Add Penalties and Sanctions as Issues for Hearing. Respondent-Insurer represented that the responses to interrogatories addressed in PALJ Eley's September 28, 2021 had yet to be received, hindering Respondent-Insurer's ability to prepare for the hearing set for January 6, 2022. Respondent-Employer had no objection to allowing Respondent-Insurer to withdraw the Application for Hearing and vacate the hearing. Respondent-Insurer further argued that Claimant was in violation of PALJ Eley's September 28, 2021 order and requested that penalties and sanctions be added as issues for hearing. Respondent-Employer took no position on Respondent-Insurer's motion to add those issues. PALJ Eley issued a PHO on December 28, 2021 granting both motions. PALJ Eley specifically ordered that, despite the withdrawal of the Application for Hearing, the duty of the parties to respond to discovery and interrogatories and to supplement responses remained intact.

9. On November 4, 2021, counsel for Respondent-Insurer mailed Claimant a letter stating that Respondent-Insurer had yet to receive Claimant's responses to interrogatories. Respondent-Insurer notified Claimant that he was in violation of PALJ Eley's September 28, 2021 order and could be subject to sanctions/penalties. Respondent-Insurer requested that Claimant provide answers to interrogatories and within the next two weeks.

10. Respondent-Insurer filed a new Application for Hearing on December 9, 2021, endorsing the same issues from July 27, 2021 Application for Hearing and adding the issues of penalties and sanctions for Claimant's continuous violation of discovery orders.

11. OAC records reflect that on February 3, 2022, Mr. T[Redacted] filed a Motion to Withdraw as Attorney of Record for Respondent-Employer and Notice to Respondent-Employer. On March 2, 2022, ALJ Elsa Martinez Tenreiro issued an order granting Mr. T[Redacted]'s Motion to Withdraw as Attorney of Record for Respondent-Employer.

12. Counsel for Respondent-Insurer mailed Claimant another letter on March 11, 2022, noting Respondent-Insurer still had not received responses to interrogatories from Claimant and detailing the relevant procedural history. The letter notes that Respondent-Insurer filed a new Application for Hearing and that a hearing was set for April 26, 2022. Respondent-Insurer again stated that Claimant was in continuous violation of Judge Eley's September 28, 2021 PHO. Counsel for Respondent-Insurer notified Claimant that

he would be requesting at hearing: (1) that all issues endorsed by Respondent-Insurer as issues for hearing are granted in Respondent-Insurer's favor, including withdrawal of its admissions on TTD due to fraud with a corresponding order compelling you to repay Respondent-Insurer all TTD benefits you received under this claim; (2) an order reducing the admitted AWW; (3) an order closing Claimant's claim on all issues, with prejudice; and (4) an order penalizing Claimant for each day he is in violation of PALJ Eley's order.

13. On April 5, 2022, counsel for Respondent-Insurer emailed Claimant documents that they noted may be submitted at hearing.

14. Hearing was set to commence on April 26, 2022 before ALJ Martinez Tenreiro. Mr. S[Redacted] appeared on behalf of Respondent-Insurer. Claimant appeared *pro se*. Claimant appeared with a family member who indicated she was an agent for Respondent-Employer, who was also *pro se.* Despite Respondent-Insurer's requests, OAC was unable to secure an interpreter for Claimant. As such, ALJ Martinez Tenreiro found good cause to continue the matter to another date. Claimant's family member provided limited interpreter services to explain to Claimant that the hearing would be continued to another date.

15. ALJ Martinez Tenreiro also spoke to Claimant in Spanish, giving him the *pro se* advisement. Claimant indicated that he was being represented by his attorney, Mr. T[Redacted]. Counsel for Respondent-Insurer clarified that Mr. T[Redacted] withdrew as counsel for Respondent-Employer. ALJ Martinez Tenreiro confirmed with Claimant that the order granting Mr. T[Redacted]'s Motion to Withdraw as Counsel was sent to the correct email address. Respondent-Insurer advised ALJ Martinez Tenreiro that Claimant had yet to provide responses to interrogatories in this matter. Claimant informed ALJ Martinez Tenreiro that he thought his attorney would be taking care of any issues and responses in this case. ALJ Martinez Tenreiro reiterated to Claimant that Mr. T[Redacted] was no longer representing him as counsel. On April 26, 2022 ALJ Martinez Tenreiro issued an order detailing the above and granting a 60-day continuance in the matter. She ordered, in relevant part:

1) Respondents will email a copy of the discovery requests to Claimant's email address within 3 days of this order.
2) Claimant shall respond to the Interrogatories to Claimant within twenty (20) days of the interrogatories being sent by email to Claimant. This order in no way restarts the timeline or timeframe to respond to prior ordered discovery pursuant to PALJ Eley's order dated September 28, 2021 compelling Claimant to respond to discovery, or any allegations that Respondents are due a penalty for failure to comply to PALJ Eley's order.
3) Claimant shall take affirmative steps to secure the services of an attorney or proceed to hearing *pro se* (self-represented) at the continued hearing.

(R. Ex. U, p. 244).

16. On April 27, 2022, Respondent-Insurer emailed Claimant a copy of the interrogatories and a copy of PALJ Eley's December 28, 2021 PHO.

17. The continued hearing proceeded before ALJ Kara R. Cayce on June 21, 2022. Mr. S[Redacted] appeared on behalf on Respondent-Insurer. Claimant appeared *pro se* on his behalf and on behalf of Respondent-Employer. A court interpreter was present. ALJ Cayce again gave Claimant the *pro se* advisement.

18. Mr. S[Redacted] identified the primary issue as penalties and sanctions for Claimant's the continuous violation of discovery orders. Respondent-Insurer requests a default judgment for the relief sought in their original Application for Hearing for continuous violation of PALJ Eley's discovery orders.

19. At hearing Claimant initially testified that he never saw the interrogatories and that he was unaware that Mr. T[Redacted] withdrew as counsel. He testified that he was surprised Mr. T[Redacted] was not present at the hearing before ALJ Martinez Tenriero. Claimant testified that, as of at least April 26, 2022, he was aware that Mr. T[Redacted] had withdrawn as counsel and that he did have a hearing set for June 21, 2022.

20. Claimant then testified that he did receive "letters" regarding his claim but that he never read the letters completely. Claimant testified that he did not recall when he received the letters. He testified that, due to the language barrier, he would ask his daughter to read the letters to him but she would not read the entire document to him. Claimant further testified that sometimes his daughter did not want to help translate the letters or to assist him. Claimant testified that Mr. T[Redacted] did, at one point, ask Claimant to respond to questions. He testified that it was his understanding was then that Mr. T[Redacted] would handle everything.

21. Claimant testified that he remembered attending the September 28, 2021 prehearing conference with PALJ Eley and at that time being instructed to answer interrogatories. He testified that at that prehearing conference he agreed he had not yet answered the interrogatories but that he would do so by October 12, 2021. Claimant confirmed that he did receive the follow-up letters from Respondent-Insurer's counsel. He testified that he did not provide the answers to interrogatories responses because his daughter did not tell him he needed to provide any response.

22. Claimant further testified that he was present at the April 26, 2022 hearing before ALJ Martinez Tenreiro at which time interrogatories were discussed. He acknowledged that ALJ Martinez Tenreiro told him he was being ordered to provide answers to the interrogatories within 20 days. He did not ask for Respondents to send a copy of the interrogatories in Spanish nor did he request that the ALJ order that the interrogatories to be sent in Spanish. Claimant confirmed that, as of the date of the hearing before ALJ Cayce, he had not provided answers to interrogatories to Respondent-Insurer.

23. At hearing Claimant confirmed his mailing and email address. All of the above referenced orders, pleadings and correspondence were properly served to Claimant at the correct mailing and email addresses.

24. The ALJ finds that Claimant willfully failed to comply with PALJ Eley's discovery orders. Respondents have proved by a preponderance of the evidence that penalties and sanctions are warranted.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Penalties and Sanctions for Discovery Violations

WCRP 9-1(B)(2) provides that responses to interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.

WCRP 9-1(F) provides that, if any party fails to comply with the provisions of WCRP Rule 9 and any action governed by it, an ALJ may impose sanctions upon such party pursuant to statute and rule. Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful. WCRP Rule 9-1(G).

Section 8-43-207(1)(p), C.R.S. empowers ALJs to impose the sanctions provided in the Colorado Rules of Civil Procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an ALJ issued pursuant to articles 40 to 47 of the Act.

It is undisputed that, as of the date of hearing, June 21, 2022, Claimant has not responded to interrogatories and requests for documents. Respondent-Insurer initially mailed interrogatories to Claimant on July 27, 2021. Thus, Claimant has far surpassed the 20-day deadline under WCRP 9-1(B)(2) for providing responses to interrogatories and production of documents. Claimant's failure to do so comes after multiple orders of ALJs compelling Claimant to provide responses and repeated requests of Respondent-Insurer. The preponderant evidence establishes that the orders compelling Claimant to respond to discovery were properly served. The documents reflect a mailing address and email address that Claimant confirmed were his correct addresses. Moreover, Claimant testified that he did receive documents regarding his claim.

Beyond the presumption that Claimant's failure to comply was willful due to his failure to comply with an ALJ's order, the preponderant evidence establishes the willful nature of Claimant's actions. Claimant attributes his failure to comply with the discovery orders to purported confusion over his legal representation, his limited proficiency in speaking and reading English, and a lack of assistance from his daughter. Some confusion or miscommunication due to the aforementioned reasons could be deemed reasonable in the first instance. Nonetheless, Claimant's alleged confusion does not serve as a valid or practical excuse for failure to comply over the course of several months, particularly considering that Claimant attended hearing at which an ALJ spoke to Claimant in Spanish and specifically reiterated he was not represented by counsel and ordered him to provide answers to interrogatories.

To the extent Claimant is not represented by counsel, Claimant has repeatedly been advised that a self-represented claimant is responsible to know the applicable rules and procedures and be prepared to accept the consequences of his own mistakes if he elects to represent himself. *In Dyrkopp v. Industrial Claims Appeals Office*, 30 P.3d 821 (Colo.App. 2001), *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980).

Claimant effectively relies on the above excuses as some shield against any obligation on his part to be responsible for his claim and any litigation involving his claim. Claimant was able to proceed with filing a claim for workers' compensation and follow the requisite procedures to obtain medical and temporary indemnity benefits. Now, when faced with allegations of fraud and the possibility of having to repay overpaid benefits, Claimant effectively purports that he was not apprised of or did not understand his responsibilities. Claimant fails to take any accountability for his claim and his failure to comply with PALJ Eley's discovery order was willful. As such, sanctions are appropriate.

CRCP Rule 37(b)(2) provides:

> **Party Deponents-Sanctions by Court.** If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> *** * ***
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Here, Respondents request sanctions for Claimant's failure to comply with a discovery order in the form of a default judgment.

The rules of civil procedure authorize default judgment in two circumstances: 1) where there is willful disobedience of discovery orders; and 2) when the default is requested by a party entitled to judgment and the other party has failed to plead or otherwise defend. CRCP 37(b)(2)(C); CRCP 55; *In the Interest of K.J.B., and Concerning K.B.*, 342 P.3d 597 (Colo.App. 2014); *Lopez v. Q3 Contracting Inc*., W.C. No. 5-049-938-003 (ICAO, Feb. 9, 2022).

The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. *See* § 8-43-207(l)(e) and (p), C.R.S.; *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991). While it is true that dismissal of one or more claims for relief may be a proper sanction under C.R.C.P. 37 (b)(2)(C), it is "the severest form of sanction" available. *See Prefer v. PharmNetRx*, 18 P.3d 844, 850 (Colo. App. 2000); *see also Sheid v. Hewlett Packard, supra*.

Based on the particular issues endorsed for hearing, the ALJ declines to impose the severest sanction of dismissal or default judgment here. A default judgment in this matter would permit Respondents to retroactively withdraw their admissions for TTD benefits due to fraud, terminate benefits, find an overpayment and order Claimant to repay such overpayment. Despite Claimant's willful violation of the discovery order, the ALJ concludes that a hearing should be conducted on the merits in this case to establish, *inter alia*, the existence of fraud and an overpayment. The ALJ acknowledges that, without Claimant's responses to discovery, Respondent-Insurer may be limited in its ability to fully present its' case. The ALJ further concludes that it is appropriate to impose sanctions in the form of prohibiting Claimant to call any witnesses on his behalf, other than himself, at hearing. Claimant shall also be required to pay the attorney fees Respondent-Insurer incurred to obtain the orders compelling answers to discovery.

ORDER

1. Claimant is barred from presenting fact or expert witnesses, except for Claimant's own testimony, at hearing in this matter.

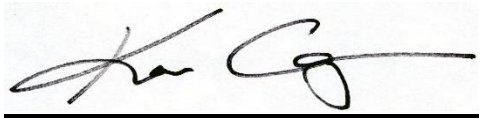
2. Claimant shall pay the attorney fees incurred by Respondent-Insurer to obtain the orders compelling answers to discovery. Respondent-Insurer may add determination of the amount of attorney fees as an issue for hearing.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 6, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Lindsay Harris is related to the admitted June 29, 2021 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee viscosupplementation injection recommended by Dr. Christopher Copeland is related to the admitted June 29, 2021 work injury.

STIPULATION

The parties have stipulated that the recommended surgery and injection are reasonable and necessary treatment for the claimant. The issue before the ALJ is whether these treatment modalities are related to the claimant's work injury.

FINDINGS OF FACT

1. On June 29, 2021, the claimant was involved in a single vehicle accident while he was operating a water truck in the normal performance of his job duties. The brakes failed on the water truck the claimant was driving. As a result, the claimant drove the vehicle off the road and into an embankment. During this time, the vehicle rolled. The claimant did not lose consciousness at the time of the accident and was able to extract himself from the vehicle.

2. The claimant first sought medical treatment after the accident on July 2, 2021. On that date, the claimant was seen in the emergency department (ED) at Community Hospital. The claimant reported a number of symptoms including stiffness in his neck, left shoulder, and left hip, and pain and swelling in his left knee. X-rays of the claimant's cervical spine, left hip, left knee, and left shoulder showed no fractures. The left knee x-ray showed osteoarthritis and a joint effusion. The left shoulder x-ray showed mild acromioclavicular and glenohumeral arthropathy. The claimant was advised to use ice and anti inflammatories.

3. The claimant's authorized treating physician (ATP) for this claim is Dr. Theodore Sofish. The claimant first saw Dr. Sofish on July 16, 2021. At that time, the claimant reported pain in his left knee, left hip, left shoulder, and neck. Dr. Sofish referred the claimant to physical therapy for his neck, left shoulder, and lumbar spine. He also ordered magnetic resonance imaging (MRI) of the claimant's left knee.

4. On August 2, 2021, an MRI of the claimant's left knee showed extensive complex lateral meniscus tear with extrusion, grade 3 chondral changes, a large joint effusion, and a small popliteal cyst.

5. On August 3, 2021, the claimant returned to Dr. Sofish. On that date, Dr. Sofish identified the claimant's diagnoses as cervical spine sprain, lumbar spine sprain, left shoulder sprain, and left knee sprain. He continued to recommend physical therapy for the claimant's cervical spine and left shoulder. Dr. Sofish also referred the claimant for an orthopedic evaluation of the left knee.

6. On August 16, 2021, the claimant was seen by Dr. Christopher Copeland for a consultation regarding his left knee. On that date, the claimant reported pain, swelling, and catching in his left knee. Dr. Copeland opined that the claimant's work injury resulted in an "acute traumatic exacerbation" of the pre-existing degenerative joint disease in the left knee. Dr. Copeland recommended a steroid injection. The medical records entered into evidence indicate that injection was administered on October 18, 2021.

7. On August 18, 2021, Dr. Sofish recommended an MRI of the claimant's left shoulder.

8. On August 24, 2021, the respondents filed a General Admission of Liability regarding the claimant's June 29, 2021 injury.

9. On October 12, 2021, the claimant was seen by Dr. Peter Scheffel for a consultation regarding his left shoulder. The claimant reported pain over the posterior and superior aspects of his left shoulder. The claimant also reported pain with overhead activities. Dr. Scheffel diagnosed a chronic rotator cuff tear. He recommended a steroid injection into the subacromial space. That injection was administered to the claimant's left shoulder on November 9, 2021.

10. On January 24, 2022, the claimant returned to Dr. Copeland. The claimant reported that the left knee injection administered in October provided two to three weeks of relief. Dr. Copeland recommended a viscosupplementation injection. The respondents have denied authorization for that injection.

11. On December 8, 2021, the claimant was seen by Dr. Sofish and requested a second opinion regarding his left shoulder. Dr. Sofish referred the claimant to Dr. Lindsay Harris for that second opinion.

12. On December 29, 2021, the claimant was seen by Dr. Harris. The claimant reported that prior to the June 29, 2021 injury he worked in physically demanding jobs in the construction industry without weakness or pain in his left shoulder. Dr. Harris noted that the claimant had undergone conserative treatment including physical therapy, a home exercise program, and a subacromial steroid injection. Dr. Harris identified the claimant's diagnoses as complete rotator cuff tear of the left shoulder, not specified as traumatic; and secondary osteoarthritis of the left shoulder due to rotator cuff

arthropathy. Dr. Harris further noted that the claimant has chronic supraspinatus and infraspinatus tears. Dr. Harris opined that the claimant's "acute injury seems to have set him on the course of intractable pain and dysfunction that is impacting his work." Ultimately, Dr. Harris recommended surgical intervention that would include a superior capsular reconstruction.

13. On March 9, 2022, the claimant attended an independent medical examination (IME) with Dr. William Ciccone, II. In connection with the IME, Dr. Ciccone reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Ciccone opined that the claimant suffered a minor sprain/strain to his left shoulder on June 29, 2021. Dr. Ciccone further opined that the claimant has returned to his pre-injury baseline with regard to his left shoulder. In support of his opinions, Dr. Ciccone noted that the claimant has a symmetrical range of motion of his shoulders, with excellent strength. Dr. Ciccone noted that the claimant has chronic rotator cuff pathology with glenohumeral arthritis. With regard to the surgery recommended by Dr. Harris, it is Dr. Ciccone's opinion that the claimant's need for left shoulder surgery is not work related.

14. With regard to the claimant's left knee, Dr. Ciccone opined that the claimant has chronic arthritis and degenerative tearing in his left knee. Those conditions are pre-existing and are not related to the claimant's work injury. It is Dr. Ciccone's opinion that the claimant suffered a minor sprain/strain to his left knee on June 29, 2021. Additional treatment of the claimant's left knee, although reasonable, is not related to the work injury.

15. Dr. Ciccone's deposition testimony is consistent with his written report. Dr. Ciccone reiterated his opinion that although the claimant needs both modalities of treatment (the recommended shoulder surgery and knee injection) the claimant's need for treatment is not from his work injury, but rather from the claimant's pre-existing shoulder and knee conditions. Dr. Ciccone also testified that although the claimant had specific acute injuries to his shoulder and knee on the date of this rollover accident, the claimant has returned to his baseline condition. Therefore, the claimant's current need for medical treatment is not due to his work injuries.

Prior Medical Treatment

16. On December 26, 2013, x-rays were taken of the claimant's bilateral knees. The x-ray of the claimant's left knee showed severe lateral joint space narrowing with near bone-on-bone arthritis. That same x-ray also showed peripheral osteophytes both medially and laterally. Both knees were shown to have osteophytic changes in the patellofemoral joint, with the left worse than the right.

17. On February 17, 2015, the claimant was seen by Dr. Jeffrey Nakano for bilateral knee pain. In the medical record of that date, the claimant reported that his right knee bothered him more than his left. Dr. Nakano diagnosed degenerative joint disease in both of the claimant's knees. He also noted that the claimant's right knee was severe

in the medial compartment, while the left knee was severe in the lateral compartment. The claimant was advised to use anti inflammatories.

18. The claimant testified that he was aware that he had arthritis in his knees. He also testified that in 2015, his right knee was bothering him more than his left knee. The claimant further testified that although his physician discussed treatment options (including pain medications, injections, bracing, or surgery) he did not pursue any of those modalities because his condition was not bad enough to merit treatment.

19. Between 2015 and his employment with the employer in 2021, the claimant worked in the oil and gas industry performing physically demanding work. The claimant testified that during that time he did not have to modify his work activities as a result of left knee or left shoulder discomfort. During that time, the claimant occasionally experienced bilateral knee discomfort in the morning, or when it was cold. However, those knee symptoms were not disabling. The claimant also testified that he was never denied recertification for a commercial driver's license (CDL).

20. On October 16, 2020, the claimant completed a pre-employment physical examination and physical fitness test for a different employer, Ensign. During that test, the claimant engaged in physical activities, including balancing on each leg, ascending flights of stairs, lifting weights, bending, squatting, riding an elliptical bike, and carrying weighted objects. This included lifting 50, 75, and 100 pound weights from the floor to the table 10 times, five times, and four times, respectively. The claimant passed every portion of this testing. The claimant testified that if he were asked to perform that test now, he would be unable to perform the tasks.

21. Between his start date with the employer, but before the June 29, 2021 work injury, the claimant was able to physically perform all of his job duties with no issues.

22. The ALJ takes administrative notice of WCRP 17 and the Colorado Medical Treatment Guidelines (MTG). Section E(2)(a) of the Lower Extremity Injury Guidelines defines aggravated osteoarthritis as "[s]welling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. In addition, the MTG provide that an occupational relationship may be established by a change in the patient's baseline condition and a relationship to work activities. Section C(2) of the Shoulder Injury Guidelines indicate that an occupational shoulder injury may result from a specific incident or injury, aggravation of a previous symptomatic condition, or a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

23. The ALJ credits the claimant's testimony regarding the nature and onset of his left shoulder and left knee symptoms. The ALJ credits the medical records and the opinions of Drs. Copeland and Harris over the contrary opinions of Dr. Ciccone. The ALJ finds that the claimant had demonstrated that it is more likely than not that the left shoulder surgery recommended by Dr. Harris is intended to cure and relieve the effects of the admitted work injury. The ALJ also finds that the claimant had demonstrated that

it is more likely than not that the left knee viscosupplementation injection recommended by Dr. Copeland is intended to cure and relieve the effects of the admitted work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. An otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986) ("[I]f a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused

the dormant condition to become disabling."); *cited by Sanchez v. Industrial Claim Appeals Office*, No. 15CA1481C (Colo. App. Mar. 17, 2016).

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Harris is related to the admitted June 29, 2021 work injury.

8. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left knee viscosupplementation injection recommended by Dr. Copeland is related to the admitted June 29, 2021 work injury.

ORDER

It is therefore ordered:

1. The respondents shall pay for the shoulder surgery recommended by Dr. Harris, pursuant to the Colorado Medical Fee Schedule.

2. The respondents shall pay for the injection recommended by Dr. Copeland, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined here are reserved for future determination.

Dated September 8, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether Respondents have established by a preponderance of the evidence grounds for withdrawal of their admission of liability on the basis of fraud.

2. Whether Claimant should be ordered to repay Respondents for benefits paid to Claimant or on his behalf.

FINDINGS OF FACT

1. On April 18, 2022, Claimant sought treatment at Care Now Urgent Care for pain of the left shoulder, which he stated he had been experiencing since April 12. Claimant represented that the injury occurred at work on April 12, 2022. Claimant reported he was running to answer a phone, slipped on oil on the floor and hit his left shoulder on a wooden door. (Ex. C). Claimant denied any similar problems in the past, denied that any non-work-related event or illness contributed to the symptoms, and denied past fractures to the region. John Keeling, PA-C diagnosed a displaced fracture to the mid-shaft of the left humerus based on the radiology findings. He referred Claimant to an arm specialist, to be seen later that day on an urgent basis. (Ex. C).

2. Claimant saw orthopedic surgeon Christopher Joyce, M.D. later on April 18, 2022. Claimant reported to Dr. Joyce a similar mechanism of injury, indicating he was running to answer a phone when he slipped and hit his left arm and head on a door. Dr. Joyce diagnosed a displaced proximal third humeral shaft fracture with significant angulation and displacement of the left arm. Dr. Joyce recommended an open reduction and internal fixation (ORIF) of the left proximal humerus. (Ex. E).

3. On April 19, 2022, Claimant reported the incident to Insurer, resulting in a First Report of Injury. Claimant indicated the incident occurred at 6:00 AM on April 12, 2022, when he slipped on the floor and fell into shelving. (Ex. H).

4. On April 21, 2022 Dr. Joyce performed an ORIF procedure of the left humeral shaft. In his operative report, Dr. Joyce indicated that although Claimant reported the fracture was 10 days-old, "this did not appear to be the case intra-operatively." Claimant had developed a "severe amount of scarring and soft tissue callus as well as essentially a pseudoarthrosis at the fracture site consistent with a humeral shaft nonunion." Dr. Joyce indicated the surgery lasted approximately 30% longer "due to the severe amount of scar tissue present that was unexpected." (Ex. F).

5. On April 26, 2022, Insurer's adjuster, SP[Redacted] filed a General Admission of Liability (GAL) for the alleged April 12, 2022 left arm injury. (Ex. I). Ms. SP[Redacted] testified the prior adjuster obtained a statement from Claimant in which Claimant represented he slipped and fell when rushing to answer a phone call. Ms.

SP[Redacted] was assigned the claim on April 19, 2022, and authorized the request for surgery on that date. Ms. SP[Redacted] testified she left messages with Claimant on April 19, April 22, and April 25, 2022, but Claimant did not return her calls.

6. Ms. SP[Redacted] testified that after filing the GAL on April 26, 2022, she received an after-hours voicemail from Mr. Keeling in which he relayed suspicions that Claimant's injury was not work related.

7. The following day, April 27, 2022, Jessica Leitl, M.D., Mr. Keeling's supervising physician emailed Ms. SP[Redacted]. Dr, Leitl reported that records within the HCA healthcare system indicated Claimant was seen at the Swedish Medical Center emergency department ("Swedish") on March 19, 2022 for a left mid-shaft humeral fracture sustained on that date. Dr. Leitl opined it was unlikely Claimant's left humeral fracture was work-related, or that it occurred on April 12, 2022. (Ex. G). Dr. Leitl provided Ms. SP[Redacted] with Claimant's March 19, 2022 medical record from Swedish.

8. On March 19, 2022, Claimant was seen at the Swedish emergency room and reported he fell that day while intoxicated and sustained an injury to his left arm. Claimant had swelling and deformity of the left mid-humerus. (Ex. A). X-rays taken at Swedish on March 19, 2022 showed a displaced oblique fracture involving the proximal third of the left humerus shaft. (Ex. B) Claimant was placed into a long arm splint with sling and discharged. (Ex. A). The injury Claimant sustained on March 19, 2022, is the same injury as that treated by Mr. Keeling, and Dr. Joyce, and which Claimant falsely represented arose out of the course of his employment with Employer.

9. Insurer paid $21,905.84 in medical benefits for Claimant's alleged work-related left humerus fracture. Insurer paid no indemnity benefits. (Ex. J).

10. Claimant did not sustain a compensable work injury on April 12, 2022. Claimant misrepresented to Respondents that he sustained a left arm injury on April 12, 2022. The ALJ further finds that Claimant misrepresented the cause of his injury with the intent to fraudulently obtain workers' compensation benefits, inducing the Respondents' GAL and payment of $21,905.84 in benefits to which Claimant was not entitled.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Withdrawal of General Admission of Liability for Fraud

When respondents attempt to modify an issue previously determined by an admission, they bear the burden of proof for the modification. § 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v.*

Irlando, 811 P.2d 379, 383 (Colo. 1991). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO Sept. 1, 2006

Respondents have established by a preponderance of the evidence grounds for withdrawal of the GAL. The evidence demonstrates the left humerus fracture Claimant represented as arising from the course of his employment with Employer did not occur as alleged. Claimant's injury occurred on or about March 19, 2022, when he was intoxicated and fell. No evidence was admitted indicating Claimant's injury arose out of the course of his employment with Employer. Accordingly, Respondents' request to withdraw the April 26, 2022 GAL is granted.

Overpayment

In *Vargo v. Indus. Comm'n*, 626 P.2d 1164,1166 (Colo. App. 1981), the court held that where a claimant makes fraudulent representations concerning the occurrence of an industrial injury, and the fraudulent representations induce the filing of an admission of liability, the admission is void *ab initio*.

The ALJ has authority to remedy fraud by requiring a claimant to repay benefits already received. *Cody v. ICAO,* 940 P.2d 1042 (Colo. App. 1996). In the case of medical benefits paid to third-parties, the ALJ possesses independent authority to remedy fraud by ordering repayment by Claimant to Insurer for all medical benefits paid to third parties as a result of Claimant's fraudulent misrepresentations. *Stroman v. Southway Services, Inc.,* W.C. No. 4-36-989 (ICAO August 31, 1999).

Respondents, as the party seeking to withdraw their GAL and obtain repayment, bear the burden of proving the elements of fraud by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The elements of fraud or material misrepresentation are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colo., Inc.*, W.C. No. 4-156-147 (ICAO Dec. 15, 2005), *citing Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra.*

The ALJ finds that Respondents have established by a preponderance of the evidence that Claimant obtained workers' compensation benefits by fraud. Claimant made false representations to Respondents and his health care providers that he sustained a left arm injury when he slipped on oil and fell into either a door or shelves in the course of his employment on April 12, 2022. As found, the injury actually occurred on March 19, 2022, when Claimant fell while intoxicated. Given Claimant sought medical care on March 19, 2022 for the same injury, the ALJ concludes it is more likely than not Claimant knew that his representation that the injury occurred on April 12, 2022 in the course of his employment was false. Insurer was not aware that Claimant's representation was false until April 27, 2022, when Ms. SP[Redacted] received Claimant's medical records from Swedish. Claimant represented the injury was work-related to Insurer with the intent of receiving workers' compensation benefits. Insurer, in reliance on Claimant's representations paid $21,905.84 in medical benefits for Claimant's alleged work-related left humerus fracture. The ALJ concludes Respondents have established the elements of fraud by a preponderance of the evidence rendering the GAL void *ab initio*. Because Claimant obtained workers' compensation benefits by fraud, Respondents are entitled to repayment of all benefits.

Repayment Terms

In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). Claimant did not present evidence regarding his ability to repay. Because no credible evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate, the ALJ orders that Claimant shall repay Insurer $21,905.84 within 60 days of the date of this Order.

ORDER

It is therefore ordered that:

1. Respondents General Admission of Liability is void ab initio due to Claimant's fraudulent representations.

2. Claimant is hereby ordered to pay Respondents $21,905.84 within sixty days of the date of this Order.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 8, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Respondents overcome the DIME's impairment rating by clear and convincing evidence?
- If Respondents overcame the DIME, what is the correct rating, if any?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?

STIPULATIONS

The parties stipulated to an overpayment of $7,670.30 for TTD benefits paid after the date of MMI. Respondents may offset the TTD overpayment against any PPD benefits awarded. If no PPD is awarded, the parties agreed to reserve recoupment of the overpayment for future determination. Respondents advanced $1,400 for Claimant's DIME after an indigency determination and are entitled to a credit for the DIME fee against any PPD owed.

FINDINGS OF FACT

1. Claimant worked for Employer as a Customer Data Technician. He serviced network infrastructure and equipment, primarily in the field. He drove Employer's vans and trucks, including a Ford F-550 bucket truck, to reach remote job sites.

2. Claimant suffered admitted injuries on November 2, 2019 when he slipped and fell on an icy sidewalk. He fell backward and landed on his buttocks and back. His head whipped backward and stuck the pavement. Claimant is unsure whether he lost consciousness, but if so, it was very brief. He felt severe pain in his neck. He got up and went to his vehicle, where he rested for a while until he felt able to continue working. He then drove to his next service call and completed the assignment.

3. Upon returning to the company garage at the end of his shift to drop off his service vehicle, Claimant noticed he was "listing to the left" when he walked. That evening, Claimant experienced worsening dizziness, difficulties with balance, nausea, and vomiting. He went to sleep and hoped he would feel better the next day.

4. The dizziness and vomiting continued the next morning. He also had a headache and neck pain. He went back to sleep and remained in bed for most of the day.

5. On the evening of November 3, 2019, Claimant was transported by ambulance to the Memorial Hospital emergency department. His primary complaints were "profound dizziness," photophobia, and neck pain. His gait was unsteady and he had difficulty ambulating without assistance. Claimant had a Glasgow Coma score of 15, consistent with a mild traumatic brain injury ("mTBI"). Cervical x-rays showed

degenerative changes but no acute fracture. A head CT showed no acute intracranial pathology. Claimant was admitted to the hospital because of the persistent dizziness and difficulty with ambulation.

6. Claimant remained hospitalized for five days. He was discharged from the hospital on November 8, 2019 with diagnoses including vertigo, anxiety, eye floaters, and a head injury. His symptoms of diplopia, headache, and vertigo had persisted throughout his admission but were "somewhat improved." Claimant was sent to the acute rehabilitation center for ongoing vestibular and post-concussive therapy. He remained at the rehab facility for seven days.

7. Claimant was referred to Concentra for authorized treatment. He saw PA-C Tianna Voros at the initial evaluation on November 19, 2019. Claimant identified his head, neck, and low back as the symptomatic areas on his initial paperwork and pain diagrams. He was still feeling dizzy, unsteady, and had double vision when he looked quickly to the right. Significant examination findings included impaired balance, positive Romberg sign, finger to nose dysmetria on the left side, and unsteady gait drifting to the left. Examination of the neck showed tenderness of the left trapezius and limited range of motion. Claimant already had appointments scheduled with physical therapy, vestibular therapy, and a neuro-optometry evaluation with Dr. Joshua Watt. Claimant was diagnosed with a closed head injury, post concussive syndrome, and a cervical strain. He was put on work restrictions and advised to keep his already-scheduled appointments with therapy and Dr. Watt. For unknown reasons, his low back was not addressed.

8. Claimant returned to Concentra on December 12, 2019 and saw Dr. Daniel Peterson. He was still having dizziness, photophobia, double vision, constant headaches, neck pain, and low back pain. Claimant described "brain fogginess but no confusion," and easy fatigability. The physical examination findings were largely unchanged. Dr. Peterson added a diagnosis of post-traumatic headache.

9. Claimant underwent a neuro-optometric evaluation with Dr. Watt on December 30 and 31, 2019. Dr. Watt documented oculomotor dysfunction with deficiencies of pursuit and saccadic eye movements, binocular convergence insufficiency, and vertical strabismus. He diagnosed post-concussion syndrome with vision complications, and opined Claimant's visual deficits were "100% related" to the work accident.

10. On January 14, 2020, Dr. Peterson ordered two adjustable canes for persistent "vestibular dizziness." Claimant later switched to walking sticks because "he feels like less of an easy mark this way."

11. Claimant was evaluated by Dr. Timothy Sandell, a physical medicine and rehabilitation specialist, on January 21, 2020. He described problems with balance, vertigo, and dizziness since the accident. He also reported neck and low back pain from the fall. Dr. Sandell observed balance issues while examining Claimant. There was palpable tenderness in the cervical paraspinals, upper trapezius, and lumbar paraspinals. Dr. Sandell recommended PT for Claimant's neck and low back, and an EMG to evaluate

possible L5 radiculopathy. At a follow up appointment two weeks later, Dr. Sandell opined Claimant's neck and back pain were probably musculoskeletal. He reiterated the recommendation for PT.

12. Claimant was evaluated by Dr. Diane Hesselbrock, a neurologist, on March 12, 2020.[1] Dr. Hesselbrock noted some "inconsistencies" in Claimant's examination. She recommended he increase Gabapentin and continue therapies.

13. On March 16, 2020, Claimant started psychological treatment with Dr. Anthony Ricci.

14. Claimant followed up with Dr. Peterson on March 24, 2020. Dr. Peterson had recently spoken with Dr. Watt and the vestibular therapist, both of whom thought Claimant was making slow progress. Examination of Claimant's neck showed increased lordosis, tenderness to palpation of the paraspinal muscles, bilateral muscle spasms, and reduced ROM. Dr. Peterson referred Claimant to Dr. Mark Meyer, an interventional pain management specialist, for the headaches and neck pain.

15. A cervical MRI on April 16, 2020 showed multilevel degenerative changes, most pronounced at C5-6 and C6-7.

16. Claimant's initial appointment with Dr. Meyer was on April 29, 2020. Dr. Meyer noted Claimant's symptoms were "classic" for post-concussive syndrome. He opined Claimant's neck pain was consistent with a whiplash injury and facet arthropathy aggravated by trauma. Claimant's headaches were most consistent with post-concussive headache. Dr. Meyer recommended cervical facet injections, and suggested Claimant increase the Gabapentin for the headaches.

17. Claimant followed up with Dr. Hesselbrock on May 14, 2020. Claimant had increased his gabapentin dose but made his dizziness and nausea worse. He was still having dizziness and diplopia when looking to the side despite participating in vision and vestibular therapy. Claimant described split-second episodes of "blacking out" while walking that caused him to lose balance briefly. Dr. Hesselbrock noted Claimant's exam findings were "not completely explained by a neurologic process or vestibulopathy." She encouraged Claimant to continue vision therapy for the diplopia. She also suggested adding duloxetine to help with the headaches.

18. On June 16, Dr. Peterson noted the neuro-optometry testing strongly suggested visual pathway disturbance, but Claimant had not improved appreciably with vision therapy. He wondered about a conversion disorder given Claimant's lack of sustained response to multiple treatments. Dr. Peterson agreed with Dr. Meyers' recommendation for cervical facet injections or medial branch blocks (MBBs).

19. Dr. Meyer performed right-sided MBBs at C5, C6, and C7 on July 9, 2020. Claimant had temporary relief for several hours. Dr. Meyer opined Claimant's

[1] Dr. Hesselbrock's records were not offered into evidence, so all information regarding her evaluations and findings is gleaned from reports of other providers.

presentation and examination were consistent with C5-6 and C6-7 facet arthropathy. Based on Claimant's symptoms, examination findings, and response to the MBBs, Dr. Meyer recommended intra-articular injections "facilitate recovery from the post whiplash facet pain."

20. On July 16, 2020, Claimant asked Dr. Peterson why he never received the PT for his low back recommended by Dr. Sandell despite consistently reporting back pain on his pain diagrams. Dr. Peterson double-checked the chart and ordered PT for Claimant's low back. He also referred Claimant for a neuropsychological evaluation. For unknown reasons, the neuropsychological evaluation was never completed. Significant physical exam findings included palpable tenderness and muscle spasm in the cervical paraspinal muscles, impaired balance, and a positive Romberg sign.

21. Claimant had approximately seven PT sessions for his low back.

22. On July 20, 2020, Dr. Hesselbrock documented that Claimant has "good days and bad days with walking."

23. Dr. Peterson referred Claimant to Dr. Meyer for evaluation of his low back. Dr. Meyer opined Claimant's presentation was most consistent with SI joint dysfunction, but his right-side gluteal pain and right leg pain suggested L5 radiculopathy. Dr. Meyer ordered a lumbar MRI.

24. After reviewing the lumbar MRI results, Dr. Meyer recommended a surgical consultation. Dr. Peterson referred Claimant to Dr. Michael Rauzzino, a spine surgeon.

25. Claimant saw Dr. Rauzzino on October 20, 2020. Dr. Rauzzino noticed Claimant had some difficulty with memory and balance. He became dizzy when his extraocular movements were checked. He had pain with palpation and "very limited" cervical and lumbar ROM. Lumbar x-rays showed central and foraminal stenosis but no large herniation. Dr. Rauzzino noted Claimant had primarily axial back pain. He did not think surgery would help but stated, "I would like to see the pictures to be sure." Review of the cervical CT and MRI showed no obvious cause for his neck pain except for multilevel degenerative changes that "may have been exacerbated by the work injury." Ultimately, Dr. Rauzzino concluded Claimant was "better served with nonsurgical options."

26. Dr. Meyer recommended a lumbar epidural steroid injection (ESI). The scheduled injection had to be canceled because of Claimant's high blood sugar levels. Claimant later cancelled the second scheduled injection because he was "scared" of a bad outcome after performing a Google search. Dr. Meyer tried to explain the low relative risk and recommended that Claimant reconsider his decision. However, Claimant never pursued the ESI.

27. Dr. Meyers' final diagnoses regarding Claimant's neck included "on-going cervicalgia consistent with whiplash injury," cervical spondylosis, post-traumatic headache, and traumatic arthropathy.

28. Claimant had his last regular psychological counseling session with Dr. Ricci in October 2020. The issues addressed during the course of treatment included adjustment disorder, anxiety, and "post-concussion sequelae." Dr. Ricci put Claimant on a "prn schedule" but encouraged periodic telephone or in-person consultations "to maintain the gains he has made, and prevent decompensation." Dr. Ricci offered no opinion regarding restrictions or limitations specifically related to psychological issues.

29. Dr. Peterson put Claimant at MMI on January 19, 2021. He anticipated Claimant would have permanent impairment and referred him for a rating evaluation with Dr. Lawrence Lesnak. Dr. Peterson's physical examination showed paraspinal cervical tenderness and limited cervical ROM, positive right straight leg raise, tenderness around the L5 level, and limited lumbar ROM. Regarding work restrictions, Dr. Peterson opined Claimant "is disabled and unable to work." Dr. Peterson released Claimant from treatment and stated Dr. Lesnak would determine his maintenance care needs.

30. Dr. Lesnak performed an impairment evaluation on March 8, 2021. He saw no clinical evidence of cervical facet pathology or SI dysfunction, and opined Claimant's subjective complaints of neck and low back pain were unsupported by objective findings. Dr. Lesnak opined Claimant does not qualify for a Table 53 rating for the lumbar or cervical spine. He opined Claimant might have suffered a mild closed head injury but had no reproducible objective findings to support his complaints. Dr. Lesnak described significant discrepancies between Claimant's gait during clinical examination and when seen entering and exiting the office. He stated Claimant was able to heel walk and toe walk without difficulty and did not fall during the examination. He opined other observed instances of imbalance appeared "voluntary" and "intentional." He concluded Claimant was at MMI with no impairment, no work restrictions, and no need for further treatment.

31. Claimant requested a DIME, which was performed by Dr. Thomas Higginbotham on July 13, 2021. Claimant described significant restriction on his daily activities because of injury-related symptoms, including frequent dizziness, headaches, and fatigue. Claimant stopped driving because of the dizziness and relied on public transportation or rides from family and friends. Dr. Higginbotham noted no exaggerated pain behaviors. He opined Claimant's appearance, presentation, and "body language" during the exam, including distraction testing, were "appropriate based on his condition." Claimant demonstrated significant balance problems. Musculoskeletal examination showed tenderness and increased tonicity in the cervical and lumbar area. Cervical and lumbar ranges of motion were reduced in all planes. Dr. Higginbotham provided injury-related diagnoses including: (1) post-concussion syndrome with oculomotor dysfunction, visuospatial disorientation, post-traumatic headache, and vestibular basilar disorder dizziness, nausea, and imbalance; (2) cervical myofascial strain; (3) lumbosacral strain/sprain superimposed on discogenic disease with right lower extremity radicular complaints; and (4) situational adjustment reaction the aggravation of pre-existing depression and anxiety.

32. Dr. Higginbotham agreed Claimant reached MMI on January 19, 2021. However, he disagreed with Dr. Lesnak's assessment of no impairment. Dr. Higginbotham provided a 47% whole person rating, composed of the following elements:

Cervical:	18% WP [4% Table 53(II)(B), 15% ROM]
Lumbar:	20% WP [7% Table 53(II)(C), 14% ROM]
Vestibular:	15% WP [Class 3, p. 178]
Mental Imp.:	6%
Combined rating:	47%

33. Explaining his rationale for the rating, Dr. Higginbotham noted Claimant fell directly on his back, and his head whipped backward and struck the ground. Claimant reported neck and back pain shortly after the accident, and had treatment directed to both areas. There was no evidence of any preinjury neck or back pain or limitations. Dr. Higginbotham gave significant weight to Dr. Watt's testing and treatment, noting, "neuro-optometry evaluation is very difficult to feign." Dr. Higginbotham opined Claimant's oculomotor dysfunction is consistent with closed head trauma and is likely contributing to the ongoing dizziness, nausea, and imbalance.

34. Dr. Lesnak reevaluated Claimant on October 11, 2021. His impressions were similar to the prior evaluation. He disagreed with Dr. Higginbotham's determination that Claimant had ratable impairment from the work accident. Dr. Lesnak thought Claimant significantly and purposefully exaggerated his balance problems and functional impairment. He pointed to episodes where Claimant was at times walking normally and at other times "falling into walls." Dr. Lesnak opined there was a "strong likelihood" of a somatoform disorder or conversion disorder based on the lack of reproducible objective findings to correlate with Claimant's ongoing complaints. He reiterated that Claimant is at MMI with no impairment and no need for further treatment.

35. Claimant attended a functional capacity evaluation (FCE) in September 2021. The therapist observed Claimant changed positions frequently because of neck and back pain, and his balance was "extremely compromised" despite using two walking sticks. Claimant satisfied the consistency and validity requirements of 29 of 30 tests, indicating reliable results. The FCE showed Claimant is functioning at the sub-sedentary physical demand level, with limited tolerance for sustained activities because of balance issues, pain, and fatigue.

36. Dr. Kathy D'Angelo performed an IME for Respondents on January 19, 2022. She opined the course of Claimant's condition did not fit the expected pattern of TBIs and musculoskeletal injuries. Dr. D'Angelo stated she found no clinical abnormalities on examination and opined there is no physiologic basis for Claimant's reported symptoms. As part of her IME, Dr. D'Angelo reviewed extensive video surveillance footage taken in October and November 2021. She opined Claimant's presentation on the video was inconsistent with his presentation at the IME and to other medical providers. She pointed to instances where Claimant demonstrated cervical and lumbar motion greater than shown on formal testing by the DIME. She dismissed portions of the videos that show difficulties with balance and ambulation because she believes Claimant repeatedly spotted the investigator and knew he was under surveillance. Like Dr. Lesnak, she perceived an "apparent conscious attempt to appear as if he had problems with balance." She stated, "At best, [Claimant's] intermittent 'stumbling' gait is functional and

not organic. At worst it is an intentional performance to exaggerate his condition." Dr. D'Angelo agreed with Dr. Lesnak that Claimant is at MMI with no impairment, no permanent restrictions, and no need for additional treatment.

37. Dr. Lesnak, Dr. D'Angelo, and Dr. Higginbotham testified at hearing and by deposition to elaborate on the opinions and conclusions expressed in their reports.

38. Dr. Lesnak was shown several portions of the video surveillance during the hearing. He opined Claimant's activities and movements on the videos were dramatically different from his described limitations and the balance issues he demonstrated in Dr. Lesnak's office. This confirmed Dr. Lesnak's belief that Claimant's alleged balance problems are not related to any neurological abnormality, because "neurologic conditions are not transient . . . . My only explanation is . . . an underlying symptom somatic disorder or somatoform disorder, which could explain his seemingly intentional or volitional acts of ambulation and unsteadiness while seeing certain health care providers."

39. Dr. D'Angelo echoed Dr. Lesnak's impressions of the inconsistencies seen in the video. She stated episodes of normal gait intermixed with a stumbling gait pattern is not indicative of a true neurologic abnormality. But Dr. D'Angelo ultimately diagnosed a conversion disorder rather than factitious disorder or malingering. Dr. D'Angelo opined the conversion disorder is unrelated to the work accident, and therefore does not qualify for an impairment rating.

40. Dr. D'Angelo reiterated she sees no basis for any permanent spinal impairment rating. She opined there is no objective basis for cervical or lumbar spine rating under Table 53, which precludes any ROM-based spinal rating.

41. Dr. Higginbotham opined Claimant had an "obvious" injury to his neck when he fell and whipped his head backward. Claimant complained of neck pain immediately, which persisted through the date of the DIME. Numerous providers documented neck issues and provided treatment. As pertains to the lumbar rating, he disagreed with Dr. Lesnak's statement that Claimant only started complaining of back pain in July 2020. He pointed to Claimant's first pain diagram at Concentra that endorsed stabbing pain in his low back. He also cited Dr. Sandell's records from January 2020 recommending PT for the back and an EMG to evaluate L5 radicular symptoms. Claimant repeatedly indicated low back pain on later visits, but those complaints were not acted on until he pressed the issue in July 2020. Although Dr. Higginbotham believes Claimant's back pain is primarily myofascial, he opined the accident fall probably "aggravated the degenerative joint problems" shown on the lumbar MRI. Dr. Rauzzino saw no surgical lesion but did recommend conservative treatment. And Dr. Meyer recommended lumbar ESIs.

42. Turning to the vestibular rating, Dr. Higginbotham noted Claimant was initially hospitalized for five days and in a rehab facility for seven days, primarily because of persistent dizziness and imbalance. Testing by Dr. Watt revealed significant oculomotor deficits, which Dr. Watt opined were "100% related" to the work accident. Dr. Higginbotham noted that visual problems and poor balance have been a central theme

throughout Claimant's course of treatment. He was also personally impressed by Claimant's poor balance exhibited during the DIME.

43. After watching the video shown at hearing, Dr. Higginbotham "softened" the vestibular rating from 15% to 10%. He opined Class 2 is more appropriate than Class 3 as he originally applied. He made no changes to the other components of the rating.

44. Regarding the 6% psychological rating, Dr. Higginbotham relied on Dr. Ricci's diagnosis of situational adjustment disorder with anxiety and depression. Dr. Higginbotham agreed Claimant had taken Lexapro before the work injury for generalized anxiety and had documented interpersonal difficulties. Dr. Higginbotham conceded he did not specifically evaluate Claimant's preinjury "baseline" psychological functioning. He did not specifically discuss with Claimant the extent to which psychological issues affected his function, but based the rating on his "clinical sense."

45. Dr. Lesnak and Dr. D'Angelo opined there is no evidence of functional limitations related to a psychological condition. To the extent Claimant has difficulties in areas of function addressed on the Mental Impairment worksheet, those limitations are related to physical problems of disequilibrium, vision, neck pain, and back pain. Dr. Lesnak and Dr. D'Angelo opined the DIME failed to account for Claimant's pre-injury history of psychological issues and interpersonal difficulties, which had required medication and interfered with his work. Dr. D'Angelo testified Claimant told her he could not sleep because of headaches, and he described no anxiety related to transportation. Dr. D'Angelo explained the psychological rating is improper "double dipping" because for example, Claimant's concerns about being operating a vehicle is related to his subjective complaints of vertigo; there is no evidence of a psychiatric condition preventing Claimant from driving. Dr. D'Angelo testified this was "giving two ratings for the same alleged issue."

46. Dr. Lesnak and Dr. D'Angelo agreed Dr. Higginbotham committed no "technical" errors in computing the rating, such as selecting an incorrect percentage from the rating tables or applying the wrong category of impairment. They simply believe Claimant has no ratable impairment related to the work accident.

47. This is a complex case, and multiple treating and examining providers have reached dramatically different conclusions regarding Claimant's level of function and impairment. The ALJ neither fully credits nor fully discredits any provider who has opined in this case. Dr. Lesnak and Dr. D'Angelo are highly persuasive regarding the psychological impairment rating. Dr. Higginbotham is more persuasive regarding the cervical, lumbar, and vestibular ratings. The ALJ also gives considerable weight to Dr. Meyers' observations, opinions, and conclusions.

48. Respondents proved the DIME's 6% psychological impairment rating was highly probably incorrect. Respondents overcame the DIME by clear and convincing evidence.

49. Claimant proved by a preponderance of the evidence he suffered permanent impairment to his cervical spine, lumbar spine, and vestibular system, as

determined by Dr. Higginbotham in his report and testimony. Claimant has a 41% whole person impairment because of the November 2, 2019 industrial injury.

50. On March 23, 2022, Claimant lost his balance and fell. He hit his face on concrete and suffered a maxillary fracture. He was taken to the emergency room and later admitted to Cordera for treatment. However, Claimant is not seeking specific medical benefits at this time, but merely seeks a "general award" of medical benefits after MMI. Before the March 23 fall, there was no persuasive evidence Claimant required any treatment to relieve his condition or prevent deterioration of his condition. Under the circumstances, a purely "general award" would be interlocutory and advisory. The issue of medical benefits after MMI, including treatment related to the March 23, 2022 fall, shall be reserved for future determination.

CONCLUSIONS OF LAW

A. Respondents overcame the DIME's psychological rating

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of whether impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

If the DIME issues multiple or conflicting ratings, the ALJ must first determine the DIME's true opinion as a question of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). The DIME's "finding" of MMI or impairment may be found in the initial report, supplemental reports, or tesimony at a hearing or deposition. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Here, the DIME's "true" rating is includes the 10% vestibular rating discussed at the hearing, combined with the cervical, lumbar, and psychological ratings desribed in the DIME report.

As found, Respondents proved the DIME's the 6% psychological impairment rating was highly probably incorrect. Dr. Lesnak and Dr. D'Angelo's opinions on this issue are credible and persuasive. Although Claimant received psychotherapy from Dr. Ricci for several months, he was released in December 2020 with only "prn" follow up. There is no persuasive evidence from any treating provider to substantiate functional limitations or impairment because of psychological factors. Dr. Higginbotham conceded he did not discuss Claimant's psychological condition in detail and relied primarily on supposition and his "clinical sense." Most important, Dr. Higginbotham's rating violates the

requirement that the physician "rate *only* impairments due *strictly* to the psychiatric condition." (Emphasis added). No doubt, Claimant has impairment related to travel, sleep, and participating in recreational activities. But those limitations are related to the impact of his dizziness and attendant balance issues, chronic headaches, neck pain, and back pain. There is no persuasive evidence Claimant's function in those areas is impaired by a psychological condition. Dr. D'Angelo and Dr. Lesnak are highly persuasive that the DIME's 6% psychological rating constitutes impermissible "double dipping."

B. What the correct rating?

When the DIME rating is overcome "in any respect," the rating becomes a matter for the ALJ's determination based on the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The ALJ is not limited to merely choosing from competing ratings offered by Level II physicians, but may independently determine the rating based on the evidence in the case. *Garlets v. Memorial Hospital, supra*. The only constraint is that the rating must be supported by the evidence and consistent with the *AMA Guides* and other rating protocols. *Gallegos v. Lineage Logistics Holdings LLC*, W.C. No. 5-054-538-002 (February 11, 2020). Even if the ALJ finds the DIME rating has been overcome, the ALJ does not have to reject every other component of a DIME rating. *Lee v. J. Garlin Commercian Furnishings*, W.C. No. 4-421-442 (December 17, 2001).

Claimant proved by a preponderance of the evidence he suffered permanent impairment to his cervical spine, lumbar spine, and vestibular system, as determined by Dr. Higginbotham in his report and testimony.

1. 18% cervical rating

For the cervical spine, Dr. Higginbotham assigned a 4% Specific Disorder rating under Table 53(II)(B), combined with 15% for ROM deficits. Table 53(II)(B) provides a 4% rating for a non-surgical disc or soft-tissue injury with "a minimum of six months of medically documented pain and rigidity, with or without muscle spasm." Claimant had a well-documented injury with a whiplash mechanism, causing immediate and persistent neck pain. Multiple examinations showed paraspinal myofascial pain, muscle spasm, and ROM deficits. Reduced ROM provides objective evidence of "rigidity," particularly when done in the context of a rating evaluation. *Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (October 27, 2021). The DIME's ROM measurements were obtained per *AMA Guides* protocols and satisfied the internal validity criteria. There is no persuasive evidence Claimant had any functional impairment or limitations related to the underlying degenerative spine changes before the work accident. Dr. Higginbotham's opinion regarding cervical impairment is credible and more persuasive than the contrary opinions offered by Dr. Lesnak and Dr. D'Angelo.

2. 20% lumbar rating

For the lumbar spine, Dr. Higginbotham assigned a 7% Specific Disorder rating under Table 53(II)(C), combined with 14% for ROM deficits. Table 53(II)(C) provides a 7% rating for non-surgical disc or soft-tissue injuries with "a minimum of six months of medically documented pain and rigidity, with or without muscle spasm, associated with moderate to severe degenerative changes on structural tests." As Dr. Higginbotham persuasively explained, Claimant fell and "landed forcibly on his back." He reported low back pain from his first visit with Concentra. The back pain was confirmed by Dr. Sandell, who recommended PT and an EMG. Imaging studies confirmed moderate to severe degenerative changes. Dr. Meyers and Dr. Higginbotham credibly opined the degenerative condition was probably aggravated by the work accident. Dr. Meyers recommended ESIs, which were declined by Claimant for personal reasons. As with the cervical spine, there is no persuasive evidence that of pre-injury functional impairment or limitations related to the underlying degenerative changes in the lumbar spine. Claimant's lumbar ROM measurements were valid according to the *AMA Guides*. Dr. Higginbotham's opinions regarding lumbar impairment are credible and more persuasive than the contrary opinions offered by Dr. Lesnak and Dr. D'Angelo.

3. 10% vestibular impairment

Based on video shown at hearing, Dr. Higginbotham determined that Claimant's balance problems are less severe than described and demonstrated during the DIME evaluation. He amended his vestibular rating to 10% whole person, based on a Class 2 vestibular impairment. The class 2 category requires:

> (a) signs of vestibular disequilibrium are present with supporting objective findings; and (b) the usual activities of daily living are performed without assistance, except for complex activities such as bike riding or certain activities related to the patient's work, such as walking on girders or scaffolds.

The ALJ credits Dr. Higginbotham's opinion that Claimant has impairment for his ongoing dizziness and balance issues. Dr. Higginbotham persuasively explained that Dr. Watt's testing provides objective evidence of oculomotor dysfunction consistent with a closed head trauma, and is likely contributing to Claimant's ongoing dizziness with nausea and imbalance. Dr. Higginbotham personally observed significant balance problems during the evaluation, as have multiple other providers. The video also objectively shows "signs" of disequilibrium, with numerous balance issues and gait abnormalities on multiple days. Claimant easily satisfies the functional component of the Class 2 category, because his balance issues would unquestionably preclude complex activities such as riding a bicycle. Dr. Higginbotham and the FCE restricted Claimant from climbing ladders and from walking more than two hours, and he cannot reasonably be expected to engage in commercial driving. These limitations prevent Claimant from returning to his preinjury work.

Dr. Lesnak concluded Claimant's balance and gait problems are highly exaggerated and probably outright fabrications. Admittedly, portions of the video surveillance demonstrate greater functional abilities than generally described by Claimant. But there are also numerous instances of poor balance, slow and unsteady gait, and stopping to rest after walking short distances. The video prompted Dr. Higginbotham to lower his rating, but not to negate the rating altogether.

Dr. D'Angelo also expressed concern about purposeful exaggeration and possible malingering. However, in her deposition, she diagnosed a conversion disorder. Previously, Dr. Peterson had wondered about a conversion disorder, as had (apparently) Dr. Hesselbrock, and Dr. Lesnak. There may be merit to the theory that Claimant suffers from a conversion disorder, or at least a conclusion that psychological factors contribute to the severity of his balance and visual issues. A conversion disorder would actually explain quite a bit about Claimant's variable presentation and lack of response to treatment. Nevertheless, a conversion disorder represents a genuine, unconscious psychological response as opposed to purposeful falsification. As such, the functional limitations flowing from a conversion disorder are no less real or impactful than those from a "true" neurological disorder. Dr. D'Angelo's argument the conversion disorder is unrelated to the injury is not credible. She offered no persuasive theory of any alternate non-work-related stressor or issue that would have coincidentally caused Claimant to develop a conversion disorder immediately after falling and hitting his head. If, in fact, Claimant has a conversion disorder, it is probably caused by the work accident.

The preponderance of persuasive evidence established that Dr. Higginbotham appropriately provided a 10% vestibular rating to account for Claimant's persistent balance problems.

4. The correct rating is 41% whole person

Based on the Combined Values Chart on page 254 of the *AMA Guides*, Claimant has a 41% whole person impairment because of the November 2, 2019 industrial injury (20% combined with 18% = 34% combined with 10% = 41%).

C. Medical benefits after MMI

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a

general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). A DIME is not entitled to special weight regarding medical treatment after MMI, but is simply another medical opinion to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, before his fall on March 23, 2022, there was no persuasive evidence Claimant required additional treatment to relieve the effects of his injury or prevent deterioration of his condition. No treating or examining provider credibly recommended any specific treatment. Although Dr. Ricci left open the possibility of "prn" counseling sessions, Claimant has not pursued that opportunity for over 18 months. Most important, Claimant received negligible benefit from numerous treatment modalities, and declined additional interventions recommended by Dr. Meyer for his neck and back. There is no persuasive reason to think Claimant would benefit from further treatment. Although Claimant may require some treatment for the worsened condition caused by the March 23, 2022 fall, Claimant is only seeking a "general award" of medical benefits after MMI at this time. Without a request for specific medical benefits, a general award would be interlocutory and advisory. Issues related to medical benefits after MMI, including treatment for the March 23, 2022 fall, will be reserved for future determination.

ORDER

It is therefore ordered that:

1. Claimant's claim for PPD benefits based on the DIME's 6% whole person psychological rating is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on a 41% whole person rating for the cervical spine, lumbar spine, and vestibular dysfunction.

3. Insurer may take credit for $7,670.30 in TTD paid after MMI.

4. Insurer may take credit for the $1,400 advance payment for the DIME.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address

for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 9, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he contracted COVID-19 arising out of and in the course of his employment?

- If Claimant's COVID-19 is compensable, was the treatment he received at the Parkview Medical Center emergency department on October 18, 2020 reasonably necessary emergency treatment?

FINDINGS OF FACT

1. Claimant works for Employer as a package delivery driver. He contracted COVID-19 in October 2020 and was hospitalized for three weeks. The primary dispute is whether Claimant contracted COVID because of his work.

2. Claimant worked out of Employer's facility in Pueblo, Colorado. He drove a rural route covering the southern portion of Pueblo and the areas around Beulah and Colorado City. The route serves primarily residential customers, with small number of businesses. Claimant worked 8 to 12-hour shifts, five days per week.

3. Employer was an "essential business" during the COVID-19 pandemic, so its operations continued after March 2020. Employer's package volume increased because so many people were shopping online.

4. Employer has several "pre-loaders" at the central facility to load packages onto the delivery vehicles. In mid-to-late 2020, Employer dispatched an average of 35 drivers from the Pueblo facility daily and used 18 pre-loaders. Because of the significant wage differential between pre-loaders and drivers, Employer's policy was that "pre-loaders load. Drivers drive and deliver." However, depending on the day's volume, drivers frequently load a relatively small number of packages onto their vehicles. Claimant testified he typically spent approximately 10-15 minutes to an hour helping load packages at the start of his shift.

5. Because Employer's business is not amenable to "remote work," most of its employees continued reporting to their regular worksites during the pandemic. However, Employer implemented several safety protocols to minimize the risk of COVID.

6. Before the pandemic, drivers generally attended a brief prework communication meeting ("PCM") at the start of each shift. These PCMs usually lasted approximately five minutes. In March 2020, Employer discontinued in-person PCMs, and instead communicated with the drivers electronically through their handheld "DIAD" computers.

7. The cabs of the package trucks, vehicle keys, and handheld DIADs were sanitized nightly. When drivers arrived at work in the morning, they would retrieve their wrapped keys and DIADs, and proceed to their delivery vehicles.

8. Employer implemented social distancing and instructed employees to remain at least six feet away from each other, to the extent possible. Pre-loaders were generally spaced between the front and back of large package trailers. It was relatively easy for drivers to socially distance because they were assigned to individual vehicles and had no known reason to spend much time roaming around the facility. Nevertheless, drivers spent some time in proximity to coworkers each morning before departing on their routes. Claimant testified he got within four feet of a coworker while loading packages in the mornings. Once on their routes, the drivers spent most of the day isolated in their package cars.

9. As another safety measure, Employer suspended the requirement to obtain customer signatures on the DIAD after making a delivery. Employer also implemented 2-week paid sick leave for COVID, so employees would not have to worry about losing wages or using their accrued leave it they reported having COVID.

10. Employer required employees to wear masks while on company property, including in the package cars. Compliance with the mask requirement was not perfect, and occasionally employees had to be admonished to wear their masks properly. Failing to wear masks was particularly problematic at the outdoor smoking area. Claimant does not smoke and there is no persuasive evidence he spent time in the smoking area. Several unidentified employees were disciplined between March 2020 and November 2020 for not wearing their masks properly. One employee was terminated for repeated violations over several months. The individual who was terminated worked as a pre-loader on the opposite end of the building from Claimant. There is no persuasive evidence Claimant was ever in close proximity to the terminated employee.

11. Claimant generally did not wear a mask while working his route, unless entering an establishment that required one. He testified he kept his mask in his pocket and donned the mask if he had contact with a customer. Claimant testified he unexpectedly encountered customers while making a delivery “maybe five times a day.” “On occasion” he was less than six feet from the customer. He later described the interactions as “not frequent” and “sporadic.” All of these momentary encounters occurred outdoors.

12. Claimant described a very isolated lifestyle in September and October 2020. Claimant testified he did not go to stores to shop and did his grocery shopping online. He testified he stopped eating out except for takeout. He testified he ordered Chinese takeout two or three times in October 2020, and picked up the food from the restaurant’s drive-through. Claimant testified he paid at the pump when purchasing gas.

13. Claimant lived with his wife, daughter, and son. As of the hearing, Claimant’s daughter was 19 and Claimant’s son was 27. Everyone in the household worked outside of the home in some capacity in September and October 2020. Claimant’s

family members will be referred to by their initials: Claimant's wife = "A.B."; Claimant's daughter = "K.B."; Claimant's son = "C.B."

14. A.B. held two part-time jobs. She worked as a CNA at a nursing home, and as a bus driver for Student Transportation of America.

15. In September 2020, she worked only 5.25 hours at the nursing home, on September 26. She did not work at the nursing home in October 2020.

16. A.B. worked the bus driver job during September and October 2020. She drove two routes in the morning and two in the afternoon. The first route had 10-12 elementary school students. The second route was 15-20 middle school students. In the afternoon, she reversed the process and transported the same groups of children home. Everyone on the buses wore masks, including A.B. She typically kept the driver's window open while driving. A.B. knows of no children on her bus that were sick with COVID in October 2020. However, in late September 2020, A.B. was exposed to a student who tested positive and had to quarantine.

17. There is conflicting evidence about where Claimant's son and daughter worked in September and October 2020. Claimant testified K.B. worked as a hostess and waitress at a pizzeria/bar but later testified she was working at a Baskin-Robbins instead. Similarly, Claimant testified C.B. worked at the Target distribution warehouse around September and October 2020, but previously told Respondents' IME that C.B. worked as a waiter at a pizzeria/bar.

18. On October 14, 2020, Claimant developed flu-like symptoms. He took OTC medication that evening and went to bed early. He worked the next day because he felt better and had no fever. On Friday, October 16, he awoke with a fever and felt worse, so he went to a testing facility for a COVID test. The test was later reported as positive.

19. On Sunday, October 18, Claimant was having difficulty breathing, so his wife took him to the emergency room at Parkview Medical Center. Claimant reported, "He may have had contact with ill people but does not recall any. He indicates that he is [a driver for] UPS, coming in contact with many people." Claimant's oxygen saturation was low and he required supplemental oxygen to keep his saturations above 90%. Claimant was admitted to the hospital.

20. A.B. and K.B. developed COVID symptoms after Claimant was admitted to the hospital. K.B. was tested for COVID on October 19, and A.B. was tested on October 20. Both tests were positive. A.B. and K.B. had "mild" cases of COVID and recovered uneventfully. C.B. never developed symptoms and tested negative.

21. Claimant spent three weeks in the hospital. On November 8, 2020, Dr. Villalba at Parkview Hospital documented Claimant had improved and was almost ready for discharge. Dr. Villalba stated, "per CDC after 20 days individuals are no longer considered contagious." Claimant was discharged from the hospital on November 9, 2020.

22. [Redacted, whereinafter Mr. R], a senior claims adjuster with Insurer, spoke with Claimant by telephone on November 11, 2020. Mr. R[Redacted] credibly testified Claimant was lucid and had no apparent difficulty conversing or remembering recent events. Claimant told Mr. R[Redacted] he wore a mask at work and "used" to get Clorox wipes to sanitize the package car "but not anymore." Claimant did not know where he got the virus. He was unware of anyone at UPS who had symptoms or tested positive. Claimant explained that before catching COVID, he was shopping for groceries online and having them loaded into his car. He said "he only goes to work and comes home." Claimant told Mr. R[Redacted] his wife drives a school bus and was exposed to a student who tested positive and had to quarantine (the ALJ infers it was the student who had to quarantine). This exposure occurred three weeks before Claimant became ill (*i.e.*, approximately the last week of September 2020). Claimant provided an accurate timeline to Mr. R[Redacted], starting with his onset of symptoms on October 14, through his release from the hospital on November 9, 2020. Claimant told Mr. R[Redacted] that A.B.[Redacted] tested positive for COVID on "Wednesday 10/14." He also stated K.B.[Redacted] later tested positive, and C.B. [Redacted] tested negative. Claimant could not recall the exact dates of K.B.[Redacted] and C.B.[Redacted]'s COVID tests.

23. Nicole Balducci is an occupational health nurse with Employer. In October 2020, she was assigned to track Employer's COVID cases. One of her tasks was to perform contact tracing of any employees who contracted COVID. According to CDC guidelines only those individuals who were within six feet of the infected employee for 15 minutes or greater would need to quarantine. Ms. Balducci did not perform formal contact tracing regarding Claimant's COVID infection because she could not speak with him to learn whether he had been in close contact with anyone at work. She considered it a HIPAA violation to reveal Claimant's COVID status and inquire around the worksite without his permission. However, Ms. Balducci had access to Employer's records regarding COVID cases at all facilities in the district, which includes Colorado. She confirmed that, besides Claimant, no other actual or potential COVID cases were documented at the Pueblo facility. Nor was she informally aware of any COVID cases.

24. Claimant saw Dr. Mark Paz for an IME at Respondents' request on January 3, 2022. Claimant told Dr. Paz he had limited contact with people before contracting COVID. Claimant stated he had stopped going to church and attending family gatherings, which upset his wife. It is unclear whether his wife and children were also avoiding those situations, or just Claimant. Claimant told Dr. Paz Employer did not enforce its mask mandate and "routinely" held morning meetings in "confined places." He said he "argued frequently" with management about non-compliance with social distancing and masking. Despite these alleged shortcomings with the health and safety protocols, Claimant stated he knew of no co-workers who were infected with and/ or symptomatic with COVID.

25. Dr. Paz opined it is not medically probable Claimant became infected with COVID because of a work related exposure. He explained asymptomatic individuals can spread COVID before they develop symptoms. The highest period of transmissibility is from two days before and one day after symptoms appeared. However, transmission can also occur outside of those windows. Dr. Paz noted Claimant's only known exposure to individuals with COVID occurred with his own family members, particularly his wife. He opined it is impossible to calculate a probability that Claimant was exposed to COVID at

work. Accordingly, Claimant's COVID cannot be attributed to his employment to the level of medical probability.

26. [Redacted, whereinafter Mr. T[Redacted] is the business manager for Employer's centers in Pueblo, Canon City, Trinidad, La Junta, and Lamar. Mr. T[Redacted] testified at hearing regarding Employer's COVID safety policies and protocols in 2020. Mr. T[Redacted]'s testimony was credible and more persuasive than Claimant's testimony, to the extent of any conflicts.

27. Claimant failed to prove he contracted COVID arising out of and in the course of his employment.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove his work directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). A claimant need not provide expert medical opinion evidence and can support a claim by any competent evidence. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant failed to prove his COVID-19 infection was proximately caused by his work. Employer implemented multiple safety protocols to minimize the risk of COVID transmission at its facilities. Mr. T[Redacted]'s testimony was credible. Claimant's allegation that Employer routinely disregarded COVID safety is uncorroborated by any persuasive evidence. Employer's efforts ultimately proved successful, as Claimant had the only case of COVID at the Pueblo facility between March 2020 and November 2020. Although compliance with masking and social distancing may not have been perfect, there is no persuasive evidence any such lapses caused Claimant to be exposed to COVID. Because the persuasive evidence shows Claimant was the only person at the workplace to contract COVID, he probably did not catch COVID from a coworker. And Claimant spent the lion's share of each day isolated in a package car, with only "infrequent," "sporadic," and brief interactions with customers, primarily in outdoor settings, an even less likely source of COVID infection.

Everyone in Claimant's household was working outside the home in September and October 2020. K.B. worked at a Baskin-Robbins or as a waitress, either of which would involve serving the public. A.B.'s job required her to spend several hours in a bus

with 25-32 schoolchildren. According to Claimant's own statement, at least one child tested positive for COVID and had to quarantine. A.B.'s job was at least as likely a potential source of COVID exposure as Claimant's job.

Claimant and two members of his household contracted COVID within days of each other. Claimant presented no expert opinion evidence regarding COVID-19 incubation rates, or other persuasive evidence to support his theory that he must have been the first family member exposed to COVID because he was the first to become symptomatic. Although a claimant does not have to present expert evidence to prove causation, the presence or absence of such evidence is a legitimate factor to consider when evaluating the preponderance of the evidence. Here, the only expert causation opinion was provided by Dr. Paz, who concluded causation cannot be established to a level of medical probability, notwithstanding the timing of who became symptomatic first. Indeed, the variability of individual response to COVID is vividly illustrated by Claimant's household in which his son never contracted COVID, A.B. and K.B. had only "mild" symptoms, but Claimant was hospitalized for three weeks.

Although it is certainly possible Claimant contracted COVID because of his work, the persuasive evidence fails to establish a causal connection is "more likely than not."

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 13, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Claimant has demonstrated by a preponderance of the evidence that lumbar L4-L5 posterior spinal fusion surgery as requested by Sanjay Jatana, M.D. is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is a 41-year-old male who works as a service technician for Employer. On July 30, 2020 Claimant was driving a 2017 Ford F-150 truck on Highway 85 during the course and scope of his employment. When Claimant approached an intersection, he was cut-off by a box truck. Claimant testified he slammed his brakes and turned right before impact. He struck the box truck side-to-side. Claimant estimated he was traveling around 60 miles per hour at the time of the Motor Vehicle Accident (MVA).

2. Claimant did not initially seek medical treatment because he wanted to determine whether his back pain would improve over the weekend. He returned to work on Monday, but his symptoms became more severe. Claimant thus obtained treatment at Authorized Treating Physician (ATP) UC Health on August 4, 2022. Claimant was diagnosed with acute bilateral lower back pain with right-sided sciatica. X-rays did not reveal any acute bone defects or abnormalities. The lumbar spine appeared well-aligned and the prosthetic intervertebral disc at L5-S1 appeared normal. Providers recommended physical therapy.

3. Claimant underwent prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Claimant testified that, after the surgery, he experienced occasional symptoms of lower back pain and soreness. However, the pain was minimal compared to his symptoms after the July 30, 2020 MVA.

4. Claimant was eventually referred to orthopedic spine specialist John Tobey, M.D. for treatment of his July 30, 2020 MVA. Claimant first visited Dr. Tobey for an evaluation on September 15, 2020. Dr. Tobey noted that Claimant had previously undergone an artificial disc replacement at L5-S1 that had not been symptomatic prior to the July 30, 2020 MVA. Claimant reported severe lower back pain on the right side. He remarked that he was undergoing physical therapy and dry needling. Dr. Tobey found no evidence of radiculopathy or myelopathy and noted significant overlying myofascial pain. He suspected that the pain might be emanating from the facet joints at L4-L5 and L5-S1. He recommended a trial of steroids and would consider bilateral L4-L5 and L5-S1 facet joint injections in the future. Dr. Tobey recommended continued physical and massage therapy.

5. On October 6, 2020 Claimant filed a request for a change of physician to Rafer Leach, M.D. Respondents approved the request, but there was some overlap involving treatment with Dr. Tobey.

6. On October 28, 2020 Dr. Tobey commented that Claimant's EMG results were only mildly abnormal and showed a very mild right ulnar neuropathy at the elbow. There was no evidence of right cervical or lumbosacral radiculopathy. There was also no evidence for peripheral neuropathy. Dr. Tobey noted that Claimant did not receive any benefit from facet joint injections and would consider an epidural injection.

7. On December 10, 2020 Claimant visited Dr. Leach for an examination. Claimant reported mild neck pain with radicular numbness and tingling to the right medial hand. He also had moderate to severe back pain with radicular pain to the right gluteal region as well as radicular numbness and tingling in the right leg. Dr. Leach commented that Claimant's cervical MRI revealed degenerative disc disease and facet arthropathy. At C4-C5 there was mild left and moderate to severe right foraminal stenosis. Dr. Leach referred Claimant for a thoracic spine MRI without contrast.

8. On January 20, 2021 Claimant was evaluated at Dr. Leach's MSK Medical facility by Nils Foley, M.D. Claimant noted his back pain was constant and moderate to severe at an 8-9/10 level. His symptoms continued to radiate into the right lower extremity. Dr. Foley recommended continued physical therapy, chiropractic care and lumbar decompressions. He also referred Claimant to Sanjay Jatana, M.D. at Orthopedic Centers of Colorado for a neurosurgical consultation.

9. On February 17, 2021 Claimant visited Dr. Jatana for an evaluation. The cervical spine MRI showed disc degeneration and central protrusions at C4-C5 and C5-C6 that produced moderate to severe right-sided neural foraminal stenosis at C4-C5 and mild bilateral stenosis at C5-C6. Otherwise there were mild degenerative changes at C3-C4 around the facet joints. An MRI of the lumbar spine was difficult to interpret due to a significant artifact caused by the disc arthroplasty at L5-S1. However, the disc appeared desiccated and had decreased signal and height. It was also hard to determine whether there was a disc protrusion on the right side. However, radiology reports revealed a central disc extrusion at L4-L5. Finally, Dr. Jatana remarked that the thoracic MRI showed a degenerate protrusion from T-6 through T-9 and a small thoracic syrinx at T11-T12. He recommended C4-C6 transforaminal epidural steroid injections and L4-L5 bilateral transforaminal epidural steroid injections to ascertain Claimant's pain generator. Dr. Jatana also recommended a lumbar discogram to determine whether the pain was discogenic and arising from the L4-L5 level if the injections were not helpful. Treatment options included a revision back surgery involving an anterior discectomy and disc arthroplasty at L4-L5 if it was confirmed as the pain generator.

10. On March 6, 2021 Claimant was admitted to the hospital for abdominal pain. He was diagnosed with an unrelated perforated sigmoid colon and diverticulitis. Claimant underwent a Hartman's procedure and colostomy. He experienced an uneventful recovery for a period of time that interfered with immediate follow-up for his cervical and lumbar spine.

11. On August 23, 2021 Claimant returned to Dr. Leach for an examination. Dr. Leach ordered an additional lumbar MRI to address Claimant's new report of urinary incontinence. Notably, the previous MRI was one year-old and Claimant was due to follow-up with Dr. Jatana for possible clearance for lumbar discography and surgical intervention. The new MRI was completed on August 29, 2021 and generally showed the same result previously identified. At L4-L5 there was mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis.

12. On November 23, 2021 Claimant visited Michael Janssen, D.O. for a Physician Advisor evaluation. After reviewing Claimant's medical records Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for his underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. In specifically addressing the proposed discectomy, Dr. Janssen concluded that the procedure was probably a reasonable option. In considering the proposed surgery, he reasoned that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

13. On January 31, 2022 Claimant visited Dr. Jatana for a follow-up appointment. Dr. Jatana remarked he had reviewed Dr. Janssen's report and agreed that, based on Claimant's response to the transforaminal epidural steroid injections, a discography was no longer necessary. He noted Dr. Janssen's conclusion that Claimant's conditions were not causally related to the MVA. Dr. Jatana responded that he had no comment regarding the cause of Claimant's current symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain. Claimant attributed his current symptoms to the MVA and sought continued treatment. Dr. Jatana thus recommended an L4-L5 discectomy with an anterior lumbar procedure and disc arthroplasty. Because Claimant had undergone surgery in the G.I. tract as well as a previous anterior exposure at L5-S1, he recommended consultation with an access surgeon to determine whether an anterior approach was even feasible. If the approach was not feasible they would proceed with a posterior approach.

14. On February 22, 2022 Physician Advisor Dr. Janssen reviewed the prior request for surgery and did not believe that an anterior procedure was appropriate. He consulted with an access physician who noted that Claimant was 220 pounds with a colostomy and previous anterior retroperitoneal approach at L5-S1. There was thus a high risk of exposing the L4-L5 level with an anterior interbody fusion. Dr. Janssen noted that Dr. Jatana did not have an opinion on the cause of Claimant's conditions. Moreover, He expressed concern that Claimant's case did not meet the Colorado Division of

Workers' Compensation Medical Treatment Guidelines (MTGs) for the Lower Back. Notably, options other than reconstruction of a degenerative, non-traumatic, non-occupational condition should be considered.

15. On March 7, 2022 Dr. Jatana reviewed Dr. Janssen's report that Claimant's condition was not work-related and revision anterior exposure was not worth the risk. Dr. Jatana noted that Claimant had failed nonsurgical treatment and had received concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at the L4-L5 level.

16. Based upon Dr. Janssen's opinion, Respondents denied Claimant's surgical request. Claimant then filed an Application for Hearing seeking approval of the proposed fusion procedure.

17. On June 1, 2022 Claimant underwent an independent medical examination with Brian E.H. Reiss, M.D. Dr. Reiss considered Claimant's medical records and conducted a physical examination. After reviewing the November 27, 2021 MRI of Claimant's lumbar spine, he noted the findings were very minimal without any nerve root contact of significance. There was only minor degeneration at L4-L5. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. Instead, the findings were degenerative and pre-existing. Dr. Reiss remarked that Claimant had done little in the way of physical therapy. Specifically, Claimant did not undertake any significant active exercises in the form of core strengthening or aerobic conditioning that would be the most appropriate treatment method. Furthermore, Claimant acknowledged during the interview and examination that he did little to no exercise and was quite likely deconditioned. Dr. Reiss reasoned that Claimant probably suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition.

18. Dr. Reiss explained that, while it is possible that the MVA aggravated Claimant's lumbar condition to some extent, his lumbar symptomatology was partially pre-existing and partially persistent on the basis of a lumbar strain, deconditioning and psychological factors. He remarked that there were no new objective findings on imaging and Claimant's subjective complaints appeared to be out of proportion to objective findings. Claimant noted 6-7/10 pain without the corresponding appearance of expected pain behaviors.

19. Dr. Reiss also testified at the hearing in this matter. He explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. In contrast, Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology, contrary to what Claimant told him at the independent medical examination. Specifically, the medical records from November 2019 reveal that

Claimant's symptoms continued for at least 10 days and were somewhat significant. Notably, the symptoms were not triggered by any particular event or aggravation.

20. Dr. Reiss concluded that Claimant's request for surgery, particularly a fusion, did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to offer improvement beyond other conservative care. Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic. Dr. Reiss concluded that he had a number of concerns about a surgical fusion and the procedure would likely not improve Claimant's condition.

21. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Specifically, providers from Family Physicians of Greeley on November 5, 2019 assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Claimant underwent x-rays of the lumbar spine and began anti-inflammatories and Flexeril at night. There was no injury associated with Claimant's symptoms and his condition was aggravated by changing positions including rolling over in bed and twisting.

22. At hearing Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He also underwent x-rays. Claimant acknowledged that the artificial disc replacement he received at L5-S1 could contribute to problems at higher levels and cause degeneration. He noted that his back would become sore in the past when he overworked, particularly when he twisted or bent.

23. Claimant has failed to demonstrate it is more probably true than not that lumbar L4-L5 posterior spinal fusion surgery as requested by Dr. Jatana is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Initially, Claimant was involved in a work-related MVA on July 30, 2020 and experienced back pain. He underwent conservative treatment in the form of physical therapy and injections, but continued to experience symptoms. Claimant's lumbar MRI revealed mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion at L4-L5. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis. Treating physicians Drs. Tobey and Leach did not make any surgical recommendations. However, Dr. Leach ultimately referred Claimant to Dr. Jatana for a surgical consultation.

24. After reviewing Claimant's medical records, Dr. Jatana determined that Claimant had failed nonsurgical treatment and undergone concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at L4-L5. Notably, however, Dr. Jatana had no comment regarding the cause of Claimant's current

symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain.

25. Despite Dr. Jatana's surgical request, the persuasive medical opinions reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. After reviewing relevant medical records, Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for Claimant's underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. Dr. Janssen determined that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

26. Similarly, after conducting an independent medical examination, Dr. Reiss concluded that Claimant's lower back symptoms were not causally related to his MVA. Initially, Dr. Reiss explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. He reasoned that Claimant likely suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition. Furthermore, Dr. Reiss concluded that Claimant's request for fusion surgery did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to provide improvement than other conservative care. Finally, Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic.

27. The medical records also reveal that Claimant has suffered from pre-existing back symptoms. Importantly, Claimant underwent a prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology. Specifically, the medical records from November 2019 reveal that Claimant's symptoms continued for at least 10 days and were somewhat significant. Medical providers assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Notably, the symptoms were not triggered by any particular event or aggravation. Furthermore,

Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He thus underwent x-rays. Finally, Claimant acknowledged that the artificial disc replacement he underwent at L5-S1 could contribute to problems at higher levels and cause degeneration.

28. Despite Dr. Jatana's opinion, the medical records, in conjunction with the persuasive opinions of Drs. Janssen and Reiss, reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Claimant's July 30, 2020 MVA did not aggravate, accelerate or combine with his pre-existing condition to produce the need for the proposed fusion surgery. Accordingly, Claimant's surgical request is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need

for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

6. The MTGs were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v. Indus. Claim Appeals Off.*, 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the MTGs shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. Nevertheless, the MTGs expressly acknowledge that deviation is permissible.

7. The MTGs define a spinal fusion as "a procedure that unites 2 or more vertebral bodies together to restrict motion and removes a degenerative disc to relieve symptoms of coexistent nerve root compression." Rule 17, Exhibit 1, Low Back Pain, Section 8.b.iii. Recommendation 152 of the MTGs delineates the following criteria prior to proceeding with spinal fusion surgery:

- all pain generators are adequately defined and treated;
- all physical medicine and manual therapy interventions are completed;
- imaging studies demonstrate spinal stenosis with instability or disc pathology, requiring decompression;
- spine pathology is limited to 2 levels; and
- psychological evaluation.

Recommendation 153 of the MTGs includes the following diagnostic indications for fusion surgery:

- neural arch defect with associated stenosis or instability;
- spondylolytic spondylolisthesis;
- degenerative spondylolisthesis 4 mm or greater;
- surgically induced segmental instability;
- symptomatic spinal stenosis in the presence of spondylolisthesis (>2 mm)

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that lumbar L4-L5 posterior spinal fusion surgery as requested by Dr. Jatana is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Initially, Claimant was involved in a work-related MVA on July 30, 2020 and experienced back pain. He underwent conservative treatment in the form of physical therapy and injections, but continued to experience symptoms. Claimant's lumbar MRI revealed mild disc space narrowing and desiccation with a mild symmetric disc bulge and a small superimposed central disc extrusion at L4-L5. There was also mild bilateral facet hypertrophy without significant central canal or foraminal stenosis. Treating physicians Drs. Tobey and Leach did not make any surgical recommendations. However, Dr. Leach ultimately referred Claimant to Dr. Jatana for a surgical consultation.

9. As found, after reviewing Claimant's medical records, Dr. Jatana determined that Claimant had failed nonsurgical treatment and undergone concordant diagnostic L4-L5 epidural steroid injections. He commented that the L4-L5 level had been identified as the pain generator. Dr. Jatana thus recommended a posterior lumbar fusion at L4-L5. Notably, however, Dr. Jatana had no comment regarding the cause of Claimant's current symptoms or treatment since the July 30, 2020 MVA. He remarked that Claimant said he was doing well prior to the MVA without significant pre-existing lower back pain.

10. As found, despite Dr. Jatana's surgical request, the persuasive medical opinions reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. After reviewing relevant medical records, Dr. Janssen assessed Claimant with "nonspecific cervical and lumbar dysfunction without clear-cut evidence of an anatomical condition related to" the July 30, 2020 MVA. He specified that the MVA did not cause the disc desiccation, result in the concern of a syrinx on the MRI, and did not cause the anatomical findings identified as a pain generator for Claimant's underlying condition. Specifically, although Claimant may have had myofascial symptomatology, there was no structural abnormality directly related to the July 30, 2020 MVA. Dr. Janssen determined that "it does not appear that there is any indication for cervical spinal reconstructive surgery as it relates to the accident. It is unknown whether or not the lumbar spine disc (pending discography) is truly related" to the July 30, 2020 MVA.

11. As found, similarly, after conducting an independent medical examination, Dr. Reiss concluded that Claimant's lower back symptoms were not causally related to

his MVA. Initially, Dr. Reiss explained that Claimant's MRI findings were normal for a person of his age, showed some degeneration and there was no nerve contact of significance. Notably, the findings were minor and not related to any specific trauma. Furthermore, December 10, 2020 flexion and extension imaging only showed minor degeneration, no instability and nothing acute. Dr. Reiss explained that none of the preceding findings would account for any lower extremity complaints. He reasoned that Claimant likely suffered myofascial pain that was worsened by deconditioning. A fusion and/or disc replacement was thus highly unlikely to significantly improve his condition. Furthermore, Dr. Reiss concluded that Claimant's request for fusion surgery did not meet the requirements of the MTGs. Notably, no specific pain generator had been sufficiently identified. Dr. Reiss commented that, in the absence of instability and degeneration, a fusion was very unlikely to provide any relief and was no more likely to provide improvement than other conservative care. Finally, Dr. Jatana's proposed posterior fusion surgery at L4-L5 would place additional stress on the previous L5-S1 disc replacement and make Claimant's back more symptomatic.

12. As found, the medical records also reveal that Claimant has suffered from pre-existing back symptoms. Importantly, Claimant underwent a prior lower back surgery in approximately 2002 or about 18 years before his July 30, 2020 work injury. He specifically had an artificial disc replacement at L5-S1. Although Claimant stated to Drs. Jatana, Tobey and Reiss that he had no lower back pain prior to his July 30, 2020 MVA, medical records reveal that he has previously experienced lower back symptoms. Dr. Reiss detailed that the medical records from November 2019 showed acute symptomatology. Specifically, the medical records from November 2019 reveal that Claimant's symptoms continued for at least 10 days and were somewhat significant. Medical providers assessed Claimant with acute left-sided lower back pain without sciatica. The providers noted that Claimant had a history of previous degenerative disc disorder. Notably, the symptoms were not triggered by any particular event or aggravation. Furthermore, Claimant confirmed that he suffered prior lumbar symptoms. Claimant reported that he performed construction and had tweaked his back in November of 2019. The symptoms were significant enough that he was concerned that a screw may have been damaged at the L5-S1 level. He thus underwent x-rays. Finally, Claimant acknowledged that the artificial disc replacement he underwent at L5-S1 could contribute to problems at higher levels and cause degeneration.

13. As found, despite Dr. Jatana's opinion, the medical records, in conjunction with the persuasive opinions of Drs. Janssen and Reiss, reflect that Claimant has failed to demonstrate that lumbar L4-L5 posterior spinal fusion surgery is reasonable, necessary and causally related to his admitted July 30, 2020 industrial injury. Claimant's July 30, 2020 MVA did not aggravate, accelerate or combine with his pre-existing condition to produce the need for the proposed fusion surgery. Accordingly, Claimant's surgical request is denied and dismissed.

ORDER

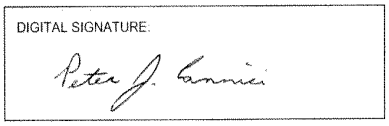
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a lumbar L4-L5 posterior spinal fusion surgery is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 13, 2022.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The issues addressed in this order concerns the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62/week to $640.00/week.

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Employer operates as a staffing agency that matches workers with employers to fill job openings in the construction trades. Claimant was hired by Employer to work as a construction laborer for [Third party name redacted] in the area of erosion control.

2. Claimant testified that before being hired by [Employer Redacted], he had quit a job in erosion control with another company because he was not getting full time hours. He testified that after he quit his job, he sought work with [Third Party name Redacted] through [Employer redacted] because "Ms. A [Redacted]" assured him that he would get at "least get 40 hours of work and some overtime" with [Third Party name redacted]. Accordingly, Claimant testified that he applied for a position with [Employer redacted], was hired at $16.00/hour and placed with [Third Party Company redacted]. Claimant completed his "Employment Application Form" on January 20, 2022. (Clmt's. Ex. 5, p. 12). He indicated that he was available to start working January 29, 2022. (Resp. Ex. D, p. 7). Claimant agreed that he started working for [Third Party Company redacted] around January 29, 0222.

3. Claimant testified that he suffered a back injury on March 30, 2022, while digging a trench and moving dirt. (*See also*, Clmt's. Ex. 1, p. 2). Following this injury, Claimant completed a "Worker's Claim for Compensation form on March 31, 2022. *Id*. In his claim for compensation, Claimant declared an average weekly wage (AWW) of $720.00. *Id*. Although he was offered modified duty work, Claimant testified that his doctor would not approve the position. Consequently, Claimant testified that he has not worked since the date of his injury.

4. Respondents admitted liability for Claimant's injury as evidenced by a General Admission of Liability (GAL) filed on May 11, 2022. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). The May 11, 2022, GAL reflects that Claimant's wages were paid "from DOI (date of injury) through 4/24/2022." *Id*. As Claimant began to lose time from work beginning April 25, 2022, it was necessary for Respondents to calculate his AWW to

insure proper payment of temporary total disability (TTD) benefits.

5. Respondents calculated Claimant's AWW to equal $460.62. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). Respondents did not provide a basis for their calculation. Claimant contends that the admitted AWW is incorrect. He maintains that he had a reasonable expectation of getting at least 40 hours of work a week while working for [Third Party Company redacted] based upon his conversation with [Name Redacted, hereinafter Ms. A]. During cross-examination, Claimant suggested that he was not getting his anticipated full 40 hours of work due to weather, i.e. heavy snow/rain affecting the job site and the fact that he had no control over how his supervisor set his working hours.

6. Payroll records admitted into evidence begin with the pay period ending February 6, 2022 and run through the pay period ending April 24, 2022. (Resp. Ex. D, p. 18). As noted, Claimant testified that he has not worked since March 30, 2022. Accordingly, monies paid for the pay period ending April 3, 2022 through the period ending April 24, 2022 reflect the wage continuation referenced in the May 11, 2022 GAL rather than wages for hours worked. Counting the week for the pay period ending February 6, 2022 and including the remaining weeks extending through the period ending March 27, 2022, the last full week of work before Claimant was injured on March 30, 2022, represents a period of eight weeks. Claimant was paid a total of $3,428.00 over this period. *Id.* The payroll records also reflect that during this eight-week period, Claimant only worked a full 40-hour workweek once, i.e. for the pay period ending February 20, 2022. *Id.* Claimant also worked 5.50 hours of overtime for this same pay period. *Id.*

7. Claimant contends that the payroll records admitted into evidence are incorrect and do not accurately reflect the hours he worked. He testified that he worked overtime on at least two occasions whereas the payroll records indicate that he only worked overtime once before his injury. Claimant testified that although he expected he would get 40 hours per week, he did not call Ms. A [Redacted] to complain that his hours were short because he knew the weather was affecting his hours. He suggested that as the weather improved his hours would increase.

8. Ms. A [Redacted] testified as an Account Executive for Employer. She confirmed that Claimant was hired as a construction laborer at $16.00/hr. (*See also*, Resp. Ex. D, p. 12). Ms. A [Redacted] testified that while she anticipated that Claimant could work as many as 40 hours a week for [Third Party Company redacted], she made no promise or guarantee to Claimant that he would get 40 work hours per week plus overtime as he implied. She clarified during cross-examination that she told Claimant that he could work up to 40 hours, weather permitting.

9. Ms. A [Redacted] testified that the hours of [Employer redacted] employees placed with [Third Party Company redacted] vary from week to week. She testified that for the week of March 13, 2022, none of the [Employer redacted]'s employees placed with [Third Party Company redacted] worked a full 40 hours. (Resp.

Ex. D, p. 14). She also testified that out of nine employees placed with [Third Party Company redacted] on March 20, 2022; only four worked a full 40-hour workweek. (Resp. Ex. D, p. 15). For the week ending March 27, 2022, Ms. A [Redacted] testified that three out of sixteen employees placed with [Third Party Company redacted] worked 40 hours. (Resp. Ex. D, p. 16). Finally, the records reflect that Claimant worked 8 hours on March 29, 2022 and 5 hours March 30, 2022. He did not work March 31, 2022, April 1, 2022, or April 2, 2022. No employees placed with [Third Party Company redacted] worked Sunday, April 3, 2022. (Resp. Ex. D, p. 17).[1]

10. Ms. A [Redacted] testified that Employers payroll records cannot be tampered with in the system from which they are produced. She also confirmed that Claimant never called her to inform her that he was not getting his anticipated hours.

11. Ms. A [Redacted] confirmed that Claimant has not worked since March 30, 2022. She confirm that Employer paid Claimant at a rate of $16.00/hour for 40 hours or $640.00 for three weeks after his injury. She no explanation for why Claimant was being paid $640.00 a week for this period.

12. Based upon the evidence presented, the ALJ is not persuaded that Employer lead Claimant to believe that he would get 40 hours of work per week as a construction laborer at [Third Party Company redacted]. In this regard, the ALJ credits the testimony of Ms. A [Redacted] to find that no promises or guarantees of working 40 hours were extended to Claimant. Rather, the ALJ is convinced that Ms. A [Redacted] probably conveyed to Claimant that under [Third Party Company redacted] it was possible that he could work up to 40 hours per week. Nonetheless, the ALJ is convinced that weather probably altered the number of days and hours Claimant was able to work during the late winter and early spring months following his hire on January 22, 2022.[2] In fact, Ms. A [Redacted] seemingly acknowledged as much when she testified that Claimant could work as many as 40 hours per week, "weather permitting."[3]

13. As submitted the March 13, 2022, time sheet contained at Resp. Ex. D, p. 14 supports a finding that weather was likely affecting the entire crew's ability to work during the week of March 7-13, 2022. In fact, no employee worked every day this week, no employee worked 40 hours for the week and no one worked Thursday or Saturday. Moreover, only four of 16 employees worked on Monday and Friday of this week and only eight of 16 employees worked on Tuesday and Wednesday. (Resp. Ex. D, p. 14). While the March 20, 2022 and March 27, 2022 time sheets suggest that there was an improvement in the weather, based on the increased number of days the crew was working and the average number of hours for those employees, Respondents did not submit a time sheet for the week ending February 6, 2022 or

[1] Based upon the time sheets submitted, the ALJ finds to reasonable to conclude that [Third Party Company redacted] is closed on Sundays.
[2] As testified to by Ms. A [Redacted].
[3] Here, the wage records cover a period of typically unsettled weather in Colorado, namely February, March and April.

February 27, 2022. Thus, the number of days and the average number of hours each member of the crew was working is unknown. Nonetheless, it is known that Claimant only worked 18 hours for the week ending February 6, 2022 and 7.50 hours for the week ending February 27, 2022. Based on the information demonstrated by the March 13, 2022 time sheet, the ALJ finds it reasonable to infer that weather was probably affecting the number of hours Claimant was able to work for the weeks ending February 6, 2022 and February 27, 2022. (Resp. Ex. D, p. 18). Because the number of hours Claimant worked for the weeks ending February 6, 2022 and February 27, 2022, are conspicuously below his reported work hours for the balance of the reported period, the ALJ finds these hours to constitute an anomaly in his earnings. Because the earnings from these two weeks do not accurately and fairly represent Claimant's typical earnings, the ALJ finds that it would be manifestly unjust to calculate Claimant's AWW by including these reduced earnings in the overall computation of his AWW. Accordingly, the ALJ elects to exclude these two weeks of earnings, add the remaining earnings in the 8 week period and divide the total by six weeks to arrive at an AWW of $503.33 ($560.00 + $772.00 + $432.00 + $360.00 + $560.00 + $336.00 = $3,020.00 ÷ 6 weeks = $503.33). (Resp. Ex. D, p. 18).

14. Based upon the evidence presented, Claimant has proven that his AWW should be increased from $460.62 to $503.33 as the ALJ finds this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[4]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

D. Sections 8-42-102(3) and (5) (b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of March 30, 2022 comes from the time sheets and wage records admitted into evidence. As found here, careful review of those materials persuades the ALJ that the computation of Claimant's AWW should not include the pay periods ending on February 6, 2022 and February 27, 2022. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity, probably due to factors beyond his control, specifically inclement weather and his supervisor's actions regarding the setting of Claimant's work hours. Indeed, the ALJ is convinced that but for the unsettled weather, Claimant likely would have worked the increased hours he testified he felt were coming as the weather improved. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the pay periods ending February 6, 2022 and February 27, 2022 as they were likely disproportionally affected by the weather at the time. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW should be increased. While the ALJ is not convinced that Claimant is entitled to an increase to $640.00, the evidence supports and increase from $460.62 to $503.33, as this figure represents the fairest approximation of his wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62 to $503.33.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $503.33 for the time period reflected in the GAL filed May 11, 2022, i.e. from April 25, 2022 and ongoing until such time that the TTD

[4] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

benefits can be terminated in accordance with the provisions of the Colorado Workers' Compensation Act.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the right hip replacement surgery recommended by Dr. Derek Johnson is causally related to the admitted work injury of March 8, 2022.

STIPULATION

The parties stipulated that the surgery recommended by Dr. Derek Johnson was reasonably necessary, making the sole remaining issue whether the surgery was causally related to the claim.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 54 year old truck drive for Employer, transporting food products to a local grocery store. He drove an 18 wheeler tractor trailer Class A. The job included manual lifting from floor to knee level up to 100 lbs. and up to 50 lbs. from knee to shoulder as well as pushing and pulling loads of up to 75 lbs. He was required to manually crank landing gear on the trailer, which required bending and twisting, and climbing into and out of the tractor, trailer, and on or off of catwalks, stepping up to 24" above the ground. Driving required use of both legs and fee to brake, accelerate and clutch.

2. Claimant was injured in the course and scope of his employment with Employer when he slipped on ice and fell on his right hip, causing injury to the right hip, on March 8, 2022. Claimant stated that he was in the process of performing his truck inspection, including checking on the pin hook-up of the trailer to make sure that everything was secure, when he slipped on the ice. He stated it was a hard fall directly on his right hip.

3. Claimant credibly testified that he had no problems with his right hip and was able to carry out all the requirements of his job prior to the March 8, 2022 incident. He advised that he had no prior medical care for his right hip, nor did he have any work restrictions that limited his ability to perform his work until March 8, 2022.

4. He stated that he had been a football player in his youth and had to have a knee replacement as early as in his twenties. He also stated that he had the left hip replaced as well, in approximately 2012 or 2013 and the opposite knee replaced in approximately 2015. However, he was not advised by his medical provider he had osteoarthritis of the right hip until he was treated for this work related incident. He recalls specifically contacting the providers to make sure that the CT scan and the MRI scan were provided to Dr. Derek Johnson, his surgeon, and he later discussed his diagnosis.

Dr. Johnson showed him the x-rays and explained that he had a fracture at the subchondral humeral head.

5. He stated that he had worked driving, loading and unloading semi-trucks/trailers for approximately one and one half years for Employer and prior to that, Claimant worked for seven years in the oil fields as a driver. He would be required to lift and move drums full of chemicals to the oil sites. He would also assist with tearing down and setting up the oil rig pads or platforms. All of these jobs in the oil fields were even heavier than the job he was performing for Employer of injury. He credibly conveyed that he was able to perform these jobs without any problems or pain in his right hip or restrictions.

6. On March 8, 2022 Claimant was evaluated in the emergency room at St. Joseph Hospital by Heather Orth, M.D. and Christopher North, PA-C. The history of present illness described Claimant with no significant medical history regarding the right hip prior to having fallen at work just prior to arrival. He described landing on the apex of his right hip. He had immediate pain and inability to bear weight, and no prior fractures of the right hip. They noted moderate diffuse tenderness laterally, with pain in the inguinal region with range of motion and a limping gait. They suspected a stress fracture and ordered a CT scan. The CT did not reveal any fractures or joint malalignment but showed advanced osteoarthritis of the hip, as read by osteopath Chelsea Jeranko. Dr. Jeranko also noted that the collar of the femoral head had osteophytes partially contributing to decrease femoral head/neck junction offset (cam morphology)[1]. Enthesopathy of the greater trochanter and ischial tuberosity indicative of underlying gluteal and hamstring tendinopathy, respectively. Mr. Tipton diagnosed contusion of the right hip. They recommended use of antiinflamatories, ice to the hip area, avoid walking if it caused pain and to use crutches if necessary.

7. Claimant was first seen by Jennifer Voag, PA-C and Gary Childers, M.D. of Aviation and Occupational Medicine (A&OM) on March 10, 2022. They noted that Claimant was a truck driver picking up a load, when he walked back to check on the pin on the trailer and slipped and fell on ice, on his right hip. They noted he had constant pain and a cramping feeling in the hip, with very limited range of motion and that Claimant had difficulty with ambulation or weight bearing on the injured hip, finding tenderness over the right hip joint. They diagnosed a strain and contusion of the right hip. They stated that, based on the examination, history, mechanism of injury, and objective findings on examination, that it was their medical opinion that there was greater than a 51% probability that this was a work-related injury. They ordered an MRA, continued medications, provided crutches and a heating pad, and provided modified duty of sitting only. They noted that objective findings were consistent with history and work related mechanism of injury.

8. Respondents filed a General Admission of Liability on March 23, 2022. Respondents noted that they were admitting to an acute right hip injury and started temporary disability benefits as of March 10, 2022.

9. Claimant was seen again on March 29, 2022 at A&OM. Claimant reported that his hip pain was actually worse with popping and constant pain, including throbbing

[1] Cam morphology is an abnormal morphology of the femoral head-neck junction.

and catching. They referred Claimant to Dr. Johnson, as he had been the physician that had previously seen Claimant for past bilateral total knee replacements and a left hip replacement.

10. On April 14, 2022 Dr. Derek Johnson, of Centura Orthopedics and Spine Meridian/Centura Health, examined Claimant and ordered x-rays, which showed advanced bone-on-bone osteoarthritic changes of the right hip and a subchondral fracture of the femoral head on his right hip.[2] Dr. Johnson specifically stated as follows:

> He has a subchondral femoral head fracture. This likely occurred as result of his fall. He did have pre-existing arthritis which was asymptomatic, but I think this acute femoral head impaction fracture is likely what is causing majorities pain. With the severity of his arthritis and this new acute fracture I think there is [not][3] (sic.) much to offer short of hip replacement that will offer him meaningful long-term relief of his symptoms.

11. On April 15, 2022, Dr. Johnson faxed a request for prior authorization to Respondents' adjuster for a right total hip arthroplasty due to right hip osteoarthritis and fracture of the femoral head.

12. Insurer sent a letter to Dr. Johnson on April 19, 2022 requesting his opinion with regard to Claimant's preexisting conditions, diagnosis and opinions.

13. Dr. Johnson responded on the same day that Claimant had a preexisting condition of osteoarthritis of the right hip, stated that the March 8, 2022 work related injury caused the subchondral femoral head fracture, and that Claimant would not have needed the surgery were it not for the work related injury as Claimant's arthritis was asymptomatic prior to the injury. He further stated that it was more likely than not Claimant would not have required the surgery but for the March 8, 2022 work related injury as Claimant's severe increase in pain was likely the result of his fall and the subsequent fracture.

14. On April 25, 2022, the same adjuster, sent Dr. Johnson a Rule 16 denial of the request for prior authorization for the proposed surgery, with the attached report authored by Timothy S. O'Brien, M.D., based on a medical record review.

15. Dr. O'Brien opined that, based on the review of the records, MRI and CT scans, that Claimant did not actually have a fracture of the femoral head because the reports of the MRI and CT did not express that there was bleeding. He further opined that the Claimant's preexisting osteoarthritis was the cause of Claimant's hip pain, not anything that might have occurred during the March 8, 2022 fall on the right hip. He specifically stated that "[T]he presence of right hip pain after a fall onto an arthritic hip joint is not an indication that new tissue breakage or yielding occurred; rather, it is an expected and predictable manifestation of the underlying condition itself." He further noted that Claimant's fall on the ice did not make him a candidate for right hip replacement as there was no aggravation or acceleration caused by the accident, but that he likely required the hip replacement before the date of injury.

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[2] This ALJ infers that the x-rays were read by Dr. Johnson based on the statement that it was "electronically signed by Derek Ryan Johnson, MD at 4/14/2022 3:02 PM."

[3] Inferred based on the remaining portions of the report and the request for prior authorization recommending the surgery.

16. On April 26, 2022 Respondents sent A&OM a copy of Dr. O'Brien's report requesting a medical opinion in the matter following review.

17. Claimant was evaluated by Dr. Michael Ladwig, of A&OM, on May 9, 2022 noting that Insurer denied Claimant's right hip replacement and Lidoderm patches. Dr. Ladwig continued Claimant on sitting duty only and kept Claimant not at maximum medical improvement (MMI). The records noted that Claimant's symptoms were unchanged and Claimant was tender at the hip and groin. Claimant specifically indicated to his provider that he did not have the current severe symptoms or need for crutches prior to the March 8, 2022 fall.

18. On May 16, 2022 Dr. Ladwig reviewed Dr. O'Brien's medical record review and opined that Claimant continued to require an unknown amount of treatment, could not anticipate when Claimant would return to full duty or when Claimant would reach MMI for the March 8, 2022 work injury.

19. On June 1, 2022 Dr. Childers and Amelia Carmosino, PA, continued Claimant on the same sedentary restrictions and stated Claimant continued not to be at MMI. On exam, Claimant continued to have tenderness at the lateral hip and groin area. There was a notation that Claimant continued to ambulate with crutches and was having back spasms secondary to limping. The records noted that Claimant was planning on proceeding with surgery despite denial as Claimant "can't wait anymore." There was a notation that the treatment plans was to proceed with the right hip replacement surgery with Dr. Johnson, scheduled for July 5, 2022 and a follow up was scheduled with Dr. Ladwig for July 11, 2022.

20. Claimant was evaluated by Robert Cox, Dr. Johnson's physician assistant, on June 7, 2022. Claimant continuing to have severe, unremitting right hip pain that was not responding to over the counter medications. He prescribed a narcotic medication at that time.

21. The July 11, 2022 note from Dr. Ladwig stated that the surgery was cancelled due to Claimant's A1C levels, noting it was rescheduled for August 15, 2022. Claimant's restrictions did not change from sedentary duty.

22. Dr. Ladwig continued to note, on August 1, 2022, that Claimant's objective findings were consistent with the history and work related mechanism of the injury. This is the last medical report in evidence from A&OM.

23. Claimant testified that the surgery proceeded on August 15, 2022 but he continued to have some right hip pain.

24. Dr. O'Brien supplemented his medical record review on August 22, 2022, following receipt of further records. The reviewed records were not submitted into evidence. Dr. O'Brien's summary of those records will not be adopted by this ALJ. Dr. O'Brien's opinion did not change. He specifically opined that Claimant "did not sustain a work-related injury on" March 8, 2022. It is clear that Dr. O'Brien did not believe Claimant to have been asymptomatic as he stated that "the likelihood that [Claimant] had no right hip pain prior to his work-related incident on March 8, 2022, is virtually 0%."

25. As found, Dr. O'Brien is not credible in this matter, stating there was likely a zero percent probability that Claimant was asymptomatic before the fall on March 8,

2022. From the totality of the evidence, Claimant is found credible in this matter. Claimant performed a heavy duty job which required multiple activities including driving an 18 wheeler, delivering, loading and unloading product for a local grocery store, not to mention the heavy duty job he had prior to the one with Employer of injury. Claimant was limited to sedentary duty and use of crutches or a cane to ambulate following the work related injury. This ALJ observed Claimant in the courtroom utilizing cane for ambulation.

26. Drs. Ladwig, Childers, PA-Cs Voag and Carmosino as well as Dr. Johnson are found credible and persuasive, in that they believed Claimant was asymptomatic prior to the work injury and sustained a work related injury on March 8, 2022, causing a subchondral femoral head fracture, and aggravating the underlying osteoarthritis of the right hip. The contrary opinions of Dr. O'Brien's medical record review reports are not found credible.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial*

Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Relatedness of Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

This is an admitted claim. The issue of whether Claimant was injured in the course and scope of his employment is not an issue in this matter. The principal matter here is whether Claimant's need for the right hip arthroplasty is causally related to the admitted March 8, 2022 work injury or the natural progression of the Claimant's underlying preexisting osteoarthritis. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal

relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, *supra.* Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant has shown that it is more likely than not that the March 8, 2022 slip on ice and fall on his right hip was the mechanism of injury and the proximate cause of Claimant's need for medical care. Claimant credibly described that he did not have any pain prior to his fall on ice. He specifically stated that he was working his full time job as a driver of an 18 wheeler tractor truck and trailer, including duties of loading and unloading of the merchandise he was hauling, lifting upwards of 75 lbs. at a time, and at no time had limitations or restrictions prior to the accident. Further, for several years before he started his employment with the Employer of injury sometime in 2020, he was working an even heavier job for the oil industry without limitations moving large barrels of chemicals. Claimant was conducting the inspection of his tractor/trailer, making sure the pin was in place and the rig was safe to drive, when he slipped on the ice and fell directly on his right hip, hard enough to cause a fracture of the subchondral femoral head. Claimant is found credible and persuasive.

Further, as found, Drs. Ladwig, Childers, PA-Cs. Carmosino and Voag and especially Dr. Johnson are found more persuasive than Dr. O'Brien. Specifically, Dr. Ladwig and Childers continued to care for Claimant and, despite having reviewed Dr. O'Brien's IME report, continued to state that, based on history, mechanism of injury, and objective findings on examination, it was more likely than not that this was a work-related injury and Claimant was not at MMI. It is inferred from these statements that these physicians and providers themselves found Claimant credible as well. Even Dr. O'Brien felt that the hip replacement surgery was reasonably necessary in light of the Claimant's underlying osteoarthritis. Claimant proceeded with the right hip arthroplasty by Dr. Johnson on August 15, 2022. Dr. Johnson advised that the total hip replacement surgery

was Claimant's best chance for recovery considering that Claimant sustained a fracture of the subchondral femoral head when he fell, impacting his right hip. This caused the underlying asymptomatic osteoarthritis to become symptomatic, requiring further medical care. The recommended treatment by Dr. Johnson is related and proximately cause by the work injury of March 8, 2022. Claimant has proven by a preponderance of the evidence that he is entitled to medical care as the subchondral femoral head fracture caused an aggravation of the osteoarthritis in his right hip and is entitled to medical care to cure and relieve him of the effects of his injuries.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall cover all medical treatment from the authorized providers for the reasonably necessary, and the causally related aggravation of the underlying preexisting right hip osteoarthritis, needed to cure and relieve the effects of Claimant's admitted March 8, 2022 injuries, including but not limited to the right hip arthroplasty performed by Dr. Johnson, subject to the Division of Workers Compensation Medical Fee Schedule.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms#WCForms.

DATED this 14th day of September, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant's injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee?

FINDINGS OF FACT

1. Claimant sustained admitted injuries in a motor vehicle accident that occurred in the course and scope of Claimant's employment with Employer on March 2, 2022.

2. Respondents presented the testimony of JL[Redacted, owner of Employer, at hearing. Mr. JL[Redacted] testified Employer had safety rules regarding the driving of company vehicles. Mr. JL[Redacted] testified this safety rule required that a seatbelt must be worn at all times the vehicle is moving. The rule further required that only employees of Employer are allowed in the vehicle and that there be no texting and driving. Claimant received and signed a copy of these policies on his date of hire, August 1, 2021.

3. Following the accident, Colorado State Patrol Officer J. Carbajal responded to the scene of the crash and issued a traffic accident report. In the accident report, Officer Carbajal wrote that Claimant was driving westbound on Interstate 70 and attempted to pass a semi-truck pulling a trailer. Claimant's vehicle lost control, drove off of the left side of the road, drove back onto the road and overcorrected. The report states that Claimant's vehicle then began to rotate, drove off of the left side of the road, struck a delineator post and overturned two times in the median, ejecting Claimant. Officer Carbajal wrote that the vehicle driven by Claimant was a GMC 2500. The report documented the license plate and vehicle identification number. Officer Carbajal recorded that the road at the scene of the crash was straight, dry and level. The weather was clear at the time of the crash. Officer Carbajal indicated that there were no observed vehicle defects. Under the section entitled "driver actions" Officer Carbajal wrote that careless driving and a lane violation were involved.

4. Grand Valley Fire Protection District responded to the scene of the crash. Claimant was located supine on the ground in the median. Claimant told the responding personnel that he was driving at highway speeds when he lost control of the vehicle and it rolled multiple times. Claimant stated that he was ejected from the vehicle and had loss of consciousness for an unknown amount of time. Claimant complained of pain in the midline spine in the mid-thoracic area where there was a visible deformity. No obvious trauma to the bilateral shoulders or chest was noted. There was a laceration present on the left elbow. Motor function and sensation were normal in both the right and left shoulders. Claimant was transported to Grand River Hospital.

5. Claimant was evaluated at Grand River Hospital on the date of the crash by Dr. Matthew Skwiot. Dr. Skwiot recorded that examination of the chest was normal with normal palpation of the entire chest wall. There was tenderness in the lumbar and thoracic spine. Claimant displayed full range of motion in his extremities. A computerd tomography ("CT") scan of the cervical spine showed swelling within the right sternocleidomastoid muscle due to possible strain or sprain. A CT scan of the chest, abdomen and pelvis showed spinal fractures in the thoracic and lumbar spine from T11 down to L3. This image also revealed bilateral posterior fifth rib fractures and pulmonary contusions in the posterior aspects of the upper and lower lobes of both lungs. No soft tissue traumatic injuries were seen within the abdomen or pelvis. Dr. Skwiot ordered Claimant to be transferred to St. Mary's Hospital.

6. Claimant was flown to St. Mary's Hospital by Care Flight of the Rockies. Their report reads that the Claimant was traveling on west bound on I-70 when he went off the highway and into the median. It was noted that Claimant was not restrained and was subsequently ejected from the vehicle. The records further note that Claimant does not fully recall the event.

7. St. Mary's Hospital treated Claimant beginning on March 2, 2022. The medical records from St. Mary's Hospital contain contradictory reports regarding Claimant's seatbelt usage.

8. Examination of Claimant indicated he denied chest and abdominal tenderness. Claimant did complain of thoracic back pain. The records further note Claimant had a lacunar laceration to the left posterior elbow but no other noted injuries to the upper extremities. A CT scan of the head was negative for intracranial injury.

9. Claimant was diagnosed with multiple unstable spinal fractures, bilateral posterior fifth rib fractures, bilateral pulmonary contusions and a small laceration to the left elbow. Claimant was subsequently evaluated by Dr. Basheal Agrawal on March 3, 2022. Dr. Agrawal noted that Claimant was involved in a high-speed motor vehicle accident while unbelted with ejection from the vehicle. Claimant underwent surgery including T8-L2 instrumented segmental posterolateral fusion and open reduction of kyphotic spinal deformity associated with spinal fracture on March 4, 2022. Claimant was eventually discharged on March 9, 2022 with restrictions of no lifting of greater than 10 pounds and minimizing bending and twisting and no driving while on narcotic mediations.

10. On March 24, 2022, Insurer filed a general admission of liability ("GAL") admitting to medical benefits and TTD from March 3, 2022 and ongoing. The GAL reduced claimant's disability benefits by 50% pursuant to a safety rule violation for no use of the seatbelt pursuant to Section 8-42-112(1)(b)..

11. Claimant was evaluated by Dr. Joel Dean on April 19, 2022. Claimant reported to Dr. Dean that some of his medical notes have been wrong and reported that his freight truck did not swerve out of control, but rather his vehicle started to fishtail. Claimant reported Dr. Dean that he was ejected from the vehicle and that he landed

hard on his back in some mud. Claimant reported that he snapped his head back hard but did not think that he hit his head.

12. Claimant reported to Dr. Dean that when he wakes up in the morning he has double vision that is horizontal and vertical and gradually resolves into blurred vision. Claimant reported having trouble staying organized and having trouble with words and thinking of things. Dr. Dean noted on examination that strength testing of the left and right shoulders did not reveal any recorded deficits. Claimant complained of continued significant low back and buttock pain. Dr. Dean diagnosed Claimant with a concussion, post-traumatic stress disorder ("PTSD"), and syndrome of inappropriate antiduretic hormone secretion (SIADH). Dr. Dean recommended an MRI scan of the brain and serum and urine studies.

13. On April 25, 2022 Claimant was evaluated by Isa Wright, Ph.D.-c. Ms. Wright noted Claimant alleged that he was ejected from the vehicle and landed on his back after being thrown approximately 30-40 feet in the air. Ms. Wright recommended a neuropsychological evaluation and completed a request for authorization.

14. Adam Michener of Delta V Engineering conducted an investigation and issued a report on June 29, 2022. Mr. Michener indicated in his report the he reviewed materials including the State of Colorado traffic accident report, photographs, Claimant's answers to interrogatories, invoices related to the GMC Sierra pickup Claimant was driving along with GMC specifications for the vehicle. Mr. Michener stated in his report that the accident report recorded that Claimant failed to use the available shoulder and lap belt and was ejected through the side window of the vehicle. Mr. Michener noted that two new tires were put on the vehicle in January of 2022. Mr. Michener noted that there were no indications in the repair records for the vehicle that would explain any alleged fishtailing as alleged by Claimant.

15. Mr. Michener examined the GMC pickup on March 29, 2022. Mr. Michener noted that the vehicle had dents, scratches and other damages consistent with an off-pavement rollover. He noted that all four tires were in good condition with the exception of the front right tire which was deflated and off of the rim as a result of the rollover. Mr. Michener examined the suspension, steering and brake components which were all still attached and Mr. Michener noted that they appeared normal without evidence of any pre-rollover issues.

16. Mr. Michener additionally examined the seatbelt in the vehicle. Mr. Michener report that the driver's side seatbelt was found in the stowed position and did not show any evidence of loading or usage. Mr. Michener reported the seatbelt correctly spooled out and locked when rapidly pulled as intended and the seat belt's latch plate correctly latched into the buckle and would not release unless the buckle's button was depressed. Mr. Michener reported that the fact that Claimant was ejected, the fact that the seatbelt functioned properly, and the lack of any evidence of usage were all evidence that Claimant was not wearing his seatbelt at the time of the rollover.

17. Mr. Michener also downloaded and evaluated data from the GMC pickup's airbag module. There was one non-deployment event which was recorded on the module. During this event, the driver's seatbelt for the collision was reported as "unbuckled." Mr. Michener remarked that it could not be determined whether the recorded event happened during the subject rollover accident or a different incident from January of 2022 noted by claimant in discovery. Mr. Michener noted in his report that to the extent that the recorded event was from the subject rollover it was evidence that Claimant was not wearing his seat belt. Mr. Michener further noted that to the extent that the recorded event was from the prior incident, this would show that Claimant did not always wear his seatbelt as he alleged.

18. Mr. Michener opined that there was no evidence that the roadway conditions or the state of the vehicle would have caused the vehicle to lose control. Mr. Michener opined that the GMC did not have issues that would lead to the rollover and that the driver's seatbelt of the GMC was intact and functioning properly. Mr. Michener further opined that the driver's seatbelt of the GMC showed no signs of usage during the subject rollover and that Claimant was not wearing his seatbelt which resulted in his ejection from the vehicle.

19. Respondents entered into evidence a copy of Employer's safety policies that was signed by Claimant on August 1, 2021. Mr. JL[Redacted] testified that he could not recall Claimant expressing any confusion regarding employer's seatbelt rule. Mr. JL[Redacted] testified that prior to the March 2, 2022 crash, there was no indication that Claimant was not wearing his seatbelt while driving vehicles for Employer. Mr. JL[Redacted] testified that prior to the March 2, 2022 crash Claimant was not disciplined by Employer for failing to wear a seat belt.

20. Mr. JL[Redacted] testified that prior to March 2, 2022, Claimant drove the subject GMC pickup on a regular basis. Mr. JL[Redacted] testified that prior to March 2, 2022, Claimant never alleged to him that the seatbelt in the vehicle was broken, malfunctioning or not in working order. Mr. JL[Redacted] testified that Claimant appraised employer in late January or early February of 2022 that the tires were starting to wear down and Employer had the tires on the vehicle replaced the next day. Mr. JL[Redacted] testified he did not receive any other complaints concerning the vehicle from Claimant.

21. On cross-examination, Mr. JL[Redacted] testified that Claimant rode in the subject vehicle with him once with Mr. JL[Redacted] driving and he never observed Claimant not wearing his seat belt. Mr. JL[Redacted] estified that Claimant was the primary driver of the vehicle but that there could have been other operators who used the vehicle.

22. Mr. Michener testified at hearing consistent with his report. Mr. Michener was recognized as an expert witness in mechanical, automotive and forensic engineering as well as accident reconstruction and investigation. Mr. Michener testified that he examined the vehicle involved in the collision which was confirmed through the vehicle identification number. Mr. Michener testified that the state patrol officer who responded to the crash indicated in his report that Claimant was not seat belted.

23. Mr. Michener testified that his examination of the driver's seatbelt of the GMC pickup revealed no mechanical issues or defects. Mr. Michener testified his examination included testing of the locking mechanism of the seatbelt which locked correctly and firmly and would not release. Mr. Michener testified that he believed that he would have been able to detect any defect with the seat belt. Mr. Michener testified that seat belts are designed to stay locked and restrain passengers in high speed rollover crashes like the one that occurred in this case. Mr. Michener testified that it was not probable from an engineering perspective that the seatbelt was properly worn by Claimant but came unbuckled due to a mechanical defect or other issue during the crash. Mr. Michener testified that he believed that the seatbelt in the GMC pickup would have restrained claimant if he had worn it and that seat belts are designed not to come unlatched due to unintentional or incidental contact.

24. Mr. Michener testified that seat belts have plastic in areas like the d-ring and latch plate where loading marks can form. Mr. Michener testified these marks can form in the seatbelt webbing as well. Mr. Michener explained in his testimony that loading marks are areas where friction and heat have deformed, melted or discolored the material due to the body forces applied to the materials by a person restrained in the seatbelt during a crash and can indicate that a seatbelt was used during a crash. Mr. Michener testified that he examined the driver's seatbelt for loading marks and that there were none. Mr. Michener testified that given the speed of crash he would have expected to find at least some subtle loading marks had Claimant been belted.

25. Mr. Michener testified on cross-examination that load marks can wear off if the vehicle is used repeatedly after an accident due to usage of the seatbelt. Mr. Michener testified that he would not have expected to find loading marks to the seat belts on the previous accidents with the vehicle, but would have expected them in this matter because the vehicle had not been driven since the crash.

26. Mr. Michener testified that the purpose of a seatbelt is the keep the passenger in the seat and decrease the forces applied to the person during a crash. Mr. Michener further testified that in the event of a high speed rollover crash it is safer to be seat belted due to the risk of being ejected from the vehicle. Mr. Michener testified that the vehicle provides integrity that will help prevent injury. By contrast when a person is ejected from the vehicle, there are additional risks, including those of being projected up into the air, increasing the velocity of the person that falls down to the ground. Mr. Michener explained that in a rollover, the vehicle has rotational motion and velocity which is applied to a person when ejected, which Mr. Michener compared to a trebuchet or letting go of a spinning merry-go-round. Mr. Michener testified the forces applied to the person in this scenario are greater compared to when restrained in the vehicle. Mr. Michener testified this is because the person restrained in a vehicle in a rollover loses speed over time and gradually comes to a rest as opposed to an ejection where the individual eventually contacts an immovable object such as the ground.

27. Mr. Michener testified that it was his conclusion that claimant was ejected from the vehicle during the rollover crash due to his failure to wear his seatbelt and that it was unlikely that he would have been ejected if he had been wearing his seat belt.

Mr. Michener testified on re-direct examination that in instances where there is extreme crush to the passenger compartment, that may be a case where someone has less injury risk being ejected outside of the vehicle. Mr. Michener testified that there was nothing revealed by his investigation that would suggest that the crash at issue was an exception to the general rule that it is safer to be inside the vehicle and belted. Mr. Michener testified he evaluated the interior of the cab of the vehicle which remained intact following the accident.

28. Mr. Michener testified that he did not do any calculations as to how Claimant was affected by not wearing his seatbelt and had no opinion as to whether Claimant was further injured as a result of not wearing his seat belt.

29. Claimant testified at hearing in this matter regarding the prior incident in the GMC pickup in February of 2022 when the vehicle veered into the median. Claimant attributed this to bald tires on the vehicle. Claimant testified that the tires were changed on the vehicle after this incident.

30. Claimant testified that on the day of the accident, he was working a job in Glenwood Springs and got in his truck to go home. Claimant testified when he got in the vehicle, he plugged in his phone, put on his seatbelt and looked at the sky before driving the vehicle. Claimant testified he was driving on I-70 in the slow lane when he went to pass a semi-tractor and went off the road. Claimant testified he remembered being thrown from the vehicle after rolling twice.

31. Claimant testified that he remembered falling to the ground flat on his back. Claimant testified that following the motor vehicle accident, he had bruising on the upper left side of and lower right side of his sternum as well as his shoulder.

32. On cross-examination Claimant testified that he always wears his seatbelt as a driver or passenger in a vehicle. Claimant testified that he wears his seatbelt as a matter of habit because that is the law. Claimant also acknowledged that on March 2, 2022 he knew that it was unsafe not to wear a seat belt. Claimant testified that it was a matter of common sense that one should wear their seatbelt for safety purposes. Claimant testified that he does not forget or neglect to put on his seat belt.

33. Claimant acknowledged that Employer had a written safety rule that required employees to wear a seatbelt when the vehicle was moving.

34.The ALJ credits the testimony of Mr. JL[Redacted] and finds that Employer had a safety rule in place which required that Employee's wear their seatbelt when operating a motor vehicle owned by Employer. The ALJ credits the testimony of Mr. JL[Redacted] and finds that this safety rule was in place for the safety of the employee.

35. The ALJ credits the testimony of Mr. Michener and finds that Respondents have proven that it is more probable than not that Claimant was not wearing his seatbelt at the time of the motor vehicle accident on March 2, 2022. Claimant's testimony that he was wearing his seatbelt at the time of the accident is found to be not credible with regard to this issue.

36. The ALJ finds that Respondents have failed to prove that it is more likely than not that Claimant's injuries resulted from his failure to wear the seat belt. Notably, Mr. Michener offered no opinion as to how the failure of Claimant to wear his seatbelt. Additionally, no credible medical evidence was presented at hearing that would establish which of Claimant's injuries, if any, would have been prevented by his use of the seatbelt on March 2, 2022. The medical records in this case are devoid of any credible indication as to how Claimant's injuries from the motor vehicle accident were the result from Claimant's failure to wear his seatbelt.

37. While it is true, generally, that seatbelts may prevent injuries in the event of a motor vehicle accident, there is insufficient evidence presented at hearing that Claimant's injuries in this case were the result of his failure to wear a seatbelt and as opposed to injuries Claimant would have received regardless of his seatbelt use. Moreover, while Mr. Michener testified that the purpose of a seatbelt is to keep the passenger in the seat and decrease the forces applied to the person during a crash, Mr. Michener provided no opinion as to how this general rule would apply in this case. Additionally, there is a lack of credible medical evidence in the medical records that would establish that Claimant's failure to wear his seatbelt on March 2, 2022 resulted in any of his injuries that arose out of the motor vehicle accident.

38. Notably, Section 8-42-112(1)(b), C.R.S., relied on by Respondents to reduce Claimant's temporary disability benefits by 50%, requires that Respondents demonstrate that Claimant's "injury results from the employee's willful failure to obey any reasonable safety rule adopted by the employer for the safety of the employee." This requires Respondents to prove that Claimant not only willfully violated a safety rule, but that the injury resulted from the willful violation. In this case, there is insufficient evidence presented that demonstrates that Claimant's injuries resulted from the safety rule violation, and therefore, Respondents have failed to meet their burden of proof to establish that Claimant's compensation should be reduced by fifty percent (50%) for an injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2021. However, in cases in which an employer alleges a safety rule violation under Section 8-42-112(1)(b), the burden of proof rests with respondents to establish that claimant willfully violated a reasonable safety rule established by the employer. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. As found, the testimony of Mr. Michener is found to be credible and persuasive that Claimant was not wearing his seatbelt at the time of the injury. As found, Employer established that the safety rule that existed which required employee's to wear a seatbelt when operating a motor vehicle and that safety rule was put into place for the safety of the employee.

6. As found, Respondents have failed to establish that Claimant's injuries following the motor vehicle accident resulted from Claimant's failure to wear his seatbelt. As found, Mr. Michener testified he had no opinion with regard to whether Claimant's injuries were furthered by not wearing his seatbelt. As found, there is insufficient credible evidence in the medical records which would provide credible evidence as to how Claimant's failure to wear his seatbelt resulted in injuries from the motor vehicle accident.

7. Because Respondents have failed to establish that Claimant's injury resulted from a willful violation of a safety rule established by Employer for the safety of employees, Respondents request to reduce Claimant's compensation for his injury by 50% pursuant to Section 8-42-112(1)(b) is denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents are not allowed a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b).

2. Respondents shall pay Claimant temporary disability benefits without a reduction of benefits.

3. Respondents shall pay statutory interest on all benefits not paid when due.

4. All matters not determined herein are reserved for future determination.

DATED: September 14, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable industrial injury, entitling Respondent to withdraw its admissions of liability.

II. In the alternative, whether Respondent proved by a preponderance of the evidence it is permitted to withdraw its admission for Temporary Total Disability (TTD) benefits for the periods of October 14, 2021 through November 1, 2021 and January 26, 2022 through February 22, 2022.

III. In the alternative, whether Claimant proved by a preponderance of the evidence that she is entitled to TTD benefits from March 1, 2022 through April 24, 2022?

STIPULATIONS

The parties stipulated to the following at hearing:

1. The admission of Respondent's Exhibit C is limited to: a) 5th Floor Admin Door 15:38:38 – 15:38:49; and b) 5th Floor Main Hall looking south 15:38:48 – 15:38:53. Additionally, Respondent's Exhibit C is admitted with the understanding that the area where Claimant's injury occurred, i.e. Claimant's desk, is out of view from any security camera and, therefore, not caught on camera.

2. Employer could not accommodate Claimant's work restrictions as of March 1, 2022, as such Claimant did not return to work for the Employer from March 1, 2022, through April 24, 2022.

3. Claimant was overpaid mileage in the amount of $2.82.

4. Respondent is not alleging Claimant committed fraud.

FINDINGS OF FACT

1. Claimant is 61 years of age. Claimant began working for Employer on July 6, 2021 as a screening verification analyst administrator.

2. This matter involves a September 2, 2021 work incident that occurred at approximately 3:05 p.m.

3. On September 2, 2021, Claimant was working at her desk in her cubicle when a security guard, J[Redacted] (last name unknown), came to chat with her. Claimant testified at hearing that she did not have a romantic relationship with J[Redacted], but interacted with him in the same way she interacted with other co-workers. Claimant testified that, on occasion, J[Redacted] would come to her cubicle to chat about different things unrelated to work. She testified that J[Redacted] occasionally made flirtatious comments to her and that she felt some of these comments crossed the line into sexual harassment. She testified that, on September 2, 2021, J[Redacted] was not flirtatious with her.

4. Claimant credibly testified at hearing. Claimant testified that when J[Redacted] approached her cubicle she told him that she was near the end of her shift and needed to finish her work. Claimant testified J[Redacted] proceeded to ask her questions about who was working at the switchboard the next day, which she found odd because she did not work the switchboard. Claimant testified she told J[Redacted] she did not know and that J[Redacted] then proceeded to talk about the Denver Broncos. Claimant testified she again told J[Redacted] that she needed to finish her work. She testified that J[Redacted] proceeded to show her a casing from his gun and said he would shoot her to which she replied, "You are not the only person with a gun. And that's when he became more angrier. I continued to work and that's when he hit me." (Hrg. Audio 2:23:24-2:23:39). Claimant testified that J[Redacted] then struck her in the back of her left shoulder and left her cubicle.

5. Claimant is seen on security video following the work incident using her left arm to open doors at approximately 3:38 p.m. without any apparent difficulty or obvious signs of pain. Claimant reported the incident to Employer's human resources department.

6. Claimant presented to the Aurora Police Department on September 9, 2021 to file a report regarding the September 2, 2021 incident. Officer Jacob Williams took the report from Claimant, investigated the matter, and wrote a report regarding his investigation. According to OW[Redacted]' report, Claimant reported to him that "J[Redacted] would come to her desk and flirt with [her] while she was working. When [she] asked J[Redacted] to leave her alone on Thursday, September 2, 2021, J[Redacted] punched her on the left shoulder with a closed fist." His report further indicates that Claimant reported when J[Redacted] hit her it hurt but it did not leave a bruise or mark. (R. Ex. B, p. 30).

7. OW[Redacted] testified at hearing on behalf of Respondent. OW[Redacted] testified that his report was an accurate summary of Claimant's statements to him and his investigation of the matter. He testified that he interviewed Claimant face-to-face on September 9, 2021. He stated that he did not observe any obvious signs of injury to Claimant. He testified that he also interviewed J[Redacted], the security guard, face-to-face. He testified that, based on his observations, J[Redacted] appeared surprised to hear of the allegations against him.

8. Employer completed a First Report of Injury on September 10, 2021 documenting, "[Employee] stated that the guard at the front desk punched her arm which caused her

pain and told the Deputy Director that she also has pain in the neck and shoulder pain as of 9/8/21. Also has stress and anxiety with this person". (Cl. Ex. 1, p. 1).

9. Claimant presented to Tom Chau, PA-C under the supervision of Matthew Lugliani, M.D. on September 10, 2021. Claimant reported that she had been struck by a security guard at work on both August 26, 2021 and September 2, 2021. Claimant reported that the security guard struck her in the back of her left shoulder on both occasions. Claimant reported that the second incident resulted in pain in the back of her left shoulder as well as up the left trapezius and into the left side of her neck. Claimant also complained of pain down into her left hand. On physical examination, PA Chau noted pain and tenderness to palpation of the left shoulder with mild tightness and spasms. He did not note any swelling, discoloration, or bruising. PA Chau diagnosed Claimant with left shoulder pain, prescribed Claimant pain medication and referred her for physical therapy. He removed Claimant from work from September 10, 2021 to September 20, 2021.

10. Claimant underwent five occupational therapy sessions from September 13, 2021 through March 18, 2022.

11. On September 20, 2021 Claimant saw David Rojas, M.D. with complaints of continued left shoulder pain and stiffness, worsening radicular signs in the left arm and hand, as well as depression and anxiety. On examination, Dr. Rojas noted tenderness in the posterior left shoulder extending into the trapezius with mild tightness and spasms and limited range of motion. There was also decreased grip strength in the left hand. Dr. Rojas assessed Claimant with left shoulder and upper extremity pain after assault and posttraumatic stress disorder (PTSD). He referred Claimant for a psychological evaluation cervical and shoulder MRIs, a pain management consultation, and an EMG. Dr. Rojas continued Claimant's work restrictions to September 30, 2021.

12. On September 24, 2021 Claimant e-mailed Employer, stating,

> Since I have been an employee with the [Employer], I have suffered from continued unwanted sexual advances and two assaults from Security Guard, J[Redacted], (last name unknown). J[Redacted] continued to present himself to me in an unprofessional manner even after I have asked him to 'stop.' In the month of August, 2021, J[Redacted] assaulted me by punching me on my left arm at which time I firmly warned him to 'stop.' Because I did not welcome J[Redacted]' advances, he began to verbally abuse me, to threaten me and later to physically abuse me. There are two instances (or more) during which J[Redacted] presented himself in my workarea (*sic*) unannounced and with no reason other than to continue with his unwanted sexual advances, using threatening tactics with his 9MM weapon stating that he would 'shoot me' and lastly, striking me with full force on my left arm. I immediately contacted my coworker Jariel Cabel for help and advice on September 2, 2021, I also tried to obtain help removing J[Redacted] from my cubicle in August, 2021, but Jariel did not know how

> to handle this situation, although he stood by and observed J[Redacted]' continued presence in my cubicle.
>
> I reported this second assault incident to HR on September 2, 2021, informing AR[Redacted] of my fear of J[Redacted] and of his comment to "shoot me" while waving his 9MM casing. AR[Redacted] advised me to immediately gather my things and to exit out the back stairwell from the 5th floor [EMPLOYER, REDACTED] exit door. I immediately walked down the 4 flights of stairs to my vehicle located in the garage.

(R. Ex. K, pp. 112-115).

13. Claimant continued to report left shoulder pain and stiffness to Dr. Rojas at a follow-up evaluation on September 30, 2021. Dr. Rojas released Claimant to modified duty from September 30, 2021 to October 7, 2021 with restrictions of no lifting/carrying/pushing/pulling/pinching/gripping over 10 lbs., no overhead reaching, and limiting the use of and resting her left arm as needed.

14. On October 11, 2021 Dr. Rojas continued Claimant's modified duty work restrictions to November 1, 2021.[1]

15. On October 13, 2021, DT[Redacted], Unit Supervisor, emailed Claimant, stating,

> I received an updated worker's comp form indicating that you are able to return to work on modified duty. The clinic should have reached out to you by now, but I have also included the updated form that I received from NM[Redacted] regarding your return to work status. I anticipate that you will be in the office at your normal start time tomorrow, 10/14. I wanted to let you know that we received your PIV card and you will now be able to work from home. IT will need to configure a laptop for you, and I will get that process moving forward. For now, we will be sending you home with a laptop as it fits within the weight restrictions provided by the doctor. We are seeking clarification from your worker's comp specialist about taking monitors home as they may not fall within the restrictions.

(R. Ex. A, p. 3).

16. Respondent filed a General Admission of Liability on October 14, 2021.

17. Employer sent Claimant follow-up emails October 18-20, 2021 stating that Employer had information indicating Claimant should return to work and requesting that Claimant contact Employer to discuss her return to work.

[1] Cl. Ex. 6, p. 53 is a Physician's Report of Worker's Compensation Injury signed by Dr. Rojas indicating Claimant was removed from all work until November 1, 2021. However, Cl. Ex. 6, p. 51is an amended form that details modified duty restrictions in line with Dr. Roja's report on Cl, Ex. 6, p. 49.

18. Dr. Rojas removed Claimant from work from November 1, 2021 to November 23, 2021.

19. On November 9, 2021, Claimant presented to Lupe Ledezma, Ph.D. for psychological evaluation. Claimant reported to Dr. Ledezma that she was punched on her left shoulder in late August and on September 2, 2021. Claimant reported that she experienced immediate sharp pain radiating up the left side of her neck. Claimant complained of anxiety, depression and forgetfulness. Dr. Ledezma concluded that Claimant is experiencing emotional distress related to the assault that occurred at work. Dr. Ledezma diagnosed Claimant with depression, moderate, single episode and acute stress disorder and recommended that Claimant undergo psychotherapy. Claimant subsequently underwent eight sessions of psychotherapy with Dr. Ledezma from December 29, 2021 through April 21, 2022.

20. On November 24, 2021, Dr. Rojas reviewed and signed a position description for an administrator 1 position. Dr. Rojas wrote that he believed Claimant was physically able to perform the job duties, but that she was not able to work in person at the facility due to ongoing PTSD. He explained that Claimant's symptoms were easily triggered at the workplace.

21. On December 14, 2021 Claimant reported to Dr. Rojas experiencing worsening stiffness and pain down her arm with generalized numbness and tingling and limited range of motion. Dr. Rojas continued to remove Claimant from work from December 14, 2021 to January 18, 2022.

22. On January 18, 2022 Dr. Rojas released Claimant to modified duty from January 26, 2022 to February 15, 2022. Dr. Rojas restricted Claimant to only working from home with no use of her left arm.

23. On January 21, 2022, Ms. DT[Redacted] emailed Claimant noting that she had received Claimant's work restrictions releasing her to return to work on January 26, 2022. Ms. DT[Redacted] wrote that, because Claimant was restricted to working from home, Claimant would need to come into the office on January 26, 2022 to obtain her PIV card and equipment. She stated that Shannon from IT would meet Claimant on the 6th floor to configure her computer to be able to work from home.

24. At 5:00 p.m. on January 25, 2022, Claimant emailed Ms. DT[Redacted] asking what security measures had been put into place to protect her from the security guard, J[Redacted]. Claimant noted concerns and indicated she would like to discuss if J[Redacted] was still employed at her worksite, the state CCRD investigation results, her specific work accommodations, and work standards.

25. At 8:26 a.m. on January 26, 2022, Claimant emailed Ms. DT[Redacted] stating that her left shoulder and left arm were in excruciating pain that day, she has received no treatment for her injury, and requested to take "workers' compensation sick leave" for the day.

26. Ms. DT[Redacted] responded to Claimant via at 12:29 p.m. on January 26, 2022. She confirmed with Claimant that J[Redacted] was no longer working at her worksite. She instructed Claimant to contact another individual regarding the state CCRD investigation results, which Employer did not have. Ms. DT[Redacted] noted that Employer had sent Claimant documents in September and November 2021 regarding ADA accommodations but that Claimant had not returned the documents. Ms. DT[Redacted] provided Claimant the contact information for Employer's ADA coordinator. Regarding Claimant's return to work she wrote,

> N[Redacted] requested a description of your job tasks to send to TPA[Third Party Administrator, Redacted]. These tasks were sent to TPA[Redacted] to have Dr. Rojas to evaluate the duties for specific restriction. N[Redacted] indicated that there is no need to wait for that determination and if you are feeling up to coming onsite, the [Employer, Redacted] can set up your laptop as long as you have someone to help you get set up at home. Based on the current restrictions outline (*sic*) in the medical form that you work remote and you are unable to use your left arm, we feel we are able to accommodate these as they are currently stated. Please let me know when you are available to come to the office for computer set up so I can reschedule with [Employer, Redacted] IT and please confirm you have someone to help you set up your equipment at home

(R. Ex. A, p. 12).

27. Claimant again requested to take workers' compensation sick leave via email on January 27, January 28, January 31, February 1-4 and February 7, 2022.

28. On February 1, 2022 Dr. Rojas continued Claimant's work from home only restrictions from February 1, 2022 to March 1, 2022.

29. On February 11, 2022 Dr. Rojas signed off on a job description, noting restrictions of work from home only and no use of the left arm.

30. Claimant underwent a cervical MRI on February 11, 2022 which revealed moderate degenerative changes, including moderate to severe C4-5 and mild to moderate C5-6 central canal stenosis and severe left C4-5 and C5-6 neural foraminal narrowing.

31. On February 15, 2022 Claimant presented to Long Vu, D.O. for a physiatry consultation. Dr. Vu noted that Claimant was neurologically intact on examination. He requested to see Claimant's MRI and EMG results to pinpoint a diagnosis.

32. On February 22, 2022 Claimant underwent a left shoulder MRI which revealed supraspinatus, infraspinatus and subscapularis tendinosis with broad full-thickness tear of the supraspinatus and moderate acromioclavicular osteoarthritis.

33. On March 1, 2022 Dr. Rojas released Claimant to modified duty from March 1, 2022 to March 22, 2022 with 2 lbs. restrictions lifting, carrying, pushing, pulling, pinching, gripping, reaching away from body, and repetitive motion; no overhead reaching; use of left arm as tolerated; and work from home only. Effective March 1, 2022, Employer could not accommodate Claimant's work restrictions, and Claimant did not return to work for Employer from March 1, 2022, through April 24, 2022.

34. Claimant underwent an EMG with Scott Primack, D.O. on March 4, 2022. Dr. Primack concluded that Claimant had clinical and electrophysiologic evidence of moderate right cervical pathology with no right brachial plexopathy or cervical radiculopathy. He opined that there were significant emotional issues surrounding Claimant's case.

35. On March 9, 2022 Dr. Lugliani noted that Claimant was likely a candidate for cervical injections. He referred Claimant to Dr. Griggs for evaluation of her left shoulder. Dr. Lugliani continued Claimant's modified duty restrictions from March 9, 2022 to March 30, 2022.

36. On March 11, 2022 Respondent sent a letter to Dr. Lugliani notifying him that, as of January 26, 2022, Claimant had been advised that the security guard was no longer at her work site. Respondent inquired if there remained any medical need for a work from home only restriction for Claimant. Dr. Lugliani responded on March 21, 2022, opining that the restriction remained necessary pending advisement from a psychologist.

37. On March 23, 2022 Respondent issued a similar letter to Dr. Ledezma inquiring if a work from home restrictions was still needed in Claimant's case. Dr. Ledezma responded on March 24, 2022 stating,

> It is my understanding that all employees in her office are working from home at this time. She is able to go into the office to pick up the equipment that she will need to perform her duties at home. If she needs to do further training in the office, she is able to do that as well.

(Cl. Ex. 8, p. 141).

38. Claimant's care was subsequently transferred to Lawrence Lesnak, M.D. Claimant first presented to Dr. Lesnak on April 25, 2022. Claimant reported that she was punched in her left scapular/suprascapular region on September 2, 2021. Claimant complained of constant left-sided suprascapular/scapular pains and discomfort, but denied any neck, midback or left upper extremity symptoms. Claimant reported that she had not worked since September 3, 2021. On examination, Dr. Lesnak noted that Claimant exhibited diffuse pain behaviors and normal physical findings. He concluded that her subjective complaints were without any correlative reproducible objective findings on examination. Dr. Lesnak noted that Claimant's left shoulder MRI was without any documented evidence of injury or trauma-related pathology, and that the EMG findings were unrelated to the work incident. Dr. Lesnak further noted that Claimant had high level

of depressive symptoms and extremely high level of somatic pain complaints. He opined that Claimant was at maximum medical improvement (MMI) with no need for further treatment, restrictions and no permanent impairment. Dr. Lesnak remarked that, although Claimant may have sustained a mild contusion of her left suprascapular/scapular region as a result of the work incident, there was absolutely no medical evidence to support that she sustained any other type of injury whatsoever.

39. On February 28, 2022 Respondent filed a General Admission of Liability terminating Claimant's TTD benefits based on a modified duty job offer approved by Dr. Rojas.

40. Effective March 1, 2022, the Employer could no longer accommodate Claimant's work restrictions. Claimant did not return to work from March 1, 2022, through April 24, 2022.

41. On March 25, 2022, Claimant applied for a hearing on TTD benefits effective March 1, 2022.

42. On April 21, 2022, Respondent filed a Response to Claimant's Application for Hearing and endorsed withdrawal of admissions.

43. On May 19, 2022, Respondent filed a Final Admission of Liability, noting that compensability was currently being challenged. According to the Final Admission of Liability dated May 19, 2022, Respondent paid TTD benefits (under wage continuation pursuant to §8-42-124, C.R.S.) from September 3, 2021 through January 18, 2022, and TTD benefits from January 19, 2022 through February 22, 2022.

44. Ms. DT[Redacted] credibly testified by deposition on behalf of Respondent. Ms. DT[Redacted] testified that she was Claimant's direct supervisor. She testified that she received notice of Claimant's October 11, 2021 work restrictions, which Employer was able to accommodate. Ms. DT[Redacted] testified that she emailed Claimant to notify Claimant that Employer had work for her. She further testified that in October 2021 Claimant just needed to come into the office to set up her laptop so she could work from home. She testified that Claimant would not have had any interactions with J[Redacted] at that time, as J[Redacted] worked on the 5th floor and Claimant worked on the 6th floor. Ms. DT[Redacted] stated that Claimant did not return to work after the October 13th offer of modified employment. She testified that Employer received notification of Claimant's January 2022 work restrictions, that Employer was able to accommodate those restrictions and sent Claimant email regarding returning to work. Ms. DT[Redacted] testified that Claimant wrote back saying that she had no use of her left arm, to which Ms. DT[Redacted] responded to Claimant and informed her Employer could still accommodate those restrictions. Claimant did not return to work. Ms. DT[Redacted] testified that, to her knowledge, Employer sent a description of modified duty tasks to Claimant's ATP in January 2022, but not in September or October 2021.

45. The ALJ finds that Respondent proved it is more probable than not the assault on September 2, 2021 was inherently personal and did not arise out of Claimant's employment. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable work injury and that Respondent is permitted to withdraw its admissions of liability.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Withdrawal of Admission

Withdrawal of an admission is granted prospectively, except in limited situations where the claimant is shown to have fraudulently supplied materially false information upon which the insurer relied in filing the admission. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Compare HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), with *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981)(retroactive relief granted where claimant made fraudulent misstatements regarding specific injury for which benefits were claimed).

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

As Respondent seeks to withdraw its admissions regarding the compensability of Claimant's work injury, it is Respondent's burden to prove it is more probable than not Claimant did not sustain a compensable work injury. There is no dispute Claimant was in the course of her employment when the assault occurred. Therefore, the pertinent question is whether Claimant's work injury arose out of Claimant's employment.

Under the tests set forth by the Colorado Supreme Court involving willful assaults by co-employees, work injuries are broken down into three categories: (1) assaults that have an inherent connection with the employment; (2) assaults that are inherently private; and (3) assaults that are neutral. *Popovich v. Irlando*, *supra*; *see also In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit*, 759 P.2d 17 (Colo. 1988).

Assaults inherently related to employment are those that have "an inherent connection with employment and emanate from the duties of the job." *Popovich,* 811 P.2d at 383. Included within this category are assaults originating in arguments over work

performance, work equipment, delivery of a paycheck, or termination from work. 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law § 8.01[2][b]*, at 8:13-14 (2000). Assaults that are inherently private are those in which "the animosity or dispute that culminates in an assault is imported into the employment" from claimant's or tortfeasor's domestic or private life, and "is not exacerbated by the employment." *Id*., § 8.02[1][a], at 8:42. These cases typically involve disputes over love interests or spouses; they generally involve parties who know one another in private life or, having met on the job, elect to enter into a private relationship just as they might have had they met elsewhere, and subsequently develop a private quarrel*. Id.,* § 8.02[1][a] at 8:48-49. Under these circumstances, there is an insufficient nexus between the assault and the employment conditions or functions for the injury to arise out of employment. *Patel v. Thomas*, 793 P.2d 632, 636-637 (Colo. App. 1990).

The third category of assaults refers to injuries that are attributable to neutral and unexplained forces and are neither personal to either party nor distinctly associated with the employment. *Popovich*, 811 P.2d at 383. Courts have expanded the category of private assaults to include those in which the assailant and victim did not know each other prior to, or associate outside of, the employment and where the victim was specifically chosen or targeted. *See Padron v. Wackenhut Servs*., 58 F. Supp. 2d 1223, 1226 (D. Colo. 1999) (finding the very utterance of allegations that the defendant specifically targeted plaintiff when he stuck his penis in her face and ear suggests that such acts are personal and private in nature); *Ferris v. Bakery, Confectionery & Tobacco Union, Local 26*, 867 P.2d 38, 42 (Colo. App. 1993) (stating that plaintiff presented strong evidence that the union president's unwelcome sexual advances were specifically targeted at her and not neutral in nature, and thus finding a genuine factual controversy regarding the employment nexus); *Stamper v. Hiteshew*, 797 P.2d 784, 786 (Colo. App. 1990) (concluding that the employer's harassing and obscene verbal statements to, and unwelcome sexual touching of, plaintiff were specifically targeted at her and were not neutral in nature). The mere fact that two employees met through their employment is not enough to cause offensive on-the-job conduct between them to fall within the "friction and strain" of the job. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).

Both the first and third categories of assaults are considered to arise out of the employment for the purposes of the Act and therefore prevent an employee from suing her employer in tort for injuries based on such assaults. Only the second category of injuries, inherently private assaults, do not arise out of employment. *Id*.

In *Horodyskyj*, the Colorado Supreme Court addressed whether claims based on sexual harassment and related torts are barred by the exclusivity provisions of the Act. *Horodyskyj* involved an employee who alleged that in the course of his employment, he was sexually harassed by a co-employee who made sexually suggestive remarks to, and unwelcome physical contact with, him. The Court held that, in the usual case, injuries resulting from workplace sexual harassment do not arise out of an employee's employment for purposes of the Act. *Id.* at 474. The Court reasoned that acts of harassment are highly personal and, except in the most unusual cases, will fall into the category of inherently private assaults. *Id. at* 478. The Court further reasoned that the co-

employee's harassing acts did not have an inherent connection to the employment because the acts did not originate in the employee's employment functions, the harassing conduct was specifically targeted at the employee, and the sexually harassing conduct originated in personal matters unrelated to the parties' work functions. The Court therefore concluded there was an insufficient nexus between the conditions of employment and the injury to support a finding that the harassing conduct arose out of the employment.

Here, as in *Horodyskyj*, the preponderant evidence establishes that the assault against Claimant falls into the inherently personal category. Claimant alleges that J[Redacted] did not make any sexual comments to Claimant on the date of the incident and that it is unclear why J[Redacted] struck Claimant. She notes that J[Redacted] began the conversation on September 2, 2021 asking about who would be working the switchboard the following day. To the extent Claimant purports that such question provides a sufficient basis to establish a connection to Claimant's employment functions, the ALJ is not persuaded. No evidence was offered indicating that Claimant or J[Redacted] was responsible for the switchboard, or that their job duties required communicating with each other regarding the switchboard. In fact, Claimant testified that she found it odd that J[Redacted] was asking her about the switchboard because it was not something for which she was responsible. J[Redacted] then proceeded to talk to Claimant about other topics unrelated to Claimant's employment, including the Denver Broncos.

Claimant's September 24, 2021 email to Employer provides further support regarding the personal nature of the assault. In the email, Claimant stated that she had been subject to continuous unwanted sexual advances from J[Redacted]. She specifically stated that J[Redacted] began to threaten and verbally and physically abuse her because she did not welcome his advances. Claimant further goes on to reference two instances during which J[Redacted] came to her cubicle "with no reason other than to continue his unwanted sexual advances, using threatening tactics…" J[Redacted] punched Claimant after she ceased entertaining his conversation. The conversation, as well as various prior interactions between Claimant and J[Redacted], were inherently personal in nature and led to the assault. J[Redacted] specifically targeted his conduct at Claimant due to personal reasons unrelated to any work function. Here, there is an insufficient nexus between the conditions of employment and the assault to support a finding that the harassing conduct arose out of the employment. Accordingly, Respondent proved it is more probable than not Claimant did not sustain a work injury arising out of her employment.

Respondent does not allege that Claimant provided materially false information upon which Respondent relied in filing the admissions. As Claimant did not suffer a compensable work injury, and Respondent does not allege fraud, Respondent shall be permitted to prospectively withdraw its admissions of liability.

ORDER

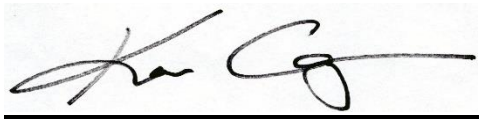
1. Respondent proved by a preponderance of the evidence that the assault on Claimant on September 2, 2021 did not result in a compensable injury, as the assault was inherently personal and did not arise out of Claimant's employment.

2. Respondent's request to withdraw its admission of liability is granted.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Is Claimant entitled to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on October 23, 2018 from an assault at work. He fell backwards while retreating from the assailant and injured his head and mid back. He was stabbed in the abdomen, which caused internal intestinal injuries.

2. Claimant underwent abdominal surgery at Parkview Medical Center, and was hospitalized for four days.

3. Employer referred Claimant to CCOM for authorized treatment. His care was initially managed by Dr. Daniel Olson and later Dr. Thomas Centi. Claimant was treated for the abdominal stab wound, a thoracic strain, vertigo, and posttraumatic stress disorder (PTSD).

4. Claimant attended psychological counseling for PTSD with Amy Alsum, LCSW, from January 2019 through March 1, 2019. He was released from care because he was managing his anxiety effectively and felt he required no additional treatment.

5. Claimant was referred to Dr. Michael Sparr for his thoracic injury. He received conservative care, including chiropractic adjustments and trigger point injections. Dr. Sparr discharged Claimant on March 16, 2020 and recommended no additional treatment.

6. Dr. Centi put Claimant at MMI on August 20, 2020, with no impairment and no restrictions. Dr. Centi also opined Claimant required no maintenance care.

7. Claimant attended a Division Independent Medical Examination (DIME) with Dr. Michael Miller on April 14, 2021. Claimant described some residual issues with PTSD, primarily related to social interaction. However, Claimant was managing the PTSD reasonably well and told Dr. Miller, "he does not have any interest in seeing a psychologist again." Claimant reported occasional, brief episodes of vertigo that did not interfere with his activities. Dr. Miller agreed Claimant was at MMI but concluded he qualified for relatively small impairment rating. Claimant's primary ongoing injury-related issue was persistent mid back pain.

8. Dr. Miller agreed Claimant reached MMI on August 20, 2020. He opined Claimant qualified for an impairment rating, primarily for the thoracic spine. Dr. Miller assigned a 5% thoracic spine rating, composed of a 2% specific-disorder rating under Table 53 and 3% for range of motion. He also assigned a 1% psychological rating for mild limitations with interpersonal relationships and recreational activities. Dr. Miller gave no

rating for the vertigo because the intermittent episodes did not interfere with activities of daily living. The was no rating for the digestive system because the injury-related conditions were successfully treated and ongoing issues of gastroparesis, fatty liver, and chronic diarrhea were unrelated to the work accident.

9. Dr. Miller recommended maintenance care of "additional psychological follow-up with Amy Alsum, LCSW or another mental health care provider for a period of 6 months." This recommendation is puzzling because Claimant had already completed psychotherapy and specifically told Dr. Miller he had no interest in additional counseling. The ALJ infers Dr. Miller was simply giving Claimant a window of opportunity for additional therapy should he change his mind. Claimant did not request or otherwise pursue additional psychological treatment within the 6-month window outlined by Dr. Miller.

10. At the DIME, Claimant also described low back pain with "sciatic" leg symptoms, neck pain, and left shoulder pain. The low back pain started in December 2019 and intensified in August 2020. The onset of left shoulder pain occurred in August 2020, and the neck pain started in September 2020. Dr. Miler reviewed imaging studies of Claimant's neck, which showed age-related degenerative changes with no acute injury. A lumbar CT on December 16, 2019 showed degenerative disc disease and a pseudoarticulation. Recent imaging of the left shoulder showed degenerative changes but no rotator cuff tear.

11. Dr. Miller credibly opined the cervical, lumbar, and left shoulder symptoms are unrelated to the work accident because of the lengthy delay before the onset of symptoms and imaging studies showing only age-related degenerative changes. Claimant failed to prove that any treatment for his neck, low back, or left shoulder is causally related to the October 23, 2018 work accident.

12. Claimant failed to prove a probable need for future treatment to relieve the effects of his injury or prevent deterioration of his condition.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the effects of a work-related injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular

treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove a probable need for future treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating providers agree no additional treatment is needed. The only maintenance care suggested by Dr. Miller was 6 months of psychological counseling. Claimant explicitly stated he was not interested in additional counseling, and did not seek further care within the six-month window offered by Dr. Miller. Indeed, Claimant has not pursued any additional injury-related treatment since being placed at MMI more than two years ago. Given the apparent stability of his condition, there is no persuasive basis to conclude he will deteriorate without additional treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits after MMI is denied and dismissed.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 14, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-553-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on February 19, 2020.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits reasonably necessary to cure or relieve the effects of a compensable industrial injury.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits.

4. Claimant's average weekly wage at the time of injury.

5. Determination of Claimant's authorize treating physician.

FINDINGS OF FACT

1. Claimant was employed by Employer as a preschool assistant, which required Claimant to assist teachers with preschool students, including special education students. On February 19, 2020, Claimant was performing her duties when she picked up and carried a preschool student weighing approximately 40 pounds, down a portion of a flight of stairs and a hallway. Claimant did not slip or fall, or notice that she twisted or injured her ankle when lifting and carrying the student. Claimant continued to work the rest of the day, and did not report any injury to Employer on February 19, 2020.

2. The following morning, February 20, 2020, Claimant woke with pain in her left foot. That morning, at approximately 11:50 a.m., Claimant saw podiatrist, Paul Stone, DPM. Claimant reported bilateral foot and ankle pain mostly in the arch, without a history of trauma. She reported her right foot became painful in August 2019, and that "almost overnight the pain jumped over to the left foot" over the area between the tibial and the navicular tuberosity. Dr. Stone noted a swollen, bulbous area located over the posterior tibial tendon. Claimant reported her right foot had been feeling better since she had started limping on the left foot. Dr. Stone noted Claimant had attempted to treat her foot pain with different at least 20 different over the counter show inserts, without success. Claimant did not report to Dr. Stone her left foot pain began that morning, that it began after carrying a student, or that it was related to her employment. (Ex. F).

3. On examination, Dr. Stone noted the left foot arch was showing signs of collapse. X-rays demonstrated a collapse of the left medial arch, and a large retrocalcaneal exostosis. Based on his examination, he diagnosed Claimant with a left posterior tendon

dysfunction, left bunion deformity, and pronated collapsed left arch. He referred Claimant for an MRI which was performed that day. (Ex. F).

4. The following day, Claimant returned to Dr. Stone. He reviewed the MRI and interpreted it as showing a high-grade tear of the posterior tibial tendon and a high-grade rupture of the ATFL (anterior talofibular ligament) on the ankle with a reported history of instability, and a partial tear of the peroneus brevis. Dr. Stone placed Claimant in a walking boot and recommended physical therapy. (Ex. 8).

5. Claimant later reported a work injury to Employer and was sent a designated provider list on February 24, 2020, which included Elizabeth Bisgard, M.D. at UC Health. (Ex. 6 & C).

6. Claimant went to Dr. Bisgard on February 25, 2020. She reported carrying a preschool student halfway down a flight of stairs and down a hallway, and did not recall any specific event or episode resulting in ankle pain. Claimant reported waking the following morning with pain in her ankle and difficulty walking. Dr. Bisgard reviewed Claimant's MRI report, and performed an examination. She noted that Claimant had "slight tenderness" in the medial ankle with decreased range of motion, and no swelling or ecchymosis. Dr. Bisgard indicated the MRI findings were difficult to attribute to the described work incident, given the lack of a traumatic event. She referred Claimant to Joshua Metzl, M.D., at the UC Health Foot and Ankle Clinic for evaluation and a causation opinion. (Ex. G).

7. On February 27, 2020, Claimant saw Kenneth Hunt, M.D., at UC Health's orthopedic foot and ankle clinic. Claimant reported to Dr. Hunt that her symptoms began at work on February 19, 2020 while helping a student down the stairs, and the following morning she had worsening symptoms. Dr. Hunt recommended Claimant remain in a walking boot, and discussed possible PRP injections. Dr. Hunt offered no opinion as to the cause case of Claimant's left foot and ankle symptoms. (Ex. 7).

8. On March 9, 2020, Claimant saw Dr. Metzl, reporting a history of several car accidents and left ankle pain predating her February 19, 2020 injury. Based on his review of Claimant's MRI, Dr. Metzl opined that Claimant had degenerative tearing of the posterior tibial tendon "with perhaps a more superimposed tear as well." He also noted chronic lateral ligament changes. His impression was "acute on chronic posterior tibial dysfunction." When addressing causation, Dr. Metzl stated "It is certainly possible that her current pain may be related to carrying the child down the stairs but I could not say that with 100 percent certainty." He recommended continued boot immobilization, and physical therapy. He indicated that "as a last resort flatfoot reconstruction with calcaneal osteotomy would be her surgical option." (Ex. H).

9. In July 2020, Claimant underwent an unrelated spinal surgery, and took a leave of absence from work due to the surgery. No documentation of additional treatment or evaluation of her foot or ankle was offered or admitted into evidence, until returned to Dr. Metzl on October 20, 2020, with continued left hindfoot pain with activity. At that visit, Dr. Metzl recommended surgery to address Claimant's flatfoot condition. (Ex. 7). Claimant

underwent a left flatfoot reconstruction surgery left on her left foot on December 2, 2020. Claimant had multiple follow up appointments at Dr. Metzl's clinic between December 17, 2020 and August 10 , 2020, and physical therapy. Other than his initial statement regarding causation, Dr. Metzl offered no further opinions regarding the cause of Claimant's foot/ankle injuries, or whether the surgery performed was reasonably necessary to address any work-related condition.

10. Dr. Bisgard testified by deposition and was admitted as an expert in occupational medicine. Dr. Bisgard opined that it is not probable that Claimant's left foot and ankle symptoms were causally related to Claimant's February 19, 2020 work incident. She credibly testified that the mechanism of injury, as explained by Claimant, would not explain her symptoms or the pathology in her foot, and would not have aggravated preexisting conditions. She testified the Claimant's left foot and ankle MRI did not show a significant tear, but did show evidence of pre-existing pathology. She credibly testified that the Claimant's pathology is typically caused by an impact or rotational injury, which did not occur in this case. Dr. Bisgard opined that had Claimant sustained trauma to her foot or ankle on February 19, 2020, it would have been immediately apparent. Claimant, however, did not relate her symptoms to carrying a child until she saw Dr. Bisgard on February 25, 2020, despite seeing Dr. Stone twice previously. Dr. Bisgard's testimony was credible and persuasive.

11. Claimant testified that on February 19, 2020, she carried a preschool student weighing approximately 40 pound down several stairs and a hallway at approximately 10:30 a.m. She testified she did not have immediate pain, and continued to work the rest of the day until approximately 3:35 p.m. Claimant testified she started to feel pain in her foot at approximately 11:30 a.m. that day, but did not report the incident because she believed the pain would go away. The following morning, she awoke and could not put pressure on her left foot. She then went to Dr. Stone. Claimant testified she has not worked since February 19, 2020, and was ultimately terminated by Employer. Claimant has not returned to work due to ongoing work restrictions. She testified that the December 2, 2020 surgery did not relieve her pain, and that she currently experiences pain due to her left foot.

12. She testified she had prior problems with her left foot, aching on and off, and pain when walking on it. Approximately six months before February 19, 2020, Claimant went to chiropractor Corey Campbell, D.C., and requested an x-ray of her left foot because she had pain in that foot. Dr. Campbell's office performed the x-ray, but provided no other services related to her left foot.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a

causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her left foot or ankle arising out of the course of her employment with Employer on February 19, 2020. When Claimant first saw Dr. Stone on February 20, 2020, she reported a history of bilateral foot pain, and a shift of pain from her right foot to her left foot. She did not attribute her injury to any specific incident, did not report the pain began on February 19, 2020 or February 20, 2020, and did not relate her condition to her employment. Claimant's reports at her visits with Dr. Stone on February 20, 2020 and February 21, 2020, are inconsistent with her testimony and later description of the injury. The ALJ finds Claimant's report to Dr. Stone that her right foot pain had begun to feel better "since she has been limping on the left," to be inconsistent with an injury on February 19, 2020, and consistent with left foot pain pre-dating February 19, 2020. Claimant did not attribute her ankle pain to a work incident until one week after the alleged incident occurred when she saw Dr. Bisgard. Even then, Claimant denied that she sustained any trauma to her left foot or ankle. The ALJ finds credible Dr. Bisgard's testimony that Claimant's symptoms and pathology are not explained by the reported mechanism of injury.

Most significantly, none of Claimant's treating health care providers opined her left foot/ankle condition was causally related to her employment, or that Claimant's February 19, 2020 work incident exacerbated or aggravated any preexisting condition. The ALJ finds Claimant has failed to establish that her left foot/ankle condition was causally related to her employment or that her condition was aggravated or exacerbated by her work activities.

SPECIFIC MEDICAL BENEFITS and AUTHORIZED TREATING PROVIDER

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant's claim for medical benefits is denied and dismissed. Claimant's request for determination of her authorized treating physician is denied as moot.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits. Claimant's request for determination of her average weekly wage is denied as moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the course of her employment with Employer on February 19, 2020. Claimant's claim is denied and dismissed.

2. Claimant's request for medical benefits is denied and dismissed.

3. Claimant's request for temporary disability benefits is denied and dismissed.

4. All other issues are moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant works as a Clinical Safety Specialist at the Colorado Mental Health Institute in Pueblo (CMHIP). Her job duties include guarding, monitoring and transporting patients within the facility. At times, she must physically restrain patients and perform "takedowns."

2. Claimant suffered admitted injuries to her right shoulder and low back on April 21, 2021 while restraining a combative patient.

3. Claimant was referred to Southern Colorado Clinic for authorized treatment. Her care was initially managed by Dr. Lakin, and later Dr. Thomas Centi.

4. On July 28, 2021, Dr. Centi recommended that Claimant continue using a TENS unit, in conjunction with medications and massage therapy.

5. Claimant saw Dr. Scott Primack twice, in August and September 2021. Dr. Primack recommended physical therapy for Claimant's back and shoulder. At the second and final evaluation on September 20, 2021, Dr. Primack noted Claimant was improving. He did not think she needed injections to her low back or shoulder, and released her from care.

6. Claimant saw Dr. Timothy Sandell on September 24, 2021. Dr. Sandell administered a right SI joint injection.

7. Claimant followed up with Dr. Sandell on October 11, 2021. She described "90 to 95%" improvement from the injection, and had pain only with certain activities. She was scheduled to continue with physical therapy. Dr. Sandell opined, "She is a candidate for repeating the injection at any time. She is doing well at this time and therefore we will hold off. Hopefully, ongoing physical therapy will be successful and prevent the need for repeat injection." He released Claimant to follow-up "as needed."

8. Claimant had several months of good relief from the SI joint injection.

9. Dr. Richard Stockelman, an orthopedic surgeon, provided injections to Claimant's shoulder. The injections were helpful.

10. On November 16, 2021, Claimant's physical therapist noted she was still receiving relief from the TENS unit.

11. Claimant completed a Functional Capacity Evaluation (FCE) on December 10, 2021. Claimant demonstrated the ability to work at the medium exertional level, with frequent reaching in all directions.

12. On January 4, 2022, Dr. Sandell issued a report addressing maintenance care. He opined Claimant may need additional therapy, medication, physician visits, or injections, "on an as-needed basis if the symptoms return or persist."

13. Dr. Centi put Claimant at MMI on January 11, 2022 with a 12% whole person impairment for her lumbar spine. Dr. Centi released Claimant to full duty and opined she required no ongoing treatment.

14. Respondent filed Final Admissions of Liability (FALs) on February 3, 2022 and March 16, 2022 admitting for the 12% whole person rating. The FALs denied liability for medical benefits after MMI based on Dr. Centi's report.

15. Claimant has been working without restrictions since MMI. She has performed all duties without apparent difficulty, including restraining patients.

16. Claimant followed up with Dr. Stockelman on April 29, 2022. Her primary complaint that day was her right knee (which is unrelated to the April 21, 2021 accident). But they also discussed her right shoulder. Claimant described her shoulder pain as "intermittent and not severe." Dr. Stockelman noted, "[Claimant] is satisfied with her shoulder at this time at least to the point where she does not want any intervention. It still hurts on occasion but not bad enough for another injection and certainly not enough for surgery." Dr. Stockelman prescribed a Medrol Dosepak, "which will help her knees and her shoulder."

17. Claimant's supervisor, Mr. V[Redacted], described Claimant as a "highly motivated" and "team-oriented" employee who does "good quality work" and enjoys helping patients. Mr. V[Redacted] has no concerns about Claimant's ability to perform her regular duties since being put at MMI, and she has completed all tasks without complaint. Claimant has occasionally mentioned soreness in her shoulder and back after restraining patients, but Mr. V[Redacted] assumed it was just the typical "bumps and bruises" from restraining patients.

18. Claimant credibly testified to approximately 3-4 episodes of right shoulder pain per week that occasionally interferes with her sleep and limits her activities. She credibly testified her low back is doing "OK" but flares occasionally "in that same area." Claimant testified the SI joint injection was helpful for several months. She would like the option to follow up with an ATP regarding potential treatment to relieve her ongoing symptoms. Claimant has not pursued additional treatment because she is worried about the cost without approval from Respondent.

19. As of the hearing, Claimant continued to obtain refills of supplies for her TENS unit approximately once per month.

20. Claimant proved a probable need for future treatment to relieve the effects of her compensable injury or prevent deterioration of her condition.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of her compensable injury and prevent deterioration of her condition. Claimant's testimony is credible. Although Claimant's condition improved with treatment, she continues to experience intermittent injury-related symptoms that affect her activities. The SI injection was helpful, but wore off after a few months. Dr. Sandell credibly opined that Claimant is a candidate for additional injections "at any time," and that she may require additional treatment for recurrent or persistent symptoms. Claimant also continues to receive regular refills of supplies for her TENS unit.

ORDER

It is therefore ordered that:

1. Respondent shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's compensable injury and prevent deterioration of her condition.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 16, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a right shoulder injury during the course and scope of his employment with Employer on April 3, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits as a result of his April 3, 2021 injury.

FINDINGS OF FACT

1. Claimant worked for Employer at its meat-packing plant performing clean-up duties. He specifically cut waste from cow carcasses and removed the debris with a shovel.

2. On April 1, 2021 Claimant sustained an admitted injury to his right shoulder arising out of and in the course and scope of his employment with Employer. Claimant submitted an "Employee Statement of Injury" to Employer in which he noted he was lifting meat waste into a can when he sustained an injury to his right shoulder, both legs, left hip and back. Claimant received treatment through Employer's on-site medical clinic under the care of Authorized Treating Physician (ATP) Carlos Cebrian, M.D.

3. On April 1, 2021 Claimant visited Dr. Cebrian for an examination. Claimant remarked that his right shoulder had been sore over the previous month, but he recently experienced increased symptoms. He had been performing cleanup jobs by using a knife to cut waste off carcasses and a shovel to remove the material. Dr. Cebrian noted a prominence at the AC joint and pain with movement. He diagnosed Claimant with an AC joint separation. Dr. Cebrian determined that Claimant's April 1, 2021 injury was caused by his work activities. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

4. Because the April 1, 2021 incident was a non-lost-time injury, Respondents did not report the claim to the Division of Workers' Compensation. Moreover, no Workers' Compensation number was assigned to the April 1, 2021 claim.

5. On April 2, 2021 Employer assigned Claimant the light duty job of "turning cattle." The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant began his light duty work on April 2, 2021.

6. Because of his work restrictions, Claimant began performing the cattle turning position using his previously-injured left arm. In 2005 Claimant had injured his left upper extremity when he suffered a gunshot wound to his left forearm. As a result of the

injury, Claimant has a plate and screws in his left forearm as well as several metallic fragments in the arm.

7. On April 3, 2021 Claimant submitted a second "Employee Statement of Injury" to Employer. The date of injury was listed as April 2, 2021. Claimant noted the injury occurred from "[t]urning cows left handed with arm injured in gunshot." The injury involved the left forearm. Claimant remarked that the injury involved tight tendons and numbness. The affected body parts included the lower wrist, thumb, pinky areas and fingers.

8. The April 2, 2021 claim for the left upper extremity was designated as W.C. No. 5-171-541. Respondents denied liability for the claim. The issue of compensability of the April 2, 2021 left forearm injury thus proceeded to hearing on September 21, 2021 before ALJ Steven Kabler. In his November 2, 2021 Findings of Fact, Conclusions of Law, and Order, ALJ Kabler denied the claim and found that Claimant failed to establish he sustained a compensable injury to his left forearm on April 2, 2021.

9. On April 3, 2021 the date on which Claimant reported his April 2, 2021 left forearm injury, he complained to his supervisor Mr. C[Redacted] that turning cows using his right arm increased his right shoulder pain. Claimant had been turning cows for approximately three hours from 9:00 a.m. until 12:00 p.m. on April 3, 2021. Mr. C[Redacted] took Claimant to the in-house clinic where a nurse, after consulting with a doctor, determined that turning cows fit within Claimant's work restrictions.

.10. After completing his work shift on April 3, 2021 Claimant visited the emergency room at East Morgan County Hospital. Claimant reported right shoulder discomfort with an onset one month earlier and increased pain while at work. The degree of pain was described as "minimal" with no swelling. Movement exacerbated the pain, but Claimant denied any significant change with overhead activity. An addendum to the report stated that the radiologist noticed a small avulsion fracture off the acromion that appeared to be old, and supported a diagnosis of rotator cuff disease. Claimant did not report an injury to Employer on April 3, 2021.

11. On April 6, 2021 Claimant returned to Dr. Cebrian for an evaluation. Dr. Cebrian assessed a possible "AC joint separation with aggravation due to work duties" and "a nondisplaced fracture at the tip of the acromial process." He restricted Claimant to no use of the right arm. Dr. Cebrian ordered an MRI as a diagnostic test for the April 1, 2021 right shoulder injury. He testified that he had no knowledge of a separate right shoulder injury that occurred on April 3, 2021 and the record does not reflect any mention of a new injury on the date.

12. The April 7, 2021 right shoulder MRI demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination.

13. On April 21, 2021 Claimant visited Dr. Hsin for an examination. Dr. Hsin diagnosed Claimant with rotator cuff tendinitis and impingement due to bone spurs. He also administered a cortisone injection to Claimant's right shoulder. Claimant did not mention a work injury that occurred on April 3, 2021.

14. On May 25, 2021 Dr. Cebrian determined that Claimant had reached Maximum Medical Improvement (MMI) for his April 1, 2021 right shoulder injury. He did not assign any permanent impairment or work restrictions. Dr. Cebrian's final diagnosis was aggravation of the AC joint and osteoarthritis of the right shoulder.

15. On November 10, 2021 Claimant filed a Workers' Claim for Compensation for the April 3, 2021 right shoulder injury. Claimant filed an Application for Expedited Hearing on the issue of compensability and medical benefits for the April 3, 2021 incident. Claimant's Application for Expedited hearing is limited to the issues of whether he sustained a compensable injury to his left upper extremity on April 3, 2021 and is entitled to corresponding medical benefits. Respondents filed a Notice of Contest on December 10, 2021.

16. On November 17, 2021 Dr. Cebrian drafted a comprehensive report addressing Claimant's April 3, 2021 right shoulder symptoms. He remarked that it was the first he had become aware of Claimant's assertion that he had suffered an acromial fracture on April 3, 2021 while turning cows. Dr. Cebrian commented that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian also explained that Claimant had sustained an injury to his right shoulder and AC joint in a January 2021 motor vehicle accident. He testified that, because of the complexities involving the new April 3, 2021 claim, he asked Claimant to return in approximately two weeks so he could provide a causation determination.

17. On November 30, 2021 Claimant returned to Dr. Cebrian for an evaluation. After reviewing Claimant's medical records, Dr. Cebrian concluded that Claimant did not sustain a new injury or aggravate his right shoulder condition on April 3, 2021. Although Claimant may have experienced discomfort, Dr. Cebrian emphasized that there was no distinct injury on April 3, 2021. Instead, Claimant likely aggravated his April 1, 2021 right shoulder injury. Dr. Cebrian explained that, even if Claimant had suffered a new injury on April 3, 2021, he had been thoroughly evaluated and received injections. Dr. Cebrian referred Claimant back to Dr. Hsin for a surgical consultation.

18. On January 24, 2022 Claimant underwent an independent medical examination with Timothy S. Obrien, M.D. Dr. O'Brien reviewed Claimant's medical records and conducted a physical examination. He recounted that Claimant had been involved in a motor vehicle accident and injured his right shoulder in January, 2021. Dr. O'Brien also remarked that Claimant is an avid weightlifter and bodybuilder. He reasoned that it is likely Claimant suffers from pre-existing osteoarthritis of the AC joint as a result of his aggressive weightlifting and bodybuilding lifestyle.

19. In relevant part, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies reveal that he did not suffer a work injury on April 3, 2021.

20. Claimant challenged Dr. Cebrian's MMI determination regarding the April 1, 2021 right shoulder injury and sought a Division Independent Medical Examination (DIME). On April 12, 2022 Claimant underwent a DIME with Alicia Feldman, M.D. Claimant described his April 1, 2021 right shoulder injury and also mentioned that he again hurt his right shoulder on April 3, 2021 while working for Employer. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to orthopedic surgeon Dr. Hsin.

21. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

22. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder. Dr. Hsin removed bone spurs and removed the end of the distal clavicle to create space. Claimant subsequently underwent rehabilitation for the surgery.

23. Dr. Cebrian maintained that Claimant did not suffer a new injury or aggravate his right shoulder condition on April 3, 2021. He also remarked that it was impossible to determine when Claimant's small labral tear occurred. It was just as likely the tear existed prior to April 3, 2021. Turning the cows would not have caused a labral tear or acromial fracture in Claimant's right shoulder. Dr. Cebrian reasoned that, although Claimant suffered pain on April 3, 2021 his symptoms were related to his April 1, 2021 admitted injury.

24. Dr. Cebrian explained that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. He noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning only involves exerting about 3 ½ pounds of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

25. Claimant has failed to establish that it is more probably true than not that he injured his right shoulder during the course and scope of his employment with Employer on April 3, 2021. Initially, Claimant assets that on April 3, 2021 he injured his right shoulder while working in the light duty position of cow turner for Employer. The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant was working in a light duty position because he had suffered an admitted right shoulder injury two days earlier on April 1, 2021. ATP Dr. Cebrian diagnosed Claimant's April 1, 2021 injury as an AC joint separation. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

26. An April 7, 2021 MRI of Claimant's right shoulder demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination. After Dr. Hsin administered a cortisone injection, Dr. Cebrian determined Claimant reached MMI on May 25, 2021 for the April 1, 2021 injury with no permanent impairment.

27. On April 12, 2022 Claimant underwent a DIME with Dr. Feldman to challenge Dr. Cebrian's MMI determination. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to Dr. Hsin. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

28. Although Claimant asserts that turning cows injured his right shoulder, the medical records and persuasive medical opinions reflect that Claimant likely did not suffer a new injury on April 3, 2021. After reviewing Claimant's medical records, Dr. Cebrian persuasively concluded that Claimant did not sustain a new injury or aggravation to his right shoulder on April 3, 2021. He explained that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder.

29. Dr. Cebrian explained that, although Claimant may have experienced discomfort, he did not suffer a distinct injury on April 3, 2021. He remarked that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. Dr. Cebrian noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning requires exerting only about 3 ½ pounds

of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

30. Similarly, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies revealed that he did not suffer a work injury on April 3, 2021.

31. Based on the medical records and persuasive opinions of Drs. Cebrian and O'Brien, Claimant has failed to demonstrate that he suffered a right shoulder injury on April 3, 2021. His work activities in turning cows on April 3, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. As Dr. Cebrian noted, although Claimant suffered pain on April 3, 2021, his symptoms were related to his April 1, 2021 admitted injury. Notably, Claimant underwent conservative therapy and ultimately surgery for his April 1, 2021 injury. Accordingly, Claimant's request for Workers' Compensation benefits based on an April 3, 2021 date of injury is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the

course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he injured his right shoulder during the course and scope of his employment with Employer on April 3, 2021. Initially, Claimant assets that on April 3, 2021 he injured his right shoulder while working in the light duty position of cow turner for Employer. The cattle turning position required Claimant to rotate cattle carcasses suspended on a swivel. Claimant was working in a light duty position because he had suffered an admitted right shoulder injury two days earlier on April 1, 2021. ATP Dr. Cebrian diagnosed Claimant's April 1, 2021 injury as an AC joint separation. He assigned right upper extremity work restrictions of no lifting in excess of five pounds, no overhead lifting, and no use of tools.

9. As found, an April 7, 2021 MRI of Claimant's right shoulder demonstrated mild supraspinatus tendinosis with no full-thickness tear of the rotator cuff and trace amounts of subacromial subdeltoid fluid. The MRI also revealed mild-to-moderate spurring and bone marrow edema at the AC joint as well as impingement. Dr. Cebrian referred Claimant to orthopedic surgeon Joseph Hsin, M.D. for an examination. After Dr. Hsin administered a cortisone injection, Dr. Cebrian determined Claimant reached MMI on May 25, 2021 for the April 1, 2021 injury with no permanent impairment.

10. As found, on April 12, 2022 Claimant underwent a DIME with Dr. Feldman to challenge Dr. Cebrian's MMI determination. Dr. Feldman determined Claimant had not reached MMI for the April 1, 2021 injury. She recommended additional therapy and a return to Dr. Hsin. On June 30, 2022 Dr. Hsin performed a right shoulder glenohumeral arthroscopy with the following: (1) debridement of the labrum; (2) bursectomy, acromioplasty, and decompression; and (3) partial distal claviculectomy. The postoperative diagnosis was right shoulder impingement syndrome, distal clavicle arthritis and a labral tear.

11. As found, although Claimant asserts that turning cows injured his right shoulder, the medical records and persuasive medical opinions reflect that Claimant likely did not suffer a new injury on April 3, 2021. After reviewing Claimant's medical records, Dr. Cebrian persuasively concluded that Claimant did not sustain a new injury or aggravation to his right shoulder on April 3, 2021. He explained that the minimally-displaced fracture at the tip of the acromial process, which appeared to be old, was not visible on the April 7, 2021 MRI. The fracture also did not appear in a September 2021 x-ray. The findings confirmed for Dr. Cebrian that any fracture pre-dated April 3, 2021. Dr. Cebrian testified that Dr. Hsin had described Claimant's labral tear as small and only requiring debridement or smoothing. The primary problem with Claimant's right shoulder involved large osteophytes or bone spurs that protruded down towards the rotator cuff and reflected a quite arthritic shoulder.

12. As found, Dr. Cebrian explained that, although Claimant may have experienced discomfort, he did not suffer a distinct injury on April 3, 2021. He remarked that the job of turning cows constitutes an insignificant mechanism to cause an aggravation, fracture, or torn labrum. Dr. Cebrian noted that Claimant had only performed the job for no more than three hours on April 3, 2021. Cow turning merely involves swiveling carcasses on a hook. Based on Employer's job analysis, cow turning requires exerting only about 3 ½ pounds of force with a tool, or slightly more force without a tool, as performed by Claimant. Dr. Cebrian did not doubt that Claimant felt some discomfort while turning cows, but his actions on April; 3, 2021 did not cause a distinct injury or new pathology.

13. As found, similarly, Dr. O'Brien concluded that Claimant did not suffer a new right shoulder injury on April 3, 2021 while working in the cow turner position for Employer. He specifically explained that there was no mechanism of injury that could have produced a fracture of Claimant's right shoulder acromion. Dr. O'Brien reasoned that turning beef is "not the type of activity that results in separation of the bone at the level of the acromion." Notably, an acromial fracture occurs as a result of a high energy blunt trauma. Dr. O'Brien concluded that Claimant's appearance, examination findings and imaging studies revealed that he did not suffer a work injury on April 3, 2021.

14. As found, based on the medical records and persuasive opinions of Drs. Cebrian and O'Brien, Claimant has failed to demonstrate that he suffered a right shoulder injury on April 3, 2021. His work activities in turning cows on April 3, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. As Dr. Cebrian noted, although Claimant suffered pain on April 3, 2021, his symptoms were related to his April 1, 2021 admitted injury. Notably, Claimant underwent conservative therapy and ultimately surgery for his April 1, 2021 injury. Accordingly, Claimant's request for Workers' Compensation benefits based on an April 3, 2021 date of injury is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits as a result of his April 3, 2021 work activities is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts.

For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: September 16, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-063-493-004

ISSUES

The issues set for determination included:

- Did Respondent prove by a preponderance of the evidence that it is entitled to recover an overpayment of PPD benefits from Claimant?

- Is Respondent's overpayment claim barred by the statute of limitations §8-42-113.5(1)(b.5)(I), C.R.S.; (c) if Respondent met its burden, what is the rate of repayment of the overpayment?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on August 2, 2022. Respondent requested a full Order on August 8, 2022, which was received on August 9, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant worked as a uniformed officer for Respondent. There was no evidence she sustained a left arm injury before 2018.[1]

2. On August 12, 2017, Claimant sustained an admitted industrial injury to her left arm when she was involved in altercation with a suspect.[2]

3. Claimant initially received conservative treatmen for the injury to her left arm, which included medications and physical therapy ("PT").

4. She underwent left ulnar nerve neurolysis and transposition surgery on December 6, 2017.

5. ATP John Sacha, M.D. concluded Claimant reached MMI on June 11, 2018. Dr. Sacha determined Claimant sustained a permanent medical impairment of 8% (scheduled) rating, including a 2% due to a loss of range of motion ("ROM") and 6% due to left ulnar motor loss.

6. Another ATP, Gerald Solot, M.D. placed Claimant at MMI on June 22, 2018 and assigned a scheduled impairment rating of 6%. Dr. Sacha performed a second impairment rating on July 9, 2018, which was consistent with Dr. Solot's.

[1] Exhibit C, p. 27.

[2] *Id.*

7. On July 19, 2018, Respondent filed a final Admission of Liability ("FAL") consistent with Dr. Solot's rating. PPD benefits paid pursuant to the FAL totaled $3,713.55.[3]

8. Claimant filed a timely objection to the FAL and requested a DOWC-sponsored IME. The DIME was conducted on November 30, 2018 by James Regan, M.D. Dr. Regan agreed Claimant reached MMI on June 22, 2018 and assigned a 15% left upper extremity rating.

9. On January 3, 2019, Respondent filed an amended FAL, admitting for Dr. Regan's rating.[4] The FAL admitted for PPD benefits totaling $9,283.87. The PPD benefits were paid out to Claimant.[5]

10. Claimant filed an Application for Hearing seeking a conversion of the scheduled impairment rating to a whole person impairment rating. In its Response to Application for Hearing, Respondent endorsed the issue of overcoming the DIME with respect to impairment.

11. A hearing took place on September 12, 2019 before Administrative Law Judge Margot Jones. The ALJ issued a Findings of Fact, Conclusions of Law and Order on October 16, 2019 which determined found that Respondent overcame Dr. Regan's findings. ALJ Jones concluded Claimant sustained a permanent medical impairment of 6% (scheduled). An overpayment of PPD benefits arose as a result of ALJ Jones Order and amounted to $5,570.32.[6]

12. Claimant appealed this Order to the Industrial Claim Appeals Office. The ICAO affirmed the decision of ALJ Jones and issued a Final Order on April 24, 2020. No further appeals were taken and ALJ Jones' Order regarding the overpayment was final.

13. On April 28, 2020, Respondent filed an amended FAL which documented an overpayment in the amount of $5,570.32.

14. The ALJ determined the one-year statute of limitations began to run once ALJ Jones' Order became final. The Order became final after all appeals were exhausted. Accordingly, the ALJ found Respondent had until April 5, 2021 to file an AFH to recoup the overpayment.

15. Respondent sent a letter to Claimant's attorney, dated January 20, 2021 requesting repayment of the overpayment.

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[3] Exhibit A.

[4] Exhibit B.

[5] Exhibit F.

[6] Exhibit C, p.36.

16. On February 3, 2021, Respondent filed an AFH, seeking to recover the overpayment. The ALJ determined the filing of the AFH was within the one-year statute of limitations.

17. The ALJ found the filing of the AFH on February 3, 2021 was action taken by Respondent to recover the overpayment.

18. There was no evidence in the record concerning Claimant‘s ability to repay the overpayment.

19. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ “operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive”. *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Statute of Limitations Defense

As determined in Findings of Fact 1 through 4, Claimant was employed by Respondent as a uniformed officer and suffered an admitted work injury to her left arm

on August 12, 2017. She received medical treatment for her arm injury which included surgery. *Id.* One of Claimant's ATP's (Dr. Sacha) placed her MMI on June 11, 2018. In a subsequent evaluation, Dr. Solot, who was also in ATP, determined Claimant was at MMI and assigned a scheduled impairment rating of 6%, which converted to a 4% whole person impairment. Dr. Sacha then performed a second evaluation of Claimant's impairment on July 9, 2018, which was consistent with Dr. Solot's. (Finding of Fact 6). On July 19, 2018, Respondent filed an FAL that admitted for the 6% scheduled impairment rating. (Finding of Fact 7).

After Claimant underwent a DIME, which was performed by Dr. Reagan, an FAL was filed on behalf of Respondent for Dr. Regan's rating. (Finding of Fact 9). The case proceeded to hearing on Claimant's AFH, at which time she sought a conversion of the scheduled impairment rating to a whole person rating. (Finding of Fact 10). Claimant did not prevail at hearing and the ALJ concluded her medical impairment rating was the scheduled rating issued by ATP, Dr. Solot. (Finding of Fact 11). By virtue of the previously filed FAL, an overpayment of PPD benefits existed in the amount of $5,570.32. Claimant filed a timely appeal of the Order, which was ultimately affirmed by the ICAO. (Finding of Fact 12). No further appeals were taken. The ALJ concluded that once the ICAO Order became final, the one-year statute began to run. (Finding of Fact 14). The deadline taking action to recoup the overpayment was April 5, 2021. (Finding of Fact 14).

As a threshold issue, the ALJ considered whether Respondent proved the existence of an overpayment and whether the claim of overpayment was barred by the one-year statute of limitations. Respondent sought to recover the overpayment and argued that the statute of limitations did not begin to run until the ICAO issued its Final Order. Claimant, on the other hand, argued that Respondent was aware of the overpayment prior to that and the one-year statute had run.

As found, an overpayment of PPD benefits occurred in the case at bench. (Finding of Fact 11). Claimant was overpaid in the amount of $5,570.32 in PPD benefits, which was established by the evidence in the record. The ALJ determined the filing of the AFH on constituted action taken by Respondent to recover the overpayment. (Finding of Fact 17). *Peoples v. ICAO*, 457 P.2d 143, 148-149 (Colo. App. 2019). Respondent's claim to recoup the overpayment was filed after the ICAO Order became final and was not barred by the applicable statute of limitations. (Finding of Fact 14). Based upon the evidence admitted at hearing, the ALJ concluded Respondent filed the AFH before the statute of limitations ran and, therefore was timely. (Finding of Fact 16).

Overpayment

An ALJ in a workers' compensation claim has authority to order repayment of overpayment. *Simpson v. ICAO, 219 P.3d 354 (Colo. App. 2010) rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson, 232 P.3d, 777 (Colo. 2010).* In the recent case of *Turner v. Chipolte Mexican Grill,* W.C. 4-893-631-07 (ICAO, February 8, 2018), the ICAO affirmed an ALJ's ability to order recovery of overpayment. *Peoples v. ICAO*, *supra,* 457 P.2d at 148.

Specifically, § 8-40-201(15.5), C.R.S. was amended in 2021 to read as follows:

"Overpayment means money received by a claimant that:

(a) (I) Is the result of fraud;

(II) Is the result of an error due only to miscalculation, omission, or clerical error asserted in a new admission of liability filed within thirty days of the erroneous admission of liability;

(III) Is paid in error or inadvertently in excess of an admission or order that exists at the time that the benefits are paid to a claimant; or

(IV) Results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title 8. Duplicate benefits include any wages earned by a claimant in the same or other employment while a claimant is also receiving temporary disability benefits.

(b) For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under articles 40 to 47 of this title 8.

(c) Nothing in this subsection (15.5):

(I) Prevents an insurance carrier or an employer from receiving a credit against permanent disability benefits for temporary disability benefits paid beyond the initial date of maximum medical improvement assigned by an authorized treating physician or the final date of maximum medical improvement established by any other means, whichever is later and to the extent that permanent disability benefits remain unpaid at the time of the filing of a final admission of liability; or

(II) Affects the power of the director or administrative law judges to determine overpayments and require repayment of overpayments pursuant to sections 8-42-113.5 and 8-43-207 (1)(q)."

Claimant argued the recent amendment to the overpayment statute should apply in this case, as it was evidence of the Colorado Legislatures' intent with regard to overpayments. In this regard, the ALJ reviewed the text of the amendment to the statute governing overpayments, which changed the definition of what constituted an overpayment. By its terms, the statute was effective January 1, 2022.[7] There was nothing in the text and no authority was presented by Claimant that the Colorado Legislature intended this amendment to apply retroactively to pending cases.

[7] Exhibit 1.

Accordingly, the ALJ concluded that Respondent had the right to recoup the overpayment which occurred in this case in 2020 and the Order will specify the terms by which Claimant is to repay the overpayment.

ORDER

It is therefore ordered:

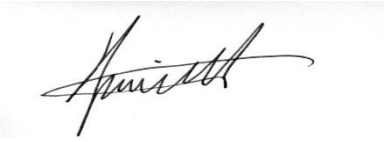
1. Respondent's claim for repayment of the overpayment is not barred by the statute of limitations.

2. Claimant shall pay $225.00 per month to Respondent repay the overpayment.

3. All matters not determined herein are reserved for future determination.

DATED: September 16, 2022

STATE of COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a work related injury to his right knee on September 22, 2021.

II. If Claimant established that he suffered a compensable right knee injury, whether he also established, that he is entitled to all reasonable, necessary and related medical care to cure and relieve him of the effects of his compensable right knee injury, including but not limited to the medial meniscus repair by Dr. Doner on June 6, 2022.

III. If Claimant established that he suffered a compensable right knee injury, whether he also established, that he is entitled to Temporary Disability Benefits beginning December 4, 2021 and ending on August 1, 2022, when he returned to work.

PRELIMINARY MATTERS

1. Respondents' motion to add witness John Toupal was granted since Claimant did not file an objection to the motion.

2. Respondents' motion for sanctions for failure to adequately respond to interrogatories was denied. The ALJ finds that the Claimant's second supplemental Answers to Interrogatories are sufficient to provide Respondents with information to adequately prepare for hearing. (Resp. Exhibit T, p. 205). To the extent that Respondents object to any specific testimony from Claimant, Respondents were permitted to assert a specific objection at the time of the specific testimony and the objection would be ruled upon at that time.

FINDINGS OF FACT

Based upon the evidence presented, including medical records entered into evidence, the ALJ enters the following findings of fact:

1. Claimant is employed as a delivery driver. Prior to his injury, he had worked for the employer position for 10 years. The first five years he worked in a job preloading packages. For the second 5 years, he worked in his current job of delivery driver. His job requires him to make 200 to 400 deliveries per day with weights varying from 1 pound to 200 pounds. At the time of the injury, he had no prior problems with his right knee.

2. On September 22, 2021 Claimant had completed a delivery to Loaf and Jug and Indiana and Lake Avenue and was walking back to his truck across a parking

lot and he felt a pop in his right knee which he described as “a rubber band on the top of his knee snapped and popped over to the side”.

3. Claimant had sharp pain at first which then became mild limping. He stopped at a pharmacy and bought aspirin and a knee brace.

4. After purchasing the aspirin and knee brace, He reported the injury to his supervisor, Mr. B[Redacted] by telephone at approximately 1:00 p.m. He finished his shift. That evening, after his shift, he took the knee brace off and his knee was very swollen.

5. The injury occurred on a Wednesday and he took the next two days off since the swelling did not go down. He was referred to Concentra on Monday. When he was seen by Nurse Practitioner, Brenden Madrid, his knee was painful and swollen.

6. Nurse Practitioner Brenden Madrid took a history that “while he was walking across a parking lot he felt a pop followed by pain to the right knee. He states it feels like a rubber band being stretched over his right knee and rolled over the knee cap. Aggravated with walking and squatting. He states his right knee swells. Feels weak.” Mr. Madrid’s assessment was right knee strain. (Clamant’s Exhibit 4, p. 16).

7. Mr. Madrid’s treatment plan included diclofenac gel; Medrol pack; MRI of the right knee; physical therapy; and x-rays of the right knee. His restrictions included lifting up to 10 pounds. He was limited to office or clerical work only with no kneeling or squatting and no standing or walking over 10 minutes per hour. According to Claimant the employer was able to accommodate these restrictions. He returned to work restricted duty beginning the Tuesday after his first visit with Mr. Madrid. The Claimant began physical therapy on October 18, 2021.

8. The x-rays showed no acute fracture. The MRI, taken on October 28, 2021 showed a tear of the posterior horn of the medial meniscus and MCL and ACL strains. (Claimant’s Exhibit 6, p. 122). It also showed patellofemoral degenerative changes. After review of the MRI results, Dr. Trifilo at Concentra referred Claimant to an Orthopedic physician for an evaluation.

9. On December 4, 2021, the Employer could no longer accommodate the restrictions.

10. Claimant was seen by Dr. Doner at Concentra on December 14, 2021 for the orthopedic consultation. After consideration of further conservative care, including an injection, Dr. Doner recommended right knee arthroscopy with partial medial menisectomy.

11. Dr. Doner stated in his causation analysis: “In reviewing the patient’s history and medical records and examination today, it appears that the patient did sustain an injury to right knee arising out of and caused by the industrial exposure of 09/22/2021/09/02/2021”. (Claimant’s Ex. 5, p. 94).

The Independent Medical Examination of Dr. Aschberger

12. Dr. John Aschberger performed an independent medical examination (IME) of Claimant on July 8, 2022 at Respondents’ request. Dr. Aschberger took a history that the Claimant had the onset of right knee pain while walking across a parking lot. He described a “rubber band’ sensation snapping across the anterior aspect of the knee. He did not misstep, step on a rock, a hole, etc. He noted that surgery was recommended and denied by workers compensation. Dr. Aschberger noted that Claimant had knee surgery on June 6, 2022, but that he did not have a copy of the surgical report. With respect to past medical history, he states: “Noncontributory. He denies any previous knee injury or issues.” (Resp. Ex. H, p. 20).

13. Dr. Aschberger opined that: “Review of the history and his report today indicates no work-related traumatic event precipitating the abnormalities. [Claimant] reports no prior symptomatology. However, given the extent of the findings on the MRI scan, including a meniscal tear and ligamental sprain, there was likely an underlying preexisting issue.” (Resp. Ex. H, p. 21).

14. Dr. Doner performed the knee surgery on June 6, 2022. The surgery was successful. Dr. Doner released Claimant to full duty on August 1, 2022 and Claimant returned to work at that time.

15. The ALJ credits the opinions of Dr. Doner and Claimant’s testimony to find that he has established, by a preponderance of the evidence, that he sustained a compensable injury to his right knee on September 22, 2021. Although there is a reference to September 2, 2021 in the same report, it appears that Dr. Doner is referring to the incident on September 22, 2021. The ALJ does not find the conclusory opinions of Dr. Aschberger to be persuasive in light of the fact that Claimant had no preexisting problems with his right knee and was able to perform a fairly strenuous job before September 22, 2021.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101,

et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during

an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer, i.e. after delivering a package to a Loaf and Jug and walking back to his delivery truck. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" his employment must be resolved before the injury can be deemed compensable.

E. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's right knee was symptomatic or required treatment before September 22, 2021. His knee became symptomatic while he was returning to his delivery van when he felt a pop in his knee.
The evidence presented supports a conclusion that Claimant reported the injury to his supervisor, by phone after the incident. He then purchased aspirin and a knee brace while he continued his delivery route. He sought care with Concentra the Monday following the incident. Prior to his injury, Claimant was able to perform his physically demanding job without difficulty.

G. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an

authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), (rev'd, No. 97CA1439 (Colo. App. Feb. 12, 1998)(not selected for publication), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case.

H. Analogous to the mechanism of injury asserted in *Bastian* and *Fisher*, *supra* the mechanism of injury claimed to have caused injury in this case arose from activities that, per Dr. Aschberger opined that do not constitute a work injury. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Contrary to Dr. Aschberger's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the right medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the mechanism of injury in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/walking at work, his right knee symptoms and his need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Doner and Concentra was reasonable, necessary and related to Claimant's September 22, 2021 injury. The medical care provided by Dr. Doner, including surgery was necessary to treat Claimant from the acute effects of his injury. In any event, at the hearing, Respondents conceded that the surgery was reasonable and necessary, but disputed whether the injury was compensable.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he sustained a work related injury to his right knee on September 22, 2021.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his right knee injury including, but not limited to, the arthroscopic surgery performed by Dr. Doner.

3. Claimant is entitled to Temporary Disability Benefits for the time period of December 4, 2021 through August 1, 2022.

4. All matters not determined herein are reserved for future determination.

NOTICE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a

Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2022

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-172-453-001

ISSUES

I. Whether the surgery recommended by Dr. Bazaz is reasonably necessary to cure and relieve Claimant from the effects of his April 7, 2021, work injury.

II. Whether Claimant is entitled to temporary total disability (TTD) benefits from April 8, 2021, to May 2, 2021.

III. Claimant's average weekly wage (AWW).

IV. Whether Respondents are liable for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

Claimant Sustained a Work-Related Injury to his Right Upper Extremity

1. Claimant was employed with Respondent-employer as an install apprentice. (Tr. p, 16:18-20). Claimant's job required a lot of heavy lifting and the need to get into tight places, such as under houses and in attics. (Tr. P.17: 5-13). Thus, Claimant's work required him to use both of his upper extremities to perform his regular job duties. On April 7, 2021, Claimant was installing an air handler in an attic when he fell eight feet through the ceiling to the floor. (Tr. p, 18:12-19; p. 19:11-12). As he fell, his right arm caught on a wooden truss in the ceiling. *Id*. Following the fall his right shoulder burned, he had pain shooting down his right arm, and his right hand fingers were swollen. (Tr. p, 20:1-6).
2. Immediately after the accident, Claimant's boss took him to the emergency department at the Medical Center of Aurora. (Tr. p, 20:20-25; 21:1).
3. Upon presentation to the emergency department, Claimant reported pain in his right upper extremity, which included his hand, wrist, arm, and shoulder. (Rs' Ex. K, p. 92). X-rays of his hand, wrist, and shoulder were negative for acute bony abnormalities or fractures. *Id*. at 96-98. He was given a sling and discharged without formal work restrictions. (Tr. p, 21:8-14). Claimant was, however, directed to follow up with an occupational medical provider for potential work restrictions. (C's Ex. 6, p. 35.) Due to his injury, which resulted in ongoing pain and the need to wear a sling, Claimant was precluded from performing his regular job duties.
4. Based on the accident – in which Claimant fell and had the immediate development of symptoms - the treatment at the emergency room was reasonably necessary to cure and relieve – treat - Claimant from the effects of his work injury. The treatment is also deemed

authorized since it was an emergency and Claimant was driven to the emergency room by his supervisor.

5. Claimant testified that at the time of the injury, he was paid twenty dollars per hour while working for Employer and worked approximately forty to fifty hours per week. (Tr. p, 17:15-25; 18:1-5). He also testified that he was given a raise from eighteen dollars per week to twenty dollars per week around March 15, 2021. For overtime, he was paid time and a half. (Tr. p, 18:6-8). Claimant was terminated from Respondent-employer on April 7, 2021 – the day of the accident. (Tr. p, 22:9-14). Claimant's testimony regarding his hourly wage, raise, and termination is consistent with the wage records. Thus, at the time of the injury, Claimant was earning twenty dollars per hour and time and half for overtime.

6. Respondent-employer wage records evidence the following:

Pay period:	Regular Hours	Regular Rate	Overtime Hours	Overtime Rate	Gross Earnings
2/1/2021- 2/7/2021	40.5	$18.00	.5	$27.00	$729.00
2/8/2021-2/14/2021	40	$18.00	11	$27.00	$1,017.00
2/15/2021-2/21/2021	40	$18.00	11	$27.00	$1,017.00
2/22/2021-2/28/2021	40	$18.00			$720.00
3/1/2021-3/7/2021	40	$18.00	5	$27.00	$855.00
3/8/2021-3/14/2021	35	$18.00			$630.00
3/15/2021-3/21/2021	35	$20.00			$700.00
3/22/2021-3/28/2021	40	$20.00	11	$30.00	$1,130.00
3/29/2021-4/4/2021	40	$20.00	12	$30.00	$1,160.00

(Rs' Ex. I).

7. Since Claimant was earning twenty dollars per hour on the date of injury, that is the hourly rate that will be used to calculate Claimant's AWW – including calculating his overtime. In calculating his AWW, the ALJ finds that the fairest method is to average the hours he worked over a 9 week period, but base his wages on twenty dollars per hour. From February 1, 2021, through April 4, 2021, nine weeks, Claimant worked 350 regular hours. At twenty dollars per hour, that would result in $7,000 in regular wages. During the same period, Claimant also worked 50.5 hours of overtime. That would result in $1,515 in overtime wages. Thus, at twenty dollars an hour, Claimant would have earned $8,515 over a nine-week period. Dividing $8,515 by nine weeks equals an AWW of $946.11. Therefore, Claimant's AWW is $946.11.

8. After being terminated the day of the accident, Employer did not provide Claimant a list of medical providers with whom to treat or direct Claimant to a medical provider for follow up care after being treated at the emergency room.

9. Claimant accepted a new job a few days after the work injury but could not begin to work until May 3, 2021, because his right shoulder was in a sling, and he could not physically

perform his job duties - due to his symptoms and physical limitations caused by his work accident - until he started working on May 3, 2021. (Tr. p, 28:9-11). Claimant has worked full time since May 3, 2021. (Tr. p, 27:20-25). As a result, Claimant's work injury precluded Claimant from performing his regular job duties from April 8, 2021, to May 2, 2021, and Claimant did not work during such period.

10. Respondents filed a medical only General Admission of Liability ("GAL") on June 14, 2021. (Rs' Ex. C, p. 5).

11. At hearing, Claimant credibly testified that he has pain in his right shoulder that shoots down into his arm and up toward his neck. (Tr. p, 25:24-25; 26:1-3). He also credibly testified that he has pain in his right chest area and cannot work above his head with his right arm for more than a few minutes without pain. *Id*.

12. About two or three weeks after the date of injury he received a medical bill from Medical Center of Aurora. (Tr. p, 22:18-23). Claimant testified that he was not aware of the bill being paid by Respondents. *Id*.

Claimant's Initial Treatment After Presenting to the Emergency Room

13. On June 28, 2021, Claimant presented to Dr. Williams at SCL Health. (Rs' Ex. L, p. 114). He reported dull and aching pain in his right shoulder that occurred several times per day and lasted minutes at a time. *Id*. at 115. Dr. Williams noted that Claimant had deferred his start date with his new employer by about three weeks and was currently working with self-imposed restrictions. *Id*. at 116. On physical examination, Dr. Williams noted mildly limited flexion, significantly limited abduction, mildly limited internal rotation, painful resisted empty can test and biceps testing, crepitus on motion, and non-tenderness over the clavicle. *Id*. Dr. Williams assigned restrictions of lifting, carrying, pushing, and pulling up to 30 pounds and no overhead reaching. *Id*. at 113. Thus, Claimant's injury continued to prevent him being able to perform his regular job duties, even if some of his restrictions were self-imposed.

14. Due to his ongoing shoulder and arm symptoms, Claimant underwent an MRI with contrast of the right shoulder on June 29, 2021. (Rs' Ex. O, p. 354). The MRI report dated July 1, 2021, demonstrated a small nondisplaced partial-thickness tear of the peripheral posterior inferior glenoid labrum at the 7:00 o'clock position with a 4 mm associated peripheral paralabral cyst. *Id*. The radiologist did not note any other findings regarding Claimant's labrum.

15. On July 6, 2021, Claimant reported pain that was aching and burning as well as numbness that occurred continuously for hours. (Rs' Ex. L, p. 121). Dr. Williams reviewed the MRI and assessed a right glenoid labral tear. *Id*. at 122. Dr. Williams opined that Claimant was likely not a surgical candidate. *Id*. But he did express concern over Claimant's ongoing pain complaints and requested an orthopedic consultation. *Id*. In the interim, Claimant was to begin physical therapy. *Id*.

16. On July 14, 2021, Claimant again reported pain that was aching and burning and numbness that occurred continuously. (Rs' Ex. L, p. 135). Dr. Williams noted that Claimant was working without difficulty with the assigned restrictions. *Id*. Claimant was to continue with physical therapy as planned, which Dr. Williams hoped he would respond well to, given the small nature of the labral tear. *Id*. at 136.

17. On July 14, 2021, Claimant presented to his first physical therapy appointment. (Rs' Ex. M, p. 247). He reported pain mostly in the anterior and posterior of his shoulder that sometimes radiated into the chest, with numbness into his fingers and with gripping. *Id*. at 248.

18. Physical therapy notes from July 26, 2021, document reports of continuing right shoulder pain and that his right arm not feeling right with tingling in the fingertips. (R's Ex. M, p. 257-258).

Dr. Ferrari's Orthopedic Assessment

19. On August 2, 2021, Claimant presented to Dr. Ferrari's office for an orthopedic evaluation of his shoulder and was evaluated by PA Belcher. (Rs' Ex. R, p. 377). Claimant reported aching, shooting, burning, cramping, and sharp pain in his right shoulder that occurred constantly. *Id*. He described constant pain, even at rest, that radiated to the right hand with numbness and tingling. *Id*. PA Belcher noted that the MRI showed normal articular cartilage, no cuff injury, no tearing, and no fracture or loose bodies. *Id*. at 378. PA Belcher also noted that the MRI showed no labral tearing – despite the MRI report documenting a labral tear. Dr. Ferrari, who appears to have just signed off on the evaluation and did not physically examine Claimant, opined that Claimant's right shoulder examination was normal and that Claimant's symptoms were consistent with a cervical spine issue and recommended an MRI of the cervical spine. *Id*. Therefore, he recommended an MRI of Claimant's cervical spine. *Id*.

Continued Medical Treatment

20. Physical therapy notes from August 9, 2021, document reports of numbness and tingling in the right four fingers and a new funky feeling in the ulnar side of the right palm. (Rs' Ex. M, p. 273-274). That same day, Claimant saw Dr. Williams and reported pain that was shooting, burning, aching, as well as numbness and weakness. (Rs' Ex. L, p. 143). On physical examination, Claimant displayed somewhat limited range of motion in the right extremity with pain, stiffness, and pulling pain with muscle spasm noted at the right upper trapezius muscle. *Id*. at 144. Dr. Williams opined that the mechanism of injury did not support cervical radiculopathy and based on Claimant's age there should be no underlying degenerative issues. *Id*. A diagnosis of traction neuropathy was discussed based on the fall and the arm injury having been the inciting event for Claimant's pain. *Id*. Dr. Williams recommended a cervical spine MRI and right upper extremity EMG. *Id*. Claimant was to continue with physical therapy. *Id*.

21. Physical therapy notes from August 16, 2021, document Claimant's primary and chief complaint was right shoulder pain but yet he also had numbness and tingling in his right fingers. (Rs' Ex. M, p. 283). That same day, Claimant saw Dr. Williams and reported pain that was aching in nature that occurred all the time. (Rs' Ex. L, p. 153). He reported that his symptoms were somewhat better but aggravated by activity. *Id*. at 154. Dr. Williams reviewed the cervical spine MRI and opined that it was essentially normal and showed no degenerative changes. *Id*. at 155. Dr. Williams concluded that if orthopedics did not find any mechanical issues with the shoulder, then Claimant should continue physical therapy. *Id*. Claimant's restrictions were modified to lifting, carrying, pushing, and pulling up to 40 pounds, with an allowance for overhead lifting. *Id*. at 153.

22. Physical therapy notes from August 24, 2021, document that Claimant was at work earlier in the day and his right hand started to swell. (Rs' Ex. M, p. 288).

23. Physical therapy notes from September 3, 2021, document continued numbness, tingling, and swelling in the shoulder into the right hand. (Rs' Ex. M, p. 294).

Diagnosis of Brachial Plexopathy

24. On September 1, 2021, Claimant presented to Dr. Miller of Colorado Rehabilitation & Occupational Medicine for the right upper extremity EMG. (Rs' Ex. P, p. 358). He reported right shoulder pain, diffuse, achy, worse with reaching overhead or leaning on the shoulder. *Id*. He also reported tingling in his right hand most prominent in the index to little finger and intermittent hand swelling. *Id*.

25. The EMG results were abnormal, with electrodiagnostic evidence most consistent with very mild right brachial plexopathy likely of the medial cord with the ulnar sensory innervation pathway. (Rs' Ex. P, p. 359). There were no needle EMG signs of acute or chronic denervation of the right upper extremity and no electrodiagnostic evidence of right median neuropathy, cervical radiculopathy, nor generalized polyneuropathy. *Id*. Dr. Miller opined that the prognosis was favorable with physical therapy, medications, and shoulder injections, such as a glenohumeral joint injection. *Id*.

Continued Medical Treatment

26. On September 7, 2021, Claimant reported pain that was aching and burning with throbbing and numbness. (Rs' Ex. L, p. 162). Dr. Williams reviewed the EMG results and recommended continued physical therapy and a trial of Gabapentin at 100 mg daily to titrate to 300 mg. *Id*. at 163. Dr. Williams opined that the brachial plexopathy should get better with time but may take nine to 12 months to completely resolve. *Id*. at 162.

27. On September 20, 2021, Claimant reported frustration with his progress. (Rs' Ex. L, p. 168). It was noted that brachial plexopathy injuries can be a slow and arduous recovery. *Id*. at 169. Dr. Williams referred Claimant for a second orthopedic opinion to help guide ongoing care. *Id*.

28. On September 30, 2021, Claimant reported pain that was aching and burning that occurred continuously with numbness and swelling. (Rs' Ex. L, p. 183). Claimant was not sure what caused the pain and noted that he experienced pain when sitting down or hanging out. *Id*. On physical examination the right shoulder had significant tenderness over the bicipital groove, limited range of motion in all planes, and most notably abduction resulted in catching around 90 degrees. *Id*. at 184. Claimant's ability to extend had worsened and he had pain and weakness with pronation. *Id*.

29. Physical therapy notes from October 7, 2021, document that Claimant experienced pain in his right shoulder as well as burning pain in his front right pec. (Rs' Ex. M, p. 325).

Dr. Bazaz's Evaluations and Surgical Recommendation

30. On November 12, 2021, Claimant presented to Dr. Bazaz for a second orthopedic opinion. (Rs' Ex. Q, p. 366). Claimant reported right sided shoulder pain. *Id*. He also reported loss of strength and right hand swelling. *Id*. Dr. Bazaz noted that Claimant "has had an EMG, which he states showed a minor issue, but it does not sound like it was anything too significant." *Id*. On physical examination Dr. Bazaz noted positive impingement findings, positive O'Brien's test, and reasonable cuff strength. *Id*. at 367. Dr. Bazaz determined that the MRI showed no significant labral tearing and no partial-thickness or full-thickness rotator cuff pathology, but did show irregularity of the posterior inferior labrum with a very small paralabral cyst and potential superior labral pathology. *Id*. at 367. Dr. Bazaz diagnosed a right shoulder contusion and opined that the MRI showed evidence of a posterior labral tear and potentially a superior labral tear, but it was not 100% convincing. *Id*. Dr. Bazaz stated that Claimant's symptoms were not only at his shoulder, but also down his arm and into his hand. Dr. Bazaz could not explain the relation of the pain and swelling in Claimant's hand to the torn labrum. *Id*. But he did not rule out the torn labrum as the cause of some of Claimant's symptoms. Therefore, Dr. Bazaz recommended a glenohumeral joint injection to determine what percentage of Claimant's symptoms were coming from the glenohumeral joint to gain confidence that the labral pathology was the cause of at least some of Claimant's symptoms. *Id*.

31. On January 10, 2022, Claimant returned to Dr. Bazaz with reports of right shoulder discomfort and distal radiation. (Rs' Ex. Q, p. 373). Dr. Bazaz noted that "the EMG was negative." *Id*. Claimant underwent an ultrasound guided injection into the glenohumeral joint on the right side for evaluation of the posterior labral tear. *Id*. Dr. Bazaz commented that it was necessary to define what the posterior labral tear meant in real life because it was seen on the MRI, but Claimant's symptoms were fairly diffuse and he needed to understand if the diffuse symptoms related to the labral tear. *Id*.

32. On January 28, 2022, Claimant returned to Dr. Bazaz with reports of right shoulder pain with distal radiation and occasional paresthesia into the upper extremities. (Rs' Ex. Q, p. 374). Dr. Bazaz noted that the majority of Claimant's pain was at the shoulder. *Id*. On physical examination, Dr. Bazaz recorded intact internal and external rotation strength, no significant pain at supraspinatus, positive impingement findings, and positive O'Brien's test. *Id*. Dr. Bazaz noted that "it sounds like an EMG was done and that was negative." *Id*. Claimant reported a few hours of relief from the glenohumeral joint injection, but it did not give lasting relief to the right shoulder. *Id*. It was noted that the injection made Claimant's symptoms a little worse. *Id*. Dr. Bazaz opined that there was some suggestion of labral pathology on the MRI but it was not 100% convincing. *Id*. Dr. Bazaz opined that the labral pathology could be causing Claimant's shoulder pain and difficulty with overhead function, but he could not say that it was causing the symptoms beyond the elbow. *Id*. Dr. Bazaz opined that the labral pathology would not be causing the paresthesias that Claimant intermittently experienced in his upper extremity. *Id*. Dr. Bazaz stated that he was hoping to find what percentage of Claimant's symptoms were coming from the glenohumeral joint/labrum with the injection, but based on the results of the injection, he still had some questions about the clinical significance of the labrum. *Id.* at 375. In the end, Dr. Bazaz could not determine the extent of Claimant's symptoms that were being caused by the torn labrum. Therefore, he concluded that the best surgical

option to address Claimant's shoulder symptoms was to proceed with a *diagnostic* arthroscopy to evaluate Claimant's labrum and other structures of his shoulder – and determine the type of repairs necessary during the operation (emphasis added). But, Dr. Bazaz made it clear that he could not definitively state that the surgery would lead to discovery of significant pathology or the pathology that was causing all of Claimant's symptoms. *Id*. Dr. Bazaz stated:

> At this time, I think our options are pretty much leaving the situation as is, use intermittent over-the-counter pain medicine, do more physical therapy which he has done since July of last year, or consider surgery. With regard to his surgery, I cannot tell him that I know for a fact that we are going to find a significant pathology/the pathology that is causing all of his symptoms. At this time, he feels that before he just leaves the situation as is he wants to proceed with intervention. Therefore, we will proceed with right shoulder diagnostic arthroscopy with close evaluation of the superior labrum and posterior labrum and proceed with labral repairs as deemed appropriate based on the intraoperative findings. We will closely look at his subacromial space and, if there is CA ligament roughening, proceed with subacromial decompression. Obviously, the pathology in the shoulder is going to be what exists in real life and, hopefully, by addressing the pathology, we can improve his clinical situation. I will proceed with the assumption that he will be a labral repair.

Id.

Therefore, Dr. Bazaz determined that a diagnostic arthroscopic surgery was reasonable and necessary to determine the extent of Claimant's shoulder injury and to determine further treatment – repairs needed – during the surgery. After determining that surgery was appropriate, Dr. Bazaz sought authorization for a "Right shoulder scope w/ slap repair, posterior labral repair DME needed: Cooling Unit, Sling." (C's Ex. 30, p. 287.) The request for authorization was denied.

Respondents' Medical Record Review by Dr. Farber

33. Dr. Farber, an expert in orthopedic sports medicine with a focus on shoulder, knee, and elbow conditions conducted a Rule 16 medical records review of Dr. Bazaz's surgical request and authored a report dated February 4, 2022. An addendum was submitted on July 9, 2022, after review of additional medical records - those pertaining to Dr. Ferrari's evaluation. Dr. Farber neither physically examined Claimant nor interviewed Claimant. Dr. Farber determined that Claimant sustained a right shoulder small partial-thickness linear tear of the posterior inferior labrum and right shoulder brachial plexopathy as diagnosed by the EMG. (Rs' Ex. J, p. 74). Dr. Farber testified that the labrum is like a clock face, 1:00 to 12:00 represents a 360-degree circumference, of which the tear at 7:00 only represents one-twelfth of the labral. (Tr. p, 35:17-22). Claimant has a very small partial-thickness tear with the associated ligaments intact. *Id*. Dr. Farber opined that

Claimant's subjective symptoms are more consistent with symptoms related to brachial plexopathy as opposed to a posterior labral tear that warranted surgical intervention. (Rs' Ex. J, p. 74).

34. Dr. Farber opined that Dr. Bazaz's surgical request is not reasonable, necessary, or related to the April 7, 2021 industrial injury for five reasons: 1) Claimant's subjective complaints are not consistent with symptomatic labral pathology; 2) There are no objective physical examination findings indicative of symptomatic posterior labral pathology to warrant surgical intervention; 3) The MRI findings are not significant enough to warrant surgical intervention in the form of a posterior labral repair and are not present to warrant a SLAP repair; 4) Claimant's response to the glenohumeral intra-articular injection is not suggestive of symptomatic posterior labral pathology that warrants surgical intervention; and 5) There is no indication for surgical intervention under the medical treatment guidelines. (Rs' Ex. J, p. 76-78).

35. First, as stated by Dr. Farber, patients with symptomatic posterior labral pathology typically report isolated posterior or deep-seated shoulder pain that is intermittent and associated with certain positions of the arm/shoulder. (Rs' Ex. J, p. 75). Patients may also report mechanical catching and/or a sense of instability with certain provocative maneuvers/positions. *Id*. At hearing, Dr. Farber testified that patients with symptomatic labral pathology should not have constant pain, numbness, tingling, or swelling. (Tr. p, 33:1-7). Because symptomatic labral pathology does not involve muscle, it should not affect grip strength. *Id*. Dr. Farber noted that Claimant's complaints of constant pain occurring continuously, radiating away from the shoulder and into the forearm, hand, and/or chest, swelling in the hand, paresthesias in the upper extremity, and diminished grip strength, but no apprehension, instability, or mechanical symptoms, is not consistent with symptomatic posterior labral pathology. *Id*.

36. Second, typical physical examination findings of patients with symptomatic posterior labral pathology include localized posterior joint line tenderness, reproducible mechanical symptoms with certain provocative maneuvers, and/or apprehension or laxity with posterior stability testing maneuvers. (Rs' Ex. J, p. 76). Dr. Farber testified that these tests consist of relocation test, posterior drawer test, the posterior load and shift test, and sulcus sign, all of which are designed to test for stability of the shoulder and to try and irritate the posterior labrum by specific provocative positions or maneuvers. (Tr. p, 33:11-16). Dr. Farber noted that despite seeing numerous medical providers, none of them administered physical examination tests specifically intended to assess for labral pathology and/or shoulder instability. (Rs' Ex. J, p. 76). Dr. Farber noted that patients with symptomatic labral pathology do not typically demonstrate stiffness, weakness, sensory deficits, or diffuse non-localizing tenderness to palpation. *Id*. That said, Claimant's documented physical examination findings showed limitations in abduction and forward flexion, tenderness over the long head of the biceps tendon, bicipital groove, infraspinatus, pectoralis major, first rib, and upper trapezius, stiffness and muscle spasms in the upper trapezius, digital numbness associated with shoulder abduction, tenderness over the right scalene muscles, limited shoulder strength, weakness with grip strength testing, and pain and weakness with wrist forearm pronation. *Id*. at 77. None of the aforementioned findings are indicative of symptomatic posterior labral pathology that

would warrant surgical intervention, nor do any of the objective physical examination findings indicate the presence of symptomatic posterior labral pathology. *Id*.

37. Third, surgical intervention is not warranted for partial-thickness posterior labral pathology. (Rs' Ex. J, p. 77). Dr. Farber noted that surgical intervention is warranted for displaced labral pathology and/or full thickness labral tears in conjunction with the presence of correlating clinical symptoms and objective physical examination findings. *Id*. Dr. Farber testified that a small tear like Claimant's is not detached or displaced and is only a partial-thickness, which has excellent healing potential. (Tr. p, 36:6-13). He noted that unless patients report instability or reproducible clicking or catching, or have an isolated pain with certain provocative maneuvers to irritate that portion of the labrum, surgery is of no benefit. *Id*.

38. Fourth, Claimant's response to the glenohumeral intra-articular injection performed on January 10, 2022, is not suggestive of symptomatic posterior labral pathology that warrants surgical intervention. (Rs' Ex. J, p. 78). Dr. Farber testified that a patient with isolated labral pathology would show dramatic improvement of pain, the duration of which would be anywhere from six to eight hours following a local anesthetic or several weeks to months following a steroid. (Tr. p, 34:16-22). Dr. Farber testified an hour of pain relief or worsening of symptoms, as in Claimant's case, is not expected. *Id*. Dr. Farber highlighted that Claimant reported receiving limited benefit to his shoulder for a few hours and that Dr. Bazaz commented that the injection made Claimant's symptoms worse, neither of which are a positive diagnostic response that substantiates the need for surgical intervention to address intra-articular pathology. (Rs' Ex. J, p. 78). Dr. Farber also drew attention to the fact that after reviewing Claimant's response to the diagnostic injection, Dr. Bazaz opined that there was still question about the clinical significance of the labrum. *Id*.

39. Fifth, and lastly, Dr. Farber noted that although the Code of Colorado Regulations Department of Labor and Employment Division of Workers´ Compensation Rule 17, Exhibit 4, Shoulder Injury Medical Treatment Guidelines do not specifically address surgical intervention for posterior labral pathology, the guidelines do discuss the need for surgery to address recurrent shoulder instability episodes and SLAP tears. (Rs' Ex. J, p. 78). In regard to the surgical aspect of the SLAP tear proffered by Dr. Bazaz, Dr. Farber highlighted that the reading radiologist made no mention of a SLAP tear on the MRI. (Tr. p, 36:14-17). Dr. Farber opined that there was no evidence of a SLAP tear on the MRI and no documentation of any shoulder instability episodes on the date of injury or subsequent thereto. (Rs' Ex. J, p. 79). Therefore, surgery for a SLAP tear is not indicated. *Id*.

40. Dr. Farber determined that, from a general orthopedic standpoint as it relates to the right shoulder, Claimant is at MMI. (Rs' Ex. J, p. 88). Dr. Farber concluded that Claimant's documented clinical symptoms, physical exam findings, and response to the intra-articular glenohumeral injection strongly argue against the presence of intra-articular shoulder pathology that is causally related to the industrial injury and responsible for his documented subjective symptoms. *Id*.

41. Dr. Farber testified that he was not sure that Dr. Bazaz was aware of the EMG findings or if he had seen the report, but Claimant's testimony of weakness lifting over head was

further evidence of a nerve injury as compared to a labral injury because the labral is not a muscle and does not have an effect on individual strength. (Tr, p. 37:19-24;38:3-9). The EMG evidence of a medial cord brachial plexopathy explain Claimant's subjective symptoms, which would not be improved with a shoulder arthroscopy. *Id*. Dr. Farber testified that Claimant had undergone 17 sessions of physical therapy which is sufficient for a labral injury, but is not sufficient for a brachial plexus injury. (Tr, p. 44:25;45:1-6). Dr. Farber testified that Claimant has not undergone physical therapy focused on brachial plexus. (Tr, p. 44:17-22). Dr. Farber testified that brachial plexus injuries can take up to a year to resolve and usually require long-term therapy and injections. (Tr, p. 45:9-14). While it is theoretically possible to have a brachial plexus injury and a symptomatic labral tear, Dr. Farber testified that he does not believe that is occurring in Claimant's situation. (Tr, p. 50:6-10). Dr. Farber opined that Claimant may require further treatment from a neurologist, physiatrist, and/or a neurosurgeon, but not an orthopedic surgeon. (Rs' Ex. J, p. 89).

42. The ALJ has weighed the opinions of Dr. Bazaz and Dr. Farber. In this case, Dr. Bazaz has treated Claimant. This includes meeting with Claimant, discussing with Claimant his symptoms and physically examining Claimant. During his treatment and evaluation of Claimant, he has tried to define the pain generator regarding Claimant's shoulder pain and symptoms in his arm. Dr. Bazaz is of the opinion that while Claimant's presentation might not be the classic presentation for a labral injury – a diagnostic arthroscopy is reasonably necessary to define the extent of Claimant's injury – and determine future treatment – in order to reduce Claimant's pain and improve his function. The ALJ is aware that Dr. Bazaz's reports are somewhat inconsistent as to whether he is aware that the EMG showed some findings suggestive of a brachial plexus injury. But, the ALJ finds that based on the facts and circumstances of this case, Dr. Bazaz thinks that some of Claimant's symptoms are related to his shoulder joint – including the labrum – and that the EMG results would address Claimant's other symptoms in his arm – which might be from a separate and distinct condition. The ALJ therefore does not find Dr. Bazaz's comments regarding the EMG to be fatal to his opinion as to whether Claimant's need for an arthroscopic surgery to be reasonably necessary to define the extent of Claimant's work injury and need for treatment to cure and relieve Claimant from the effects of his work injury. Overall, and based on the totality of the evidence, the ALJ finds Dr. Bazaz's opinion to be credible and persuasive as to the need for the diagnostic arthroscopic surgery -with repairs to be made as deemed reasonably necessary during the surgery.

43. In this case, the ALJ has also considered the opinion of Dr. Farber. The ALJ finds Dr. Farber's opinion in his reports and testimony to be clear, concise, and very well-reasoned. As set forth above, Dr. Farber has not only concluded that the arthroscopic surgery is not reasonably necessary, but he has also articulated the basis for his opinion in great detail. On the other hand, Dr. Farber has not obtained a detailed history from Claimant and has not physically evaluated Claimant. Moreover, he has not focused on the diagnostic value of the surgery.

44. In weighing the evidence, this a very close case. But, in the end, and based on the totality of the evidence, the ALJ finds Dr. Bazaz's opinion and recommendation for surgery to be more persuasive than the opinion provided by Dr. Farber. The ALJ finds Dr. Bazaz's opinion to be more persuasive than Dr. Farber's because Claimant still has shoulder pain

and limited function of his right shoulder – combined with symptoms that appear to also be consistent with a brachial plexus injury. Thus, performing surgery to define the extent of Claimant's shoulder injury with the goal of finding shoulder pathology that can be treated during surgery to improve Claimant's shoulder pain and function is reasonable and necessary to cure and relieve - treat - Claimant from the effects of his work injury.

45. The ALJ has also considered the Colorado Medical Treatment Guidelines. The ALJ, however, does not find them to be persuasive based on the facts of this case because as stated by Dr. Farber, the Guidelines do not specifically address surgical intervention for posterior labral pathology as found on Claimant's MRI.

46. As a result, the diagnostic surgery recommended by Dr. Bazaz, which he described as a right shoulder scope with slap repair, a posterior labral repair, with the associated durable medical equipment – which consisted of a cooling unit and a sling – is found to be reasonably necessary to cure and relieve Claimant from the effects of his work injury, i.e., related.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197

P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. **Whether the surgery recommended by Dr. Bazaz is reasonably necessary to cure and relieve Claimant from the effects of his April 7, 2021, work injury.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Moreover, medical "treatment" encompasses both diagnostic and curative medical procedures. *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) ("The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury."); *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining claimant's condition and suggesting further treatment). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

In this case, Claimant suffered a compensable injury when he injured his right shoulder on April 7, 2021. Since the date of injury, Claimant has consistently complained of pain and symptoms in his right shoulder as well as symptoms that go down his arm and into his hand.

Since his injury, Claimant has been seen by a number of physicians in order to define the extent of his injury and treat his injury in order to relieve Claimant's symptoms. The treating providers have included Dr. Williams, PA Belcher, Dr. Ferrari, and Dr. Bazaz. The treatment and diagnostic procedures have included, physical therapy, a shoulder injection, an EMG, and two MRIs. Claimant has also been evaluated by an independent

medical examiner, Dr. Farber, to determine the cause of Claimant's symptoms as well as the extent of future treatment.

Based on the evidence presented at hearing, Claimant is suffering from a shoulder injury, which includes at least a labral tear or tears, as well as a brachial plexus injury. This finding is supported by the fact that Claimant has symptoms and/or MRI and EMG findings that are consistent with a torn labrum as well as a brachial plexus injury. The problem, however, is that Claimant's shoulder symptoms – and his response to the injection – do not definitively confirm that his shoulder symptoms are due to his torn labrum. This is borne out by Dr. Bazaz's reports and recommendation for a diagnostic arthroscopic surgery to determine the extent of Claimant's shoulder injury and the cause of his pain and dysfunction - and to repair any damaged structures found during the surgery.

The ALJ finds and concludes that Dr. Bazaz's methodology for evaluating Claimant's condition and attempt to definitively find the pain generator in his shoulder – before recommending surgery - demonstrates a thorough assessment of Claimant's condition and the resulting recommendation for surgery. As found above, the ALJ finds Dr. Bazaz's opinion that the surgery is reasonably necessary to attempt to cure and relieve Claimant from the effects of his injury is found to be credible and persuasive. This is based upon the fact that Dr. Bazaz has physically evaluated Claimant in person, has been able to get a full history regarding his symptoms and failure to improve after undergoing physical therapy and an injection, and that Claimant's shoulder symptoms have not improved. Dr. Bazaz's opinion is also found credible and persuasive based on his statement that the surgery may not resolve all of Claimant's symptoms – thus demonstrating he is aware that Claimant might have a second condition that is causing some of Claimant's symptoms and functional impairment.

As stated above, the ALJ has also considered the opinions of Dr. Farber as well as the Colorado Medical Treatment Guidelines. As found, Dr. Farber's reports and testimony are clear, concise, well supported and persuasive. But, for the reasons set forth above, the ALJ has credited and found Dr. Bazaz's reports and recommendation for surgery to be more persuasive based on the totality of the evidence.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the diagnostic shoulder surgery recommended by Dr. Bazaz – with repairs as needed - is reasonably necessary to cure and relieve Claimant from the effects of his work injury, i.e., related.

II. **Whether Claimant is entitled to temporary total disability benefits from April 8, 2021, to May 2, 2021.**

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain

TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant suffered an injury to his right shoulder on April 7, 2021. Claimant's job required him to use both upper extremities. Immediately after the injury, Claimant was taken to the emergency room with pain in his right shoulder and arm. Based on his injury and symptoms, Claimant was prescribed a sling for his right arm. Due to being in a sling, and ongoing pain, Claimant was unable to perform his regular job duties as of the date of injury. Claimant was able to find employment after his work injury. But, due to his ongoing symptoms and need to wear a sling, Claimant was unable to start his new job and work until May 3, 2021. Moreover, Claimant did not work from April 8th through May 2nd of 2021.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his work injury caused his disability and that he could not perform his regular job duties from April 8, 2021, through May 2, 2021, and did not work during such time. Therefore, Claimant established that he is entitled to TTD from April 8, 2021, through May 2, 2021.

III. **Claimant's average weekly wage.**

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

In this case, the ALJ finds and concludes that arriving at a fair approximation of Claimant's wage loss and diminished earning capacity can best be determined by averaging the number of hours Claimant worked each week in the nine-week period preceding his injury. The ALJ also finds and concludes that in arriving at a fair approximation of Claimant's wage, his AWW should be based on the hourly rate he was being paid at the time of the accident – which is twenty dollars.

The ALJ finds and concludes that on the date of injury, Claimant was earning twenty dollars per hour for up to forty hours per week and thirty dollars per hour for overtime.

The ALJ also finds and concludes that From February 1, 2021, through April 4, 2021, nine weeks, Claimant worked 350 regular hours. At twenty dollars per hour, that would result in $7,000 in regular wages over the nine-week period. During the same period, Claimant also worked 50.5 hours of overtime. At thirty dollars per hour, that would result in $1,515 in overtime wages. Thus, at twenty dollars an hour for regular time, and thirty dollars an hour for overtime, Claimant would have earned $8,515 over a nine-week period. Dividing $8,515 by nine weeks equals an $946.11. Therefore, the ALJ finds and concludes that Claimant's AWW is $946.11.

IV. **Whether Respondents are liable for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury on April 7, 2021, when he went through a ceiling and fell approximately eight feet. Immediately after the accident, Claimant developed pain in his right shoulder and upper extremity and was taken by his boss to the emergency room at the Medical Center of Aurora. Upon presentation to the emergency department, Claimant reported pain in his right extremity, which included his hand, wrist, arm, and shoulder. Based on Claimant's injury, Claimant was evaluated and treated on an emergent basis. The evaluation and treatment included X-rays of Claimant's right hand, wrist, and shoulder. Although the X-rays were negative for acute bony abnormalities or fractures, Claimant was given a sling and directed to follow up with an occupational physician.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the emergent medical treatment he received at the emergency room at the Medical Center of Aurora on the day of April 7, 2021, was reasonably necessary to cure and relieve - treat - Claimant from the effects of his work injury. Moreover, the ALJ also finds that such treatment was authorized since Claimant was taken to the emergency room by his boss and it was an emergency. Thus, Respondents are responsible for the treatment provided on April 7, 2021, at the emergency room visit.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay for the surgery, and DME (durable medical equipment), recommended by Dr. Bazaz.

2. Respondents shall pay Claimant TTD from April 8, 2021, to May 2, 2021.

3. Claimant's AWW is $946.11, and TTD should be paid based on an AWW of $946.11.

4. Respondents shall pay for the medical treatment Claimant received at the Medical Center of Aurora – emergency department – on April 7, 2021.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2022

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-745-001

ISSUES

1. Whether Claimant sustained a compensable, repetitive motion/trauma work injury on or about February 3, 2021.

2. Whether the left carpal tunnel release recommended by Dr. Nicholas Noce is reasonable and necessary to cure or relieve the effects of a compensable work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately 12 years. Claimant's primary job responsibilities were as a "tail conditioner" which required her to remove tails from cow carcasses using a knife and a hand-held hook. Claimant testified her job duties consisted of cutting, washing, and trimming cow tails, and sharpening her knife by hand. Claimant testified she used a hook and a knife to trim 2,300 to 2,500 tails per day. Although Claimant has held other positions, the overwhelming majority of her employment has been as a tail conditioner.

2. On February 4, 2021, Claimant sustained a work-related laceration to her left thumb, and received treatment for that condition. During the course of treatment, Claimant began reporting pain and her left arm and forearm.

3. On March 23, 2021, Claimant was examined by authorized treating physician Daniel Bates, M.D., at the Banner Occupational Health Clinic. Dr. Bates documented complaints of pain along the flexor tendon and a positive Tinel's sign with radiation of symptoms into the first, second, and third digits of the left hand. Claimant also had evidence of a trigger thumb. Dr. Bates referred Claimant to hand specialist, Nicholas Noce, M.D., for evaluation.

4. Claimant saw Dr. Noce on April 22, 2021. Dr. Noce opined Claimant's numbness and tingling in her hand was unrelated to her thumb laceration, but Claimant appeared to have some carpal tunnel symptoms. Dr. Noce recommended an EMG which he opined was unrelated to Claimant's thumb laceration claim. He indicated if Claimant's EMG were negative, she should follow up with workers' compensation, as there would be nothing further to do with respect to her carpal tunnel symptoms. (Ex. C).

5. On April 27, 2021, Dr. Bates ordered the EMG, which Gregory Reichhardt, M.D., performed on May 19, 2021. Claimant reported to Dr. Reichhardt pain through the entire left arm, the palmar aspect of the left hand and pain in the left thumb. The EMG study showed a "mild left median sensory neuropathy at the wrist without motor involvement." The study was otherwise negative. Dr. Reichhardt posited the EMG demonstrated a possible component of carpal tunnel syndrome. He also noted that Claimant's more

diffuse left upper extremity numbness was of unclear etiology. He indicated it would be reasonable to consider a carpal tunnel injection for diagnostic purposes. (Ex. G).

6. After reviewing the results of the EMG, Dr. Bates referred Claimant back to Dr. Noce to discuss procedural intervention for minor carpal tunnel syndrome. (Ex. F). Claimant saw Dr. Noce on July 27, 2021, reporting numbness and burning pain in her distal forearm and into the index, middle and ring finger of the left hand. Claimant's trigger thumb was completely resolved. Dr. Noce opined Claimant's EMG showed mild carpal tunnel syndrome. He recommended a steroid injection for left carpal tunnel syndrome to see if Claimant improved. He indicated: "All of her symptoms are not obviously carpal tunnel and so it would be best to try a steroid injection even if it only gives her temporary relief. If she does get temporary relief of most or all of her symptoms and then the symptoms return then I would recommend carpal tunnel release, and this would likely have very good results. If she has little to no improvement from the steroid injection then it would be difficult to say how much improvement she would get from a carpal tunnel release." He performed the steroid injection on July 27, 2021. (Ex. C).

7. Claimant returned to Dr. Bates on August 3, 2021, noting that she had not yet had any improvement of her symptoms from the carpal tunnel injection. Dr. Bates indicated that it was too early to determine the efficacy of the injection, and suggested waiting two to four weeks to determine the effectiveness, and then he would defer to Dr. Noce for treatment options. (Ex. F).

8. On August 10, 2021, Claimant returned to Dr. Bates and noted that she had increased wrist pain after the injection. He noted "I am wondering, if the carpal tunnel injection has actually been somewhat beneficial and the patient has been using the wrist more freely if not subconsciously, and has flared up her wrist tendinitis, as most of the discomfort seems to be over the flexor carpi muscles. He again indicated he would defer to Dr. Noce regarding wither a carpal tunnel release would be beneficial. He stated: " I am inclined to believe that this ought to be done as the patient does not really have other objective findings in her wrist which would explain the ongoing discomfort other that the carpal tunnel syndrome and median never damage." He recommended a trial of gabapentin to address pain. (Ex. F).

9. Claimant saw Dr. Noce again on August 26, 2021, reporting she had a "small amount of improvement of some of her numbness and tingling in her fingers and then she developed a lot of pain along her wrist and up into her elbow. Claimant reported continued numbness and tingling in her fingers, but also pain into the volar aspect of the wrist, forearm, and elbows. Dr. Noce opined "I believe most of her symptoms are from carpal tunnel syndrome however some of her forearm and proximal pain may or may not be from carpal tunnel syndrome." He indicated he though Claimant's hand numbness and tingling would improve with a carpal tunnel release, but it was difficult to predict whether it would improve her forearm pain. (Ex. C).

10. Claimant saw Dr. Bates' on August 31, 2021. Dr. Bates recommended Claimant undergo a carpal tunnel release as recommended by Dr. Noce based on documented median nerve damage. He also noted Claimant's "full left upper extremity discomfort is

unlikely to be caused by the carpal tunnel syndrome, and does not have an underlying physiologic cause from our objective investigation thus far." He recommended a trial of massage to address Claimant's non-carpal tunnel symptoms in the left arm. (Ex. F).

11. At Respondents' request, Claimant was evaluated by Thomas Mordick, M.D., a hand surgeon, on January 4, 2022. Later, on June 7, 2022, Dr. Mordick reviewed additional records. Dr. Mordick's examination and opinions were focused on Claimant's thumb laceration, which he opined was at maximum medical improvement (MMI). He opined that if Claimant had carpal tunnel issues, those issues are unrelated to her thumb laceration. The opinions expressed in his reports are immaterial to the issue of whether Claimant has work-related carpal tunnel syndrome. (Ex. A & B).

12. On January 20, 2022, Dr. Bates responded to a letter from Respondents regarding Claimant's thumb laceration claim. He agreed with Dr. Mordick that Claimant was at MMI for that claim. In addition, he stated that the thumb laceration was not at issue. Instead, he indicated Claimant had been treated for ongoing pain and paresthesia of the thumb "which is likely to be caused by her mild median neuropathy noted on EMG." He further noted that Claimant's "occupation has multiple primary risk factors for cumulative trauma disorder, including carpal tunnel syndrome and trigger finger. I have advised the patient [illegible] to file a separate claim for the carpal tunnel syndrome multiple times." He further stated that Claimant needed a separate injury claim for carpal tunnel syndrome separate from the laceration claim, and that Claimant needed a carpal tunnel release procedure. (Ex. 4).

13. On February 16, 2022, Claimant filed a Worker's Claim for Compensation for a repetitive injury to the left wrist and arm, with a stated date of injury as February 3 2021. (Ex. I).

14. Claimant testified at hearing that she had no previous diagnosis or treatment for carpal tunnel symptoms, and she would like to proceed with the carpal tunnel surgery recommended by Dr. Noce and Dr. Bates. Claimant's medical records demonstrate that Claimant was seen at Employer's in-house clinic between October 20, 2017 and October 30, 2017 for complaints of left neck, arm, shoulder, and hand pain that she attributed to her job duties. No definitive diagnosis was provided, and no credible evidence was offered to indicate Claimant had treatment for these conditions after October 2017. (Ex. D). Claimant testified that the pain she experiences now is different and more severe than the pain she experienced in 2017.

15. Respondents presented Dr. Mordick's testimony by deposition in lieu of live testimony. Respondents moved to qualify Dr. Mordick as an "expert" without designating his area of expertise. However, the ALJ infers from the testimony that Dr. Mordick's expertise is in hand surgery, and admits Dr. Mordick as an expert in hand surgery.

16. Dr. Mordick testified that during his examination of Claimant in January 2022, Claimant had markedly reduced strength and range of motion in the fingers, flexors and extensors, and restricted strength in the thumb. He noted that Claimant was tender to palpation over the forearm from the elbow to the wrist, and the palm and dorsal aspect of

the wrist. He also noted that Claimant had diminished sensation in all five digits of the left hand compared to the right.

17. Dr. Mordick testified that he did not believe Claimant has carpal tunnel syndrome because her presentation was atypical for carpal tunnel. Specifically, Claimant had symptoms on the dorsal aspect of her hand, numbness in the small finger, and limited finger extension, which he opined were atypical for carpal tunnel syndrome. Dr. Mordick cited the "upper extremity guidelines"[1], as a basis for his opinions. He testified that Claimant's EMG performed by Dr. Reichhardt was "atypical" and that an EMG is not conclusive proof of carpal tunnel syndrome. Dr. Mordick did not examine Claimant for carpal tunnel syndrome, and his opinion is based on his review of Claimant's medical records, and additional documentation he received the day of his deposition. Dr. Mordick testified that carpal tunnel repetitive movement can cause carpal tunnel syndrome, and that he did not perform any causation analysis with respect to Claimant because he did not receive some information until shortly before his deposition. Dr. Mordick also testified he felt that Claimant would have a poor result from surgery. Dr. Mordick's opinions were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible

[1] The ALJ notes that Dr. Mordick referenced specific pages of the "upper extremity guidelines" in his testimony. For example, Dr. Mordick testified "The CATS diagrams, the upper extremity guidelines, page 10, indicates that if there is pain on the dorsal of the forearm of the hand, it is unlikely to be carpal tunnel syndrome." The ALJ is unable to locate any such statement in the Colorado Medical Treatment Guidelines, W.C.R.P. Rule 17. The Colorado Medical Treatment Guidelines do not contain specific "upper extremity guidelines." The MTGs for carpal tunnel syndrome are contained in the Cumulative Trauma Guidelines, W.C.R.P. Rule 17, Exhibit 5. The specific pages referenced by Dr. Mordick do not correspond with W.C.R.P. Rule 17, Exhibit 5, (effective March 2, 2017), nor with the two prior versions of the Cumulative Trauma Guidelines (*i.e.*, the versions effective October 30, 2010, and January 1, 2006). Consequently, the ALJ is unable to ascertain the "guidelines" Dr. Mordick referenced in his testimony.

inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant has established by a preponderance of the evidence that she has sustained a compensable occupational injury arising out of the course of her employment with Employer. The credible evidence establishes that Claimant has carpal tunnel syndrome causally related to her employment. Claimant's job position requires continual,

repetitive motions with her hands, including using a hook and knife 2,300-2,500 per day for a period of years. Although Claimant's job did change occasionally, her primary job for the vast majority of her employment was as a tail conditioner.

The Colorado Medical Treatment Guidelines, W.C.R.P. 17, Exhibit 5, provide guidance for the diagnosis of carpal tunnel syndrome. The "Physical Examination Findings Reference Table," (¶ D.1.f., p. 13), and the Specific Physical Exam Findings section (¶ G.1.d.), indicate a clinical diagnosis of carpal tunnel is confirmed by 1) patient history of paresthesia in two of the following digits: thumb, index, and middle finger; and 2) At least one of the following physical exam signs: Positive Phalen's sign, modified Phalen's test; positive Tinel's sign over the carpal tunnel; positive compression test; compression with wrist flexed; thenar atrophy; weakness of the abductor pollicis brevis, and/or sensory loss.

Claimant reported numbness, pain, and radiation into at least the index and middle finger, and had a positive Tinel's sign on examination by Dr. Bates. Additionally, Claimant's EMG testing, performed by Dr. Reichhardt was consistent with mild carpal tunnel syndrome. Accordingly, the ALJ finds that Claimant substantially meets the criteria for diagnosis of carpal tunnel syndrome. Although Claimant reported symptoms in her left upper extremity that are unrelated to carpal tunnel syndrome, no credible evidence was admitted that the existence of these other symptoms renders the diagnosis of carpal tunnel inaccurate.

The ALJ also credits Dr. Bates' opinion that Claimant's occupation has multiple primary risk factors for cumulative trauma disorder, including carpal tunnel syndrome and trigger finger." Moreover, the repetitive use of a knife and hook are a peculiar risk of Claimant's employment. Dr. Bates' opinion is consistent with Dr. Mordick's acknowledgement that carpal tunnel can be caused by repetitive motion. Claimant credibly testified that she uses her knife and hook 2,300 - 2,500 times per day in the same repetitive motion, and has done this for multiple years. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant's carpal tunnel syndrome arose out of the course of her employment with Employer.

SPECIFIC MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish

entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that carpal tunnel release surgery recommended by Dr. Noce and Dr. Bates is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. As found, Claimant has a work-related diagnosis of carpal tunnel syndrome. The ALJ finds the opinions of Dr. Bates and Dr. Noce that such surgery is necessary to address Claimant's carpal tunnel symptoms more credible than the contrary opinion of Dr. Mordick. The fact that carpal tunnel surgery may not address Claimant's unrelated does not render the proposed surgery unreasonable or unnecessary. Claimant's request for authorization of surgery is granted.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable occupational disease or injury in the form of carpal tunnel syndrome, on or about February 2, 2021.

2. Claimant's request for authorization of carpal tunnel release surgery is granted.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-067-944-003

ISSUES

The issues set for determination included:

- Did Claimant meet her burden of proof to overcome the Division of Workers' Compensation-sponsored IME ("DIME") physician's (Gregory Reichhardt, M.D.) opinions on maximum medical improvement and permanent impairment rating?

- If Claimant overcame Dr. Reichhardt's opinions on the issue of impairment, what was her impairment rating?

- Is Claimant entitled to temporary total disability benefits from July 23, 2019 through February 27, 2020?

STIPULATION

The parties stipulated that Claimant's average weekly wage should be $596.33 from the date of injury to Nov. 30, 2018, and $720.61 from December 1, 2018 forward.[1] Also, Respondents agreed that Delia Bakeman, M.D. at UC Health is in the authorized chain of referrals.

PROCEDURAL HISTORY

A Summary Order was issued by the ALJ on August 12, 2022 and served on August 12, 2022. Claimant, by and through her attorneys of record requested a Corrected Order. A Summary Order was issued on August 12, 2022. On August 18, 2022, a Corrected Summary Order was issued pursuant to 8-43-302(1), C.R.S. Respondent requested a full Order on August 23, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant was employed by Employer as a special education para- educator. She worked in that capacity assisting a teacher in a large classroom.

2. On January 22, 2018, Claimant was injured when she was struck in the back of her head by a soccer ball that was either thrown or kicked by a student from less than 4 feet away. Claimant testified she felt pain and was dizzy. Claimant also said she did not have a memory of the next two hours and experienced neck pain, as well as a headache.

[1] This Stipulation was approved by the Order issued on May 16, 2022.

3. There was no evidence in the record that Claimant required treatment for her cervical spine before January 2018.

4. Claimant initially treated at Respondent's ATP, Peak Form on Jan. 23, 2018.[2] She reported 6/10 pain in the lower back, upper back and neck, as well as nausea and weakness. Her pain was exacerbated by movement. She was diagnosed with a mild TBI, concussion, lumbar strain and cervical strain. Claimant was initially returned to full duty.

5. On January 26, 2018, Claimant was evaluated by Roxana Witter, M.D. Dr. Witter's assessment was: concussion without LOC; thoracic strain; lumbar strain; cervical strain. Claimant was taken off work by Dr. Witter, who also prescribed medications and massage therapy before PT.[3]

6. On February 6, 2018, Claimant underwent a CT of her head/brain and the films were read by Brian Steele, M.D. Dr. Steele's impression was: normal noncontrast head CT, with no skull fracture or intracranial hemorrhage following trauma. Claimant remained off work and on February 16, 2018, Dr. Witter issued work restrictions of office work only.

7. Claimant was treated by Rebecca Hutchins, O.D., F.C.O.V.D. for vision therapy. Dr. Hutchins evaluated Claimant on May 23, 2018 and diagnosed: convergence insufficiency, general binocular vision disorder, Saccadic dysfunction, and photophobia. She indicated this was "post trauma vision syndrome" and recommended prism glasses and vision therapy. She stated that most mild TBI patients require 4-9 months of weekly therapy to regain their visual skills.

8. Claimant testified that during the first six months after her injury the biggest problems were the visual disturbance, she had difficulty driving, was greatly fatigued, had headaches regularly and neck pain.

9. On August 20, 2018, Claimant underwent a cervical spine MRI and the films were read by Kevin Wooley, M.D. Dr. Wooley's impression was: multilevel degenerative changes, including right sided facet arthropathy at C2-C3; moderate left-sided facet arthropathy at C4-C5, disc bulge/osteophyte complex and uncovertebral joint hypertrophy at C5-C6. No disc herniations were noted. The ALJ inferred that the MRI was ordered because Claimant reported cervical symptoms.

10. Claimant returned to Peak Form on Sept 24, 2018 and was evaluated by physician's assistant Jasmine Wells. At that time, Claimant reported pain in the left shoulder, neck and jaw. Claimant's diagnoses were: concussion without LOC; thoracic strain; lumbar strain; cervical strain. Claimant was to continue PT, treatment with Dr. Cortgageorge and visual therapy with Dr. Hutchins. PA Wells reported that she reached

[2] Exhibit 14, p. 699.

[3] Exhibit 14, p. 708.

out to Employer and talked to KB[Redacted] to see if they could accommodate restrictions of 20 minutes of work, 10 minutes of rest for 2-3 hours per day. Employer could not accommodate those restrictions.

11. On Oct. 26, 2018, Claimant returned to at Peak Form and was evaluated by Ethan Moses, M.D. for the first time. Dr. Moses opined she would have impairment for both her cervical and TBI. Dr. Moses noted Claimant was interested in transitioning her back to work, but the employer is not willing to take her back with restrictions. He reported that Claimant was starting to volunteer 1 hour a week and wanted her to do that for Employer.

12. Matthew Brodie, M.D. began overseeing Claimant's treatment on December 14, 2018. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon of lower back; strain of muscle, fascia and tendon at neck level.

13. The ALJ found Dr. Brodie evaluated Claimant at regular intervals and over the next eighteen months, she received treatment for cervical pain and spasm, as well as visual disturbance. Dr. Brodie made objective findings in reference to Claimant's cervical spine, including restrictions in cervical ROM. The ALJ determined this was objective evidence of an injury to this area of the body.

14. Alexander Zimmer, M.D. performed an independent medical examination on March 11, 2019 at the request of Respondent. At that time, Claimant reported trouble focusing, fatigue, along with pain in the left neck, jaw and shoulder area. She also reported memory problems. On examination Claimant had decreased sensation for her cranial nerves and normal range of motion ("ROM") for the neck. The sensory exam was normal for the upper and lower extremities.

15. Dr. Zimmer's impression was that Claimant had multiple symptoms. opined that Claimant did not have any objective evidence of neurological abnormalities involving the brain. Dr. Zimmer referenced Dr. Cotgageorge, without a clear history of impaired consciousness to some degree, it was difficult to make a diagnosis of traumatic brain injury. Dr. Zimmer stated the increasing symptoms over time also were completely atypical and not consistent with a post-concussion-type syndrome. Dr. Zimmer stated subjective symptoms may be consistent with an adjustment disorder with anxious and depressed mood or to other, non-neurological factors. Claimant's work restrictions would be related to her psychological condition. Dr. Zimmer opined that Claimant was neurologically at maximum medical improvement and felt she would have permanent impairment for the cervical spine as well as psychological issues.[4]

16. Respondent filed a General Admission of Liability ("GAL") on March 4, 2019 amending the average weekly wage to $547.44 and temporary total disability rate to $364.96 based on a COBRA coverage letter effective December 1, 2018. Temporary

[4] Exhibit I, p. 1102.

total disability benefits at the $364.96 rate were admitted from December 1, 2018 and ongoing. The ALJ inferred that the addition of Claimant's COBRA benefits to the AWW was some evidence that her employment was terminated.

17. Claimant was reevaluated by Dr. Brodie on May 14, 2019 and documented that he had reviewed the reports of the specialists and (including Dr. Zimmer) and opined Claimant was stable from a neurological standpoint. Claimant psychological condition had been full assessed and he referred Claimant to a psychiatrist. Dr. Brodie noted a trial return to work would be considered.

18. On June 18, 2019, Dr. Brodie evaluated Claimant, at which time Claimant was receiving treatment for headaches neck and back pain/spasms and visual disturbance. Dr. Brodie he confirmed Claimant remained on modified duty and limited her work to four hours a day. The ALJ inferred school was not in session when Dr. Brodie concluded Claimant could work modified duty at this appointment.

19. There was no evidence in the record that Employer offered modified duty to Claimant.

20. Claimant returned to Dr. Brodie on July 23, 2019. Claimant was reporting symptoms of fatigue, left sided jaw pain and left-sided neck pain. Positive facet loading was noted on the left, but no radiation of pain was found. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon of lower back; strain of muscle, fascia and tendon at neck level; adhesions and ankyloses of temporomandibular joint; left temporomandibular joint dysfunction.

21. After discussing her functionality for work, Dr. Brodie said Claimant could return to work with no restrictions.[5] Dr. Brodie noted there were improvements with regard to Claimant's cognitive functionality and vision issues. Dr. Brodie stated this was to be considered a trial to determine whether disability resulted from any potential symptomology that may occur while working. Dr. Brodie contacted Employer, but it was unclear what transpired regarding any discussions regarding Claimant's trial return to work.

22. KB[Redacted] of the Employer testified that an employee must complete a Fitness for Duty ("FFD") test to return to work for the Employer if an employee has not been working for three months or more due to some type of leave. Ms. KB[Redacted] testified that Claimant did not complete the FFD test and therefore was not capable of returning to her pre-injury employment position. The ALJ inferred that this was a policy of Employer that required completion to the FFD. Ms. KB[Redacted] testified that Claimant had not requested a repeat FFD test to date. Ms. KB[Redacted] testified that the Employer encouraged Claimant to apply for other positions with the Employer once she was advised she could not return to her pre-injury position.

[5] Exhibit C, p. 34.

23. Claimant testified that she attended a Fitness for Duty (FFD) test per request of the Employer but was not able to complete the FFD test due to dizziness. Ms. KB[Redacted] testified that Claimant did not complete the FFD and was not capable of returning to her pre-injury employment position. The ALJ was unable to conclude from the evidence in the record whether Claimant's position was open at the time she attended the FFD test. The imposition of this requirement contributed to Claimant's wage loss.

24. On August 2, 2019, Respondent filed a GAL terminating temporary total disability benefits as of July 23, 2019 per ATP, Dr. Brodie's report returning Claimant to regular work duty.

25. Claimant returned to Dr. Brodie on August 6, 2019. Dr. Brodie once again noted Claimant was able to return to full duty work. The ALJ noted Dr. Brodie did not appear to evaluate Claimant's ability to return to specifically her special education paraeducator position, as evidenced by his recommendation that Claimant obtain any employment.

26. Claimant underwent an independent medical exam with James E. Berwick, D.D.S at the request of Respondent on September 20, 2019. Dr. Berwick noted Claimant was not struck directly in the mandible and she did not have a mechanism of injury that would have caused derangement of the TMJ-s. Dr. Berwick said her symptoms of parafunction were like not related to the work injury. Dr. Berwick opined that Claimant's dental, face, jaw, and/or temporomandibular (TMJ) conditions were not related to the January 22, 2018 incident.

27. Dr. Brodie evaluated Claimant on October 31, 2019 at which time Claimant reported continued treatment for headaches and visual disturbance. Dr. Brodie noted palpable tenderness to the cervical spine, as well as the sensation of pain and reduced ROM in left rotation and left lateral bending. Dr. Brodie's diagnoses were: concussion without loss of consciousness; strain of muscle, fascia and tendon at neck level; adhesions and ankyloses of temporomandibular joint; left temporomandibular joint dysfunction. The WCM 164 indicated Claimant could return to regular duty.

28. On November 11, 2019, Claimant underwent an independent medical examination with Carlos Cebrian, M.D. at the request of Respondent. At that time Claimant's symptoms. Claimant's work-related diagnoses included mild traumatic brain injury; cervical strain. Dr. Cebrian opined that any injury was mild and Claimant could be expected to recover. Dr. Cebrian said Claimant's complaints were somatic in origin and her pain complaints were out of proportion to the objective medical evidence. Dr. Cebrian opined the request for Botox treatment and injections should be denied as not related to the work injury.

29. Dr. Cebrian opined Claimant was at maximum medical improvement as of November 11, 2019 (and potentially as early as March 31, 2019) as Dr. Cebrian opined Claimant had a 0% permanent medical impairment, as defined by the *AMA Guides*. There was no evidence that Dr. Cebrian performed ROM testing of Claimant's cervical spine

with dual inclinometers. Dr. Cebrian stated Claimant was able to work in a full and unrestricted capacity and there was no claim-related basis for restrictions, either temporary or permanent. Dr. Cebrian's opinion regarding permanent impairment was not persuasive the ALJ.

30. Claimant was evaluated by Dr. Brodie on multiple occasions over the next eight months. The following summarizes Dr. Brodie's opinions with regard to Claimant's return to work:

- July 23, 2019: return to work–no restrictions. Dr. Brodie referred to this as a "trial and said clinically assumed that vision-based dysfunction is responsible for patient's intermittent residual symptomology."
- August 6, 2019: released to unrestricted work "including work with another employer".
- August 22, 2019: released to return to full duty-no restrictions.
- October 4, 2019: able to work full duty–no restrictions.
- October 31, 2019: return to work full duty–no restrictions.
- November 11, 2019: return to work full duty–no restrictions.
- December 19, 2019: return to work full duty–no restrictions. Dr. Brodie noted Claimant asked for work restrictions.
- January 6, 2020: return to work full duty–no restrictions. Dr. Brodie discussed restrictions for visual impairment
- January 20, 2020: return to work full duty–no restrictions.

31. The ALJ concluded Claimant's admitted work injury and its sequalae following it caused her to lose wages.

32. Claimant returned to Dr. Brodie on February 27, 2020. At that time, Dr. Brodie discussed her treatment with Dr. Tanner, specifically that the latter was not able to provide a prognosis and that it was difficult to determine whether the injections were beneficial or palliative. Dr. Brodie opined that the it was not possible to say there was an objectively-based trend toward continuous improvement from the treatment for migraine headaches, neck pain and fatigue. Dr. Brodie's evaluation of Claimant documented spasm in the cervical spine. The ALJ found this was evidence of continued cervical spine dysfunction.

33. Dr. Brodie concluded Claimant was at MMI. Dr. Brodie assigned a 20% whole person impairment pursuant to the *AMA Guides* for a neurological impairment using table 1, page 109, episodic neurologic disorders, section B. This was related to the convergence disorder and relative consistency of clinical assessments regarding central nervous system dysfunction. Dr. Brodie stated it was less than 50% probable that Claimant sustained a permanent cervical injury. Dr. Brodie did not provide any detail regarding this analysis. There was no evidence in the record that Dr. Brodie performed ROM testing of Claimant's cervical spine with dual inclinometers.

34. Dr. Brodie recommended maintenance treatment in the form of additional 6 sessions of cognitive rehabilitative/linguistic therapy and additional six sessions of

migraine headache disorder treatment with Dr. Tanner. Dr. Brodie released Claimant to work full duty with no restrictions.

35. The ALJ found that the treatment records of Dr. Brodie/Peak Form reflected more than two years of symptoms and treatment for the cervical spine.

36. Claimant continued to receive treatment for visual disturbance after MMI. Dr. Hutchins completed a form "to determine if the employee has a medical condition that prevents her from returning to work without accommodations". Dr. Hutchins' response, dated May 11, 2020, stated that Claimant was still under her care and she has substantial impairment walking and seeing. [6] Dr. Hutchins stated Claimant also had major impairment is learning, reading, thinking, concentrating, and memorizing. She had moderate impairment for numerous others including working and interacting with others. Dr. Hutchins said Claimant had "difficulty functioning in noisy environments with a lot of movement present", had difficulty walking and this made her nauseous**.** Dr. Hutchins opined that she was unable to predict when the employee is likely to return to full time work. The ALJ concluded Dr. Hutchins' opinion that Claimant could not return to work without restrictions.

37. Respondent-Employer also sent the same form to Allison Gray, M.D., a neurologist that was treating Claimant for her post-concussion syndrome and migraines. Her response was dated April 27, 2020. She noted several areas in which Claimant was substantially impaired including writing, concentrating, hearing and seeing. There were other areas of moderate impairment like interacting with others, memorizing, learning and "working". Dr. Gray stated that reasonable accommodations would include allowing breaks every two hours for 15 minutes, limiting work to 5-6 hours a day, reducing screen time as much as possible, allow use of ear plugs to reduce noise, and tinted glasses to reduce light**.** Dr. Gray said it was unknown if Claimant could return to full time work, but possibly in August of 2020.[7]

38. On July 6, 2020, Claimant underwent the DIME, which was performed by Dr. Reichhardt. At that time, she reported pain in her jaw, which radiated to the neck, shoulder, arm and left thumb when it flared up. She had intermittent pain in the right thumb, but did not have low back pain. Claimant also reported decreased attention, along with visual symptoms. On examination, Dr. Reichhardt noted Claimant appeared to be uncomfortable during the evaluation and had pain in the cervical spine. Claimant's gait, balance and coordination were normal. Her reflexes were normal in the upper and lower extremities. Cervical range of motion was: 15/4 flexion, extension 25/5, right lateral bending 29/5, left lateral bending 30/3 right rotation 45, left rotation 30. Dr. Reichhardt did not provide an explanation as to the

39. Dr. Reichhardt's clinical diagnoses were: diffuse cervical, periscapular pain-probable myofascial pain; jaw pain, possible myofascial pain superimposed on a subluxed

[6] Exhibit 13, pp. 697-698.

[7] Exhibit 4, pp. 484-487.

disc. (Myofascial pain was work related and subluxed TMJ was likely not work related.); possible TBI with ongoing visual symptoms; assorted tinnitus following swimmers ear; decreased facial sensation, non-work related. Dr. Reichhardt concluded Claimant was at MMI as of February 27, 2020 and assigned a 20% medical impairment for the TBI, specifically for episodic neurologic disorder for moderate interference with daily activities.

40. Dr. Reichhardt concluded there was no permanent impairment for the temporomandibular joint dysfunction and no impairment for psychological dysfunction or the lumbar spine. He stated Claimant did not have a specific cervical spine disorder. He opined Claimant's diagnosis was probable generalized myofascial involvement.[8] The ALJ noted Claimant's treatment for cervical issues was part of the medical records summary in the DIME report, however, Dr. Reichhardt did not provide any detail regarding this analysis. There was no evidence in the record that Dr. Reichhardt performed ROM testing of Claimant's cervical spine with dual inclinometers (i.e. no worksheets were included.)

41. On September 4, 2020, an FAL was filed on behalf of Respondent, admitting for Dr. Reichhardt's medical impairment rating. The FAL admitted for maintenance medical treatment.

42. Claimant was evaluated by Dr. Parry on February 9, 2021. She reported continuous headaches and some degree of neck pain since the time of the accident. Claimant told Dr. Parry she responded only on a short-term basis to intervention such as medial branch blocks, rhizotomy, chiropractic and massage therapy. She also had fatigue with visual tasks and increased noise. On examination, Claimant had a notable scoliotic curve convex to the right in the mid thoracic area. Her cervical spine had increased paravertebral muscle spasm, more on the left than the right. Tenderness was also noted on the left medial scapular border, but no scapular winging. Claimant had some mild middle trapezius weakness, but otherwise full strength at the shoulder, elbow, wrist and fingers.

43. Claimant's cervical ROM was measured at 40° of flexion 40° of cervical extension, 25° of right lateral flexion, 20° of left lateral flexion, right rotation was 65° and left rotation was 36°. Dr. Parry opined Claimant's direct work-related injury included the following diagnoses: mild traumatic brain injury; central vestibular dysfunction, with the possibility of additional peripheral vestibular function; visual processing and binocular dysfunction; probable skew deviation and conjugate eye movement dysfunction; cervical strain.

44. Dr. Parry concluded Claimant was not at MMI, as she has never had a true course of vestibular rehabilitation, coupled at the appropriate time with vision therapy. Dr. Parry stated Claimant should have electrocochleography, if it had not been done in the past as part of the vestibular evaluation. Dr. Parry provided a provisional medical impairment rating, pursuant to the *AMA Guides* of 15% impairment for the cervical spine, which included 4% for specific disorder and loss of ROM at 11%; for a total of 15%. She also had a 20% impairment for a traumatic brain injury, including the headache, vestibular

[8] Exhibit H, p. 260; Exhibit 8, p. 569.

and visual dysfunction. Dr. Parry determined Claimant sustained a 32% whole person impairment. The ALJ credited Dr. Parry's opinion that Claimant had a permanent impairment to her cervical spine and for the brain injury.

45. Claimant testified that treatment she received from the various physicians since being placed at MMI has improved her condition.

46. Dr. Brodie, Dr. Reichhardt and Dr. Parry concluded Claimant sustained a 20% medical impairment related to the TBI. The ALJ credited these opinions and found Claimant sustained a 20% whole person impairment for brain-episodic disorders (as defined by the *AMA Guides*) as a result of her work injury.

47. Dr. Parry's opinions regarding MMI and permanent impairment differed from Dr. Reichhardt's.

48. Claimant did not prove that it was highly probable that Dr. Reichhardt was incorrect with regard to the issue of MMI.

49. Claimant proved that it was highly probable that the conclusions of Dr. Reichhardt were incorrect with regard whether she had permanent impairment to the cervical spine.

50. The ALJ determined Claimant overcame the opinions of DIME physician, Dr. Reichhardt as to cervical impairment and found she had a Table 53 impairment. Drs. Brodie, Reichhardt and Parry all agreed regarding her TBI impairment.

51. Claimant sustained a wage loss as a result of her work injury and she met her burden of proof and established she was entitled to TTD benefits from August 2, 2019 through February 27, 2020.

52. Claimant met her burden of proof and established she was entitled to PPD benefits based upon a 15% impairment of the cervical spine.

53. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME

As determined in Findings of Fact 2–5, Claimant suffered an admitted industrial injury on January 22, 2018 when the back of her head was struck by a soccer ball that was either thrown or kicked by a student. Claimant reported pain in the upper and lower back, neck, as well as nausea and weakness. *Id.* She was diagnosed with a mild TBI, concussion, lumbar and cervical strain. Claimant was also treated for visual disturbance, headaches and fatigue. *Id.* These symptoms were such were such that a CT scan was ordered on February 6, 2018. (Finding of Fact 6).

As found, Claimant also had symptoms related to her cervical spine immediately after the work injury. (Findings of Fact 4-5). Claimant underwent an MRI of the cervical spine and the ALJ inferred this was ordered because of Claimant's symptoms. (Finding of Fact 9). The medical records admitted at hearing reflected the fact that Claimant required treatment for a multiplicity of problems, which included visual disturbance, headaches, along with neck and back pain. These records reflected treatment from January 2018 through February 2020. As found, Dr. Brodie, who oversaw Claimant's treatment for much of this time included cervical spine diagnoses in his regular reports.

Dr. Brodie concluded Claimant was at MMI as of February 27, 2020. (Finding of Fact 33). As found, Dr. Brody decided Claimant did not have a permanent medical impairment in her cervical spine, but did not provide an explanation of his reasoning. *Id.* The ALJ also found Dr. Brodie did not measure Claimant's cervical ROM as part of this evaluation. *Id.*

Claimant underwent a DIME on July 6, 2020, which was performed by Dr. Reichhardt. As found, Dr. Reichhardt recorded some findings with regard to Claimant's cervical ROM, but did not provide an explanation as to the significance of his

measurements. (Finding of Fact 38). Dr. Reichhardt did not include the work sheets to demonstrate he tested Claimant's cervical spine ROM with dual inclinometers, as required. Dr. Reichhardt, while referencing Claimant's treatment for her cervical spine, did not specifically address the question of a Table 53 impairment. (Findings of Fact 39-40). Claimant then filed the instant AFH to contest Dr. Reichhardt conclusions.

The ALJ noted the question of whether Claimant overcame Dr. Reichhardt's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Claimant relied solely on the opinions of Dr. Parry to question the finding of MMI. (Finding of Fact 44). In the case at bar, the ALJ concluded Claimant did not adduce sufficient evidence to overcome Dr. Reichhardt's conclusion that she was at MMI. (Finding of Fact 48).

However, the ALJ determined Claimant met her burden of proof as whether she had impairment to the cervical spine. The ALJ's reasoning was twofold; first, Dr. Reichhardt did not provide an explanation as to why he concluded Claimant had no permanent cervical impairment. As found, his analysis was limited to two sentences, despite referencing Claimant's extensive cervical treatment in the records summary. The ALJ found there was no evidence in the record that Dr. Reichhardt performed ROM testing of Claimant's cervical spine with dual inclinometers. (Findings of Fact 38-40). The ALJ found that it was highly probable that the conclusions of Dr. Reichhardt were incorrect with regard to whether Claimant had permanent impairment to the cervical spine. (Finding of Fact 49).

Second, the ALJ found there was substantial support in Claimant's treatment records for a permanent medical impairment of the cervical spine. Dr. Brodie diagnosed Claimant with cervical sprain and dysfunction throughout his treatment of her in 2019-20. The ALJ found that the medical records in the record, including the treatment records of Dr. Brodie/Peak Form reflected more than two years of symptoms and treatment for the cervical spine. (Findings of Fact 13, 35). Yet, in his impairment report, Dr. Brodie concluded there was less than 50% probability Claimant had a permanent impairment to her cervical spine. The ALJ found he provided no analysis of the basis for this conclusion. There was also no evidence in the record that Dr. Brodie performed ROM testing of

Claimant's cervical spine with dual inclinometers. This was also true for Respondent's IME physician, Dr. Cebrian. (Finding of Fact 35).

In this regard, Dr. Parry was the only physician who tested Claimant's cervical ROM and this was more than a difference of opinion between the respective medical experts. Dr. Parry conducted ROM testing, pursuant to the *AMA Guides* and the ALJ credited her opinion regarding Claimant's medical impairment for that area of her body. (Finding of Fact 43). The ALJ concluded the dispute over Claimant 's impairment went beyond a difference in opinions and Claimant showed Dr. Reichhardt was more probably wrong in his conclusion. The ALJ determined Claimant met the criteria for a 15% whole person impairment rating for her cervical spine pursuant to Table 53 (*AMA Guides*) based upon Dr. Parry's opinion that she sustained this impairment as a result of her work injury. (Finding of Fact 44).

TTD Benefits

The issue of whether Claimant is entitled to TTD from July 23, 2019 through February 27, 2020 turned on whether she had a full duty release to return to work in on July 23, 2019 when Dr. Brodie returned her to full duty without restrictions. (Findings of Fact 20-21). Claimant contended that different ATP-s had issued work restrictions and therefore she was entitled to TTD benefits. Respondents disputed this and argued Dr. Brodie's return to work was a full duty release to return to work, which cut off their liability for TTD benefits. The determination of whether Claimant has been released to return to work by the attending physician is a question of fact. See *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo.App.1997).

Respondent cited *Burns v. Robinson Dairy, Inc*., 911 P.2d 661, 662 (Colo. App. 1995) for the proposition that TTD benefits were properly terminated when Dr. Brodie returned Claimant to her regular job. In *Robinson Dairy*, the employer and insurer admitted liability to temporary total disability benefits. Claimant's attending physician released the employee to return to work with full duties. Claimant attempted to return to work but alleged that he was unable to perform his duties. The ATP examined him and reiterated his opinion Claimant was able to work, had no permanent impairment and was at MMI. Other physicians who examined Claimant opined that he had not reached MMI. The ALJ found that Respondents properly terminated benefits pursuant to § 8-42-105(3)(c), C.R.S. based upon the attending physician's initial release to work. The Panel affirmed.

On appeal, the Court of Appeals affirmed and held where the attending physician had provided Claimant with a written release to work, the ALJ was bound to terminate TTD benefits pursuant to § 8-42-105(3)(c). Therefore, any evidence concerning Claimant's self-evaluation of his ability to perform his job was irrelevant and properly disregarded by the ALJ. The Court also reject Claimant's related contention that the denial of TTD benefits was erroneous because he was not yet at MMI, noting that "the occurrence of any one of the conditions enumerated in § 8-42-105(3) is sufficient to terminate benefits. Because the conditions are separated by the word "or," it is presumed

that the disjunctive sense was intended". *Burns v. Robinson Dairy, Inc*.,*supra*, 911 P.2d at 662-663.

However, the ALJ determined the record in the instant case contained conflicting opinions from attending physicians regarding Claimant's release to work, including ATP-s who evaluated Claimant after the Dr. Brodie released her to return to work and thus, the facts in this case diverge from those in *Burns v. Robinson Dairy, Inc*., *supra,* 911 P.2d at 661. As found, there was also a difference of medical opinions between Dr. Brodie and Drs. Hutchins and Gray. More particularly, the ALJ found these other ATP-s were still issuing work restrictions after this time (and after the MMI determination), which limited Claimant's return to work. (Finding of Fact 36-37). The facts in this case distinguish it from *Burns v. Robinson Dairy, Inc*., supra in that at least one ATP, Dr. Hutchins restricted her ability to return to full duty. *Archuletta v. Industrial Claim Appeals Office,* 381 P.3d 374 (Colo. App. 2016).

There were questions regarding whether Claimant could return to work without restrictions. Dr. Brodie initially characterized the return to work as a "trial" return to work on July 23, 2019. (Finding of Fact 21). The WCM 164 completed by Dr. Brodie specified Claimant had no restrictions, which Dr. Brodie then maintained through each subsequent evaluation to the time he placed her at MMI. (Finding of Fact 30). However, the ALJ found that Dr. Brodie did not appear to evaluate Claimant's ability to return to her para professional position in a full-time capacity in his subsequent evaluations, as evidenced by his recommendation that Claimant obtain any employment. (Finding of Fact 44).

In addition, there was no evidence that Claimant's position (or another para-educator position) was available and open at the time Dr. Brodie returned Claimant to work. As part of this issue, the evidence showed Employer required Claimant to complete a Fitness for Duty test to return to her position, which Claimant could not. (Finding of Fact 44). This requirement was imposed because Claimant had been off work for more than three months. The ALJ determined that the FFD test requirement after Claimant's work injury was a factor in her wage loss. (Finding of Fact 23). The ALJ found Claimant's wage loss was related to her work injury. (Finding of Fact 31).

Accordingly, the ALJ found Claimant met her burden of proof and is entitled to TTD benefits from August 2, 2019 through February 27, 2020 when Dr. Brodie placed her at MMI. (Finding of Fact 51).

ORDER

It is therefore ordered:

1. Claimant is at MMI.

2. Respondent shall pay TTD benefits from July 23, 2019 through February 27, 2020.

3. Respondent shall pay PPD benefits based upon a 32% whole person impairment, including medical impairment for Claimant's cervical spine and Brain-episodic disorders.

4. Respondent is entitled to a credit for PPD benefits previously paid.

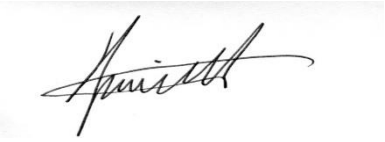
5. Respondent shall pay statutory interest at 8% on all benefits not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section §8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm .

DATED: September 21, 2022

STATE of COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-158-988-003

ISSUE

1. Did Respondents prove by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury?

2. If Respondents proved by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury, can Respondents withdraw the prior admission of liability?

3. Did Respondents prove by a preponderance of the evidence that Claimant committed fraud, and if so, are Respondents entitled to reimbursement for the amount of medical and temporary disability benefits issued on the claim?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a ramp agent for Employer. On November, 6, 2020, Claimant lifted a piece of luggage and felt a pain in her belly button. (Tr. 22:16-23).

2. Claimant went to Concentra that same day and was evaluated by Jenelle Tittelfitz, PA-C. Claimant told Ms. Tittelfitz that she was lifting a 67-pound bag at work that morning, and felt a lot of pain. She rated her pain as a 10/10. Claimant described "a sudden onset of sharp shearing pain in the left lower abdomen with pain radiating down to her pelvis" after lifting the bag. By the time of the evaluation, the pain was constant, stabbing, and worse with movement or forward bending. Claimant admitted to not feeling well for the prior two weeks, but no additional details are included in the medical records. Ms. Tittelfitz noted Claimant's surgical history of a tubal ligation two years prior. Ms. Tittelfitz diagnosed Claimant with an abdominal wall strain, and ordered a stat CT scan of Claimant's abdomen and pelvis. (Ex. B).

3. A CT scan was performed on Claimant that day. According to the radiologist, the impression was an "umbilical hernia *unchanged from previous imaging*." (emphasis added). The report noted that the imaging was compared to imaging from November 2, 2020, just four days prior. (Ex. K).

4. The November 2, 2020 CT scan was ordered on October 26, 2020 by Quinn Litchfield, D.O. at Alpine Family Practice. Claimant saw Dr. Litchfield on October 26, 2020 for a well-woman examination. (Ex. D).

5. The medical records indicate that Claimant had a well-woman examination and noted she had a "pain in [her] stomach" with her lower left quadrant being worse. Claimant stated that the pain was a 9/10, would come and go, and felt like cramps/contractions.

Dr. Litchfield ordered a CT scan of Claimant's abdomen and pelvis. (Ex. D). Dr. Litchfield wanted Claimant to return in one to two weeks to follow up on her abdominal and pelvic pain. Claimant testified that the pain was just on the left side of her stomach. (Tr. 29:2-10). According to the November 2, 2020 CT report, claimant underwent a CT of her abdomen due to "left lower quadrant abdominal and back pain over 4 months." (Ex. K). Claimant's November 2, 2020 CT scan revealed a "prominent umbilical and infraumbilical hernia." *Id.*

6. Claimant testified that when she had her well-woman examination on October 26, 2020, she thought she might have had a tubal pregnancy. (Tr. 27:7-18). Claimant testified that Dr. Litchfield ordered the November 2, 2020 CT scan because he thought Claimant may have had a tubal pregnancy. (Tr. 47:24-48:10). According to the medical records, Dr. Litchfield ordered a urine pregnancy test. (Ex. D, p. 105).

7. The ALJ finds that as of October 26, 2020, Claimant thought she was pregnant, and Dr. Litchfield ordered a urine pregnancy test for Claimant.

8. As of November 6, 2020, however, Claimant knew she was not pregnant. Prior to receiving the CT scan of her abdomen and pelvis, Claimant completed a Clinical Screening Form. In response to the question whether there was any possibility of pregnancy, Claimant answered "no" two times. (Ex. K pp. 259-60).

9. Claimant testified she did not know the results of the November 2, 2020 CT scan when she went to Concentra on November 6, 2020 for her alleged work injury. (Tr. 32:1-9). Claimant further testified she told her Concentra doctors about the CT exam on November 2, 2020, but there is no evidence of this in the medical record. (Tr. 32:14-22).

10. At the hearing, Claimant testified that she injured herself at work several days ***prior*** to the November 6, 2020 incident. Claimant testified she and a coworker were lifting human remains and she felt a severe pain in her abdomen that caused her to go home for the day. According to Claimant, this injury occurred on or about October 30, 2020. (Tr. 31:8-13). Claimant further testified that this injury "started the process" and caused her pain. (Tr. 27:19-24).

11. Claimant testified that she told her supervisor about the alleged injury on or about October 30, 2020, but her supervisor did not report the injury. (Tr. 24:16-25:2).

12. The alleged injury on or about October 30, 2020 is not referenced in any of Claimant's medical records. The ALJ finds that Claimant did not tell any of her medical providers about the alleged injury on or about October 30, 2020.

13. TG[Redacted] is a claims adjuster for Sedgwick, CMS, the third-party administrator on this claim. Ms. TG[Redacted] took an initial statement from Claimant shortly after her November 6, 2020 alleged injury.

14. Ms. TG[Redacted] testified that when she specifically asked Claimant if she had any prior abdominal problems or hernias, Claimant told Ms. TG[Redacted] she had no prior hernias or abdominal pain. (Tr. 43:1-7). Claimant did not dispute this testimony.

(Tr. 33:4-9). Claimant further testified that she did not tell Ms. TG[Redacted] about the alleged work injury on or about October 30, 2020. (Tr. 33:12-19).

15. Ms. TG[Redacted] testified that because Claimant reported no prior hernias or abdominal symptoms, Respondents accepted the claim and admitted liability. (Tr. 43:20-23).

16. Claimant had abdominal issues in 2018. On August 24, 2018, after giving birth, Claimant underwent a post-partum tubal ligation that resulted in a large periumbilical hematoma. On December 21, 2018, Claimant was seen at Cornerstone Family Practice for abdominal pain. Claimant reported generalized abdominal pain, especially behind her umbilicus. (Ex. I).

17. On June 8, 2021, at Respondents request, John Burris, M.D., performed an independent medical examination. Claimant told Dr. Burris she had laparoscopic tubal ligation surgery in 2018. Dr. Burris noted in his report that Claimant denied any prior abdominal pain or problems or abdominal hernias. (Ex. A, p. 2). Claimant confirmed this, and testified she told Dr. Burris she did not have any prior abdominal pain or hernias. (Tr. 23:3-14).

18. Dr. Burris testified via deposition that umbilical hernias are usually a congenital defect, and a lifting mechanism of injury is not one of the risk factors for developing an umbilical or incisional hernia. (Burris Dep. 11:16-18). Adult risk factors that contribute to umbilical hernias include obesity, multiple pregnancies and previous abdominal surgeries, all of which Claimant has or has had. (Ex. A, p. 10; Burris Dep. 10:20-25 – 11:1-20).

19. Claimant's testimony regarding the timing and mechanism of her injury was inconsistent. The present claim is based on an alleged injury that occurred on November 6, 2020. Specifically, Claimant reported having abdominal pain after lifting a 67-pound bag. (Ex. B).

20. Claimant testified that on or about November 1, 2020, she lifted human remains and left work early after the event because of pain in her abdomen. (Tr. 25:7-21).

21. Claimant later testified at hearing that her abdominal pain began three days prior to the November 2, 2020 CT scan, which would be October 30, 2020. She further testified she believed the pain was due to a tubal pregnancy rather than a hernia. (Tr. 26:22-27:18).

22. On October 26, 2020, ten days prior to the alleged injury on November 6, 2020, Claimant had a well-woman examination where she reported having 9/10 left sided stomach pain that comes and goes. (Ex. D). Claimant testified she thought she may be pregnant, and Dr. Litchfield ordered a urine pregnancy test. But by November 6, 2020, Claimant knew she was not pregnant. (Ex. K).

23. The ALJ finds Claimant's timeline of events and mechanisms of injury to be inconsistent and lacking credibility.

24. After reviewing Dr. Burris's independent medical examination report, Claimant's ATP, Amanda Cava, M.D. agreed Claimant did not sustain a work-related injury on November 6, 2020. (Ex. B).

25. The ALJ finds that Claimant did not sustain a compensable work injury on November 6, 2020.

26. Ms. TG[Redacted] testified that she relied on Claimant's statement she had no prior abdominal problems or hernias to move forward with accepting the claim. Ms. TG[Redacted] testified that had she known about a preexisting condition, she would have requested prior medical records to make a determination regarding compensability. (Tr. 43:16-23, 44:2-7).

27. The ALJ finds that Claimant provided incomplete and materially false information to Respondents.

28. Ms. TG[Redacted] testified Respondents paid a total of $44,339.71 on this claim based on Claimant's representations. Of this amount, $8,796.48 were temporary total disability benefits and $35,543.23 were medical benefits. (Tr. 45:11-23).

29. Claimant testified that she has three different types of insurance and would not have committee fraud. (Tr. 4:1-6)

30. The ALJ finds that on multiple occasions, Claimant was not forthcoming regarding her past abdominal issues, particularly as they related to her 2018 tubal ligation and a possible pregnancy on October 26, 2020. Claimant was truthful in telling Ms. TG[Redacted] that she did not have a past history of hernias.

31. While Claimant knew by November 6, 2020 that she was not pregnant, the ALJ credits Claimant's testimony she did not know the results of her November 2, 2020 CT scan.

32. The ALJ finds that Claimant did not make a knowingly false representation with the intention that it be acted upon. Respondents did not prove by a preponderance of the evidence that Claimant had an intent to deceive and defraud Respondents.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. §8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H&H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

As of November 2, 2020, four days before the alleged word-related injury, Claimant's CT scan indicated she had an umbilical hernia. On November 6, 2020, after Claimant reported abdominal pain after lifting a 67-pound bag, she went to Concentra for an evaluation. Claimant was diagnosed with an abdominal strain, and Ms. Tittelfitz ordered a CT scan of Claimant's abdomen. The November 6, 2020 CT scan showed "umbilical hernia unchanged from previous imaging." Thus, there is no causal nexus between Claimant's umbilical hernia and her alleged work injury on November 6, 2020. As found, Claimant did not sustain a compensable work-related injury on November 6, 2020. (Findings of Fact ¶ 25).

Withdrawal of Admissions

The beneficial intent of the Act is predicated on claimants providing accurate information. *Vargo v. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981). Therefore, when a claimant supplies materially false information upon which his employer and its insurer relied in filing an admission of liability, the court is justified in declaring the admission void *ab initio*. *Id.*; *Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985); *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995); *West v. Lab Corp. of America*, W.C. No. 4-684-982 (ICAO February 27, 2009). *Vargo* and *Lewis* stand for the proposition that the authority of an ALJ to remedy fraud is limited to the express provisions of the statute, except where the fraud occurs prior to entry of a final admission or closure of the claim by way of an order. In circumstances where no final adjudication has occurred, "retroactive withdrawal" is a permissible remedy. *Cf. Johnson v. Indus. Comm'n*, 761 P2d 1140 (Colo. App. 1988).

As found, Claimant told Ms. TG[Redacted] she did not have a history of abdominal pain and she did not have a history of hernias. But on October 26, 2020, less than two weeks before the alleged work-related injury, Claimant complained of abdominal pain at her well-woman examination, and Dr. Litchfield ordered a CT scan of her abdomen. On November 2, 2020, Claimant underwent a CT scan of her abdomen and pelvis that indicated she had a prominent umbilical and infraumbilical hernia. As found, Claimant did not know the result of her CT scan on November 6, 2020 when she was treated at Concentra and had another CT scan. Claimant did not tell Ms. TG[Redacted] about her appointment on October 26, 2020, where she complained of abdominal pain, nor did she tell her that she had a CT scan a few days prior. Claimant testified that she told the physicians at Concentra about the November 2, 2020 CT scan. Ms. TG[Redacted] credibly testified that had she known of Claimant's prior abdominal problems, she would have requested medical records to conduct a further investigation. As found, Respondents relied on the information provided by Claimant in filing the admission of liability. (Findings of Fact ¶ 26). Claimant omitted material facts regarding her recent appointment with Dr. Litchfield and the CT scan that was ordered because of her abdominal pain. (Findings of Fact ¶¶ 27 and 30).

As found, Claimant did not suffer a work-related injury. (Findings of Fact ¶ 25). Respondents have proven by a preponderance of the evidence that Claimant's medical condition and subsequent medical treatment were not work-related. Accordingly,

Respondents' admission of liability is void *ab initio*, and Respondents can withdraw the prior admission of liability.

Fraud

To prove fraud, a party must generally show the following: (a) a party made a false representation of a material fact; (b) the party knew that the representation was false; (c) that the person to whom the representation was made was ignorant of the falsity; (d) that the representation was made with the intention that it be acted upon; and (e) that the reliance resulted in damages to the plaintiff. *See Nelson v. Gas Research Institute*, 121 P.3d 340, 343 (Colo. App. 2005). The existence of these elements is generally a question of fact for determination by the ALJ. *See Vargo, supra*. Because proof of fraud is a factual issue, the ALJ may base her decision on inferences drawn from circumstantial evidence, as well as direct evidence. *See Elec. Mutual Liab. Insur. Co. v. Indus. Comm'n,* 391 P.2d 677 (1964). Insofar as the ALJ's inferences are supported by substantial evidence in the record they must be upheld on review. *May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo.App.1988); *Essien v. Metro Cab, Inc.*, W.C. No. 3-853-693 (I.C.A.O. Aug. 22, 1991)

It is undisputed that Respondents relied upon Claimant's assertion to Ms. TG[Redacted] that she did not have any prior abdominal pain or prior hernias in admitting liability on this claim without any further investigation, and paying medical benefit and temporary disability payments. (Findings of Fact ¶ 26). Respondents, however, have not proved by a preponderance of the evidence that the representation was made with the intention that it be acted upon. As found, Claimant testified that despite having a tubal ligation in 2018, she thought she may have had a tubal pregnancy, and she thought this was the source of her abdominal pain. (Findings of Fact ¶ 6). On October 26, 2020, Claimant was seen for a well-woman examination, and Dr. Litchfield ordered a urine pregnancy test. The ALJ credits Claimant's testimony that she thought she could possibly be pregnant, and thought that was why Dr. Litchfield ordered a CT scan of her abdomen and pelvis. (Findings of Fact ¶ 7).

As found, Claimant did not make a knowingly false representation with the intention that it be acted upon. (Findings of Fact ¶ 32). Claimant told Ms. TG[Redacted] that she never had a prior hernia nor abdominal pain. The ALJ infers that Claimant's response regarding abdominal pain related to any past hernias, not abdominal pain in general. Ergo, while Claimant omitted material facts regarding her October 16, 2020 well-woman examination and accompanying abdominal pain, the ALJ finds that Claimant did not do so with the intention that Respondents act upon false information. Respondents have failed to prove by a preponderance of the evidence that Claimant committed fraud.

Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323

(Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). As found, Claimant did not suffer a compensable work-related injury, thus she is not entitled to TTD benefits. Respondents paid Claimant $8,796.48 in TTD benefits. Claimants must reimburse Respondents in the amount of $8,796.48.

Respondents are asking for a payment of $500 per month from Claimant until the benefits are fully repaid. The Colorado Court of Appeals has held that ALJs have discretion to fashion such a remedy with regard to overpayments. *See Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (I.C.A.O. Feb. 8, 2018), *citing Simpson v. Indus. Claim Appeals Offi*ce, 219 P.3d 354 (Colo. App. 2009; *see also Arenas v. Indus. Claims Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *see Louisiana Pacific Corp v. Smith*, 881 P.2d 456 (Colo. App. 1994). There is no evidence in the record regarding Claimant's ability to pay Respondents $500 per month. The ALJ finds that payments of $200 per month are reasonable.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work-related injury on November 6, 2020.

2. Respondents may withdraw the prior admission of liability.

3. Claimant must reimburse Respondents for the temporary disability benefits issued on this claim in the amount on $8,796.48 as she did not sustain a compensable work-related injury on November 6, 2020.

4. Claimant shall pay Respondents $200 per month.

5. Respondents failed to prove by a preponderance of the evidence that Claimant committed fraud.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-149-765-003

ISSUES

The issues set for determination included:

- Did Respondents overcome the opinion of Division of Workers' Compensation IME ("DIME") physician (Miguel Castrejon, M.D.) by clear and convincing evidence that Claimant was not at MMI?

- Did Claimant overcome the opinion of Dr. Castrejon by clear and convincing evidence that his left knee condition and need for further treatment was not causally related to the October 2, 2020 date of injury?

- Did Respondents proved by a preponderance of the evidence that Claimant's average weekly wage ("AWW") should be reduced from $1,405.44 to $715.49 for purposes of future indemnity benefits awarded?

- Is Claimant entitled to temporary total disability ("TTD") benefits beginning June 11, 2021 and continuing as permitted by statute?

- Did Claimant prove by a preponderance of the evidence that Jay Lorton, M.D. is an authorized treating provider?

- Did Claimant prove by a preponderance of the evidence that he requires further medical treatment for left shoulder, left knee, left hip, and/or fractured femur as reasonably and necessarily related to the October 2, 2020 date of injury?

- Is Claimant entitled to disfigurement benefits.[1]

PROCEDURAL STATUS

A Summary Order was issued by the ALJ on July 22, 2022 and served on August 12, 2022. On July 29, 2022, Respondents requested a full Order. An Order granting an extension of time to submit Amended Findings of Fact, Conclusions of Law and Order was granted. Claimant and Respondents filed Amended Proposed Findings of Fact, Conclusions of Law and Order on August 22, and 23, respectively. This Order follows.

[1] A separate Order awarding disfigurement benefits was issued on May 3, 2022.

FINDINGS OF FACT

1. Claimant worked for Respondent-Employer as an over the road truck driver. Claimant testified he is sixty-seven years old is a 6'-7" tall and weighed 345 pounds.

2. Claimant's medical history was significant in that he suffered an injury to his left knee and leg on September 28, 2020. Claimant treated at St. Joseph Hospital at Medical Center in Phoenix and the CT scan showed no evidence of fracture or dislocation, but circumferential subcutaneous edema was present. Severe osteoarthritis was also present in the left knee. Claimant was offered a knee immobilizer and Tauruna Ralhan, M.D. recommended Claimant follow up with an orthopedist for further management of the knee pain.

3. There was no evidence in the record that Claimant required additional treatment for this injury or had work restrictions related to it.

4. Claimant also had preexisting conditions which included diabetes mellitus and morbid obesity.[2]

5. Claimant's taxable earnings through September 27, 2020 totaled $9,301.32. Claimant received a $63.00 per diem from Respondents for meals and other incidentals. DS[Redacted], who testified for Employer, confirmed the $63.00 was not included in Claimant's taxable income reported to the IRS.[3]

6. Claimant's per diem payment should not be included in his AWW since it was not included in his taxable income.

7. On October 2, 2020, Claimant suffered an admitted industrial injury when he fell while exiting his truck. Claimant missed a step and his left foot got caught in the grab bar, which broke his femur. Claimant testified that he thought he reinjured his left knee on October 2, 2020.

8. Claimant was treated in the Emergency Department at Denver Health and underwent a closed reduction percutaneous screw fixation of the left distal femur. Claimant was hospitalized through October 13, 2020. In a treatment note, dated October 8, 2020, the occupational therapist documented Claimant reported left arm weakness.

9. Additional diagnoses at time of Claimant's discharge included: acute hyperkalemia – resolved; CKD II; Diabetes Mellitus Type 2; bilateral lower extremity erythema; hypertension; morbid obesity; diabetic skin ulcer on the left foot; peripheral neuropathy; spina bifida; left lower extremity edema; and lower extremity cellulitis. The

[2] Exhibit J, p. 39.

[3] Exhibit F.

discharge records made no mention of symptoms or diagnoses related to Claimant's left ankle, left hip, or left shoulder. Claimant was discharged with a wheelchair.

10. A General Admission of Liability ("GAL") was filed on behalf of Respondents on or about October 16, 2020. The GAL admitted for TTD benefits paid at a rate of $936.95 per week, based upon an AWW of $1,405.44 per week.

11. Claimant testified he did not have separate residence and used his truck as his residence. Ms. DS[Redacted] confirmed Claimant drove a company-owned truck. Claimant testified he no longer had use of the truck after his injury. After his injury, Claimant was living at a Days Inn motel and he testified the cost was $68.11 per day.

12. The ALJ concluded the cost of the Claimant's motel should be included in the AWW. The cost of this housing was $476.77 per week ($68.11 x 7 days).

13. Claimant underwent rehabilitation at Sloan's Lake Rehabilitation and was then evaluated by ATP, Patrick Antonio, D.O. on December 10, 2020. Dr. Antonio's impression was femur fracture, left; status post-surgery. Dr. Antonio's treatment notes on January 7, February 4 and February 8, 2021; all referenced left arm/left shoulder pain and discomfort. Claimant received treatment to those areas of the body. The February 4 note reflected the fact Claimant was still wheel chair bound.

14. Claimant was evaluated by John Schwappach, M.D. at Denver Metro Orthopedics on January 11, 2021 evaluated Claimant's left hip and knee. Dr. Schwappach noted Claimant was making slow progress with rehabilitation and he noted interval healing of the left femur fracture. Dr. Schwappach diagnosed Claimant with severe end-stage arthritis of the left knee and noted left shoulder complaints. Dr. Schwappach was going to refer claimant to a physiatrist. PT was noted at progressive mobilization, upper body strength and strengthening of the affected extremity. The ALJ inferred Claimant reported pain in those areas of his body, which prompted Dr. Schwappach to evaluate same.

15. Dr. Schwappach evaluated Claimant on February 8, 2021, at which time Claimant reported the sensation of movement in his left knee, as well as pain in the left shoulder. A left shoulder subacromial steroid injection was performed Dr. Schwappach noted Claimant should be weight-bearing and continue with active/passive range of motion ("ROM") of the left knee.

16. On March 8, 2021, Claimant returned to Dr. Schwappach, who noted that Claimant had severe end-stage arthritis in the left knee and a total knee replacement procedure was not possible until Claimant was no longer using a wheelchair and could ambulate up and down the hall twice.

17. On April 13, 2021, Claimant was evaluated by Dr. Antonio for a recheck of left shoulder pain. Claimant was referred to an orthopedic specialist for second opinion regarding left shoulder and left knee/femur.

18. Claimant underwent an MRI of his left shoulder on April 16, 2021 and the films were read by Trystain Johnson M.D. Dr. Johnson's impression was: (allowing for the motion artifact) suspect high-grade partial bursal sided tear near the distal anterior insertion of the supraspinatus, with more diffuse tendon strain and intrasubstance degeneration. Supraspinatus muscle belly edema also associated, subscapularis and infraspinatus tendinosis and articular sided fraying without tear. Chondromalacia was noted along the anterior glenoid and superior humeral head, with associated joint effusion and mild synovitis without loose body evident. Some posterior inferior capsular edema could be chronic capsulitis versus a sprain. The ALJ found the MRI provided objective evidence of what was causing symptoms in the left shoulder.

19. Claimant retuned to Dr. Antonio on April 30, 2021 who noted the referral to Dr. Hewitt for orthopedic second opinion has not occurred yet. Claimant states lateral shoulder pain is worse with movement and left knee/hip pain as well, even with movement in bed causing sharp pain. Claimant wanted to continue physical therapy and was still in a wheelchair.

20. On May 20, 2021, Claimant was evaluated by Lawrence Lesnak M.D., at the request of Respondents. At that time, Claimant complained of nearly constant left anterior shoulder pain and left axillary pain, as well as severe left anterior knee pain. Dr. Lesnak stated there was no evidence of specific knee joint effusion on exam; there was evidence of moderate bilateral knee joint crepitus, with passive range of motion ("ROM"), although knee joint instability was not present. Claimant was described as having good, pain-free, ROM of his cervical and thoracic spine, which was limited due to body habitus. Limitations in left shoulder ROM were noted. Moderate to severe muscle atrophy involving the left first dorsal interosseous muscle was present.

21. Dr. Lesnak's impressions were: subjective complaints of left anterior axillary pains with no current clinical evidence of specific left shoulder impingement syndromes; possible probable symptomatic left shoulder osteoarthritis/degenerative changes; subjective complaints of left anterior knee pains-probable symptomatic left knee osteoarthritis/degenerative changes; acute left mid-distal femoral shaft fracture with a non-displaced fracture line extending into the left femoral intercondylar region; chronic right knee, as well as right greater than left foot and ankle pains; polyarthritis; chronic right ulnar forearm and right ulnar hand numbness-chronic ulnar neuropathy.

22. Dr. Lesnak opined that none of Claimant's current complaints were related to the occupational injury that occurred on October 2, 2020. Dr. Lesnak stated Claimant's acute left mid-distal femur fracture was causally related to the occupational incident, however, the severe/advanced left knee osteoarthritis and any symptomatic left shoulder joint pathology was unrelated to the occupational incident. Dr. Lesnak also noted Claimant was morbidly obese, with a history of chronic untreated diabetes mellitus, hypertension, obstructive sleep apnea, and peripheral neuropathies, as well as what appeared to be chronic left ulnar neuropathy. Dr. Lesnak stated Claimant was at MMI.

23. Claimant was evaluated by Dr. Antonio on June 11, 2021. Claimant expressed a concern that he was still in a wheelchair and unable to walk without significant discomfort and instability. He also reported that his shoulder occasionally popped. He had limited use of the left arm. Dr. Antonio placed Claimant at MMI after receiving Dr. Lesnak's IME report. Dr. Antonio agreed with Dr. Lesnak that the left femur fracture was the only medical condition related to the October 2, 2020 date of injury and Claimant had no permanent impairment. Claimant was released to full duty. This occurred before the DIME was performed.[4]

24. There was no evidence in the record that Claimant has worked since his injury.

25. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on or about July 2, 2021. The FAL (undated) admitted for TTD benefits from October 3, 2020 through June 10, 2021 and the 0% medical impairment rating issued by Dr. Antonio.

26. On July 20, 2021, Claimant was evaluated at the Carillion Clinic in Virginia by Thomas Shuler, M.D. for left shoulder and left knee pain. Dr. Shuler noted Claimant was injured at work in October 2020 and his medical issues were complicated. Dr. Shuler characterized Claimant's left shoulder problems as chronic since his work-related accident.

27. Dr. Shuler opined Claimant had adhesive capsulitis and he would need to work on ROM and strengthening. Dr. Shuler recommended physical therapy and felt if he could get his motion back, he could consider arthroscopy. Regarding Claimant's left knee, significant osteoarthritis was present, particularly in the medial compartment. Dr. Shuler did not believe Claimant was a candidate for a total knee replacement, as his femur was not fully healed. Claimant would also need the femoral rod removed prior to any surgery on the knee. Dr. Shuler administered cortisone injection to the left knee at this visit.

28. On October 14, 2021, Claimant underwent a DOWC-sponsored IME, which was performed by Miguel Castrejon, M.D. At that time, Dr. Castejon noted Claimant was using a wheelchair and exhibited very poor balance, with a positive rhomberg test. The examination of the left shoulder revealed trapezius and rhomboid tenderness, but no muscle atrophy. Claimant was tender over the anterior capsule and AC joint, with limited ROM in the left shoulder. On examination of the left hip, mild trochanteric pain was noted, with no evidence of instability or impingement. The examination of the left knee revealed in the absence of effusion, with ROM 15 to 170°. Tenderness was present with lateral femoral condyle, with pain on patellar compression. Dr. Castrejon concluded Claimant was not at MMI with regard to the left shoulder and left hip.

[4] Exhibit M, pp. 67-69. There was no evidence Dr. Antonio evaluated the physical requirements of Claimant's job.

29. Dr. Castrejon specifically analyzed the issues of whether Claimant's left shoulder and left hip were related to the October 2, 2020 work injury, including a discussion of the anatomic structures involved.[5] Dr. Castrejon opined there was no direct injury to the left hip, but Claimant developed left trochanteric bursitis secondary to prolonged immobilization and sitting. Dr. Castejon concluded Claimant had a diagnosis of left shoulder impingement related to muscle weakness and instability that led to a decrease in the subacromial space, which caused the impingement. Dr. Castrejon opined Claimant's left shoulder condition was a compensable consequence of the industrial event for which medical treatment is indicated. The ALJ credited the opinion of Dr. Castrejon with regard to the relatedness of Claimant's left shoulder and left hip.

30. Dr. Castrejon diagnosed left knee osteoarthritis, which was characterized as nonindustrial. Dr. Castrejon noted there were questions regarding the left knee, including the x-ray form the September 29, 2020 injury, which possibly showed an underlying insufficiency fracture. There was also a note that Claimant had a torn meniscus, with a surgical repair, although this was not reported by Claimant. Dr. Castrejon concluded that Claimant's left knee condition was not worsen ed by the knee injury.

31. Dr. Lesnak issued a supplemental report after reviewing Dr. Castrejon's DIME report and concluded the Claimant was at MMI with no impairment related to the work injury. Dr. Lesnak's expert testimony was consistent with his previous reports. The ALJ determined Dr. Lesnak's opinion differed from Dr. Castrejon's and was less persuasive.

32. The evidentiary deposition of Dr. Lesnak occurred on March 9, 2022. Dr. Lesnak testified there was no evidence that Claimant sustained a left shoulder injury as a result of the industrial event. He testified that Dr. Castrejon noted Claimant did not report left shoulder symptoms until five weeks after the date of injury. Dr. Lesnak further testified that the left shoulder MRI scan demonstrated a bursal-sided tear which is a chronic degenerative condition.[6] Dr. Lesnak testified that Claimant's co-morbid conditions including polyarthritis, morbid obesity, diabetes, and degeneration in multiple other joints wholly support a finding that Claimant's left shoulder condition was not causally related to the October 2, 2020 date of injury. Dr. Lesnak stated that the medical evidence in the records did not support DIME Dr. Castrejon's opinion that the left shoulder symptoms and pathology were related to the October 2, 2020 date of injury. Dr. Lesnak's opinion diverged from Dr. Castrejon.

33. Regarding the diagnosis of left hip trochanteric bursitis, Dr. Lesnak testified that the two most common medical tests utilized for a diagnosis are the Ober's test and the FABER test. Dr. Lesnak stated Castrejon did not document using either of these tests during his evaluation of Claimant.[7] Dr. Lesnak testified that a greater trochanteric bursitis

[5] Exhibit N, pp. 87-89.

[6] Lesnak deposition p. 15:7-18.

[7] Lesnak deposition. p. 22: 24-25; p. 23, 1-25; p. 24, 1-11.

would not have been caused by the femur fracture. Rather, it is generally caused by repetitive motions, such as running. Dr. Lesnak stated that Claimant's sitting in a wheelchair was not a repetitive motion such that it caused the tendon to slide back and forth over the bony prominence of the bursa. Dr. Lesnak testified that to the contrary, individuals with greater trochanteric bursitis are recommended to perform more seated activities.

34. Neither Claimant nor Respondents proved that Dr. Castrejon's opinions were more probably wrong with regard to the issues of MMI and causation, respectively.

37. The ALJ concluded Claimant's left shoulder and hip, both of which had degenerative changes, were worsened by the October 2, 2020 work injury.

38. Claimant moved to Oklahoma and was evaluated by Jay Lorton, M.D. on December 21, 2021. Claimant testified Dr. Lorton had treated a friend. There was no evidence in the record that an ATP initially referred Claimant to Dr. Lorton. Dr. Lorton noted a history of left shoulder area pain since October 2020 when he slipped and fell getting out of his tractor-trailer truck. Dr. Lorton ordered an MRI.

39. On January 5, 2022, Claimant underwent an MRI of the left shoulder and the films showed: moderate to severe supraspinatus tendinosis with a very small interstitial split supraspinatus tendon footprint. Thin interstitial split posterior fibers supraspinatus tendon were located medial to its footprint. Moderate infraspinatus and subscapularis tendinosis; minimal subacromial subdeltoid bursitis and mild subcoracoid bursitis were all present. Mild degeneration was seen in the superior labrum, with thickening and scarring in the inferior glenohumeral ligament. The long head biceps tendon was intact and severe acromioclavical joint arthrosis with moderate to severe narrowing of the anteromedial aspect of the supraspinatus outlet was present along with Os acromiale (normal variant) with thin trace fluid in the synchondrosis. The ALJ found the MRI showed objective evidence of pathology in the left shoulder.

40. Claimant was evaluated by Nancy VanderMolen, D.O. at Concentra on January 21, 2022. The record contained two referrals from Dr. VanderMolen (who is an ATP), one of which was to Dr. Labutti at Advanced Orthopedics, the other was to Dr. Lorton at Advanced Orthopedics. The referral was at Claimant's request. Both referrals were dated January 21, 2022.[8]

41. On January 26, 2022, Claimant underwent left shoulder arthroscopic surgery, which was performed by Dr. Lorton. There was no evidence in the record that authorization was sought before the surgery was performed.

42. The ALJ concluded Claimant's left shoulder and hip, both of which had degenerative changes, were worsened by the October 2, 2020 work injury.

[8] Exhibit 37, pp. 226-227.

43. Dr. Castrejon's evaluation occurred after Dr. Antonio returned Claimant to work with no restrictions. Since Claimant is not at MMI (as found by Dr. Castrejon), he is entitled to TTD benefits.

44. Dr. Lorton is an ATP.

45. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

AWW

As determined in Findings of Fact 7-9, Claimant suffered an admitted industrial injury on when he broke his femur. Claimant required emergency medical treatment for the fracture including surgery. *Id.* Respondents admitted for the injury and a dispute arose concerning AWW. The ALJ determined the AWW issue implicated both § 8-42-102(2), C.R.S. and § 8-40-201(19)(b) , C.R.S. The former provides: "Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or

other remuneration which the injured or deceased employee was receiving at the time of the injury, and in the following manner; except that any portion of such remuneration representing a per diem payment shall be excluded from the calculation unless such payment is considered wages for federal income tax purposes".

§ 8-40-201(19)(b), C.R.S provides "the term wages includes the amount of the employees cost of continuing the employers group health insurance plan…and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)".

In the case at bar, Claimant sought a higher AWW, as he lost the use of his truck after his injury. Respondents correctly argued Claimant's per diem should not be included in the AWW. However, the ALJ determined the cost of Claimant's lodging should be included in his AWW, as he was provided a truck with a sleeper by Employer. (Finding of Fact 11). Claimant testified he did not have a separate residence and after the work injury he has been staying at a motel. *Id.* The only evidence in the record of the value of said lodging was Claimant's testimony. The Colorado Court of Appeals decision in *Western Cultural Resource Mgt v. Krull,* 782 P.2d 870, 871 (Colo. App. 1989) is apposite to this question.

The ALJ found Claimant's AWW calculation should include the cost of housing which is $476.77 per week ($68.11 x 7). (Finding of Fact 12). The ALJ agreed with Claimant's calculation: his AWW of $715.49 plus $476.7 totals $1,192.26. *Id.* Inclusion of the cost of housing achieves the overall objective in calculating the AWW, which is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993); *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

Respondents argued in their Amended proposed Order that Claimant's AWW should remain at the higher rate until Claimant obtains personal housing. Once Claimant obtained personal housing, Respondents asserted his average weekly wage should return to $715.49 per week. No authority was cited in support for this argument and the ALJ will not include it in the Order. However, this is without prejudice for Respondents to request a hearing on the issues of modifying or reopening Claimant's AWW, should Claimant's circumstances change.

Overcoming the DIME

In resolving the issues, the ALJ noted the question of whether Claimant overcame Dr. Castrejon's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475,

482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004).

In the case at bar, the ALJ determined that Respondents did not meet their burden of proof to overcome Dr. Castrejon's opinion that Claimant was not at MMI and that his hip and shoulder condition were related to the work injury. The ALJ credited Dr. Castrejon's opinion and determined the hip and shoulder were worsened by the industrial injury. (Finding of Fact 42). As found, Respondents offered Dr. Lesnak reports and expert testimony to controvert the conclusions of Dr. Castrejon. (Findings of Fact 20-22, 34-35). The ALJ determined this medical evidence constituted a differing opinion and did not meet the clear and convincing evidentiary standard to overcome the DIME's opinion. (Findings of Fact 36).

Likewise, Claimant argued that his knee condition was related to the injury and testified that he thought his left knee was worsened by his injury on October 2, 2020. (Finding of Fact 7). The ALJ found insufficient evidence was adduced by Claimant overcome Dr. Castrejon's opinion regarding his left knee. (Finding of Fact 36). Claimant did not meet did not meet the clear and convincing evidentiary standard to overcome the DIME's opinion.

Medical Benefits-Authorization

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to Claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom Claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010). In this case there was a dispute as to the propriety of the referral to Dr. Lorton.

Claimant admitted that he got the name of Dr. Lorton from a friend. (Finding of Fact 38). Subsequently he was referred to Dr. Lorton by Dr. VanderMolen. (Finding of Fact 40). Dr. VanderMolen is presumed to have exercised her independent medical judgment and the referral was not negated simply because Claimant got the name of Dr. Lorton from a friend. Under these facts, the ALJ concluded Respondents are required to pay for the medical treatment recommended by ATP, Dr. Lorton (and all referrals from him) as he was an ATP. (Finding of Fact 44). This did not include the surgery performed by Dr. Lorton for which authorization was not sought before the procedure. (Finding of Fact 41).

TTD Benefits

Respondents argued that the return to regular work by Dr. Antonio precluded the claim for TTD benefits. TTD benefits shall continue until the first occurrence of any of the following: "(1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment". § 8-42-105(3)(a-d), C.R.S.

On June 11, 2021, Dr. Antonio returned Claimant to work, with no restrictions. (Finding of Fact 23). The ALJ found that this return to work occurred before the DIME evaluation. *Id.* Dr. Castrejon's conclusion that Claimant was not an MMI was later in time and on this basis, the ALJ concluded Claimant was entitled to TTD benefits. (Finding of Fact 43).

ORDER

It is therefore ordered:

1. Respondents shall pay for reasonable and necessary medical treatment for Claimant to cure and relieve the effects of his shoulder, femur and hip injury.

2. Respondents shall pay for medical benefits provided by Dr. VanderMolen.

3. Claimant's request that Respondents pay for the shoulder surgery is denied and dismissed.

4. The ALJ found Dr. Lorton was an ATP after the referral on January 21, 2022 by Dr. VanderMolen. Respondents shall pay for reasonable and necessary medical treatment provided by Dr. Lorton (and his referrals), pursuant the Colorado Workers' Compensation Medical Fee Schedule.

5. Claimant's AWW is increased to $ 1,192.26 per week.

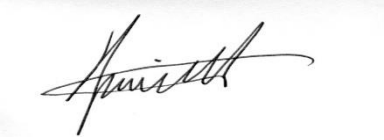
6. Respondents shall pay TTD benefits in the amount of $794.84 per week from June 11, 2021 to ongoing, until terminated by law.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2022

STATE of COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

Two separate claims were consolidated for purposed of hearing and judicial economy:

Issue with regard to W.C. No. 5-153-595-002, Date of Injury (DOI) October 23, 2020:

I. Whether Respondents have overcome the DIME physician's opinion with regard to the impairment provided in this matter.

Issues with regard to W.C. No. 5-184-071-002, DOI September 1, 2021:

II. Whether Claimant has proven by a preponderance of the evidence that Claimant was injured in the course and scope of his employment with Employer and if this claim is compensable.

If the September 1, 2021injury is compensable, then:

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to the alleged injury of September 1, 2021.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits.

V. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

VI. Whether Claimant has proven by a preponderance of the evidence the amount of Claimant's average weekly wage applicable to a September 1, 2021 claim.

STIPULATION OF THE PARTIES

At the commencement of the hearing Respondents advised that they were no longer wishing to litigate the issue of impairment or challenge the Division Independent Medical Examination (DIME) physician, Dr. Anjmun Sharma's opinion in the hernia claim for October 25, 2020, W.C. No. 5-153-595-002. Respondents offered to stipulate to filing a Final Admission of Liability consistent with Dr. Sharma's DIME report and Claimant accepted the stipulation.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

Case Number WC 5-153-595-002, for date of injury of October 23, 2020:

1. Claimant was a mechanical service technician for Employer since sometime in 2018 or 2019 and was 54 years old at the time of the hearing.

2. Respondents filed a General Admission of Liability on January 25, 2021 in the October 23, 2020 work related injury where Claimant injured his abdomen, causing a hernia. Claimant injured his abdomen when going up a ladder while carrying a second ladder, in order to reach a compressor that required a double ladder set up.

3. Claimant was placed at maximum medical improvement on August 30, 2021 by Dr. Scott Richardson, without restrictions, as Claimant had full function, and required no further medical intervention following surgical repair of the left abdominal hernia.

4. The parties proceeded through a DIME process, as Requested by Claimant, with Dr. Anjmun Sharma. Dr. Sharma issued a report dated July 28, 2021 stating that Claimant's impairment for his October 23, 2020 work related abdominal ventral hernia was 13% whole person impairment. Respondents withdrew the issue of challenging the DIME physician's report by clear and convincing evidence, and agreed that Respondents would file a Final Admission of Liability consistent with Dr. Sharma's report. This ALJ approves the above stipulation of the parties in W. C No. 5-153-595-002.

Case Number WC 5-184-071-002, for date of injury of September 1, 2021

5. On September 1, 2021, Claimant was working on the roof of a building, replacing a fan motor of a condenser. He climbed up to the roof by ladder. A portion of the roof was pitched (slanted slope) and then the condenser was on a flat part of the roof further up. When he was standing on the pitched portion of the roof with his left foot, in the process of stepping onto the flat portion of the roof with his right foot, Claimant twisted his left knee and felt a pop. At that point, his left knee twisted while his left foot was planted on the 8 or 9 pitched roof, which was approximately a 36 to 38 degree pitch, causing a popping in his left knee. He was carrying a condenser part and his tools at the time. Claimant stated that all his weight was on the left leg because he had lifted his right foot to step from the pitched area to the flat roof area.

6. Claimant stated that something snapped in his knee. Claimant did not feel immediate pain but by approximately 30 minutes later, the pain in his knee started to intensify on top of the knee as well as inside and on the outer portion of his knee. Initially he thought he might have pulled a muscle. Since he was on the last job of the day, Claimant went home, thinking he would sleep on it and see how he was feeling in the morning. But his knee continued to hurt and swelled up, with a horseshoe swollen area above the knee cap. He reported the injury the following day and was sent for a drug test that day at Concentra.

7. Claimant had a right knee injury. in approximately 2014 while in a walk in cooler, banging his knee in the cooler, causing a meniscus bruise. He had conservative care, with some time off. The problem resolved.

8. Claimant stated that he had never been diagnosed with arthritis, to his knowledge, before this September 2021 injury.

9. After Claimant reported the injury, he was sent to Concentra for a drug test on September 2, 2021, but he was not evaluated for the knee condition.

10. Claimant was first evaluated for the left knee injury on September 9, 2021 at Concentra Medical Center by Scott Richardson, M.D. Dr. Richardson took a brief history but failed to investigate or go into the mechanics of the actual injury. He diagnosed a left knee strain. He prescribed antiinflamatories medication, and referred Claimant to physical therapy. Dr. Richardson restricted Claimant to temporary restrictions, occasionally lifting & carrying up to 20 lbs. and frequently lifting up to 10 lbs.; no use of ladders, no kneeling, no squatting, sitting 50% of the time, may be on feet up to 15 minutes at a time and use cane as needed.

11. Dr. Richardson's records are somewhat contradictory. Under chief complaint he noted that Claimant "started experiencing "popping" in the left knee while working in 9.1.2021." Then he goes on to state "[T]he next day he started experiencing swelling and pain as well." However, in the history of present illness he noted that Claimant noticed that on the date of injury he had a "gradual onset of diffuse pain in his left knee with popping." The latter indicates that Claimant was experiencing the pain on the date of the injury itself. Under the review of systems, Dr. Richardson noted that Claimant had joint pain, muscle pain, joint swelling, joint stiffness and limping. Yet in the physical exam he found no swelling of the left knee. He did ultimately opine that Claimant's objective findings were consistent with the history and/or work-related mechanism of injury and illness.

12. On September 14, 2021 Dr. Richardson documented that Claimant had the following history of present illness:

> 9/14/21:
>
> Left knee is doing better.PT X 1-helped.Taklng OTC Aleve 2 tabs-only twice so far. Did not gel Rxs. Occas. click/pop in the knee. Some constant dull ache. Limping less. Stopped using cane today. SI. Upper calf pain. No knee swelling. No fevers, SOB or CP. Work restrictions were the same.
>
> Initial visit: 9/9/21: DOI: 9/1/21:
>
> On 9/1 working as a HVAC technician he noticed a gradual onset of diffuse pain in his left knee with popping (states no prior popping in the knee). No specific injury but he was going up/down a ladder quite a bit plus kneeling and squatting and carrying 20-30 pounds at times. He noticed swelling in the knee later in the day. There has been a constant ache in the knee since then. The swelling comes and goes. Increased pain after being on his feet for a while. Flexion of the knee hurts. Ice and elevation have helped. … He denies prior injury to the knee. Some limping-he has a cane to use. Right knee had a work related injury in 2016-states he had an MRI-"bruised meniscus", says they wanted to replace the knee-had PT but no surgery and gets occas. pain in the right knee.

13. Claimant disagreed with the notation that there was "No specific injury" in this matter. Claimant stated that he was on the incline of the roof putting all his body weight on his left leg, twisting while holding the parts and his tools, and lifting his right leg to make a step, when he heard the left knee pop. He had swelling and gradual pain increase after some 30 minutes.

14. Claimant also disagreed that he provided any history regarding prior injuries to his left knee, only the right knee. He stated that he was never advised that he had arthritis prior to this work injury or that anyone had ever made a recommendation with regard to a knee replacement surgery of the right knee. He explained that he was advised, when he was being seen for the right knee about possible treatment that might be needed and a right knee replacement might be one of those possible treatments, but the right knee condition resolved with rest and physical therapy.

15. The same work restrictions continued through October 7, 2021 when Claimant was referred for the MRI. Neither party submitted any further records from the authorized treating providers at Concentra. This ALJ inferred that Claimant failed to attend any further appointments or that Respondents denied the claim at that time.

16. Claimant was not offered modified employment except for a short period of time of approximately three to four weeks when he performed work delivering parts to other technicians.

17. Claimant had an MRI on December 17, 2021, which was read by radiologist Elizabeth Young, M.D. The MRI showed a horizontal tear of the medial meniscal body and posterior horn. There was a flipped meniscal fragment in the intercondylar notch with a radial tear at the posterior horn root junction. Claimant also had patellofemoral and medial tibiofemoral compartment chondrosis.[1]

18. Claimant stated that he received a letter from a company he did not recognize, which terminated him as of January 10, 2022. Claimant testified that the modified duty running parts was no longer available. He received two other letters, one dated November 17, 2021 and a second one dated December 27, 2021,[2] which stated that he, or someone on his behalf, had submitted for a leave of absence. However, Claimant was emphatic that he did not make the request, that likely someone from Employer's Human Resource Department had made the request.

19. Claimant also had shown the letters to his supervisor, and was advised by his supervisor not respond to them because he was an employee that was supposed to be on workers' compensation. He also did not recognize the group that sent the three letters to him as part of Employer's organization. He stated that his supervisor had received his work restrictions and knew he was under restrictions by the workers' compensation doctor. As found by this ALJ Respondents have failed to establish that Claimant committed a volitional act, or exercised some control over the termination as Claimant was fully relying on his supervisor's instructions in this matter. Claimant did not precipitate the employment termination by a volitional act that he would have reasonably expect to cause the loss of his employment.

20. Based on the letter dated November 17, 2021, that states that Claimant or someone on his behalf submitted for leave of absence as of November 8, 2021, it was inferred that the last day Claimant may have performed any work for Employer was likely November 7, 2021.

[1] Pre-arthritic or arthritic condition of the knee.
[2] Respondents' Supplemental Exhibit, Exhibit K

21. On May 17, 2022 Dr. Sander Orent issued a report following his independent medical evaluation at Claimant's request. He took an extensive history, which was consistent with Claimant's account of the mechanism of the accident. He stated that Claimant was on an angled roof, twisting around the area to a flat portion where the condenser, he was working on, rested. This was the last job of the day so he finished and went home, thinking that it would be better in the morning. However, he woke up in significant pain and reported the work injury to his employer. He had the drug screen done and had to wait a week to get in to see any provider for his work related injury. Dr. Orent documented that Claimant had constant pain in the left knee, even walking to the trash bin or to get the mail, and would wake him up from a sound sleep. Dr. Orent specifically noted that Claimant had never had a history of left knee pain.

22. On physical exam, Dr. Orent found that Claimant's quadriceps on the left leg was atrophied both on the medial lateral and anterior belly. He noted effusion of the knee joint but not a tensor fusion but some fluid in the joint with tenderness on palpation across the joint line. He also noted a positive Apley's and McMurray's.[3] Dr. Orent performed a record review in this matter. He noted that the MRI was over six months old and the findings were consistent with acute tearing of the meniscus, including at the root. He stated that there was absolutely no previous symptoms of his left knee and no history of previous injuries or surgeries. He diagnosed complex meniscal tears and probably exacerbated osteoarthritis of the left knee. He stated that the meniscal tears were acute and the osteoarthritis was asymptomatic until this injury on September 1, 2021. Claimant continued to deteriorate without treatment and showed decreasing ability to function.

23. Dr. Orent opined that Claimant was injured on the job as standing on an angled surface while twisting were not common daily activities. He opined that the twisting motion while having the foot on the angled roof caused a tearing of the meniscus as well as an aggravation of the underlying osteoarthritis. He noted that Claimant had progressively worsened over the course of the last several months with ongoing disuse atrophy, depression and a feeling of worthlessness. He noted that Claimant was clearly not at maximum medical improvement, required reimaging of the left knee, immediate consultation with an orthopedic surgeon and most likely either a meniscectomy or a joint replacement.

24. Claimant was evaluated by Timothy S. O'Brien, M.D., an orthopedic specialist, at Respondents' request for an independent medical evaluation on June 28, 2022. Dr. O'Brien took a history of a popping and pain of the left knee on September 1, 2021 while Claimant was fixing a condenser unit. He noted Claimant had to climb an inclined roof to reach the HVAC unit, and later had popping, pain and swelling of the left knee. He took a history that Claimant was completely asymptomatic prior to this, that he had been going up and down the incline part of the roof and had symptoms of achiness, radiation of pain, tingling, swelling, giving out, clicking, stabbing, numbness and throbbing. On exam, Dr. O'Brien noted that Claimant had atrophy of the thigh (quadricep) of approximately 1.5 cm compared to the right thigh. He found medial joint line tenderness and noted Claimant could not perform a McMurray's because he could not relax. Dr. O'Brien stated that "[I]n order for a meniscus to tear traumatically, even a meniscus with

[3] Test to determine meniscal tears.

preexisting degeneration, the foot had to be planted and there had to be a twisting injury. Despite this, Dr. O'Brien opined that Claimant did not incur an injury and that any work Claimant performed as an HVAC technician was not sufficiently traumatic to cause the left knee problems as they were preexisting and degenerative in nature.

25. This ALJ reviewed the IME Rule 8 recording from Dr. O'Brien's evaluation[4] and it was apparent that Dr. O'Brien failed to delve into the mechanics of how Claimant incurred the injury and what specific movements Claimant performing while working on the inclined roof. Dr. O'Brien's questions to Claimant were frequently multiple questions at once and Claimant would answer one of the questions but not all as the interrogation was a rapid-fire type questioning. A large majority of the questioning related to what other providers told Claimant. The extent of the evaluation took approximately 22 minutes, including the examination, with the first two minutes of Dr. O'Brien speaking extremely quickly about procedures and the need for the recording. Dr. O'Brien was gone from the exam room approximately two to three minutes while Claimant changed, and can be heard speaking in the background indistinctly with someone other than Claimant. He asked how Claimant was injured but interrupted Claimant throughout the explanation, suggesting words. Claimant specifically stated that the popping happened when he was on the incline part of the roof.[5]

26. Dr. Orent testified at hearing that he evaluated Claimant in May 2022 to ascertain whether Claimant's left knee injury was related to any particular event at work. Dr. Orent was accepted as a Board Certified Emergency/Trauma medicine expert as well as an expert in Occupational Medicine and causation analysis. Dr. Orent questioned Claimant extensively about the mechanism of injury while he was in the process of repairing the condenser motor. Claimant provided a history that he was injured as he stepped from the angled roof, while moving equipment and his tool bag in the process of repairing the condenser. Claimant stepped from the angled roof onto the flat roof. There was a twisting motion as he had his foot planted on the angled portion of the roof with his left foot, and taking the step up to the flat portion of the roof with his right foot. Claimant heard a pop of his left knee. After approximately 30 minutes Claimant's left knee had swollen and was hurting.

27. Dr. Orent described that Claimant had a series of torn cartilage in his left knee. One of them was described as a piece of meniscal material folded in the left knee cap. A piece of the meniscus was flipped under and into the intracondylar notch. Dr. Orent persuasively explained that the kind of injury shown on imaging was not from the degenerative process. He stated that the medical literature states that this kind of injury, a bucket handle injury, is generally caused by a traumatic event where the foot is planted on the ground and there is a twisting of the knee. And in this case, the fact that he had his left foot planted on an angled roof with all of his weight while twisting, and a popping of the left knee, is what caused the Claimant's injuries. He explained that this was the only mechanism of injury that caused this kind of flipped piece of the meniscus with a radial (curved) tear.

[4] Claimant's Exhibit 8.
[5] Claimant's Exhibit 8 @ minute 9:30 to 9:38 and minute 21:20 to 21:29.

28. Dr. Orent stated that the definitive event was well beyond the normal activities of daily living, especially standing on an angled roof. Claimant was on a pitched roof of approximately 36° to 38°, which is a very significant angle, and is not something that most individuals do in the course and scope of their lives. He further stated that the timing was not just coincidental because Claimant felt the pop as he had his foot planted on the angled roof with all of his own weight, as well as the part and his tools, when he twisted in order to step up onto the flat portion of the roof. Shortly thereafter Claimant felt the pain and the swelling. Dr. Orent opined, consistent with the medical literature, that Claimant's left knee injury was caused during the course of his employment while working on the roof and was related to the events which occurred on September 1, 2022. He disagreed with Dr. O'Brien's opinion that all of Claimant's left knee condition was degenerative or preexisting.

29. Dr. Orent stated that the MRI findings were also consistent with the kind of injury Claimant described to him. Dr. Orent stated that there was a lack of confounders in this case. That the medical literature states that this kind of injury, where there is a flipped meniscal fragment in the intercondylar notch with a radial tear[6] at the posterior horn root junction, occurs when a patient has the foot planted and twists. And this is exactly how Claimant injured his knee and when he first heard the pop of his knee. He stated that Claimant's condition was not degenerative in nature because the flipped meniscal fragment is generally caused by a planted foot with weight and twisting. He stated that Dr. O'Brien agreed that this was the only mechanism and disagreed with Dr. O'Brien's opinion with regard to causation.

30. Dr. Orent stated that there was no doubt that Claimant had preexisting arthritis in the left knee. However, Claimant was 100% functional prior to the events on September 1, 2022, performing all of his job duties and was asymptomatic. However, Claimant was incapacitated after this date. Dr. Orent stated that Claimant would not have been able to perform his duties, including climbing up onto roofs, flat ones or angled ones, if he had been symptomatic from the degenerative condition. He disagreed with Dr. O'Brien's assessment that Claimant had no particular event that caused the injury.

31. He stated that this was a discrete event that, with no confounders, the timing of the event, the pop when he made a twisting movement while his foot was planted on the angled roof and no other incidents that had occurred. Additionally, he stated that Claimant did not have problems with the knee prior to this event, and the fact that he was completely asymptomatic before this event took place, all indicate that Dr. Orent's causality determination was correct. His opinion, that Claimant was injured in the course and scope of his employment while climbing from the angled roof to the flat roof was what caused the injuries, and was persuasive to this ALJ.

32. Dr. Orent did agree with Dr. O'Brien's opinion that the injury could only occur where there was a planted foot and a twisting of the knee, which is what the literature suggests. Dr. Orent stated he made causation analysis in accordance with the Medical Treatment Guidelines and the teachings of the Level II accreditation. He would make

[6] According to Dr. Orent, a radial tear is a curved tear generally caused by an acute injury where the knee is twisted, as opposed to a straight or lineal tear which is generally caused by degenerative osteoarthritis. (Hearing testimony @ minute 2:02-2:03)

causation determinations throughout his career first as an emergency medicine physician as well as an occupational medicine physician multiple times a day and stated that he considers himself an expert in causation determinations. Dr. Orent stated that O'Brien got the mechanism of injury incorrect because he said that there was no twisting of the knee and Dr. Orent obtained a very clear history that there was a twisting. This ALJ concurs. Dr. Orent opined that there was no other rational explanation of the type of injury other than the planting of the foot and twisting of the knee. He stated that he listened in on the evaluation by Dr. O'Brien and stated Dr. O'Brien was very brief in his questioning of Claimant and did not delve into the specific mechanic of Claimant's movements of the injury.

33. Particularly patent to Dr. Orent was that Dr. O'Brien did not explore the mechanism of injury. He simply asked questions in a rapid-fire type of way. He explained that the IME process can be very intimidating to claimants in general and Claimants do no always correct a physician that make statements that are incorrect.

34. Dr. Orent stated that Claimant had arthritis but that this event of September 1, 2021 caused an aggravation of the condition, that was previously independently non-disabling and asymptomatic. The incident caused a torn meniscus which in itself aggravated the underlying arthritis. And because of the extensive arthritis and the torn meniscus, Claimant probably has no alternatives but to proceed with a left knee replacement surgery. This event specifically precipitated the need for surgery.

35. Dr. Orent stated that the atrophy of the quadriceps could have been caused by the arthritis if it was symptomatic and Claimant had not been using the lower extremities. But here, Claimant had clearly been working, was functioning as an HVAC mechanic, going up ladders and difficult to reach places, and had no symptoms prior to the September 1, 2021 event. Dr. Orent opined that the atrophy here was a direct result from the left knee injury sustained on September 1, 2021.

36. Lastly, Dr. Orent stated that Dr. O'Brien's criticism of Dr. Orent was incorrect as he clearly was not aware of Dr. Orent's medical expertise. Dr. Orent worked as an emergency medicine physician for 14 years and had to treat significant amounts of orthopedic issues while in that practice as well as his workers' compensation practice for over 30 years, which were mostly acute injuries, most commonly orthopedic injuries. A substantial amount of Dr. Orent's training and experience was establishing causality, and separating the work related injuries from the non-work related injuries. Dr. O'Brien, on the other hand, would more than likely treat those patient that had more severe orthopedic conditions that required surgical evaluations and treatment only.

37. Dr. Orent, would defer to the orthopedic provider, regarding Claimant's course of treatment, but believed that the only course was a total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket injury caused by the twisting knee that popped, tearing the meniscus in multiple places.

38. Dr. Orent believed Claimant was very straight forward, honest and sincere during his evaluation of Claimant. Dr. Orent physically examined Claimant and addressed that examination in his report. He stated that Claimant had a complex set of moves, and a provider needed to enquire extensively into the mechanics of the moves that Claimant made on the date of the injury to make a proper causality determination consistent with

the requirements of the Division's Accreditation materials and the MTGs. Dr. Orent reviewed the September 9, 2021 notes from the Concentra and the provider did not do a detailed exploration of the mechanism of injury, simply that there was a gradual onset of diffuse pain and swelling, which is not necessarily contradictory. It was just inadequate and not complete because there was no exploration of the mechanism of injury. He further stated that when there is injury and significant loss of range of motion, as was shown on September 9, 2021, there could be no other reasons for the loss of range of motion than joint swelling. He stated that the loss of range of motion, would inhibit McMurray's or other positive tests. The Concentra provider did note that Claimant walked in with a cane and was limping on the date of the exam, which was consistent with an acute injury. Dr. Orent did rely heavily on the Claimant's assertion that he had no significant prior history of left knee pain and nothing in the medical records changed his mind to that effect. He saw no way with that kind of AROM that Claimant could have been climbing ladders up and down, fairly frequently, with equipment, to perform his job.

39. Dr. O'Brien also testified at hearing in this matter in regard to his evaluation of Claimant, as documented in the above described report. Dr. O'Brien was accepted as an expert that was Board Certified in Orthopedics and as a Level II accredited physician. He is currently retired but, when he was practicing for approximately 30 years, 20 to 30% of his practice involved work injured patients and he had to make assessments for causation in those cases. Dr. O'Brien disagreed with Dr. Orent's opinions and causation analysis, stating that whatever was recorded in the most contemporaneous report is generally the most accurate. He also stated that there was 0% chance that Claimant had an acute injury or that there was 0% chance that Claimant did not have ongoing pain in the left knee based on his experience. Further, he testified that there was virtually no probability that Claimant would not have significant pain going up and down ladders in performing his job, considering the extent of the osteoarthritis in his knee. He continued to opine that Claimant's condition was purely related to the degenerative process. Dr. O'Brien was found to not be persuasive.

40. As found, Claimant was credible in that he had no pain prior to his September 1, 2021 work related injury. He performed the job of a HVAC service technician for almost two years without incident or limitation. He would typically have to climb ladders to the roof and then climb the roof, some of which were extremely steep. In this case he was on an inclined roof surface, while carrying mechanical parts as well as his tools. He was in the process of stepping from the steep inclined roof onto the flat portion of the roof, with all of his weight on his left lower extremity, and lifting his right leg to make the step, when his knee was twisted and he felt a pop. Claimant unquestionably had osteoarthritis. However, it was asymptomatic. He may have also had some level of meniscus degeneration that caused tears in his meniscus. However, the action of twisting the knee in this case, caused an aggravation of the preexisting osteoarthritis as well as caused the flipped meniscal fragment in the intercondylar notch with a radial tear and aggravation of other meniscus degeneration.

41. As found, Dr. Orent specifically inquired about the exact motion Claimant was making when he had the pop of the knee. As found, Dr. Richardson failed to ask Claimant what the mechanics of the movements he was making. However, both Dr. Orent and Dr. Richardson reached the same conclusion, that Claimant experienced a work

related injury on September 1, 2021, which included meniscal tears and an aggravation of the underlying arthritis of the left knee. While it is patent that Claimant had a significant amount of arthritis, as credibly described by Dr. Orent, that condition was asymptomatic and did not impede Claimant from working full duty without limitations. Dr. Orent's testimony in this regard is credible and persuasive over the contrary opinions of Dr. O'Brien. Claimant has shown that he was injured in the course and scope of his employment with Employer, causing a flipped meniscal fragment into the intercondylar notch with a radial tear at the posterior horn root junction of the meniscus. Claimant has further shown that the meniscal radial tear and other menisci injuries caused the asymptomatic arthritis to become symptomatic, thereafter causing a disability and aggravation of the underlying condition. Lastly, Claimant has shown that he requires medical care to relieve him of his work related injury, including possible total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket injury caused by the twisting knee tearing the meniscus.

42. Claimant has credibly shown that he was under medical restrictions of sedentary work as of September 9, 2021, but did not return to work as of September 2, 2021 when he had his drug test performed. Claimant is entitled to temporary disability benefit. Claimant stated that he returned to work for three to four weeks but neither party provided the wage records for time periods just prior to the work injury or subsequent to the September 1, 2021 injury date to determine which weeks those were. This ALJ infers from the January 10, 2022 letter, from the third party administrator, that the modified duty was no longer available beginning November 8, 2021. Due to the lack of records or testimony regarding average weekly wage that was proximal to the September 1, 2021 work related injury, this ALJ is unable to determine Claimant's average weekly wage.

43. As found, Respondents have failed to show Claimant was terminated for cause due to his failure to respond to the request for leave of absence documentation. Claimant credibly testified that he received the letters from the third party administrator but when he discussed it with his supervisor, he was instructed to ignore them as Claimant was injured at work and the letters did not apply to him. He was further advised that the human resource office would take care of it. Claimant also credibly stated that he never applied for the leave of absence indicated in the letters, that it likely was done by the HR office on his behalf as indicated in the letters. Respondents have failed to show by a preponderance of the evidence that Claimant was terminated for cause.

44. Any evidence or possible inferences contrary to the above findings, including any evidence that the accident occurred on September 2, 2021, were specifically found not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor

of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. The Act is remedial and beneficent in purpose and should be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families. *Colo. Counties, Inc. v. Davis*, 801 P.2d 10, 11 (Colo App.1990); *County Workers Comp. Pool v. Davis,* 817 P.2d 521 (Colo.1991); Williams v. Kunau, 147 P.3d 33 (Colo. 2006). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August

18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Orent are more persuasive than the contrary opinions of Dr. O'Brien. Claimant credibly stated that he had no pain of the left knee prior to his September 1, 2021 work related injury. He performed the job of a HVAC service technician without incident or limitation from his left knee. He would typically have to climb ladders to the roof and then climb the roof, some of which were extremely steep as was the incline of the roof he had to climb on September 1, 2021. In this case he was on an inclined roof surface, while carrying mechanical parts as well as his heavy tools. He was in the process of stepping from the steep inclined roof onto the flat portion of the roof, with all of his weight on his planted left lower extremity, and lifting his right leg to make the step, when he twisted his left knee, and he felt a pop. Claimant has osteoarthritis. However, it was asymptomatic until this twisting and popping event. He may have also had some level of meniscus degeneration that caused tears in his meniscus. However, the action of twisting the knee in this case, caused an aggravation of the preexisting osteoarthritis as well as caused the flipped meniscal fragment in the intercondylar notch with a radial tear at the posterior horn root junction and other aggravations of meniscal tears. This aggravation was also demonstrated and supported by the fact that Dr. Richardson never documented that Claimant had any muscle atrophy, but by the time both Dr. Orent and Dr. O'Brien evaluated Claimant, Claimant had significant quadricep atrophy. Claimant has shown that it was more likely than not that he incurred an injury and aggravation of preexisting conditions proximally caused by the accident of September 1, 2021.

As further found, Dr. Orent specifically inquired about the exact motion Claimant was making when he had the pop of the knee. As found, Dr. Richardson failed to ask Claimant what the mechanics of the movements he was making. However, both Dr. Orent and Dr. Richardson reached the same conclusion, that Claimant experienced a work related injury on September 1, 2021. While it is patent that Claimant had a significant amount of arthritis, as credibly described by Dr. Orent, that condition was asymptomatic and did not impede Claimant from working full duty without limitations. Dr. Orent's testimony was credible and persuasive over the contrary opinions of Dr. O'Brien. Claimant has shown that he was injured in the course and scope of his employment with Employer, causing radial meniscal tear and aggravation of other meniscal tears. Claimant has further shown that the related meniscal tears caused the asymptomatic arthritis to become symptomatic, causing a work related disability. Claimant has shown that it was more likely than not that he incurred a twisting injury and aggravation of preexisting condition to his left knee within the course and scope of his employment with Employer, which are related to the accident of September 1, 2021.

C. Reasonably Necessary Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101,

C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the aggravation of the preexisting condition as well as the meniscal injuries. Dr. Orent credibly testified that Claimant requires medical care in this case due to the September 1, 2021 work related injury, including, possibly, a total left knee replacement/arthroplasty in light of the aggravation of the underlying osteoarthritis. Claimant has shown that it is more likely than not that he requires medical care to relieve him of his work related injuries, including possible total knee replacement due to the underlying degenerative condition that was significantly aggravated by the bucket type injury caused by the twisting knee tearing the meniscus.

D. Temporary Disability Benefits

Entitlement to temporary disability benefits is conditioned on whether Claimant is entitled to benefits or has been terminated for cause so these issues are interlinked.

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first

occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Claimant alleges temporary total disability benefits from September 2, 2021 through the present.

As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD or TTD benefits for the period beginning September 2, 2021 until terminated by law. The evidence shows that Claimant was unable to return to his regular employment as a service technician due to the requirement to go up on roofs and the like. Claimant testified he was not provided with modified work other than for approximately three to four weeks. Claimant's testimony in this regard is found credible. Here, there is no doubt or question that Claimant was under work restrictions as provided by his authorized treating physician. The last restrictions as provided by Dr. Richardson on October 7, 2021 of occasionally lifting and carrying up to 20 lbs.; frequently lifting up to 10 lbs.; no use of ladders, no kneeling, no squatting, sitting 50% of the time, may be on his feet up to 15 minutes at a time and use cane as needed. Neither party submitted any ATP records subsequent to this date.[7] Based on the evidence presented, Claimant has shown by a preponderance of the evidence he is entitled to temporary total or temporary partial disability benefits.

However, neither party submitted the wage records to appropriately calculate the lost earnings.

E. Termination for Cause

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. Sec. 8-43-105, C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The burden shifts to the employer, who bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008).

[7] This ALJ infers that Respondents no longer authorized any further visits with the ATP from this date forward other than the MRI, and that Claimant has not been placed at MMI by any ATP.

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for the termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over the termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

While Claimant was purportedly terminated for failing to provide some documentation, Claimant relied upon his supervisor's instructions that the letters from the third party administrator did not pertain to him, as he was injured on the job. Claimant credibly testified that he spoke to his supervisor with regard to the forms and was specifically instructed not to complete them. Claimant relied on those instructions. As found by the totality of the evidence, Claimant did not commit a volitional act that led to his termination. Respondents have failed to show by a preponderance of the evidence that Claimant committed a volitional act that led to the circumstance of his termination. He was just following the instructions of his supervisor.

F. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841

P.2d 335 (Colo.App.1992). Here, the parties failed to provide records concurrent to the date of the compensable injury of September 1, 2021. The last records in evidence show wages only through April 10, 2021. This ALJ is unable to calculate the average weekly wage in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Pursuant to the stipulation of the parties, regarding the hernia injury which is the subject of the W.C. No. 5-153-595 claim, the parties' stipulation is approved and entered as an order. If a Final Admission has not been filed since the date of the August 17, 2022 hearing, Respondents shall file an admission consistent with Dr. Anjmun Sharma's DIME report within ten (10) days of this order.

2. Claimant sustained a work related injury on September 1, 2021, the subject of W.C. No. 5-184-07, in the course and scope of his employment with Employer and this claim is compensable.

3. Respondents shall pay for all medical benefits in this matter that are reasonably necessary and related to the aggravation of the preexisting osteoarthritis and the meniscal injuries caused by the September 1, 2021 work related accident. Any medical costs associated with the claim are subject to the Colorado Workers' Compensation Medical Fee Schedule.

4. Respondents shall pay temporary disability benefits from September 2, 2021 until terminated by law. The parties shall exchange any wage records from any of Claimant's earnings from April 2021 to the present within 10 days of this order, in order to calculate average weekly wage and the lost wages. Should the parties be unable to reach a determination of average weekly wage or benefits from September 2, 2021 to the present the parties shall provide the wage information to this ALJ within thirty (30) days of this order and a supplemental order shall be issued.

5. Respondents' claim of termination for cause is denied and dismissed.

6. Respondents shall pay interests at the statutory rate of 8% per annum on all amounts not paid when due.

7. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 22nd day of September, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant proved by a preponderance of the evidence she is entitled to Temporary Total Disability (TTD) benefits from September 20, 2021 through September 22, 2021, October 2, 2021, and October 14, 2021 through April 20, 2022.

- Whether Claimant proved by a preponderance of the evidence Respondent is subject to penalties under §8-43-304(1), C.R.S. for a violation of W.C.R.P. 5-2(C).[1]

STIPULATIONS

At hearing the parties stipulated to an AWW of $685.58 with a corresponding TTD rate of $457.08.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately four years as a head baker.

2. Claimant's scheduled shift was from 12:30 a.m. to 8:30 a.m.; however, with agreement from management, she would often report to work between 6:30 p.m. or 7:30 p.m. and work six to eight hours to complete her shift.

3. Claimant was scheduled to begin a shift at 12:30 a.m. on Sunday, September 19, 2021. Claimant clocked in for this shift at 6:28 p.m. on Saturday, September 18, 2021.

4. Claimant sustained an admitted industrial injury at approximately 11:45 a.m. on September 18, 2021. Claimant felt pain in her left shoulder and neck area while transferring sheet pans. Claimant completed her shift and clocked out at 2:10 a.m. Upon finishing her shift, Claimant went home and iced her shoulder, took ibuprofen, and went to sleep. Claimant testified that her shoulder did not feel any better when she woke up on Sunday, September 19, 2021.

5. Claimant's next shift was scheduled to begin at 12:30 a.m. on Monday, September 20, 2021. Timecards show that, per her usual procedure, Claimant clocked in for her Monday, September 20, 2021 shift at 6:35 p.m. on Sunday, September 19, 2021. Upon arriving at work, Claimant reported her injury to HR[Redacted], Human Resources Assistant Store Manager. Claimant's timecards show that she worked 7.18 hours for her shift on Monday, September 20, 2021, leaving work at 2:16 a.m. on Tuesday, September 20, 2021.

[1] Based on evidence presented at hearing, Claimant withdrew her penalty claim under §8-43-304(1), C.R.S. for Respondent's failure to admit or deny liability under §8-43-203(2)(a), C.R.S.

6. On September 20, 2021, Claimant presented to authorized treating provider Monica Fanning Schubert, NP at the office of Bryan Alvarez, M.D. NP Schubert diagnosed Claimant with a left shoulder strain and placed Claimant on the following temporary restrictions from September 22, 2021 to October 7, 2021: lifting, repetitive lifting, and carrying limited to 5 lbs. and no overhearing reaching. NP Schubert removed Claimant from all work from September 20, 2021 to September 21, 2021.

7. Claimant testified at hearing that she was unable to perform her regular job duties with these restrictions.

8. Claimant's next shift was scheduled to begin at 12:30 a.m. on Tuesday, September 21, 2021. Claimant did not work her scheduled shift on September 21, 2021 due to being removed from work by NP Schubert for that date. Claimant also did not work her scheduled shift on Wednesday, September 22, 2021 due to her work injury.

9. Claimant began light duty work for her next scheduled shift on September 25, 2021. Claimant testified that she was unsure if she missed any time from work as a result of her shoulder injury from September 22, 2021 until she stopped working on the evening of October 12, 2021, for her shift on October 13, 2021. Claimant had no specific memory of whether she did or did not miss work on October 2, 2021. The bakery schedule shows that Claimant was scheduled to work on October 2, 2021. Claimant's timecards do not show any hours worked on October 2, 2021.[2]

10. Respondent filed a First Report of Injury with the DOWC on September 28, 2021.

11. On October 7, 2021, Dr. Alvarez imposed restrictions from October 7, 2021 to October 28, 2021 of lifting/carrying/pushing/pulling of 5 lbs. and no reaching overhead with the left upper extremity. Timecards show that Claimant was off work on October 8, but worked her shifts with those restrictions on October 9-12, 2021.

12. Upon completing her scheduled shift on October 13, 2021, Claimant testified that she informed Ms. HR[Redacted] and CG[Redacted], Store Manager, that she could not continue performing the modified duty work in the bakery. Claimant testified that she had begun experiencing problems with her right shoulder due to overcompensating for her injured left shoulder, and that her left upper extremity continued to be in pain. At that time, Ms. HR[Redacted] and Ms. CG[Redacted], discussed with Claimant finding lighter duty work options in other parts of the store. They informed Claimant that she could work sitting at a table at the front of the store asking customers if they were interested in completing an application for employment. Claimant testified she declined the verbal offer at that time due to concerns about increased exposure to COVID-19.

13. Claimant returned to Dr. Alvarez on October 28, 2021. At that time Dr. Alvarez gave Claimant a written release to work with restrictions from October 28, 2021 to November 18, 2021 on both the left and right upper extremities of no

[2] Based on the evidence presented at hearing Claimant is not requesting TTD for October 2, 2021.

lifting/carrying/pushing/pulling more than 5 lbs. and no reaching overhead.

14. Claimant testified that she could not perform her regular or modified work duties with those restrictions.

15. Dr. Alvarez continued the same bilateral restrictions on November 18, 2021, December 9, 2021, January 20, 2022, and February 10, 2022. On March 3, 2022, Dr. Alvarez increased the bilateral restrictions to 15 lbs. lifting/carrying/pushing/pulling and 1 lb. overhead reaching.

16. Respondent filed a General Admission of Liability on December 7, 2021.

17. Claimant underwent left shoulder surgery on April 21, 2022 and has received TTD benefits since such time.

18. On or around November 9, 2021, Claimant received a written offer of modified duty from Employer (dated October 29, 2021). The letter noted Claimant's restrictions of no lifting, carrying, pushing, or pulling over 5 lbs. and no overheard reaching. The offer was for the same position discussed with Claimant on October 13, 2021 - sitting at a table at the front of the store asking customers if they were interested in completing an application for employment.

19. Claimant declined the written offer of modified duty on November 16, 2021. Under "Reason" Claimant wrote: "Increased exposure to COVID-19; while numbers of infect are high in community, And [Employer] does not require customers or employees to wear masks in store." Claimant authored a separate letter on November 16, 2021 stating, in relevant part,

> I'm declining the light-duty (other than bakery) that you are now offering because I do not want to be placed in front of store where every customer and employee will be entering and exiting the store, putting myself at a higher risk of contracting COVID-19. As of right now cases of COVID-19 in our neighborhood area are at highest numbers since last December. [Employer] does not require customers or employees to wear a mask in store even though signage is posted.

(Cl. Ex. 5, p. 37).

Claimant further stated that she was requesting FMLA leave until January 1, 2022 so that she could heal and return to her position in the bakery.

20. Claimant testified that she received the written offer of modified duty five days prior to November 16, 2021. Claimant testified that she declined the written offer of modified duty because of increased exposure to COVID. Claimant testified that she lives with other family members including, at the time, a five-month old granddaughter and her father-in-law. Claimant testified that two other family members also worked outside of the

house. Claimant testified that, at the time, COVID numbers were high and she practiced masking at work but, despite a mask mandate, Employer did not enforce the mandate. Claimant further testified that she was hired to work in the bakery and was not hired by Employer to take applications. Claimant further testified that she was in constant pain and did not want to work outside of the bakery, moving from night shift to day shift. Claimant did not state she was physically unable to perform the modified duty or that there were any other circumstances precluding her from doing so.

21. Ms. HR[Redacted] testified at hearing on behalf of Respondent. Ms. HR[Redacted] testified that the modified duty position offered to Claimant involved sitting at a table at the front of the store taking employment applications for approximately eight hours a day during a day shift. Ms. HR[Redacted] testified that the modified position was within Claimant's work restrictions.

22. PA[Redacted] testified at hearing on behalf of Respondent. Ms. PA[Redacted] was the adjuster on Claimant's claim beginning September 2021. Ms. PA[Redacted] has approximately seven years of experience adjusting workers' compensation claims in Colorado. Ms. PA[Redacted] is aware that the Act and the Rules require a position statement to be filed with 20 days of a First Report of Injury.

23. On October 1, 2021, Ms. PA[Redacted] completed a Notice of Contest listing the DOWC as a recipient, and certified the filing and mailing of the document to the DOWC. At hearing, Ms. PA[Redacted] admitted that she did not file the Notice of Contest with DOWC. She testified that, on October 1, 2021, she input the workers' compensation number from the DOWC into Insurer's computer system and mailed the Notice of Contest to Claimant only without filing a copy of the document with the DOWC. She testified that she mistakenly failed to complete the form that gets filed with the DOWC because October 1, 2021 was one of her last days with Insurer before her employment ended. She testified that she was trying to get everything done with a caseload of over 100 cases, was in a hurry, and mistakenly forgot to file Insurer's position with the DOWC.

24. Claimant testified that she spoke to Ms. PA[Redacted], who told Claimant that the claim was under investigation and that Respondent could not provide additional medical treatment until the investigation was completed and Respondent received Dr. Burris's IME report. In addition, Claimant confirmed that she received the Notice of Contest mailed by Ms. PA[Redacted] on October 1, 2021. Claimant testified that Respondent's failure to timely file with the DOWC caused her stress and financial struggles.

25. Ms. PA[Redacted] acknowledged that Claimant was on work restrictions as of October 14, 2021, and those and restrictions increased as of October 28, 2021. Ms. PA[Redacted] admitted that she knew of the fact that Claimant was off work from October 14 and continuing. She further acknowledged that Claimant had not received the light duty job offer until at least October 29, 2021 (at the earliest).

26. Claimant remains employed by Employer but has not returned to work for Employer since October 14, 2021.

27. Claimant failed to prove it is more likely than not she is entitled to TTD benefits for September 20, 2021, as she did not sustain any lost time on that day.

28. Claimant proved it is more probable than not she is entitled to TTD benefits September 21-22, 2021 and October 14, 2021 to November 16, 2021.

29. Respondent proved it is more probable than not that Claimant refused a reasonable offer of modified employment, thus terminating her TTD benefits from November 17, 2021 to April 20, 2022.

30. Claimant proved by a preponderance of the evidence Respondent violated W.C.R.P. 5-2(C). Respondent failed to prove its conduct was objectively reasonable and is thus subject to penalties.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

<u>September 20-22, 2021</u>

As found, Claimant is not entitled to TTD benefits for September 20, 2021 as Claimant did not miss any time from work on that date. Claimant did miss work and sustain wage loss on September 21 and 22, 2021 as a result of her work injury. As of the date of hearing, Claimant has missed more than 14 days of work as a result of her work injury. The preponderant evidence establishes, and Respondent does not dispute, that Claimant is entitled to TTD benefits for September 21 and 22, 2021.

<u>October 14, 2021 through April 20, 2022</u>

Respondent argues that Claimant's wage loss from October 14, 2021 through April 20, 2022 was not caused by her industrial injury, but instead by Claimant declining an offer of modified duty.

The applicable law to establish entitlement to temporary disability benefits should not be conflated with the applicable law for termination of temporary disability benefits due to a refusal to begin an offer of modified employment. *In re Claim of Tapp*, W.C. No. 5-120-394-001 (ICAO, Mar. 8, 2021); *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 378 (Colo. App. 2016).

It is undisputed Claimant continued working in the bakery in a modified capacity until October 14, 2021 and was not receiving any temporary indemnity benefits. Claimant's refusal of an offer modified employment cannot be a basis for finding Claimant is not *entitled* to temporary indemnity benefits in the first instance. Accordingly, here, the ALJ must first address Claimant's initial entitlement to temporary indemnity benefits.

Claimant proved it is more probable than not she is entitled to TTD benefits from October 14, 2021 through November 16, 2021. Claimant left work and sustained actual wage loss during this time period due to a disability caused by the work injury. Claimant credibly testified that she was physically unable to continue performing the modified duty work available to her in the bakery due to pain in her left and right upper extremities. Soon thereafter Dr. Alvarez placed Claimant on restrictions for her bilateral upper extremities. As a result of the work injury, Claimant suffered medical incapacity and was unable to resume her prior work.

As Claimant proved her initial entitlement to TTD benefits and has been awarded TTD benefits pursuant to this order, the ALJ's second determination is whether Claimant's TTD benefits should be terminated due to a refusal of a modified job offer.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Where the employers seek to terminate benefits under this statute, they bear the burden of establishing the factual predicate for its application. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). It is a question of fact for the ALJ to decide whether a claimant has been released to return to work. *Archuletta v. Industrial Claim Appeals Office*, *supra*.

The term "modified employment" means employment within the restrictions established by the attending physician. *See Flores-Arteaga v. Apple Hills Orchard Juice Co.*, W.C. No. 3-101-024 (ICAO, Feb. 15, 1996). The offered modified employment must be reasonably available to the claimant under an objective standard. *Willhoit v. Maggie's Farm*, WC 5-054-125-01 at *4 (ICAO, July 26, 2018); *Ragan v. Temp Force*, W.C. No. 4-216-578 (ICAO, June 7, 1996). A claimant's rejection of offered modified employment does not constitute responsibility for termination. The ALJ should consider the consequences of the industrial injury, the financial hardship that would be imposed on the

claimant by accepting the modified employment and "[a]ny other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment." §8-42-105(4)(b)(II), C.R.S.

Claimant's attending physician, Dr. Alvarez, gave Claimant a written release to return to modified employment. Respondent made a written offer of modified duty to Claimant on or around November 9, 2021 which was compliant with the restrictions assigned by Dr. Alvarez on October 28, 2021. Claimant declined the offer of modified employment and did not begin such employment. Claimant does not allege, nor is there any evidence, that the modified duty position offered to Claimant did not comply with her restrictions. There is no evidence, nor does Claimant contend, that she declined the offer of modified duty due to a physical inability to perform the work. Claimant instead declined the offer of modified employment because she did not want to increase her exposure to COVID and because she wanted to continue working in the bakery on the night shift. While the offer of modified employment was not ideal for Claimant, the preponderant evidence establishes that the offer was objectively reasonable and reasonably available to Claimant.

The modified employment did not require Claimant to violate any of her medical restrictions. While not enforced by Employer, there was signage requiring customers and employees to wear masks in the store. Claimant testified that she took precautions of wearing her mask. Outside of a general concern of COVID exposure, Claimant offered no evidence indicating she has a particular medical condition or that she was otherwise immunocompromised such that contracting COVID would place her at a higher risk. Although Claimant noted concerns of potentially exposing other individuals in her household to COVID, Claimant acknowledged that two other members of her household also worked outside of the home and thus would have some exposure to COVID as well.

The record establishes that Claimant also declined the work offer because she did not want to work outside of the bakery department and did not want to work a day shift. Claimant testified that she was hired to work in the bakery department and was not hired to take applications. Employer was not required to offer Claimant modified work in the bakery department nor on the night shift. Importantly, there is no evidence Claimant was unable to work on the day shift or that there were particular circumstances precluding Claimant from doing so. *See, e.g., Simington v. Assured Transportation and Delivery*, W.C. No. 4-318-208 (March 19, 1998) (the claimant's refusal of an offer of modified duty was reasonable where the claimant had moved further from the employer's place of business due to a fire at the claimant's home, the effects of medication taken for the industrial injury prevented the claimant from driving to work, and the claimant lived in a remote area where other forms of transportation were not available).

Based on the totality of the circumstances, the offer of modified employment was objectively reasonable and reasonably available to Claimant. Notwithstanding Claimant's subjective concerns, the offer was one which Claimant could accept as a practical matter. As such, her refusal of the offer of modified employment provides a basis for termination of TTD from November 17, 2021 to April 20, 2022.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

Claimant seeks penalties for Respondent's violation of W.C.R.P. 5-2(C). W.C.R.P. 5-2(C) provides that the insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division.

Respondent argues that W.C.R.P. 5-2(C) requires that the insurer only "state" whether liability is admitted or contested, not "file" a document with the DOWC. Respondent, therefore, contends that the Notice of Contest mailed to Claimant on October 1, 2021 complies with the requirement of W.C.R.P. 5-2(C). The ALJ disagrees.

Respondent does not cite any authority supporting its argument and its argument does not comport with the established methods by which an insurer states its position pursuant to W.C.R.P. 5-2(C). An insurer states a position either contesting or admitting liability by filing with the DOWC a Notice of Contest or General Admission of Liability. Respondent effectively argues that an insurer could simply state, by any method, its position without notifying the DOWC, which could not be the intention of the rule. Moreover, Ms. PA[Redacted], an experienced adjuster, testified to her understanding that the Act and the W.C.R.P. require a position statement to be filed with the DOWC within 20 days of a First Report of Injury. Additionally, the certificate of service on the Notice of Contest, prepared and signed by Ms. PA[Redacted], demonstrates that the Notice of Contest was required to be filed with the DOWC and that Ms. PA[Redacted] intended to do so.

Respondent's failure to file the Notice of Contest with the DOWC within 20 days of filing the First Report of Injury constitutes a violation of W.C.R.P. 5-2(C). As Claimant proved Insurer violated a rule of procedure, she has made a prima facie showing of unreasonable conduct. Accordingly, it is Respondent's burden to prove its conduct was reasonable.

Respondent failed to prove its conduct was objectively reasonable. Ms. PA[Redacted] was aware of the requirement under W.C.R.P. 5-2(C) and failed to comply. Ms. PA[Redacted] admitted that she mistakenly failed to file Insurer's position with the DOWC because she was in a hurry and was busy attempting to complete all of her work before transferring jobs.Insurer's conduct was within its control and was objectively unreasonable. As such, penalties are appropriate.

Respondent offered no evidence of its ability to pay any imposed penalties. There is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $50.00/day is appropriate. Respondent was in violation of W.C.R.P. 5-2(C) from October 12, 2021 until it filed the General Admission of Liability on December 7, 2021 (a period of 56 days). Accordingly, a total penalty of $2,800 shall be imposed.

ORDER

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits September 21-22, 2021 and October 14, 2021 to November 16, 2021. Respondent shall pay Claimant TTD benefits at the stipulated TTD rate.

2. Respondent proved by a preponderance of the evidence Claimant refused a reasonable offer of modified employment, terminating Claimant's TTD benefits from November 17, 2021 to April 20, 2022.

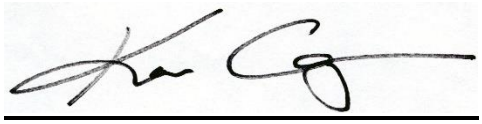
3. Respondent shall pay $2,800.00 in penalties its failure to timely state whether liability is admitted or contested pursuant to W.C.R.P. 5-2(C). 75% ($2,100.00) shall be paid to Claimant and 25% ($700.00) shall be paid to the Subsequent Injury Fund created in §8-46-101, C.R.S.

4. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues addressed in this order concerns the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62/week to $640.00/week.

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Employer operates as a staffing agency that matches workers with employers to fill job openings in the construction trades. Claimant was hired by Employer to work as a construction laborer for [Third party name redacted] in the area of erosion control.

2. Claimant testified that before being hired by [Employer Redacted], he had quit a job in erosion control with another company because he was not getting full time hours. He testified that after he quit his job, he sought work with [Third Party name Redacted] through [Employer redacted] because "Ms. A [Redacted]" assured him that he would get at "least get 40 hours of work and some overtime" with [Third Party name redacted]. Accordingly, Claimant testified that he applied for a position with [Employer redacted], was hired at $16.00/hour and placed with [Third Party Company redacted]. Claimant completed his "Employment Application Form" on January 20, 2022. (Clmt's. Ex. 5, p. 12). He indicated that he was available to start working January 29, 2022. (Resp. Ex. D, p. 7). Claimant agreed that he started working for [Third Party Company redacted] around January 29, 0222.

3. Claimant testified that he suffered a back injury on March 30, 2022, while digging a trench and moving dirt. (*See also*, Clmt's. Ex. 1, p. 2). Following this injury, Claimant completed a "Worker's Claim for Compensation form on March 31, 2022. *Id*. In his claim for compensation, Claimant declared an average weekly wage (AWW) of $720.00. *Id*. Although he was offered modified duty work, Claimant testified that his doctor would not approve the position. Consequently, Claimant testified that he has not worked since the date of his injury.

4. Respondents admitted liability for Claimant's injury as evidenced by a General Admission of Liability (GAL) filed on May 11, 2022. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). The May 11, 2022, GAL reflects that Claimant's wages were paid "from DOI (date of injury) through 4/24/2022." *Id*. As Claimant began to lose time from work beginning April 25, 2022, it was necessary for Respondents to calculate his AWW to

insure proper payment of temporary total disability (TTD) benefits.

5. Respondents calculated Claimant's AWW to equal $460.62. (Clmt's. Ex. 2, p. 4; Resp. Ex. A, p. 1). Respondents did not provide a basis for their calculation. Claimant contends that the admitted AWW is incorrect. He maintains that he had a reasonable expectation of getting at least 40 hours of work a week while working for [Third Party Company redacted] based upon his conversation with [Name Redacted, hereinafter Ms. A]. During cross-examination, Claimant suggested that he was not getting his anticipated full 40 hours of work due to weather, i.e. heavy snow/rain affecting the job site and the fact that he had no control over how his supervisor set his working hours.

6. Payroll records admitted into evidence begin with the pay period ending February 6, 2022 and run through the pay period ending April 24, 2022. (Resp. Ex. D, p. 18). As noted, Claimant testified that he has not worked since March 30, 2022. Accordingly, monies paid for the pay period ending April 3, 2022 through the period ending April 24, 2022 reflect the wage continuation referenced in the May 11, 2022 GAL rather than wages for hours worked. Counting the week for the pay period ending February 6, 2022 and including the remaining weeks extending through the period ending March 27, 2022, the last full week of work before Claimant was injured on March 30, 2022, represents a period of eight weeks. Claimant was paid a total of $3,428.00 over this period. *Id.* The payroll records also reflect that during this eight-week period, Claimant only worked a full 40-hour workweek once, i.e. for the pay period ending February 20, 2022. *Id.* Claimant also worked 5.50 hours of overtime for this same pay period. *Id.*

7. Claimant contends that the payroll records admitted into evidence are incorrect and do not accurately reflect the hours he worked. He testified that he worked overtime on at least two occasions whereas the payroll records indicate that he only worked overtime once before his injury. Claimant testified that although he expected he would get 40 hours per week, he did not call Ms. A [Redacted] to complain that his hours were short because he knew the weather was affecting his hours. He suggested that as the weather improved his hours would increase.

8. Ms. A [Redacted] testified as an Account Executive for Employer. She confirmed that Claimant was hired as a construction laborer at $16.00/hr. (*See also*, Resp. Ex. D, p. 12). Ms. A [Redacted] testified that while she anticipated that Claimant could work as many as 40 hours a week for [Third Party Company redacted], she made no promise or guarantee to Claimant that he would get 40 work hours per week plus overtime as he implied. She clarified during cross-examination that she told Claimant that he could work up to 40 hours, weather permitting.

9. Ms. A [Redacted] testified that the hours of [Employer redacted] employees placed with [Third Party Company redacted] vary from week to week. She testified that for the week of March 13, 2022, none of the [Employer redacted]'s employees placed with [Third Party Company redacted] worked a full 40 hours. (Resp.

Ex. D, p. 14). She also testified that out of nine employees placed with [Third Party Company redacted] on March 20, 2022; only four worked a full 40-hour workweek. (Resp. Ex. D, p. 15). For the week ending March 27, 2022, Ms. A [Redacted] testified that three out of sixteen employees placed with [Third Party Company redacted] worked 40 hours. (Resp. Ex. D, p. 16). Finally, the records reflect that Claimant worked 8 hours on March 29, 2022 and 5 hours March 30, 2022. He did not work March 31, 2022, April 1, 2022, or April 2, 2022. No employees placed with [Third Party Company redacted] worked Sunday, April 3, 2022. (Resp. Ex. D, p. 17).[1]

10. Ms. A [Redacted] testified that Employers payroll records cannot be tampered with in the system from which they are produced. She also confirmed that Claimant never called her to inform her that he was not getting his anticipated hours.

11. Ms. A [Redacted] confirmed that Claimant has not worked since March 30, 2022. She confirm that Employer paid Claimant at a rate of $16.00/hour for 40 hours or $640.00 for three weeks after his injury. She no explanation for why Claimant was being paid $640.00 a week for this period.

12. Based upon the evidence presented, the ALJ is not persuaded that Employer lead Claimant to believe that he would get 40 hours of work per week as a construction laborer at [Third Party Company redacted]. In this regard, the ALJ credits the testimony of Ms. A [Redacted] to find that no promises or guarantees of working 40 hours were extended to Claimant. Rather, the ALJ is convinced that Ms. A [Redacted] probably conveyed to Claimant that under [Third Party Company redacted] it was possible that he could work up to 40 hours per week. Nonetheless, the ALJ is convinced that weather probably altered the number of days and hours Claimant was able to work during the late winter and early spring months following his hire on January 22, 2022.[2] In fact, Ms. A [Redacted] seemingly acknowledged as much when she testified that Claimant could work as many as 40 hours per week, "weather permitting."[3]

13. As submitted the March 13, 2022, time sheet contained at Resp. Ex. D, p. 14 supports a finding that weather was likely affecting the entire crew's ability to work during the week of March 7-13, 2022. In fact, no employee worked every day this week, no employee worked 40 hours for the week and no one worked Thursday or Saturday. Moreover, only four of 16 employees worked on Monday and Friday of this week and only eight of 16 employees worked on Tuesday and Wednesday. (Resp. Ex. D, p. 14). While the March 20, 2022 and March 27, 2022 time sheets suggest that there was an improvement in the weather, based on the increased number of days the crew was working and the average number of hours for those employees, Respondents did not submit a time sheet for the week ending February 6, 2022 or

[1] Based upon the time sheets submitted, the ALJ finds to reasonable to conclude that [Third Party Company redacted] is closed on Sundays.
[2] As testified to by Ms. A [Redacted].
[3] Here, the wage records cover a period of typically unsettled weather in Colorado, namely February, March and April.

February 27, 2022. Thus, the number of days and the average number of hours each member of the crew was working is unknown. Nonetheless, it is known that Claimant only worked 18 hours for the week ending February 6, 2022 and 7.50 hours for the week ending February 27, 2022. Based on the information demonstrated by the March 13, 2022 time sheet, the ALJ finds it reasonable to infer that weather was probably affecting the number of hours Claimant was able to work for the weeks ending February 6, 2022 and February 27, 2022. (Resp. Ex. D, p. 18). Because the number of hours Claimant worked for the weeks ending February 6, 2022 and February 27, 2022, are conspicuously below his reported work hours for the balance of the reported period, the ALJ finds these hours to constitute an anomaly in his earnings. Because the earnings from these two weeks do not accurately and fairly represent Claimant's typical earnings, the ALJ finds that it would be manifestly unjust to calculate Claimant's AWW by including these reduced earnings in the overall computation of his AWW. Accordingly, the ALJ elects to exclude these two weeks of earnings, add the remaining earnings in the 8 week period and divide the total by six weeks to arrive at an AWW of $503.33 ($560.00 + $772.00 + $432.00 + $360.00 + $560.00 + $336.00 = $3,020.00 ÷ 6 weeks = $503.33). (Resp. Ex. D, p. 18).

14. Based upon the evidence presented, Claimant has proven that his AWW should be increased from $460.62 to $503.33 as the ALJ finds this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[4]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

D. Sections 8-42-102(3) and (5) (b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of March 30, 2022 comes from the time sheets and wage records admitted into evidence. As found here, careful review of those materials persuades the ALJ that the computation of Claimant's AWW should not include the pay periods ending on February 6, 2022 and February 27, 2022. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity, probably due to factors beyond his control, specifically inclement weather and his supervisor's actions regarding the setting of Claimant's work hours. Indeed, the ALJ is convinced that but for the unsettled weather, Claimant likely would have worked the increased hours he testified he felt were coming as the weather improved. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the pay periods ending February 6, 2022 and February 27, 2022 as they were likely disproportionally affected by the weather at the time. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW should be increased. While the ALJ is not convinced that Claimant is entitled to an increase to $640.00, the evidence supports and increase from $460.62 to $503.33, as this figure represents the fairest approximation of his wage loss and diminished earning capacity at the time of his March 30, 2022 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $460.62 to $503.33.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $503.33 for the time period reflected in the GAL filed May 11, 2022, i.e. from April 25, 2022 and ongoing until such time that the TTD

[4] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

benefits can be terminated in accordance with the provisions of the Colorado Workers' Compensation Act.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-177-867-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that Q-SART and thermogram testing for CRPS is reasonable and necessary to cure or relieve the effects of Claimant's July 19, 2021 work injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on July 19, 2021, when he caught his left hand in a rope while performing his job duties and sustained a compression/crush injury to the left hand. Claimant's injury occurred when he wrapped a rope around his hand to pull a tarp off of a load of hay he was hauling on a truck.

RELEVANT PRIOR INJURIES AND CONDITIONS.

2. Claimant has a significant history of prior injuries to his left hand, including work injuries to the left hand in March 2012 and February 2017, which resulted in surgeries. Claimant was also diagnosed with a familial tremor of both hands in 1994. As a result of these prior conditions, Claimant had pre-existing diminished sensation in the ulnar distribution of his left hand, an essential tremor, and grip weakness.

3. Claimant's March 2012 work injury occurred when the ulnar aspect of Claimant's left hand was caught between two pipes, necessitating a skin graft and surgery. Claimant was evaluated for an impairment rating by Laura Caton, M.D., on March 28, 2013. Dr. Caton opined that Claimant's grip and motion had "fully recovered" and that he had occasional tingling in the left hand with barometric changes, and skin color changes in cold weather. Dr. Caton assigned an 18% left upper extremity permanent impairment rating and released Claimant from all work restrictions. Dr. Caton found Claimant had a 5% loss of range of motion at the left wrist, and loss of range of motion at the fingers, with the exception of the thumb. (Ex. 37).

4. In August 2012, Claimant was evaluated for possible complex regional pain syndrome (CRPS), through a thermogram, and bone scan, both of which were negative. It was determined Claimant did not have CRPS at that time. (Ex. K, L, M, N).

5. In May 2013, Claimant sustained a non-work-related injury when pulling a garden hose at his home. He experienced a pop in the ulnar wrist and lost sensation over the ulnar aspect of the left hand with swelling. (Ex. 36). No records of additional treatment for this injury were offered into evidence.

6. In February 2017, Claimant sustained an injury to his left thumb resulting in a fracture requiring ORIF surgery. (Ex. P, Q). As of April 2017, Claimant had limited range of motion in his left thumb, but had regained strength in the left hand. Claimant's provider, Malcolm Slaton, PA-C, indicated Claimant's left grip strength was close to his right-hand

grip strength. (Ex. P). On June 21, 2017, Claimant was evaluated by Robert Dupper, M.D., for an impairment rating. Dr. Dupper assigned a 26% left upper extremity impairment rating, which included 24% left thumb range of motion impairment, and complete loss of sensation of the left thumb. Dr. Dupper noted that Claimant had returned to work, and was working with pain and limitations of strength and sensation of the left hand. (Ex. P).

7. In May 2019, Claimant sustained another injury when he fell on his left wrist. Claimant had some tingling in his left arm, but reported that he believed it was due to his prior injuries. (Ex. L). During this timeframe, Claimant was also experiencing severe migraines which were associated with right-sided weakness and numbness. Due to the headaches, Claimant was off work for several months. (Ex. G, L).

8. In his dealings with health care providers related to the July 19, 2021 work injury, Claimant reported his prior injuries and hand conditions to his health care providers.

JULY 19, 2021 INJURY

9. Following his July 19, 2021 injury, Claimant was evaluated at Greeley Hospital, diagnosed with a hand contusion, and placed in a splint. On July 23, 2021, he was evaluated by authorized treating physician (ATP) Oscar Sanders, M.D., at UC Health. Claimant had pain in the thenar eminence and pain in the ulnar aspect of the left hand. Claimant reported tinging in the hand and grip weakness, which he characterized as chronic, but worsened since his injury. (Ex. 26).

10. After his initial evaluation, Dr. Sanders referred Claimant to Bret Peterson, M.D., a hand surgeon at Orthopaedic & Spine Center of the Rockies. Claimant first saw Dr. Peterson on August 5, 2021, and reported ulnar-sided pain and swelling, and noted that he had a pre-existing ulnar nerve injury with diminished sensation and weakness in his hand. Claimant also had pre-existing clawing of the left hand. Claimant's primary complaint at that time was pain in his radial hand and wrist pain. Dr. Peterson recommended an MRI arthrogram, which was negative for ligament tear. (Ex. Q).

11. On August 26, 2021, Claimant saw Dr. Peterson, reporting diminished sensation in the radial nerve distribution over the dorsum of the left hand. Dr. Peterson noted Claimant had baseline clawing of the left hand and a loss of intrinsic function. Dr. Peterson recommended Claimant undergo electrodiagnostic testing for new onset of radial sensory nerve dysfunction. (Ex. 31)

12. On September 29, 2021, Claimant saw Gregory Reichhardt, M.D., for electrodiagnostic testing, which was interpreted as showing chronic/old left ulnar neuropathy, but was otherwise negative. He noted Claimant had preexisting numbness, of the 4th and 5th digits. He also noted mild left-hand swelling and mottling of the skin, with no sweat or temperature changes noted. (Ex. D). Dr. Reichhardt opined that Claimant's symptoms extended "well beyond the distribution of any single nerve," that Claimant's findings were concerning for complex regional pain syndrome (CRPS). He indicated that Claimant met the "Budapest criteria" for CRPS, and referred Claimant for

the performance of Q-SART and thermogram[1] testing for further evaluation. Dr. Reichhardt submitted the request for Q-SART and thermogram testing to Insurer on October 5, 2021. (Ex. D).

13. The Colorado Medical Treatment Guidelines (MTG), for Complex Regional Pain Syndrome (CRPS), W.C.R.P. 17, Ex. 7, provide that patients who meet the "Budapest criteria," defined below, may begin initial treatment for CRPS. The MTG sets out the following criteria as:

- Continuing pain, which is disproportionate to any inciting event; and
- At least one symptom in 3 of the following 4 categories:
    - Sensory: reports of hyperesthesia and/or allodynia;
    - Vasomotor: reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry;
    - Sudomotor/edema: reports of edema and/or sweating changes and/or sweating asymmetry;
    - Motor/trophic: reports of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).
- At least one site at the time of evaluation in 2 or more of the following categories:
    - Sensory: evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);
    - Vasomotor: evidence of temperature asymmetry and/or skin color changes and/or asymmetry. Temperature asymmetry showing at least a 1°C difference between the affected and unaffected extremities;
    - Sudomotor/edema: evidence of edema and/or sweating changes and/or sweating asymmetry. Upper extremity volumetrics may be performed by therapist that have been trained in the technique to assess edema; or
    - Motor/trophic: evidence of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- No other diagnosis that better explains the signs and symptoms. It is essential that other diagnoses which may require more urgent treatment, such as infection, allergy to implants, or other neurologic conditions, are diagnosed expediently before defaulting to CRPS.

14. On October 7, 2021, Insurer submitted Dr. Reichhardt's request for Q-SART and thermogram testing to Kathy McCranie, M.D., for review. Dr. McCranie opined that Claimant did not meet the Budapest criteria to begin diagnostic testing because Claimant's pre-existing conditions explained all of his symptoms, with the exception of swelling. Dr. McCranie opined that Claimant's preexisting tremor and weakness were "at

[1] Q-SART testing is an autonomic test measuring sweat, an a thermogram test measures temperature.

baseline," and Claimant had "baseline numbness from an ulnar neuropathy," previous loss of motion evidence by a prior impairment rating, and that his skin changes were explained by the prior ulnar skin graft. Dr. McCranie opined that the bulk of Claimant's findings were not related to his July 19, 2021 work injury. Dr. McCranie's opinion is not persuasive. (Ex. C).

15. On October 12, 2021, Claimant saw Dr. Peterson. Dr. Peterson acknowledged Claimant had a previous injury in 2012 resulting in permanent ulnar nerve dysfunction, and indicated Claimant had consistent pain out of proportion with neurologic involvement. Claimant reported pain in the proximal forearm, dorsal hand, and wrist. Claimant described splotchy colors, altered sweat patterns, and swelling in his left hand. He recommended Claimant undergo a thermogram. He also indicated it would be optimal to obtain a stellate ganglion block to gauge Claimant's response. Dr. Peterson also recommended a carpal tunnel release and radial neurolysis as treatment options. He noted that Claimant's symptoms would likely persist without intervention. (Ex. Q).

16. On October 20, 2021, Dr. Reichhardt responded to Dr. McCranie's opinion in his report from that date, indicating he disagreed with Dr. McCranie's opinion that Claimant's symptoms could not be considered part of Claimant's current Budapest criteria. Dr. Reichhardt opined that Claimant met the Budapest criteria, even accounting for Claimant's preexisting symptoms. Specifically, Dr. Reichhardt indicated that Claimant was reporting increased pain beyond his pre-July 19, 2021 baseline pain. Claimant's post-July 19, 2021 allodynia was on the radial side of the hand, rather than the ulnar side. Claimant's skin changes were also in a different location than his skin graft. He indicated that he did not consider Claimant's tremor as part of his Budapest criteria. Notwithstanding, he opined that Claimant, has subjective reports meeting three of four subjective criteria (allodynia on the radial aspect of the hand, color changes in the hand, edema in the left hand, and increased motor change compared to pre-injury). Objectively, he opined that Claimant met at least two criteria, including allodynia of the radial aspect of the hand, evidence of erythema and increased skin mottling. He noted that Claimant has evidence of mild edema of the left hand, meeting the sudomotor requirement, and significant weakness in the left hand and loss of range of motion. He opined that Claimant met the Budapest criteria even accounting for his prior injuries. (Ex. D).

17. On November 9, 2021, Claimant saw Dr. Peterson and his physician assistant, Jessica Ritengo, PA-C. Dr. Peterson indicated that Claimant "certainly falls into the CRPS spectrum." Claimant reported worsening numbness in his thumb, index and middle fingers beyond his baseline finger numbness. Claimant also reported splotchy colors and altered sweat patterns and swelling of the left hand, and provided video evidence of color change. On exam, Claimant had blotching to left hand to his skin color and tone, and loss of hair over the dorsum and knuckles of the left hand. Dr. Peterson's diagnosis was left upper extremity crush injury, preexisting ulnar nerve neuropathy and dysfunction from previous crush injury, probable CRPS/irritable carpal tunnel syndrome, and compressive radial neuropathy. (Ex. Q).

18. On November 16, 2021, Claimant was seen at the office of Timo Quickert, M.D., for evaluation for a stellate ganglion nerve block. Claimant reported excessive sweating

of the left hand, goosebumps to the left arm, temperature and color changes, and swelling. On examination, Claimant had tenderness with both light and moderate palpation of the left hand, the left hand was cooler than the right, and Claimant had increased erythema in the left hand and forearm, and slight swelling on the left. Dr. Quicker agreed with Dr. Reichhardt that Claimant demonstrated symptoms of CRPS, and recommended two stellate ganglion blocks one week apart, and that Claimant be evaluated by Dr. Reichhardt two hours after the procedure to determine effectiveness. (Ex. 35).

19. On December 3, 2021, Dr. Sanders opined that Claimant has CRPS and that more likely than not the CRPS is reasonably related to Claimant's July 19, 2021 work injury. (Ex. 19).

20. On January 7, 2022, Dr. Quickert performed a left stellate ganglion block without immediate complications. (Ex. B). Approximately two hours later, Claimant saw Dr. Sanders, noting increased pain, numbness, weakness, and tremors. Claimant had significant tachycardia. Dr. Sanders was concerned about Claimant's reaction to the injection and referred him to the UC Health emergency department for evaluation. (Ex. 17). At UCH, Claimant reported developing a left-sided migraine headache, and a left-sided facial droop, which Claimant reported was common with his migraine headaches. Later records from other providers describe Claimant's facial droop as right-sided.

21. On January 12, 2022, Claimant underwent an independent medical evaluation (IME) performed by Scott Primack, D.O., at Respondents' request. As relevant to the present issues in this case, Dr. Primack opined that Claimant does not have CRPS, based on his own examination and the fact that Claimant had no reported improvement or change in function following the stellate ganglion injection. He opined that an autonomic test battery or thermogram were not recommended based on Claimant's history, and examination. Dr. Primack also opined that Claimant was at maximum medical improvement (MMI). (Ex. A).

22. On January 21, 2022, Claimant underwent a neurologic evaluation with Ryan Barmore, M.D., to assess his hand tremor and right-sided facial droop. Claimant reported that since the stellate ganglion block, he had increased pain and weakness in his left arm with intermittent chills. Dr. Barmore noted that Claimant's facial droop was variable and not present when Claimant was distracted by conversation, and that Claimant's hand tremor was intermittent. He indicated that he suspected Claimant's facial droop was the result of a functional movement disorder, but could not rule out an underlying organic disorder related to his hand tremor. He diagnosed Claimant with functional neurological symptom disorder with abnormal movement, and tremor of both hands. (Ex. G).

23. Based on his reaction to the initial stellate ganglion block, Claimant declined to undergo a second block as initially recommended by Dr. Quickert. (Ex. E). Dr. Reichhardt opined that claimant's complication was not fully understood, which raised the risk of a second procedure, and that Claimant did not receive benefit from the first injection, calling into question whether a second injection would be of benefit. (Ex. D). He agreed with Claimant's decision not to undergo a second stellate ganglion block.

24. On February 4, 2022, Dr. Primack issued a second report in which he primarily addressed the reasonableness, necessity and relatedness of carpal tunnel and medial nerve compression surgeries proposed by Dr. Peterson. Dr. Primack opined that such surgeries would not be considered work-related or effective, and that Claimant's current symptoms were related to his pre-July 19, 2021 injuries. (Ex. B).

25. On March 1, 2022, Dr. Sanders indicated he continued to agree that Claimant should continue to be evaluated for CRPS, and that he considered Q-SART and thermogram testing to be reasonable. He indicated Claimant was not at maximum medical improvement because diagnostic testing had not been completed. Dr. Sanders felt a pain psychology evaluation was appropriate as well. (Ex. 14).

26. On March 17, 2022, Dr. Reichhardt noted in his examination report that he had reviewed Dr. Primack's opinion and continued to recommend Q-SART and thermogram testing. He again reiterated that Claimant met the Budapest criteria for CRPS, and that his presentation was made more complex by his pre-existing neurological injury, his functional neurologic disorder, and possible presence of a pain disorder. He acknowledged that although Q-SART and thermogram testing would not likely result in the performance of additional stellate ganglion blocks, or a spinal cord stimulator in the near future, he felt that establishing (or ruling out) CRPS as a diagnosis was reasonable. He indicated a bone scan would be a consideration with a positive Q-SART and/or thermogram. (Ex. 3)

27. On April 11, 2022, Dr. Sanders responded to a letter from Insurer that outlined Dr. Primack's opinion, and asked if Dr. Sanders agreed. In response, Dr. Sanders wrote:

> "[Claimant] has completed multiple evaluations with both Dr. Reichhardt and Dr. Peterson of orthopedic surgery. He has been previously noted to demonstrate signs and symptoms fulfilling the Budapest criteria, to include disproportionate pain/hypersensitivity, swelling, skin mottling, weakness and numbness. It has been noted that patient does have pre-existing ulnar nerve injury findings at baseline. His case has also been complicated by a potential functional neurologic disorder and pain disorder. However, his ongoing pain and dysfunction is a significant elevation from his preinjury baseline. To assist in providing diagnostic clarity, given the complexity of this case, I would strongly agree with proceeding with Q-SART and thermogram to assist in providing the most comprehensive and appropriate care for [Claimant], with the ultimate goal of returning him back to his preinjury baseline functioning and to work."

28. Respondents' presented Dr. Primack's testimony by deposition in lieu of live testimony. He was admitted as an expert in neurology, physiatry, physical medicine, and electrodiagnostic medicine without objection. Dr. Primack's testimony was consistent with his reports. Additionally, he testified, in his opinion, that Claimant's hand pain is the result of a wrist sprain and non-work-related functional neurologic disorder, rather than CRPS. He further testified that the fact that Claimant had a prior chronic nerve injury and a negative response to the stellate ganglion block was enough for him to determine that

Claimant does not need Q-SART or thermogram testing. He testified that if Claimant does not meet the Budapest criteria, Q-SART testing not appropriate, and that in his opinion, Claimant does not meet the Budapest criteria.

29. Dr. Primack testified that although he does not believe Claimant meets the Budapest criteria, if Claimant met the criteria, the results of a thermogram and Q-SART testing would tend to establish whether Claimant's condition was or was not work-related. Specifically, he testified as follows:

> Q: Have you had occasion before, though, when that argument also involves prior testing and prior evidence of all of that Budapest criteria?
>
> A: I'm not sure of your question, but it is not uncommon to see someone who has had a previous nerve injury and then there is another injury, and the concerns are, do they have CRPS? That is not uncommon.
>
> Q: Okay. In this case when we look at the argument about whether or not there is Budapest criteria, if there is Budapest criteria, let's say you are wrong and the other guys are right, if there is, is it probable that that is because of what occurred on July 19, 2021, or is it more probable that it was preexisting, given the testing and the prior medical records that you have?
>
> A: That is a great question. It depends upon the results of the thermogram and the Q-SART, meaning the thermogram, if the unmyelinated C fibers are only seen with the ulnar nerve, then that is CRPS type 2. That would not be a component of the work injury, if it is CRPS type 2 from an ulnar nerve problem because he has had ulnar nerve problems for a long time.
>
> If he has CRPS type 2 where the median nerve lights up, you can make a case that that would be work-related. If you have CRPS type 1, which means you don't have any nerve injury, then that would be considered work-related.
>
> Q: Okay. And you said that would require the median nerve to light up in this testing?
>
> A: It would have to be -- yeah. Well, what happens is, is that the data would look more towards, instead of a diffuse pattern, a specific pattern within a specific nerve dermatome.
>
> Q. Okay.

> A: That is what you would see on the thermogram and the autonomic test battery. So you would be sweating within those areas of the skin that specifically receive median nerve conduction or median nerve electrical input.
>
> Q. Okay. And given the MRI, because you said the MRI that was done, and the EMG that was done so far, do you anticipate that there would be median nerve involvement?
>
> A. No, I don't. But, you know, based upon your question, you know, there would be scenarios that you could analyze.

(Primack Deposition, p. 53, l. 6 - p. 55, l. 2).

30. Dr. Reichhardt testified at hearing and was admitted as an expert in physical medicine and rehabilitation and electrodiagnostic medicine. Dr. Reichhardt's testimony was consistent with his medical records. He testified that he has not diagnosed Claimant with CRPS, but that Q-SART and thermogram testing were reasonable and necessary tests to determine whether Claimant has CRPS. It is possible Claimant does not have CRPS. He testified Claimant's negative response to the stellate ganglion block was not definitive evidence that Claimant does not have CRPS. Dr. Reichhardt testified that Claimant met the Budapest criteria, at his first visit with Dr. Reichhardt, and that he satisfied more criteria as treatment progressed. Dr. Reichhardt opined Claimant ultimately met all objective Budapest criteria. Dr. Reichhardt testified that Claimant's condition could be treated without performance of the Q-SART and thermogram, but that testing will provide a proper diagnosis which will allow better clinical and treatment decisions.

31. At hearing, Claimant's testimony concerning his July 19, 2021 mechanism of injury, and his prior injuries was consistent with his reports of injuries documented in his medical records. Claimant testified before his July 19, 2021 injury, he had approximately 80% grip strength, and was able to perform his work duties. He had pain in the pinkie of his left hand, but had use of his left hand. He testified that he did not have swelling, hair loss or temperature changes in the left hand. He testified he would like to undergo Q-SART and thermogram testing if approved.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that Q-SART and thermogram testing are reasonable and necessary to cure or relieve the effects of

Claimant's industrial injury. At issue is whether Claimant meets the appropriate criteria to undergo additional diagnostic testing to determine if Claimant's current condition constitutes CRPS. Claimant has not been definitively diagnosed with CRPS. Dr. Primack and Dr. McCranie have opined that Claimant does not meet the Budapest criteria, rendering Q-SART and thermogram testing unreasonable and/or unnecessary. Conversely, Claimant's treating providers, Dr. Reichhardt, Dr. Sanders, and Dr. Peterson believe Claimant meets these criteria. The ALJ finds the opinions of Dr. Reichhardt, Dr. Sanders, and Dr. Peterson to be more persuasive than those of Dr. Primack and Dr. McCranie, and that Claimant meets the Budapest criteria.

Throughout his treatment and evaluation with his treating health care providers, Claimant has consistently and forthrightly disclosed his prior injuries and conditions. As evidence by the medical records, Dr. Reichhardt, Dr. Sanders, and Dr. Peterson were aware of Claimant's pre-existing conditions, and considered these conditions when determining that Claimant meets the Budapest criteria. Although Claimant has significant pre-existing conditions, and has had multiple prior injuries to his left hand, he was tested for CRPS in 2013 and found not to have the condition.

Dr. Primack testified that although he does not believe Claimant meets the Budapest criteria, if Claimant meets those criteria, the results of a thermogram and Q-SART testing would tend to establish whether Claimant's condition was or was not work-related. Similarly, Dr. Reichhardt testified that performance of Q-SART and thermogram testing would assist in arriving at a definitive diagnosis, and would provide information that would assist in determining the appropriate treatment for Claimant's condition. Taken as a whole, the ALJ concludes that Claimant has established that it is more likely than not that he meets the Budapest criteria, and that Q-SART and thermogram testing is reasonable and necessary to cure or relieve the effects of his industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of Q-SART and thermogram testing is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 23, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable industrial injury on January 7, 2021.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary disability benefits.

IV. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Employer is a trucking company that transports trailers for FedEx. Owner is the sole operator of Employer.

2. Claimant began working for Employer as a team driver in February 2020. Claimant's job duties included transporting goods from Denver, Colorado to Omaha, Nebraska, hooking up trailers to trucks using dollies, and truck maintenance. Claimant testified that the dollies weighed approximately 400-600 pounds.

3. Claimant testified that, upon being hired by Employer, he met with Owner at Owner's office and completed paperwork. Claimant testified that one of the documents he completed was a waiver of workers' compensation. Claimant acknowledged that he did not reference any alleged waiver in his discovery responses and did not request a copy of the alleged waiver from Employer through discovery. Claimant did not offer the alleged waiver into evidence. Claimant testified that he mentioned the alleged waiver to his sister, but elected to sign it and start employment because of the pay and his understanding that Employer was a good company.

4. Claimant's older sister, J.V., testified at hearing that Claimant mentioned having signed a workers' compensation waiver sometime early on in his employment with Employer. Claimant lived with J.V. at the time. J.V. graduated law school and works as an auditor for Kaiser Permanente.

5. Owner testified at hearing that he never required Claimant to sign a waiver of workers' compensation. He testified that doing so would be unethical. Owner testified that Employer has dealt with work injuries of employees on prior occasions and had done so appropriately.

6. GL[Redacted] testified at hearing on behalf of Respondents. Mr. GL[Redacted] is Employer's PEO representative. He testified that he has previously handled workers' compensation claims for Employer and has no knowledge of Employer ever requiring an employee to sign a waiver of workers' compensation rights.

7. Claimant regularly worked with another team driver, RS[Redacted]. Claimant and Mr. RS[Redacted] took turns driving and sleeping. Claimant's shifts consisted of driving for 12 hours, being off for a few hours, then going back to work. This occurred approximately five days in a row until he was off for a few days.

8. Claimant testified that he talked to Mr. RS[Redacted] regarding workers compensation on approximately two or three occasions prior to his alleged injury. Claimant testified that Mr. RS[Redacted] informed him that if he was involved in a workers' compensation matter Owner would "f*ck" him. Claimant testified that Mr. RS[Redacted] also seemed to be "against" worker's compensation. Claimant testified that he was not aware of any employees that had work injuries.

9. Mr. RS[Redacted] testified at hearing that he never told Claimant Owner would "f*ck" him on a workers' compensation matter. He testified that he does not recall ever specifically talking with Claimant about workers' compensation. Mr. RS[Redacted] further testified that he was never forced to sign any waiver of workers' compensation, nor was he aware of any other employees that were required to do so.

10. Claimant alleges that he sustained an industrial injury while working for Employer at approximately 8:30 a.m. or 9:00 a.m. on January 7, 2021. Claimant testified that he was lifting a dolly to connect to trailers in the FedEx yard. Claimant testified that he bent down to lift the dolly, grabbed it, and lifted it with his arms and body. He testified that he then twisted his back to attach it the dolly to the cab and felt a pop in his lower back/buttocks area with a burning, tingling and numbness down his leg. There were no witnesses to the event. Claimant testified that, at the time, he believed he simply pulled a muscle and did not think much of it.

11. Claimant did not report the alleged injury to Owner, despite texting with Owner that same morning. Claimant testified he did not report the incident to Owner when it occurred because he did not think it was a serious injury and because he signed a waiver of workers' compensation. Claimant testified that he did not say anything about it to Mr. RS[Redacted] about the incident at the time because of Mr. RS[Redacted]'s alleged prior comment that Owner would "f*ck" him regarding workers' compensation matters.

12. Claimant worked full duty and completed the remainder of his shift on January 7, 2021, as well as his scheduled shifts on January 8 and January 9, 2021. Owner and Mr. RS[Redacted] testified that they did not notice any observable signs that Claimant was injured. Claimant was able to perform his regular job duties during this time.

13. Claimant testified he 'believed' he mentioned the incident to his sister the week of the incident. J.V. testified that, on or around January 10, 2021, Claimant informed her that he hurt his back moving a dolly at work.

14. Claimant took personal time from work January 10, 2021 to January 19, 2021 to travel to Wyoming to be with his father. Claimant testified that his leg symptoms were not as bad while he was in Wyoming because he was not sitting as much. Claimant testified that stretched and iced his lower back in an attempt to alleviate his symptoms.

15. Claimant worked full duty as scheduled from January 19 through January 23, 2021. Claimant testified that his pain worsened when he returned to work and that he was experiencing numbness and tingling. Owner and Mr. RS[Redacted] again testified that they did not notice any observable signs that Claimant was injured. Claimant was able to perform his regular job duties during this time. Claimant was scheduled off and did not work on January 24 and January 25, 2021.

16. J.V. testified that, between January 10 and January 26, 2021 Claimant was acting as if he were in pain. She testified she observed Claimant walking more slowly, and appearing to have a difficult time standing fully upright.

17. Claimant was scheduled to return to work on January 26, 2021. Claimant testified that he was in severe back pain when he woke up that morning. Claimant testified that he went out to his driveway, loaded his personal truck and began driving into work but was experiencing excruciating pain. Claimant testified that he did not feel he could safely drive in that condition. Claimant testified he drove back home, went into his house, sat on the couch, and contacted Owner. At 7:00 a.m. Claimant sent Owner a text message stating, "I'm debating on going to the ER, either tore my hamstring or it's sciatica." (R. Ex. J, p. 94). Both Claimant and Owner testified that they spoke via phone after that text message.

18. Claimant testified that he called Owner and told him "what was going on." Claimant did not specify what exactly he told Owner at that time. He acknowledged that he did not make any mention to Owner regarding the alleged January 7, 2021 incident or an injury at work.

19. Owner testified that, during the conversation on January 26, 2021, Claimant told him that he slipped and fell in his driveway while going to his personal vehicle. Owner testified that the weather conditions were snowy and icy on the morning of January 26, 2021. Owner testified that Claimant did not mention anything to him at the time regarding any alleged work injury.

20. Mr. RS[Redacted] testified that Claimant informed him that he slipped and fell next to his truck at home on January 26, 2021 and had to crawl back to the house.

21. Claimant testified that he did not fall on the morning of January 26, 2021 nor did he sustain any other trauma between January 11 and January 26, 2021. Claimant denies ever telling Owner or Mr. RS[Redacted] that he slipped and fell in his driveway on January

26, 2021. Claimant attributes the symptoms he experienced on January 26, 2021 to the alleged January 7, 2021 work injury.

22. J.V. testified that she recalled Claimant coming home in extreme pain on the morning of January 26, 2021. J.V. was just getting up when Claimant came back into the home. She testified that Claimant did not tell her he fell nor did she see him fall. J.V. did not see any bruising, scratches, tears in his clothing or dirt on Claimant's clothes that morning. J.V. testified that the ground was clear of snow that day.

23. Owner gave Claimant the day off on January 26, 2021. Claimant testified that the pain got so bad that he urinated himself and "blacked out" around 2:00 a.m. on January 27, 2021.

24. J.V. took Claimant to the emergency room at Lutheran Medical Center on the morning of January 27, 2021. Claimant testified that he does not have any recollection of that day, including the visit to the emergency room. Claimant testified he has no recollection of what he told the doctors at the emergency room. He testified that he did not recall anything until waking up at home on January 28, 2021.

25. J.V. testified that she was in the emergency room with Claimant and that he was having a hard time communicating with the hospital staff due to his pain. Despite this alleged difficulty communicating, J.V. testified that Claimant specifically told the nurses and doctors that he injured himself lifting a dolly on January 7, 2021.

26. The Lutheran Medical Center note from January 27, 2021 contains no reference to any incident on January 7th, any incident lifting a dolly, or any work incident. The note states that Claimant presented with

> [s]ymptoms since yesterday. [Claimant] felt feverish and sweaty yesterday. [Claimant] developed numbness to the left foot. He then developed pain from the foot all the way to the low back. It runs up the back of the leg. He denies a history of sciatica. No trauma. No IV drug use. No history of similar issues. He was incontinent of urine and felt he could not feel or hold his bladder last night. He has never had this issue. Symptoms are moderate and constant.

(R. Ex. E, p. 11).

27. The clinician noted a normal heart rate. Claimant was found to be alert and oriented with no acute distress. A lumbar MRI was performed, which revealed L4-L5 and L5-S1 stenosis due to congenitally short pedicles "confounded by [a] small disc herniation at L4-L5 and large [disc herniation] at L5-S1 with radiculopathy." (See Id. at p. 23). Claimant was provided pain medications and steroids and was referred for a neurosurgery consult.

28. Claimant saw neurologist Mark Magner, M.D. at 3:15 p.m. that same day. Dr. Magner noted an acute onset of symptoms on January 26, 2021, but also noted that Claimant had lower back pain for three days, and numbness, tingling and burning sensation in his left leg for a week. He documented that Claimant was calm, bright and alert. Dr. Magner diagnosed Claimant with spinal stenosis of the lumbar region with radiculopathy and lumbar disc herniation with radiculopathy. He remarked, "Given the hyper-acute timing and also he is not in extremis, we both agreed to try conservative measures." (Id.) Dr. Magner prescribed Claimant medication and referred him for physical therapy.

29. Claimant later called Owner January 27, 2021. Despite his initial testimony that his first recollection after he blacked out was on the morning of January 28, 2021, Claimant testified about this call, stating that he spoke with Owner to inquire about workers' compensation coverage and that Owner told him his injury would not be covered by worker's compensation because he went to the hospital from his house and not from work. Claimant testified that he did not recall telling Owner about the alleged January 7, 2021 work incident during this telephone call. He, nonetheless, testified that he recalled Owner telling him during this call that "You can't be lifting anymore dollies after this."

30. J.V. testified that she heard a telephone conversation on speakerphone between Claimant and Owner on January 27, 2021 in which Claimant "definitely" reported a work injury to Owner.

31. Owner testified that Claimant called him from Lutheran Medical Center on January 27, 2021 inquiring if his condition was work-related since he was heading to work when he fell. Owner informed Claimant that it was not work-related since his fall occurred at home. Owner testified that, at that time, Claimant never said anything to him about hurting himself while lifting a dolly or injuring himself at work.

32. Claimant subsequently sought treatment at Kaiser Permanente. Claimant presented to James Welle, M.D. on February 1, 2021 with complaints of radicular back pain. Dr. Welle noted "Patient reported symptoms restarting around his ed visit on 1/27/21. This is new for him. Withotu (*sic*) trauma." (R. Ex. F, p. 26). Although Claimant testified that he told Dr. Welle about his January 7, 2021 work injury at this appointment, the medical record from this date does not include any reference to a specific incident or any work incident. Dr. Welle diagnosed Claimant with a lumbar disc herniation and radiculopathy and chronic anxiety and referred Claimant for physical therapy.

33. A physical therapy note dated February 11, 2021 documents, "[Claimant] is a 32 year old male who presents with the complaint of: L LE pain starting on 1-27-2021 after walking and the L LE collapsed." (Id. at p. 31).

34. Dr. Welle reexamined Claimant on February 23, 2021. At this exam, Claimant reported that his injury occurred at work. Dr. Welle noted,

> First seen in ED, then referred to nsgy at SCL; Then came back in house; Was going to work; had symptoms of leg pain and numbness the week before; was pully (*sic*) dolly, felt pop in back, on older truck; has been sitting for 9 hours and thought that had pulled something; started having pain in the left leg; started stretching afterwards; then started noticing the burning back down the leg; the following week, started getting numbness from the foot; had time off; employed by [Employer] contacted (*sic*) to FedEx[.]"

(R. Ex. F, p. 37).

35. Claimant last saw Dr. Welle on February 23, 2021. On March 2, 2021, Dr. Welle issued a letter stating that, based on the description of events, his physical examination, and imaging studies, Claimant's disc herniation and resulting pain and disability resulted from his work duties.

36. Claimant continued at Kaiser Permanente for two chiropractic treatments on March 3 and March 8, 2021. During these appointments, Claimant continued his description of his injury occurring after lifting a dolly. However, he also stated they injury occurred approximately six weeks prior.

37. Owner testified that he spoke to Claimant on a daily basis after January 26, 2021 and, during that time, Claimant never changed his story to him that his injury occurred during a slip and fall in his driveway. Owner testified that approximately one month after January 26, 2021, Claimant and J.V. called him requesting workers' compensation paperwork.

38. Claimant and J.V. testified they requested workers' compensation paperwork from Owner on two or three occasions prior to being provided the paperwork.

39. Claimant filed a claim for worker's compensation on March 12, 2021 stating that he injured himself while hooking up a dolly on January 7, 2021.

40. Owner testified that his receipt of the claim for worker's compensation was the first time he was made aware Claimant was alleging a work injury occurred on January 7, 2021 lifting a dolly. Owner testified that, if Claimant would have reported a work incident to him, he would have completed an accident report and followed Employer's procedures.

41. Claimant subsequently selected Injury Care Associates as his authorized provider and presented to Martin Kalevik, D.O. on March 30, 2021 and April 6, 2021. Claimant reported that he felt a pop and burning sensation in his lower back while moving a dolly at work on January 7, 2021. Claimant denied having any falls or direct trauma. Dr. Kalevik assessed Claimant with lumbosacral radiculopathy and opined that Claimant sustained a work-related injury. He referred Claimant for physical therapy and an evaluation with Samuel Chan, M.D. Dr. Kalevik placed Claimant on work restrictions.

42. Dr. Chan evaluated Claimant on May 19, 2021. Claimant continued to report that he injured himself lifting a dolly on January 7, 2021 while at work. Dr. Chan requested authorization for steroid injections, which were denied due to Claimant's claim being contested.

43. Claimant treated by Thomas Robinson, PT on six occasions from April 22 to May 27, 2021. Claimant reported to PT Robinson that he injured his back lifting a dolly at work on January 7, 2021.

44. Dr. Kalevik changed medical offices and Claimant's care was transferred to Margaret Irish, D.O. Claimant first saw Dr. Irish on April 29, 2021. Claimant reported that he injured his back lifting a dolly on January 7, 2021. Dr. Irish found Claimant's lumbosacral radiculopathy work-related and continued his physical therapy and work restrictions. Dr. Irish's notes indicate that, at the time of treatment, she had emergency room records and the records of Dr. Magner.

45. On October 5, 2021, Dr. Irish issued a letter after reviewing additional records. Dr. Irish wrote that, at her May 20, 2021 visit, she did not have statements from Employer or medical records indicating Claimant had fallen at home on January 26, 2021, nor medical records from the neurosurgeon stating that there were congenital issues. Dr. Irish noted that, in reviewing those records, it appeared clear that Claimant had pre-existing lumbar spine degenerative/congenital changes. She opined that Claimant had a pre-existing back condition and that he fell outside while getting into his personal truck. She concluded that, while Claimant may have had a mild exacerbation of his low back pain from lifting a dolly on January 7, 2021, such exacerbation would have resolved in a few weeks. Dr. Irish opined that Claimant's back condition was not causally related to his employment.

46. Claimant did not return to work for Employer due to his back condition and restrictions. In November or December 2021 Claimant returned to work as a truck driver for a different employer. He sustained an injury in January 2022 to his back and subsequently quit employment as a truck driver.

47. Dr. Kalevik testified at hearing on behalf of Claimant. Dr. Kalevik is Level II accredited and board certified in family medicine. He testified that, based on Claimant's reported history, presentation, examination, and imaging, Claimant's injury is work-related. Dr. Kalevik testified that there are objective findings on MRI and examination of a lumbar disc herniation and radiculopathy. Dr. Kalevik explained that, while Claimant probably had pre-existing degenerative lumbar changes, an acute event had to occur in order to result in Claimant's disc extrusion and radiculitis. Dr. Kalevik testified that there was no evidence that Claimant underwent any treatment to his back prior to the alleged work injury. Dr. Kalevik testified that he did not review all of the Kaiser Permanente records but that he had seen employee statements regarding the relatedness of Claimant's alleged work injury. Dr. Kalevik explained that his opinion that Claimant sustained a January 7, 2021 work injury was based in part on Claimant's reported history. He acknowledged that the emergency room records from January 27, 2021 do not note a January 7th incident or work injury. Dr. Kalevik acknowledged that there was not an

objective way for him to tell whether Claimant was injured at work on January 7, 2021 or at home on January 26, 2021.

48. PT Robinson testified at hearing that Claimant's description of his injury to him seemed honest and was consistent with Claimant's symptoms. PT Robinson testified that he believes Claimant's injury is work-related. PT Robinson acknowledged that he is not Level II accredited or trained by the DOWC to make a causation opinion. He acknowledged that falls can cause disc herniations and there would very definitely be a severe onset of symptoms with a disc herniation.

49. Dr. Irish testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Irish testified consistent with her October 5, 2021 letter and continued to opine that Claimant's condition is not work-related. She testified that Claimant did not mention any work injury on his initial evaluations. She explained that the medical records from that visit indicate that Claimant's blood pressure and pulse were not unusually high, and that his and exam was fairly unremarkable, contradicting Claimant's testimony that he was in so much pain at the time that he blacked out. Dr. Irish explained that Claimant has congenitally short pedicles which can compress the spinal cord and result in pain and sometimes numbness and tingling. She further explained that a disc herniation can be acute or chronic, and that lifting a dolly or falling can cause herniations.

50. Claimant testified that he did not have any back injuries or back problems prior to the work injury. Claimant alleges that Mr. RS[Redacted] "sucked up" to Owner. Claimant testified that Owner offered to pay for Mr. RS[Redacted]'s wife's plane ticket and their mortgage issues. Claimant further testified about an incident on August 21, 2021 when he accidently hit a FedEx trailer with his work truck and reported it to Owner. Claimant alleges that Owner did not report the incident to FedEx as required by Employer's contract with FedEx. Claimant acknowledged he has never reported a January 7, 2021 work injury to Owner, Mr. RS[Redacted] or anyone else at Employer. Claimant admitted he has several lawyers in his family, including his father, who owns a law firm that represents claimants in workers' compensation claims.

51. Owner testified that he did give Mr. RS[Redacted] a payday advance in the past and offered to help him in other ways like allowing him to stay at his home and buy a plane ticket. Owner attempted to assist his workers that needed assistance. Regarding the August 21, 2021 incident, Owner explained that he reported the incident to FedEx as required.

52. MC[Redacted] worked at FedEx at the time and testified at hearing that Owner did inform her of the August 21, 2021 incident, that she personally looked at the truck and determined there was not significant damage warranting filing of a written report. She testified that, although the written policy is to submit a written report, that sometimes does not occur due to being busy and understaffed. Ms. MC[Redacted] testified that there was no issue with how Owner handled the August 21, 2021 incident or with Owner failing to report incidents to FedEx as required.

53. Mr. RS[Redacted] confirmed that Owner has given him payday advances, which he paid back. He testified that he does not owe Employer any money and that he has no financial interest in testifying against Claimant.

54. The ALJ finds the testimony of Dr. Irish, Owner, Mr. RS[Redacted], Mr. L[Redacted] and Ms. MC[Redacted], as supported by the records, more credible and persuasive than the testimony of Claimant, J.V., and Dr. Kalevik.

55. The ALJ finds that Claimant failed to prove it is more probable than not he sustained a compensable work injury arising out of and in the scope of his employment for Employer on January 7, 2021.

56. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The medical records establish that Claimant suffered from small and large disc herniations with radiculopathy. While Claimant purports that he sustained a work injury on January 7, 2021, Respondents witnesses allege Claimant specifically told them his injury was the result of a slip and fall at home. There is a two-week time period from when Claimant alleges he injured his back at work to when he sought medical treatment and became disabled. Both Claimant's reported mechanism of injury and a slip and fall could

result in Claimant's condition and pathology. Accordingly, this case effectively turns on the credibility of the witnesses.

As found, Claimant and J.V. are less credible and persuasive than Respondents' witnesses. Claimant's testimony is refuted by the credible testimony of Owner and Mr. RS[Redacted]. Claimant purports that he signed a waiver of workers' compensation, which he did not refer to in discovery nor offer as evidence. Owner credibly testified that there was no such waiver. Mr. RS[Redacted] and Mr. GL[Redacted] credibly testified that they also were not aware of Employer having employees sign a waiver of workers' compensation. Claimant further testified that he was not aware of any other workers sustaining work injuries but contends that he and Mr. RS[Redacted] randomly discussed workers' compensation and that Mr. RS[Redacted] informed him that Owner would "f*ck him" on a workers' compensation claim. Mr. RS[Redacted] credibly testified he never made such statement to Claimant. Thus, these stated reasons for failing to report his alleged work injury to Employer are incredible.

While Claimant's sister, J.V., testified that Claimant appeared to be in pain from January 10, 2021 to January 26, 2021, Owner and Mr. RS[Redacted] credibly testified that they did not observe any issues with Claimant during that timeframe. Claimant was able to perform his regular work duties at that time. Claimant was not disabled nor did he seek any treatment until January 27, 2021. Claimant effectively alleges that, on January 26, 2021, his symptoms from the alleged January 7, 2021 work injury significantly worsened without any specific reason or trauma. He purports that he woke up in significant pain, attempted to go to work, and was unable to do so. Claimant's story is contradicted by the credible testimony of both Owner and Mr. RS[Redacted], who credibly testified that Claimant personally told them that he slipped and fell by his truck while at home on January 26, 2021. Claimant admitted that he did not report a January 7, 2021 work injury to Employer. Owner was unaware that Claimant was alleging a January 7, 2021 work incident until receiving workers' compensation paperwork from Claimant several months later. When Claimant inquired about workers' compensation coverage, it was with respect to whether his fall at home could be covered, not an alleged January 7, 2021 work injury.

Prior to February 11, 2021, the medical records are devoid of any mention of a work injury or work incident on January 7, 2021. While Claimant testified that he was in so much pain that he "blacked out" and did not remember anything from the emergency room visit on January 27 2021 until the next morning, the medical records from January 27, 2021 document that Claimant was alert and oriented. Dr. Irish credibly testified that certain normal exam findings contradicted Claimant's testimony that he was in so much pain at the time that he blacked out. Moreover, Claimant contradicted himself when he testified that he blacked out and did not remember anything until the morning of January 28, 2021, but then testified to remembering the specific telephone conversation he had with Owner on January 27, 2021 in which he inquired about workers' compensation and the Owner told him he could no longer lift dollies. Furthermore, Claimant's testimony that he was "blacked out" at the emergency room and J.V.'s testimony that Claimant was having difficulty communicating due to his pain does not comport with her testimony that Claimant specifically told multiple emergency room providers that he sustained an injury

on January 7, 2021 while lifting a dolly at work. J.V.'s testimony that Claimant "definitely" reported a January 7, 2021 work injury to Employer is controverted by Claimant's own testimony that he did not report such work injury to Employer.

Based on the totality of the evidence, it is more likely than not Claimant slipped and fell at home, causing his disability and need for medical treatment. The preponderant evidence does not establish that Claimant sustained an injury arising out of and during the course of his employment on January 7, 2021. The preponderant evidence does not establish that Claimant's condition, disability and need for medical treatment was caused, aggravated, accelerated, or exacerbated by a work injury. Accordingly, Claimant's claim shall be denied and the remaining issues are moot.

ORDER

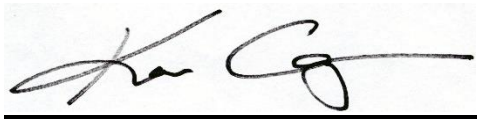
1. Claimant failed to prove it is more probable than not he sustained a compensable industrial injury arising out of and in the course of his employment on January 7, 2021.

2. Claimant's claim is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Douglas C. Scott, M.D. that he warranted a 0% whole person permanent impairment rating as a result of his December 8, 2020 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a firefighter who has worked for Employer since 1994. Claimant was diagnosed with renal cancer while treating for kidney stones in 2020. He reported his condition to Respondent on December 10, 2020.

2. At the time Claimant reported his diagnosis, he had already undergone surgical treatment for his renal cancer on December 8, 2020. The surgery was performed by Justin Green, M.D. and consisted of a right robotic assisted laparoscopic partial nephrectomy. The nephrectomy removed approximately 20% of Claimant's right kidney.

3. After reporting his cancer diagnosis to Employer, Claimant selected Alisa Koval, M.D. at Denver Health – Center for Occupational Health and Safety (COSH) as the Authorized Treating Physician (ATP). Claimant first visited Dr. Koval on December 18, 2020. Dr. Koval noted Claimant's recent surgery and that he was presenting to establish a Workers' Compensation claim. She determined Claimant had no residual symptoms and would likely soon be cleared to return to duty.

4. On January 8, 2021 Claimant returned to Dr. Koval for an examination. Dr. Koval stated "[Claimant] reports feeling well. He has recovered from his kidney procedure and has been cleared by his surgeon to resume activity. He may RTW for a trial of full duty at this time." On February 26, 2021 Dr. Koval placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment and no work restrictions. She recommended maintenance care in the form of follow-up with urology as needed.

5. Following an investigation and review of the relevant medical records, Respondent determined Claimant's renal cancer satisfied the criteria for the firefighter presumption under §8-41-209, C.R.S. On April 8, 2021 Respondent thus filed a General Admission of Liability (GAL). Respondent covered Claimant's lost work time from December 8, 2020 through January 7, 2021.

6. At the request of the claims adjuster, Claimant returned to Dr. Koval on December 10, 2021. The adjuster asked Dr. Koval to perform an impairment rating or clarify her position on impairment. Dr. Koval noted Claimant had no symptoms and was not clear on the purpose of the visit. In addressing impairment, Dr. Koval explained that "the upper urinary tract is graded by deterioration of renal function; his renal function is

nominal, and he does not meet criteria for the lowest class of impairment (Class I, pg. 20 I, AMA Guides 3rd Edition)."

7. On December 20, 2021 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Koval's MMI and impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

8. On March 11, 2022 Claimant underwent a DIME with Douglas C. Scott, M.D. After obtaining a detailed history and reviewing Claimant's medical records, Dr. Scott agreed that Claimant reached MMI on February 26, 2021 with a 0% whole person permanent impairment. In calculating the impairment, he reasoned:

> Using the AMA Guides to the Evaluation of Permanent Impairment, revised 3rd edition, and referencing Chapter 11 on The Urinary and Reproductive System, Section 11.1 on the upper urinary tract and referencing Table 1: Classes of upper Urinary Tract Impairment, page 201, [Claimant] has a Class 1 impairment of the whole person of 0% person, i.e. he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance. Therefore, [Claimant] has 0% whole person permanent impairment for his surgically removed renal cancer. Apportionment is not applicable.

Dr. Scott agreed with Dr. Koval that Claimant should undergo yearly follow-up care with his oncologist.

9. On March 17, 2022 Respondent filed an amended FAL consistent with Dr. Scott's MMI and impairment determinations. Claimant objected and sought a hearing to overcome the DIME opinion. He asserted he suffered permanent impairment as a result of the partial removal of his right kidney.

10. In support of his position, Claimant presented reports and testimony from Annyce S. Mayer, M.D. At hearing, Dr. Mayer testified as an expert in occupational medicine and as a Level II accredited physician. Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She specifically determined that her impairment consisted of a 2% whole person rating for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (*AMA Guides*). Notably, Table 1, Class 1 permits up to a 10% discretionary whole person rating. The ratings combined to yield a total 4% whole person impairment.

11. In an April 21, 2022 letter, Dr. Mayer provided the following basis for her rating:

> The following calculation was made based on the operative and surgical reports and kidney dimensions in volunteers without known kidney disease (Emamian, 1993). The average length of the right kidney in males aged 30-

> 60 years was about 115 mm. The length of the right kidney for a person of his height of 186 cm was also about 115 mm. The surgical pathology specimen from [Claimant's] right kidney was 2.2 x 2.2 x 1.7 cm. This represents an approximately 19% loss of the right kidney. In my medical opinion, this is equal to 2% whole person impairment for loss of kidney structure, which along with consideration of that while continuous surveillance is not needed, periodic surveillance by his oncologist will be required on an ongoing basis. Considering all factors, I consider him to have a 4% whole person impairment of the Upper Urinary Tract.

12. Dr. Mayer testified at the hearing in this matter consistent with her written opinions. She addressed a sub-note to Table 1. The note reads "[t]he individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person. This value is to be combined with any other permanent impairment (including any impairment in the remaining kidney) pertinent to the case under consideration." Dr. Mayer then utilized Dr. Green's surgical report that noted the size of the specimen removed from Claimant measures 2.2 x 2.2 x 1.7 cm. Using a study on average kidney size, Dr. Mayer estimated the loss represented 20% of Claimant's right kidney. She reasoned that, if complete loss of a kidney, even without concurrent loss of renal function, is rated at 10% impairment of the whole person, then 20% loss of a kidney should be rated at 2% impairment of the whole person.

13. Dr. Mayer further explained that Claimant sustained a discretionary impairment under Section 11.1, Table 1, Class 1. Section 11.1, Table 1, Class 1 allows for up to 10% impairment of the whole person for either: (1) "Diminution of upper urinary tract function" that can be objectively measured; or (2) "Intermittent symptoms and signs of upper urinary tract dysfunction are present that do not require continuous treatment or surveillance." Dr. Mayer remarked that Claimant did not have measurable diminution of upper urinary tract function and thus did not qualify for impairment under the first category of Class 1. However, she further commented that Claimant exhibited signs of upper urinary tract dysfunction in the form of measurable kidney loss and required periodic monitoring for his kidney. Therefore, Claimant warranted a 2% discretionary whole person rating for impairment under the second category of Class 1.

14. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and the required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to his needed maintenance care due to the safety aspects of the loss of a portion of the kidney.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he warranted a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury. Dr. Scott's

DIME opinion is well-reasoned, based on a review of the records and an analysis of Claimant's symptoms, and relies on the proper portions of the *AMA Guides*. Dr. Scott correctly determined that Claimant has no diminution of upper urinary tract function and therefore does not qualify for a rating under the first portion of Section 11.1, Table 1, Class 1. He also noted Claimant has no symptoms of upper urinary tract dysfunction and does not qualify for a rating under the second portion of Section 11.1, Table 1, Class 1.

16. Dr. Scott's statement that Claimant "has a Class 1 impairment of the whole person of 0% person, i.e., he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance," is not a misstatement of fact. The statement is part of Dr. Scott's rationale for his impairment rating and is reasonably construed as reflecting that Claimant has no impairment under Section 11.1, Table 1, Class 1. Dr. Scott was merely quoting the relevant portion of the *AMA Guides* under which Claimant has no impairment. Furthermore, Dr. Scott's impairment rating is mirrored in rationale by the impairment rating of the ATP Dr. Koval. She noted that Claimant's renal function is nominal, and he does not meet criteria for the lowest class of impairment.

17. Dr. Scott's DIME opinion is not required to contain an analysis of every conceivable way Claimant could receive an impairment rating through a physician's exercise of discretion. His failure to address impairment under the provision that provides impairment for total loss of a kidney does not constitute error. He found Claimant had only a portion of his kidney removed. Under the plain language of the *AMA Guides* the removal of a portion of a kidney does not qualify for impairment. The section requires the total removal of a kidney. Dr. Scott therefore reasonably elected not to discuss why he did not exercise discretion to find impairment under an inapplicable portion of the *AMA Guides*.

18. In contrast to Dr. Scott's DIME opinion, Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She specifically determined that her impairment rating consisted of a 2% whole person impairment for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *AMA Guides*. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and his required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to required maintenance care due to safety concerns about the loss of a portion of the kidney.

19. Like Dr. Scott, Dr. Mayer also recognized that Claimant's renal function remains normal and he had no loss of function from the surgery. Signs, in the absence of symptoms, are inadequate to warrant an impairment rating under Section 11.1, Table 1, Class 1. Dr. Mayer also agreed that Claimant had no symptoms, but only signs, of upper urinary tract dysfunction. However, in the absence of both signs and symptoms of upper

urinary tract dysfunction, a rating under Table 1, Class 1 cannot be applied. Furthermore, Dr. Mayer incorrectly applied Table 1, Class 1 by testifying that a rating should be provided for periodic monitoring (as opposed to continuous monitoring), while Table 1, Class 1 actually reads that impairment "does not require continuous treatment or surveillance." Monitoring only becomes a factor in assigning a rating if the injured worker's impairment falls under Section 11.1, Table 1, Class 2 or higher.

20. Despite Dr. Mayer's opinion awarding a 2% whole person impairment for loss of a portion of the kidney, the *AMA Guides* note that an additional 10% whole person impairment is only for the "solitary kidney" i.e., total loss of a kidney. There is no mention in the *AMA Guides* of proportional impairment for partial loss of a kidney. The *AMA Guides* specify a detailed basis for impairment ratings, and frequently provide for impairments based on partial losses of body parts or function. However, where there is no discussion of proportionate impairment for partial losses, it is reasonable to read the *AMA Guides* as suggesting no impairment. The preceding interpretation is supported by the examples in Chapter 11 page 200. The examples show that in cases where there is partial loss of a kidney (Ex. 2 "marked diminution in size of one kidney" and Ex. 1 "contracted kidneys"), the corresponding impairment ratings lack a component for a proportionate amount of the 10% impairment for total loss of a kidney.

21. Finally, although Dr. Mayer relied on the discretion given to rating physicians to use the *AMA Guides* as a starting point for a final impairment rating, Drs. Scott and Koval also had the same discretion and declined to find impairment. Drs. Scott and Koval chose not to rate Claimant for a partial loss of the kidney without concurrent loss of renal function. Dr. Mayer's opinion to the contrary thus merely represents a difference of professional opinion and does not constitute clear and convincing evidence to overcome Dr. Scott's DIME opinion.

22. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott. Claimant has offered the opinion of Dr. Mayer with a different rationale for impairment. Dr. Mayer's reasoning represents an alternate application of the *AMA Guides* that is distinct from Dr. Scott's DIME opinion. To the extent Dr. Mayer's opinion is a plausible exercise of discretion by a rating physician, it constitutes a mere difference of opinion and does not reflect clear error on the part of Dr. Scott. The record reveals that Dr. Scott correctly determined that Claimant warranted a 0% whole person impairment rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's determination that Claimant suffered a 0% permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery is incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on

causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. Section 11.1 of the *AMA Guides* addresses the upper urinary tract. The Section specifies the following:

> from a physiologic point of view, an individual with a solitary kidney may have no actual impairment of renal function; nevertheless, with that condition there exists an absence or loss of the normal safety factor that may be of potential significance in evaluating impairment, depending on the cause of the condition. The individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person because of a structural loss of an essential organ. This value is to be combined with any other permanent impairment, including any impairment in the remaining kidney, to determine the individual's impairment.

9. Section 11.1, Table 1, Class 1 delineates criteria for evaluating impairment of the upper urinary tract. Section 11.1, Class 1 notes, in relevant part:

> Class 1—Impairment of the Whole Person, 0-10%: A patient belongs in Class I when (a) diminution of upper urinary tract function is present, as evidenced by creatinine clearance of 75 to 90 liters/24 hr (52 to 62.5 ml/min) or PSP excretion of 15% to 20% in 15 minutes; or (b) intermittent symptoms and signs of upper urinary tract dysfunction are present that do not require continuous treatment or surveillance.

The sub-note to Table 1 specifically provides, in relevant part:

> The individual with a solitary kidney, regardless of cause, should be rated as having 10% impairment of the whole person. This value is to be combined with any other permanent impairment (including any impairment in the remaining kidney) pertinent to the case under consideration.

10. In challenging Dr. Scott's DIME opinion, Dr. Mayer relied on the Division of Workers' Compensation (DOWC) Desk Aid#11 Impairment Rating Tips. The Rating Tips provide, in relevant part:

> **Impairment rating for Workers Who Have Undergone an Invasive Treatment Procedure:** The rating physician should keep in mind the *AMA Guides, 3rd Edition (rev.)* definition for impairment: "The loss of, loss of use of, or derangement of any body part, system, or function." Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement. Therefore, the patient should be evaluated for an impairment by a Level II Accredited Physician. Although the rating provided may be zero percent, it is essential that the physician perform the necessary tests, as outlined in the *AMA Guides, 3rd Edition (rev.)* for the condition treated, in order to justify the zero percent rating.

11. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he warranted a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury. Dr. Scott's DIME opinion is well-reasoned, based on a review of the records and an analysis of Claimant's symptoms, and relies on the proper portions of the *AMA Guides*. Dr. Scott correctly determined that Claimant has no diminution of upper urinary tract function and therefore does not qualify for a rating under the first portion of Section 11.1, Table 1, Class 1. He also noted Claimant has no symptoms of upper urinary tract dysfunction and does not qualify for a rating under the second portion of Section 11.1, Table 1, Class 1.

12. As found, Dr. Scott's statement that Claimant "has a Class 1 impairment of the whole person of 0% person, i.e., he has no diminution of upper urinary tract function or symptoms and signs of upper urinary tract dysfunction with no requirement of continuous treatment or surveillance," is not a misstatement of fact. The statement is part of Dr. Scott's rationale for his impairment rating and is reasonably construed as reflecting that Claimant has no impairment under Section 11.1, Table 1, Class 1. Dr. Scott was merely quoting the relevant portion of the *AMA Guides* under which Claimant has no impairment. Furthermore, Dr. Scott's impairment rating is mirrored in rationale by the impairment rating of the ATP Dr. Koval. She noted that Claimant's renal function is nominal, and he does not meet criteria for the lowest class of impairment.

13. As found, Dr. Scott's DIME opinion is not required to contain an analysis of every conceivable way Claimant could receive an impairment rating through a physician's exercise of discretion. His failure to address impairment under the provision that provides impairment for total loss of a kidney does not constitute error. He found Claimant had only a portion of his kidney removed. Under the plain language of the *AMA Guides* the removal of a portion of a kidney does not qualify for impairment. The section requires the total removal of a kidney. Dr. Scott therefore reasonably elected not to discuss why he did not exercise discretion to find impairment under an inapplicable portion of the *AMA Guides*.

14. As found, in contrast to Dr. Scott's DIME opinion, Dr. Mayer determined that Claimant sustained a 4% whole person impairment as a result of the nephrectomy. She

specifically determined that her impairment rating consisted of a 2% whole person impairment for partial removal of the kidney along with a 2% discretionary impairment due to the presence of cancer in the kidney under Section 11.1, Table 1, Class 1 (page 201) of the *AMA Guides*. Dr. Mayer concluded that, by combining the 2% rating from the sub-note to Table 1 and the 2% rating from Section 11.1, Table 1, Class 1 Claimant suffered a 4% whole person impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery. She reasoned that DIME Dr. Scott failed to properly apply the *AMA Guides*. Dr. Scott specifically did not consider Claimant's structural loss from his surgery for renal cancer and his required ongoing surveillance of his cancer by an oncologist. He also failed to take into account the loss Claimant sustained to his kidney structure that gave rise to required maintenance care due to safety concerns about the loss of a portion of the kidney.

15. As found, like Dr. Scott, Dr. Mayer also recognized that Claimant's renal function remains normal and he had no loss of function from the surgery. Signs, in the absence of symptoms, are inadequate to warrant an impairment rating under Section 11.1, Table 1, Class 1. Dr. Mayer also agreed that Claimant had no symptoms, but only signs, of upper urinary tract dysfunction. However, in the absence of both signs and symptoms of upper urinary tract dysfunction, a rating under Table 1, Class 1 cannot be applied. Furthermore, Dr. Mayer incorrectly applied Table 1, Class 1 by testifying that a rating should be provided for periodic monitoring (as opposed to continuous monitoring), while Table 1, Class 1 actually reads that impairment "does not require continuous treatment or surveillance." Monitoring only becomes a factor in assigning a rating if the injured worker's impairment falls under Section 11.1, Table 1, Class 2 or higher.

16. As found, despite Dr. Mayer's opinion awarding a 2% whole person impairment for loss of a portion of the kidney, the *AMA Guides* note that an additional 10% whole person impairment is only for the "solitary kidney" i.e., total loss of a kidney. There is no mention in the *AMA Guides* of proportional impairment for partial loss of a kidney. The *AMA Guides* specify a detailed basis for impairment ratings, and frequently provide for impairments based on partial losses of body parts or function. However, where there is no discussion of proportionate impairment for partial losses, it is reasonable to read the *AMA Guides* as suggesting no impairment. The preceding interpretation is supported by the examples in Chapter 11 page 200. The examples show that in cases where there is partial loss of a kidney (Ex. 2 "marked diminution in size of one kidney" and Ex. 1 "contracted kidneys"), the corresponding impairment ratings lack a component for a proportionate amount of the 10% impairment for total loss of a kidney.

17. As found, finally, although Dr. Mayer relied on the discretion given to rating physicians to use the *AMA Guides* as a starting point for a final impairment rating, Drs. Scott and Koval also had the same discretion and declined to find impairment. Drs. Scott and Koval chose not to rate Claimant for a partial loss of the kidney without concurrent loss of renal function. Dr. Mayer's opinion to the contrary thus merely represents a difference of professional opinion and does not constitute clear and convincing evidence to overcome Dr. Scott's DIME opinion.

18. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott. Claimant has offered the opinion of Dr. Mayer with a different rationale for impairment. Dr. Mayer's reasoning represents an alternate application of the *AMA Guides* that is distinct from Dr. Scott's DIME opinion. To the extent Dr. Mayer's opinion is a plausible exercise of discretion by a rating physician, it constitutes a mere difference of opinion and does not reflect clear error on the part of Dr. Scott. The record reveals that Dr. Scott correctly determined that Claimant warranted a 0% whole person impairment rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's determination that Claimant suffered a 0% permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery is incorrect.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a 0% whole person permanent impairment as a result of his December 8, 2020 admitted industrial injury and subsequent surgery.

2. Any other issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: September 26, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-085-135-002

ISSUE

1. Did Claimant establish by a preponderance of the evidence that the right wrist MRI requested by her authorized treating physician (ATP) is reasonable, necessary and related to her May 2, 2017 industrial injury?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 32 year-old right-handed female. On May 2, 2017, Claimant sustained an acute injury to the triangular fibrocartilage (TCFF) on the ulnar side of her right wrist in the course and scope of her employment.

2. On June 1, 2017, Claimant underwent a right wrist MRI. The report was read as showing severe extensor carpi ulnaris tendinopathy and tendinitis. The most significant pathology appeared at the ulna styloid going distally. (Ex. D, p. 19).

3. Claimant underwent a second right wrist MRI on September 29, 2017. The MRI was read as showing mild extensor carpi ulnaris tendinitis without tearing. (Ex. F, p. 114).

4. On December 6, 2017, John Safanda, M.D. performed a right wrist arthroscopy with debridement and partial excision of the TCFF. The indications for surgery included persistent and debilitating dorsal ulnar right wrist pain. (Ex. B, p. 8). Claimant initially did well postoperatively, but over the next couple of months she experienced a flare-up of pain with ongoing tenderness to palpation at the dorsal aspect of the distal ulna of the right wrist. (Ex. C, p. 11).

5. On September 21, 2018, Dr. Safanda opined that Claimant did not appear to be improving. He expressed reservations about additional surgery given her poor response to surgery. But at Claimant's request, Dr. Safanda referred her for a second opinion with a hand specialist. (Ex. C, p. 12).

6. Claimant began treating with Kai Mazur, M.D. in Santa Rosa, California where she lives. Dr. Mazur examined Claimant on October 3, 2019.[1] At that appointment, Claimant stated the popping and catching sensation in her wrist resolved following the December 6, 2017 surgery, but her dorsal wrist and hand pain persisted and slowly worsened. She described pain along the dorsal ulnar hand that worsened with activities requiring moving

[1] There is no evidence in the record regarding Claimant's treatment, if any, between September 21, 2018 and October 3, 2019.

the wrist. Dr. Mazur ordered another MRI to evaluate the extensor carpi ulnaris. (Ex. D, pp. 16-20).

7. Claimant had a third, right wrist MRI on November 26, 2019. The MRI was read as showing moderate extensor carpi ulnaris tendinosis without a focal tear. (Ex. F, p. 116).

8. Claimant continued to complain of pain in her right wrist. The pain over her dorsal wrist and hand persisted and worsened. The pain ran along the dorsal ulnar hand, and worsened with activities. (Ex. D, pp. 22-37).

9. On June 8, 2020, Dr. Mazur performed a right wrist arthroscopy with TFCC debridement and a right open extensor carpi ulnaris reconstruction. (Ex. D, pp. 38-39).

10. By October 13, 2020, Claimant reported her ulnar-sided pain was subsiding, but she was developing progressive radial wrist pain. Dr. Mazur diagnosed de Quervain's tenosynovitis, and noted that this pain was present previously, but it had worsened. (Ex. D, p. 48).

11. Dr. Mazur performed a right de Quervain's release on March 29, 2021, and Claimant did well following the surgery. (Ex. D, pp. 69-70).

12. On September 30, 2021, Dr. Mazur saw Claimant for a follow-up visit. Claimant complained of numbness surrounding the scar and radial wrist, which was present prior to surgery and had not resolved. Claimant indicated that wearing a watch was uncomfortable because of the pressure it applied to her wrist. On examination, Claimant's Finkelstein test was negative. Dr. Mazur noted Claimant had pain with wrist dorsiflexion and that the volar radiocarpal wrist joint was tender to palpation and there was pain with forced volar flexion. He suspected she had a small ganglion cyst that was not palpable nor visible, but caused pain with certain movement. (Ex. D, pp 79-81).

13. Dr. Mazur noted that Claimant's last MRI on November 26, 2019, nearly two years prior, did not show a ganglion cyst. Because Claimant's symptoms had persisted and slowly worsened, Dr. Mazur was concerned. He felt "[a] repeat MRI scan would be appropriate to rule out a ganglion cyst and guide further treatment." (Ex. D, pp. 80-81).

14. Dr. Mazur submitted a request for authorization on October 5, 2021. (Ex. D, p. 83). On October 7, 2021, Respondents denied Dr. Mazur's request for authorization for a repeat MRI because they deemed the request "incomplete." (Ex. 2, pp 31-32).

15. Claimant saw Dr. Mazur's physician assistant, Jennifer Henshaw-Lefever, two months later, on December 2, 2021. Claimant told Ms. Henshaw-Lefever that the request for the MRI had been denied, but the office did not have any documentation of this. According to the medical records, Claimant was still experiencing pain and it was localized to her radial wrist. Claimant reported swelling and a lump in the area she did not feel before. Claimant recently had foot surgery, and, at times, had to use crutches rather than her knee scooter, which increased her wrist pain. (Ex. D, p. 84).

16. On January 19, 2022, Claimant was treated by Dr. Mazur. He noted that her ulnar-sided pain had resolved, but the radial wrist pain had persisted and was not improving, despite a recent injection. Dr. Mazur diagnosed an occult ganglion cyst or possible flexor carpi radialis tendinosis, specifically noting that neither could be felt or seen. Dr. Mazur noted Claimant's symptoms had worsened and were "related to more weightbearing on the wrist while recovering from foot surgery". Dr. Mazur further noted, repetitive activities and forceful activities may force further fluid into the ganglion cyst which enlarges the cyst. (Ex. D., pp. 93-95).

17. Dr. Mazur submitted a follow up request for authorization for an MRI on January 14, 2022. (Ex. D, p. 101). On January 18, 2022, Respondents again denied the request for authorization on the basis it was deemed "incomplete." (Ex. 2, pp. 33-34).

18. Respondents retained John McBride, M.D., through Integrated Medical Evaluations, Inc. to review the records and provide an opinion. Dr. McBride completed a records review and issued his report on February 19, 2022. (Ex. H). Dr. McBride did not exam Claimant, nor did he speak with Dr. Mazur.

19. Dr. McBride opined that an MRI is a very sensitive test to detect a ganglion cyst, and none was identified on Claimant's May 29, 2019 MRI. He also noted that Claimant underwent foot surgery requiring her to use crutches, and she developed a new onset of volar radial wrist pain. He "agree[d] with Dr. Mazur that her new radial sided pain is more due to her weightbearing on her crutches while recovering from foot surgery." (Ex. H, p. 130).

20. Dr. McBride testified that the treatment of Claimant's work-related ulnar sided wrist pain has been completed, and Claimant's ulnar-sided wrist injury bears no relationship to, and did not cause, Claimant's current symptoms of radial volar wrist pain. Dr. McBride testified that, while the requested MRI is reasonable, the need for it is not related to the May 2, 2017, work injury.

21. The ALJ finds Dr. McBride's opinion credible, but not persuasive. As early as October 13, 2020, Claimant was developing progressive radial wrist pain. On January 19, 2022, Dr. Mazur noted the Claimant's radial pain had persisted. Dr. Mazur requested authorization for an MRI to rule out a ganglion cyst and to "guide further treatment" because of Claimant's continued pain. While Claimant's use of crutches in late 2021 worsened her pain, the ALJ finds that Claimant's radial sided wrist pain occurred prior to her use of crutches.

22. The ALJ finds Dr. Mazur's opinion regarding the need for an MRI credible and more persuasive. The ALJ finds that the repeat right wrist MRI, requested by Dr. Mazur, will help determine if Claimant's ongoing pain and numbness is related to this injury and her many surgeries, or some cause not related to the admitted claim. The MRI will be beneficial in setting the course of additional treatment, if any, for Claimant.

23. Based on the totality of the evidence, the ALJ finds that Claimant proved, by a preponderance of the evidence, that the repeat right wrist MRI is reasonable, necessary and related.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question of whether

medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colo., Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

As found, Claimant complained of radial wrist pain as early as October 10, 2020. The right-wrist MRI will assist Claimant's ATP, Dr. Mazur, to determine if Claimant's ongoing pain is related to the admitted claim. The ALJ places greater weight on the ATP's request and explanation for the need for this diagnostic procedure than on the opinion of Dr. McBride. The MRI will be beneficial in setting the course of additional treatment, if any. As found, the right wrist MRI is reasonable, necessary and related.

ORDER

It is therefore ordered that:

1. Respondents shall provide the right wrist MRI for Claimant requested by the Dr. Mazur.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the repair of Claimant's right lateral epicondylitis requested by authorized treating provider ("ATP") Jason Rovak, M.D., is reasonable, necessary, and causally related treatment for Claimant's industrial injury.

II. Whether the Claimant proved by a preponderance of the evidence that the right shoulder arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head bicep subpectoral tenodesis, requested by ATP Rudy Kovachevich, M.D., is reasonable, necessary and causally related treatment to Claimant's industrial injury.

STIPULATIONS

The parties stipulated at hearing that the radial tunnel surgery requested by Dr. Rovak is authorized and is reasonable, necessary and related to Claimant's work injury.

FINDINGS OF FACT

1. Claimant is a right-hand-dominant 55-year-old male who has worked for three years as a cement truck driver.

2. Claimant sustained an admitted industrial injury on May 19, 2021 when he was struck by the chute of a cement truck on the inside of his right forearm. Claimant testified that, upon being struck in the forearm, his arm was pushed down and backwards.

3. Claimant presented to Denver Health on May 24, 2021 with complaints of right forearm pain, bruising and swelling. Claimant reported that he was hit in his right forearm, causing his arm to push backwards. Claimant reported pain in the radial aspect of his wrist radiating up to his lateral forearm, lateral epicondyle and up to the biceps. Claimant further complained of numbness and tingling in his right hand and fingers. On examination, Lileya Sobechko, M.D. noted bruising and swelling over the anterior aspect of the forearm; swelling and bulging over the brachioradialis muscle; swelling, bulging and bruising over the distal bicep; and limited range of motion of the right elbow, forearm and right upper arm. Claimant was assessed with a right forearm contusion and right arm/forearm strain. Dr. Sobechko provided Claimant a sling and ordered an MRI for possible DBT rupture. She removed Claimant from work.

4. Claimant underwent an MRI of the right elbow on May 26, 2021 which revealed chronic appearing common extensor tendinosis with a moderate, high-grade, partial

thickness interstitial subacute tear with adjacent partial chronic tearing and scarring over the an 11 mm length; and adjacent partial chronic tearing and scarring involving the undersurface of the lateral ulnar collateral more than radial collateral ligaments.

5. Claimant underwent physical therapy and acupuncture treatment with no significant improvement. Claimant was subsequently referred to Jason Rovak, M.D. for an orthopedic evaluation.

6. Claimant first presented to Dr. Rovak on July 1, 2021. Claimant reported that his entire right extremity was pulled back during the work incident on May 19, 2021. Claimant described some burning discomfort on the posterior aspect of the forearm and occasional tingling in the fingers and some discomfort around the insertion of the deltoid. Dr. Rovak reviewed Claimant's occupational medical records and noted that an MRI showed biceps tendinosis without a tear, common extensor tendinosis as well as high-grade partial thickness tearing. Dr. Rovak concluded that, based on the contact site, Claimant certainly could have a bit of contusion around the radial tunnel. He remarked that epicondylitis or radial tunnel was "obviously" within the differential diagnosis given the MRI findings and site of contusion. (Cl. Ex. 7, p. 80). Dr. Rovak assessed with right arm pain and referred Claimant for a nerve conduction study.

7. On August 13, 2021, Claimant presented to Samuel L. Chan, M.D. for a consultation and EMG/nerve conduction study. Claimant reported diffuse pain over the extensor aspect of his right arm and numbness and tingling radiating into his 3rd and 4th digits on the dorsal aspect of his right upper extremity. Dr. Chan noted a normal examination of the bilateral shoulders. The EMG of the right upper extremity was normal. Dr. Chan opined that Claimant's clinical findings were most consistent with radial neuritis and a forearm contusion.

8. On September 8, 2021, Claimant saw Elizabeth Etsy, M.D. at Denver Health. On examination of the right shoulder, Dr. Etsy noted noted tenderness to palpation over distal right deltoid with pain with range of motion over the lateral deltoid. Dr. Etsy noted there was no evidence of rotator cuff dysfunction.

9. Claimant returned to Dr. Rovak on September 23, 2021. Claimant reported experiencing a burning discomfort from about the mid humerus level near the insertion of the deltoid down to the fingers. Dr. Rovak noted that Claimant's EMG was normal and that Claimant's MRI revealed biceps tendinosis as well as lateral epicondylitis findings. He opined that the site of pain reported on his examination was consistent with radial tunnel syndrome, which he noted "can go hand-in-hand with lateral epicondylitis, though it is not terribly common." (Cl. Ex. 7, p. 82). Dr. Rovak administered a steroid injection into Claimant's the radial tunnel for diagnostic and therapeutic purposes.

10. On October 7, 2021 Claimant saw Cynthia Kuehn, M.D. at Denver Health Claimant with complaints of sharp pain near his right shoulder.

11. On October 20, 2021, Dr. Etsy again examined Claimant's right shoulder and noted tenderness over the deltoid, painful range of motion, and diminished motor strength in the biceps and rotator cuff. Regarding Claimant's continued symptoms, Dr. Esty noted, "Consider contribution of initial R shoulder injury to the pt's current presentation. Will MRI shoulder to assess for rotator cuff pathology, given pt's pain and limited AROM on shoulder exam." (R. Ex. P, p. 77).

12. At a follow-up evaluation with Dr. Rovak on October 21, 2021, Claimant reported that the steroid injection helped. Dr. Rovak administered a second steroid injection to the radial tunnel, which did not provide any long-term benefits.

13. Claimant underwent an MRI of the right shoulder on October 22, 2021 which revealed: (1) intermediate and near full-thickness tearing of the supraspinatus; (2) mild tendinosis of the infraspinatus, supscapularis, and long head of the biceps; and (3) moderate acromioclavicular degenerative joint disease.

14. On November 11, 2021 Dr. Chan noted examination of Claimant's bilateral shoulders was normal.

15. On November 18, 2021 Dr. Rovak reviewed Claimant's shoulder MRI and referred Claimant to Rudy Kovachevich, M.D. for a shoulder evaluation.

16. Claimant presented to Dr. Kovachevich on December 2, 2021. He reported a sudden onset of right shoulder pain occurring 6 months prior and that the symptoms had been moderate and fluctuating and were exacerbated by motion at the shoulder and relieved by restricted activity. Dr. Kovachevich noted,

> …[the chute] came down forcefully and hit his forearm and forced his shoulder back aggressively. He had immediate pain in his forearm and subsequent swelling and bruising as well as pain in the shoulder. He was seen initially and the focus was on the forearm but during some of his therapy, he continued to have significant pain in the shoulder that persisted and would not improve.

(Cl. Ex. 8, p. 93).

17. Claimant reported that his pain was mainly on the anterior lateral aspect of the shoulder. On examination of the right shoulder, Dr. Kovachevich noted that rotator cuff musculature was weak and painful against resistance. He further noted decreased range of motion, moderate pain on provocative maneuvers with Neer and Hawkins impingement signs, moderate cross body adduction testing, minimal tenderness of the AC joint, moderate pain and speeds and O'brien testing, and mild to moderate tenderness over the anterior long head biceps tendon. Dr. Kovachevich noted that he had a lengthy discussion with Claimant over the nature of Claimant's traumatic right shoulder injury and persistent shoulder pain. He noted that Claimant "clinically and radiographically has evidence of a large near full-thickness supraspinatus rotator cuff tear as well as diffuse rotator cuff

tendinopathy, bursitis and long head bicep tendon." (Id.). Dr. Kovachevich concluded that further conservative care would not be beneficial or warranted and recommended that Claimant proceed with surgical invention consisting of arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head biceps subpectoral tenodesis.

18. On December 6, 2021, Dr. Kovachevich submitted a request for authorization of right shoulder surgery, which was denied by Respondents.

19. Claimant returned to Dr. Rovak on December 9, 2021. Dr. Rovak opined that Claimant failed conservative management for the elbow and forearm. He recommended that Claimant undergo a lateral epicondyle debridement and radial tunnel release. Dr. Rovak further recommended that they try to do the surgery at the same time as Claimant's shoulder surgery to avoid multiple operative settings and recoveries.

20. Claimant saw Jennifer Pula, M.D. at Denver Health on December 16, 2021. Dr. Pula noted that Claimant had reported right shoulder pain since his initial injury. On examination of right shoulder, Dr. Pula noted tenderness to palpation on the superior right shoulder, with no tenderness to the AC joint or lateral acromion.

21. On December 23, 2021 Dr. Rovak submitted for authorization of a right lateral epicondyle debridement and radial tunnel release.

22. On December 30, 2021 Jonathan L. Sollender, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Sollender did not offer any opinion on Claimant's right shoulder as it was outside of his specialty. Dr. Sollender opined that Claimant has radial tunnel syndrome. He noted that there were radiographic findings of right lateral epicondylitis but very little clinical evidence in support of lateral epicondylitis. He noted that his examination of Claimant was inconsistent with the MRI findings of right lateral epicondylar pathology. Based on the lack of clinical findings and the chronic appearance of the tissues of the lateral epicondyle on his MRI imaging, Dr. Sollender opined that Claimant's right lateral epicondylitis was present prior to the May 19, 2021 work injury. Dr. Sollender noted that Claimant did not report being struck at the lateral right elbow, but instead was struck over the extensor surface of the right forearm. He opined that the only area of injury from the May 19, 2021 work injury is the right radial tunnel region. Dr. Sollender opined that a right radial tunnel release was a reasonable approach to treat Claimant's condition.

23. Claimant attended a follow-up evaluation with Dr. Chan on January 27, 2022. Dr. Chan noted that Drs. Rovak and Kovachevich recommended surgical intervention. Dr. Chan reviewed Dr. Sollender's IME report, noting Dr. Sollender's determination that Claimant did not have any objective findings of lateral epicondylitis but findings suggesting radial neuropathy. As such, Dr. Chan opined that the radial tunnel release would be considered appropriate. He further opined that it would be reasonable for Claimant to be evaluated by Dr. Kovachevich as well as Dr. Rovak to review Claimant's current symptoms as well as proposed surgical intervention.

24. At the request of Respondents, Mark Failinger, M.D. performed an IME on March 4, 2022 to address Claimant's right shoulder. Claimant reported that his right arm was pushed down and backwards during the work incident and that he experienced immediate pain in his right arm from the shoulder to the fingers. Claimant further reported having ongoing right shoulder pain with physical therapy. Dr. Failinger concluded that it was not medically probable that the reported mechanism of injury created tearing in Claimant's rotator cuff. He explained that, unless the movement was of severe magnitude torqueing the shoulder significantly beyond its normal range of motion, forcing the arm into some extension could not have created a rotator cuff tear. He further noted that there was no specific mention of shoulder pain in Claimant's initial medical visits nor in the physical therapy notes. Dr. Failinger opined that there was not reasonable temporal or timely reporting of shoulder symptoms.

25. Dr. Failinger testified consistent with his IME report at a post-hearing deposition. Dr. Failinger testified as a Level II accredited expert in orthopedic surgery and sports medicine. Dr. Failinger stated that there was a brief mention of shoulder symptoms in a physical therapy report from June 2021, but no mention of any significant shoulder symptoms or dysfunction until around October 7, 2021. He testified that it is highly improbable Claimant injured his shoulder on May 19, 2021 when there was no mention of the shoulder being the source of Claimant's pain until October 2021. Dr. Failinger explained that Claimant's right arm would have had to be severely pushed back to cause a rotator cuff tear, with force pushing the arm out behind and almost perpendicular to the body. He further testified that if Claimant did sustain a tear in his shoulder on May 19, 2021, there likely would have been high levels of shoulder pain complaints at that time. Dr. Failinger opined that Claimant has some preexisting degenerative tearing in his shoulder.

26. Claimant credibly testified at hearing that he had no limitations or symptoms in his right forearm or right shoulder prior to his admitted industrial injury of May 19, 2021. No evidence was offered indicating Claimant had prior symptoms or limitations or received prior treatment to the right forearm or shoulder. Claimant testified that, prior to the work injury, he had never been advised by any physician that he had a rotator cuff tear. He stated that he felt pressure at his right shoulder when the chute pushed his arm back and down. He testified that on the date of the work injury his forearm was in severe pain. Claimant further testified that he had some pain up through his arm into the shoulder and upon removing the sling he and participating in physical therapy he experienced continued right shoulder pain. Claimant testified that he continues to have burning numbness down from his elbow into his hand and into his middle and index ring fingers.

27. The ALJ finds the opinions of Drs. Rovak, Kovachevich and Etsy, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions and testimony of Drs. Sollender and Failinger.

28. Claimant proved it is more probable than not the lateral epicondyle and right shoulder surgeries recommended by Drs. Rovak and Kovachevich are causally related to the work injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Claimant proved it is more probable than not the right lateral epicondyle debridement recommended by Dr. Rovak is reasonable, necessary and causally related to Claimant's work injury. Both Dr. Rovak and RIME physician Dr. Sollender opine that there is radiological evidence of lateral epicondylitis; however, Dr. Sollender concluded that the condition was pre-existing, asymptomatic and was not aggravated, accelerated or exacerbated by the work injury. Claimant credibly testified, and there is no evidence to the contrary, that he did not have any symptoms or limitations in his right forearm prior to the work injury. Subsequent to the work injury, Claimant has continued to experience symptoms and limitations in his right forearm into his hand. Dr. Rovak, who is familiar with Claimant's mechanism of injury and presentation, explained that lateral epicondylitis can go hand-in-hand with radial tunnel syndrome, and has recommended the surgery to cure and relieve Claimant from the effects of his work injury.

Claimant also proved it is more probable than not that the right shoulder surgery recommended by Dr. Kovachevich is reasonably necessary and causally related to his work injury. Claimant has been consistent in reporting to his physician that his arm was pushed backwards during the work incident. There is objective radiological evidence of a rotator cuff injury. Dr. Failinger opined that the need for shoulder surgery is unrelated to the work injury as the mechanism of injury is unlikely to cause Claimant's shoulder condition, and because there was a delay in documented shoulder symptoms and limitations. As noted by Dr. Kovachevich, he had a lengthy discussion with Claimant regarding the nature of his injury and his shoulder symptoms, and credibly concluded that Claimant requires surgery for his condition. Claimant credibly testified, and there is no evidence to the contrary, that he did not have any right shoulder symptoms or limitations prior to the work injury. There is no evidence Claimant sustained a separate injury after the work injury that resulted in his shoulder condition.

Regarding the delay in documented right shoulder symptoms or limitations in the medical records, the ALJ is persuaded that the treating physicians initially focused on Claimant's right forearm. When Claimant's condition did not improve with conservative treatment, Dr. Etsy then considered the contribution of an initial right shoulder injury to Claimant's symptoms. Upon obtaining an MRI, there was objective evidence of shoulder pathology. The ALJ does not consider Dr. Chan's normal shoulder findings to be dispositive on the issue of relatedness, as he consistently noted normal findings even after the rotator cuff tear was revealed on MRI and Drs. Etsy, Kovachevich and Pula noted abnormal shoulder findings. To the extent the rotator cuff tear is degenerative and preexisting, the ALJ is persuaded that the work injury aggravated, accelerated or exacerbated Claimant's right shoulder condition, causing the need for the recommended right shoulder surgery.

Based on the totality of the evidence, the lateral epicondyle and right shoulder surgeries recommended by Drs. Rovak and Kovachevich are causally related to the work injury and reasonably necessary to cure and relieve its effects.

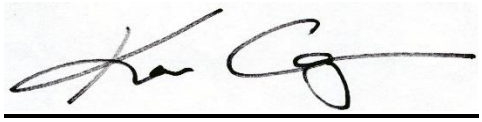
ORDER

1. Claimant proved by a preponderance of the evidence that the right lateral epicondylitis debridement recommended by Dr. Rovak and the right shoulder arthroscopic extensive glenohumeral joint debridement, subacromial decompression, arthroscopic versus mini open rotator cuff repair, and possible long head bicep subpectoral tenodesis requested by Dr. Kovachevich, M.D. are reasonable, necessary and causally related treatment for Claimant's industrial injury. Respondents are liable for the recommended surgeries.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondents are subject to penalties under §8-43-304(1), C.R.S. for failing to obey a February 9, 2022 prehearing order of Prehearing Administrative Law Judge (PALJ) Craig C. Eley.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on March 16, 2021.

2. On November 5, 2021, Claimant submitted a mileage reimbursement request to Respondents for mileage expenses incurred from September 2, 2021 through October 28, 2021. On January 6, 2022, Claimant submitted a mileage reimbursement request to Respondents for mileage expenses incurred from November 3, 2021 through December 12, 2021. The aforementioned mileage expenses total $3,901.46.

3. On November 5, 2021, Respondents submitted a request for reimbursement for a November 3, 2021 prescription in the amount of $17.80.

4. A prehearing conference took place before PALJ Craig C. Eley on February 9, 2022 on Claimant's Motion to Compel Mileage Payment and Prescription Reimbursement. Respondents requested payment for the mileage and prescription expenses detailed in Findings of Fact #2 and #3 herein.

5. PALJ Eley found good cause to grant Claimant's motion. He issued an order dated February 9, 2022 ordering Respondents to, no later than February 16, 2022, deliver to Claimant's attorney checks payable to Claimant for $3,901.46 for mileage expenses and $17.80 for prescription reimbursement.

6. As of the date of hearing in this matter, July 13, 2022, Respondents had not made any payments to Claimant pursuant to PALJ Eley's February 9, 2022 order. Respondents did not call any witnesses nor offer other evidence regarding its reason for failing to issue payment pursuant to PALJ Eley's order.

7. Claimant suffered financial harm and stress as a result of Respondents' failure to pay the reimbursement as ordered. Claimant credibly testified that her only income is $838.88 in workers' compensation benefits every two weeks, which is less than her expenses. Claimant testified her fuel costs are significant due to having to commute to her doctors' appointments for treatment of her work injury. Claimant further testified that she has had to borrow money and rely on her credit cards due to Respondents' failure to reimburse her mileage expenses.

8. Claimant's counsel has made numerous attempts to resolve the outstanding payments with Respondents to no avail.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Penalties

Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves

undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Per PALJ Eley's February 9, 2022 order, Respondents were required to pay Claimant a total of $3,919.26 no later than February 16, 2022. As of the date of hearing, Respondents had not paid Claimant pursuant to PALJ Eley's order. Respondents' failure to pay Claimant pursuant to PALJ Eley's February 9, 2022 order constitutes a failure to obey a lawful order.

Respondents' conduct was objectively unreasonable. Respondents provided no explanation for their failure to comply with PALJ Eley's order. There is no evidence Respondents were unaware of the order or attempted to comply. Respondents do not dispute that they owe Claimant the reimbursement ordered by PALJ Eley. Claimant's counsel has made numerous attempts to resolve the outstanding payments with Respondents to no avail. A reasonable insurer who received an order from an ALJ to reimburse Claimant for mileage and benefits by a certain date would comply. Respondents failure to do so was objectively unreasonable. Accordingly, the imposition of penalties is appropriate.

Respondents offered no evidence regarding their ability to pay a fine. As such, there is no evidence indicating Respondents are unable to pay a penalty that is proportionate to their offense. Based on the degree of reprehensibility of Respondents' conduct, the harm suffered by Claimant, penalties assessed in comparable cases, and Respondents' ability to pay, the ALJ concludes that a penalty of $100.00/day is

proportionate to the offense and appropriate. A penalty of $100.00 for the period of 146 days (February 17, 2022 to July 13, 2022, the date of hearing) totals $14,600.00.

The penalty of $100.00/day shall continue until Respondents issue the outstanding payment to Claimant for $3,901.46 in mileage reimbursement and $17.80 in prescription reimbursement.

ORDER

It is therefore ordered that:

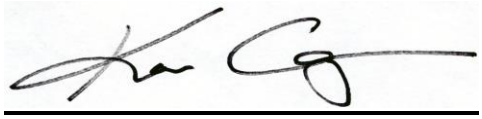
1. Respondents shall pay penalties at the rate of $100.00 per day from February 17, 2022 to July 13, 2022, in the aggregate amount of $14,600.00, and continuing thereafter at the same rate until Respondents issue payment to Claimant for $3,901.46 for mileage reimbursement and $17.80 for prescription reimbursement. 75% of the fine shall be apportioned to Claimant and 25% of the fine shall be apportioned to the Subsequent Injury Fund.

2. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due, pursuant to §8-43-410, C.R.S.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable injury on March 14, 2021?
- Respondents stipulated that the incident on July 28, 2021 was compensable, but dispute that nature or extent of the medical treatment related to the incident.
- Did Claimant prove a left total hip arthroplasty performed on June 1, 2021 by Dr. Schuck was causally related to the admitted work accident and/or the disputed claim?

STIPULATIONS

- The parties stipulated to an average weekly wage of $1,772.78 which included concurrent employment.
- The July 28, 2021 industrial injury is compensable.
- If the total hip replacement is found to be related to the industrial injury the Claimant is entitled to three weeks of temporary total disability benefits beginning on June 1, 2022 or credit for sick time or leave taken.

FINDINGS OF FACT

1. Claimant works for Employer as a fire engineer and arson investigator for the Pueblo Fire Department. The job is physically demanding, requiring heavy lifting of between 50 to 100 pounds, hauling hoses, and climbing on to the top of his fire truck to operate the flow of water from the pump control panel.

2. In addition to his job for the City, Claimant is a wildland firefighter. Every year, the physical requirements for that position is taking a "pack test". He was able to perform his annual pack test in February 2021. This test consists of wearing a 45 pound vest and walking 3 miles which he did in 40 ½ minutes, which was under the time limit of 42 minutes. Following this test, he had no pain in his left hip.

3. On March 14, 2021, following a fire at a residence, Claimant was assisting other fire department and law enforcement personnel in removing bodies from the basement of the residence through a narrow basement window. Claimant was at the bottom of the backboard with Claimant bearing most of the weight of one of the bodies. While removing the body on the backboard, Claimant he felt a pop like a rubber band midline on his left thigh. It felt like he pulled a muscle.

4. Claimant reported the injury on the same day and a First Report of Injury was filled out by Employer on March 17, 2021 (Claimant Exhibit 4, page 9).

5. Claimant did not seek medical treatment and continued working full duty. Claimant did not have pain in his hip joint. His pain was mostly in his thigh and groin. Prior to July 28, 2021, his pain did not completely resolve but he was able to function.

6. On July 28, 2021 the Claimant was performing his job as a fire engineer and was called to an alarm for smoke behind the steel mill in Pueblo. When he arrived he realized that a U-Haul truck was on fire. He was operating the panel on top of the fire truck that controlled the water flow while another firefighter was spraying the water from a hose attached to the fire truck. When he stepped down from the top of the truck, he stepped on to a large piece of steel angle iron on the ground. As he was stepping on to the angle iron, he did a pseudo-split and he fell backwards on the dirt and grass. He had tremendous pain in his left hip in the joint. He did not report the injury until he returned to the fire station. He sought medical treatment with Concentra the next morning.

7. He reported to Nurse Practitioner Brendon Madrid that he slipped off the side of the truck and felt a pop in his left hip. He also stated that he re-aggravated his prior March 14, 2021 injury. He also noted that he had clicking in his left hip joint. He had 6 or seven physical therapy appointments before it was decided to have an MRI performed.

8. The MRI performed on August 15, 2021 showed moderate to severe osteoarthritis with labral tearing, iliopsoas bursitis with reactive edema of the of the iliopsoas and abductor musculature, mild left hamstring tendinosis and moderate degenerative joint disease of the left hip with labral tearing.

9. Claimant was referred to Dr. Schuck by Concentra for an orthopedic consultation. Claimant was initially seen by Dr. Schuck's physician's assistant, Mitchell Dawson on August 31, 2021. Mr. Dawson performed an intra-articular corticosteroid injection into his hip at the time of the visit.

10. Claimant was next seen by Dr. Ellis, Dr. Schuck's associate on October 5, 2021. Dr. Ellis reported that following the injection, Claimant had a week's worth of relief. Following that, he returned to his baseline level of pain. On October 5, 2021, Dr. Ellis recommended a total hip replacement since conservative care had failed to resolve his pain.

11. Request for authorization of the left hip replacement was denied.

12. A left total hip arthroplasty was performed by Dr. Schuck on June 1, 2022. (Claimant's Exhibit 10).

13. Claimant was referred to Dr. Annu Ramaswamy for an IME at the request of Respondents. Dr. Ramaswamy's IME took place in two parts; the history section on April 4, 2022 and the physical examination section on April 8, 2022.

14. Dr. Ramaswamy's assessment was:

A. Partial or full-thickness left iliopsoas tendon tear – **acute and related to the July 28, 2021 work-related injury.**

B. Left adductor strain – work related-incident (as related to the July 28, 2021 injury.

C. History of pre-existing severe degeneration within the left hip and there appears to be no evidence for a labrum secondary to the degeneration. (Respondents Exhibit A, page 12).

15. Dr. Ramaswamy testified that he evaluated both claims. He felt that the March injury was an upper thigh strain based on the history given. He felt that the July incident was an adductor injury and a partial or full iliopsoas tear. He could not tell if the tear was a full tear or partial tear since the radiologist who he consulted with could not tell due to the amount of fluid present on the MRI. There was also bone edema shown on the MRI. The bone edema could be an acute condition or could be due to the friction of bone on bone.

16. Dr. Rook also performed an IME at the request of Claimant on May 2, 2022. Although he could not be certain as to the diagnosis following the first injury, since there was no examination or medical imaging, he thought the Claimant had a left hip sprain. With respect to the July 28, 2021 incident, the MRI showed an acute injury including fluid in the joint, bone edema in the weight bearing part of the hip joint and bone marrow edema in the head of the femur. Dr. Rook opined that the need for the hip replacement surgery due to the July 28, 2021. He disagreed with Dr. Ramaswamy that the work related injury was limited to the hip flexor muscle.

17. Claimant's testimony was credible and persuasive, including the testimony that he did not have left hip joint pain until July 28, 2021.

18. Claimant proved he suffered a compensable injury on March 14, 2021. The facts with respect to the incident that occurred on that date, namely lifting a body out of a small window when he felt a pop in his thigh are sufficient to establish a compensable injury. Both Dr. Ramaswamy and Dr. Rook concluded that the Claimant suffered a thigh strain from this incident.

19. With respect to the July 28, 2021 incident, Dr. Rook's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. Ramaswamy. Both doctors agree that the hip flexor muscle was injured in the July 28, 2021 incident. What they disagree upon is whether the incident caused permanent aggravation of the Claimant's underlying degenerative left hip arthritis.

20. Claimant proved the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary and causally related to the compensable work injuries. No one disagrees that the left hip arthroplasty was the appropriate procedure to address Claimant's ongoing hip problems. The surgery did in fact alleviate the Claimant's pain in

his hip. The work accidents aggravated, accelerated, or combined with the pre-existing condition to cause the need for the hip replacement.

21. The stipulated average weekly wage corresponds to a maximum TTD rate of $1,158.92.

22. The Claimant was off work beginning June 1, 2022 due to his hip surgery.

CONCLUSIONS OF LAW

A. Compensability

To receive medical or indemnity benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered compensable injuries on March 14, 2021 and July 28, 2021. Claimant's lifting incident on March 14, 2021 caused a temporary strain of his thigh as both Dr. Ramaswamy and Dr. Rook have opined. Further, the fall on July 28, 2021 proximately caused left hip joint symptoms. Despite the fact that he had preexisting osteoarthritis, his condition was asymptomatic, despite his heavy duty work requirements including his ability to perform his annual pack test.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment, the claimant is entitled to medical benefits as long as the pain is proximately caused by the employment-related activities and not the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Abeyta v. Wal-Mart Stores, Inc*., W.C. No. 4-669-654 (January 28, 2008). However, the mere fact a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

The Claimant has proven that left total hip arthroplasty performed by Dr. Schuck was reasonably necessary. The dispute relates to causation. As found, Claimant proved the need for surgery was proximately caused by the work accident. Claimant's testimony regarding the accident, and the onset and progression of hip symptoms is credible. Dr. Rook's causation analysis is credible and more persuasive than the contrary opinions offered by Dr. Ramaswamy. Claimant arrived at work on July 28, 2021 with a degenerated but asymptomatic hip. He then fell and did a pseudo-split and had tremendous amount of pain in the hip joint. By the next day, he noticed clicking in the hip. Although Claimant had pre-existing degenerative changes before the accident, he was not a candidate for a hip replacement because he was asymptomatic. The possibility that Claimant would have developed hip symptoms at some point in the future does not negate the fact it became symptomatic on July 28, 2021 as a direct and proximate consequence of his industrial accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for accidental injuries on March 14, 2021 is compensable. As stipulated, his injuries on July 28, 2021 are compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injuries, including the right total hip arthroplasty performed by Dr. Schuck on June 1, 2022.

3. Claimant's average weekly wage is $1,772.78, with a corresponding TTD rate of $1,181.85 per week. Since this amount exceeds the cap for the dates of injury his TTD is limited to $1,158.92 for the disability beginning on June 1, 2022.

4. Insurer shall pay Claimant TTD benefits, commencing June 1, 2022 and continuing until terminated according to law, subject to any wage continuation.

5. Insurer shall pay Claimant's statutory interest of 8% per annum on all compensation not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 27, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that ongoing Botox injections constitute reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (Colo. App. 1988).

FINDINGS OF FACT

1. On August 16, 2022, the parties entered into a stipulation which was approved by the ALJ on August 18, 2022. As relevant to the issued to be decided in this Order, the parties stipulated that Claimant's date of maximum medical improvement is August 1, 2022, the date of Claimant's most recent appointment with his authorized treating physician (ATP), Myles Nathaniel Cope, M.D. The remaining stipulations are not material to the issue for decision in the present matter (*i.e*., W.C. 5-091-017-001).

2. Claimant sustained an admitted injury when he was involved in a roll-over motor vehicle accident arising out of the course of his employment with Employer on October 30, 2018. As a result of the accident, Claimant sustained multiple injuries, including a close head injury, C1-C2 fracture, L1 compression fracture, left shoulder injuries, and left wrist injuries. Claimant was initially treated conservatively, and later underwent an occiput to C2 posterior fusion surgery on March 13, 2019. Following surgery, Claimant had continued care and treatment for multiple issues, including headaches. (Because the issue in the present matter relates to authorization for headache treatment, the ALJ does not address Claimant's other injuries or treatment, except as relevant to headaches and the medical benefits requested).

3. On January 24, 2020, Claimant was evaluated by authorized treating physician (ATP) James Rafferty, D.O. Dr. Rafferty indicated Claimant's headaches were fairly constant and variable in intensity since his injury. He indicated Claimant's headaches were thought to be cervicogenic in nature with muscle tension or contraction contributors. He diagnosed Claimant with likely cervicogenic headaches from cervical spine injury, and possible occipital neuralgia. Claimant was evaluated by a neurologist, Dr. Sykes, who placed Claimant on headache medications, which were discontinued due to side effects. (Ex. G).

4. Claimant was evaluated by Jeff Reynek, N.P., for headaches on January 27, 2021.[1] Mr. Reynek diagnosed Claimant with intractable chronic migraine without aura, chronic posttraumatic headache, and cervicogenic headaches. Claimant had tried various

[1] No treatment records from Mr. Reynek were offered or admitted into evidence. The information related to Claimant's treatment and diagnosis by Mr. Reynek is contained in report by other providers, and IME physicians.

headache medications without improvement. Mr. Reynek recommended consideration of Botox injections for headaches. (Ex. S).

5. On April 14, 2021, Claimant saw Dr. Rafferty who noted that his headaches remained symptomatic and were most likely cervicogenic in nature. Claimant was primarily using Tylenol for headaches, as other medications were not effective. Dr. Rafferty noted Claimant was going to wait until completion of treatment for his cervical spine, which included facet joint injections before considering Botox injections. (Ex. G).

6. On June 8, 2021, Claimant underwent a C5-6 cervical medial branch block which provided relief of Claimant's cervical pain after the injection. The admitted records are unclear as to whether the medical branch blocks relieved Claimant's headaches. Based on the results of the medial branch block, on June 9, 2021, one of Claimant's ATPs, Greg Reichhardt, M.D., recommended a radiofrequency nerve rhizotomy. (Ex. E).

7. On July 12, 2021, Claimant underwent Botox injections into the scalp and cervical spine, apparently performed by Mr. Reynek. (Ex. 7, S). Although not documented in any contemporaneous records, Claimant credibly testified that he noticed an approximately 20% improvement in his headaches following the July 12, 2021 Botox injection.

8. Claimant underwent a cervical rhizotomy on July 21, 2021, performed by David Columbus, M.D.[2] On August 12, 2021, Claimant saw Dr. Reichhardt and reported no improvement in his neck pain with the rhizotomy, but did note that his headaches "might have decreased a little bit from a 7 down to a 5-6/10." (Ex. E).

9. Claimant underwent a second set of Botox injections on October 6, 2021. Claimant testified that he improved approximately 10% additional relief when compared to the July 12, 2021 Botox injections. (Ex. 7).

10. On October 21, 2021, Kathy McCranie, M.D., performed a physician advisor review for Respondents related to Claimant's request for additional Botox injections. Dr. McCranie, citing an August 24, 2021 record from Dr. Rafferty indicated Claimant received 31 Botox injections into the scalp and cervical spine with no improvement, and that Claimant had persistent headaches and dizziness.[3] Dr. McCranie also summarized a record from Dr. Columbus dated July 21, 2021, in which Dr. Columbus indicated that the June 8, 2021 medial branch blocks resulted in a complete resolution of Claimant's cervicogenic headaches. (Ex. S).

11. Claimant received a third set of Botox injections on April 6, 2022, and testified that the relief he received was comparable to the relief he experienced following the October 6, 2021 injections. (Ex. 7).

12. On April 7, 2022, Claimant saw Dr. Rafferty. Claimant reported that "since his dizziness did, in fact, become worse recently he has to wonder about whether or not his

[2] No records from Dr. Columbus were offered or admitted into evidence. Information regarding the procedures performed by Dr. Columbus is contained in reports of other providers and IME reports.
[3] Dr. Rafferty's August 24, 2021 record was not offered or admitted into evidence.

first two sets of Botox injections had helped him with his dizziness as well." Claimant reported that he had not yet responded to the April 6, 2022 injections. (Ex. G).

13. Claimant saw Dr. Reichhardt on April 11, 2022, and reported a 15-20% improvement with the April 6, 2022 Botox injection and felt his balance was better for a couple of days. (Ex. E). Claimant reported similar results to Dr. Rafferty on May 5, 2022. (Ex. G).

14. On April 12, 2022, Dr. McCranie performed another physician advisor review, specifically reviewing an apparent appeal from Mr. Reynek regarding continuing Botox injections. Dr. McCranie characterized Mr. Reynek's appeal as indicating Claimant had receive "significant and sustained benefit having at least 7 less headache days per month and over 100 less headache hours per month. He has a history of chronic migraine headaches and pain occurring 15 days per month 4 or more hours per day and did not tolerate or failed to respond to migraine preventive."[4] Dr. McCranie indicated she did not see additional medical records supporting Claimant's response to Botox. She also noted that Claimant did not meet an 80% improvement requirement for continued Botox injections outlined in the Medical Treatment Guidelines, and there was no documentation of improved function in the appeal letter. Dr. McCranie recommended denying the request for Botox injections. (Ex. S).

15. On May 20, 2022, Annu Ramaswamy, M.D., performed a Rule 8 independent medical examination (IME), at Respondents' request, and issued a report dated June 26, 2022. Based on his review of medical records and examination of Claimant, Dr. Ramaswamy opined that Claimant has cervicogenic headaches. He noted the Botox injections Claimant received did not help substantially, and opined that additional Botox injections would not be clinically indicated. (Ex. F).

16. On June 15, 2022, Claimant saw Myles Cope, M.D., at UC Health, and again on July 18, 2022 and August 1, 2022. With the exception of a prescription for self-injectable Aimovig for migraine prevention, Dr. Cope's treatment records do not document evaluation or treatment of headaches. (A WC164 forms completed on July 19, 2022 and August 1, 2022 include "chronic migraine cephalgia" in the work-related diagnosis, but Dr. Cope's records otherwise do not otherwise mention headaches or migraines). (Ex. H). Claimant testified he had tried the Aimovig injection, but it had no effect on his headaches.

17. Dr. Ramaswamy testified at hearing and was admitted as an expert in occupational medicine and internal medicine. He testified that he does not dispute Claimant has experienced and continues to experience significant headaches. At his examination, Claimant reported constant pressure headaches, without nausea or light sensitivity. Dr. Ramaswamy opined that Claimant's headaches do not have the common features of migraine headaches such as being episodic in nature, or accompanied by photophobia or nausea.

[4] Mr. Reynek's appeal letter was not offered or admitted into evidence.

18. Instead, Dr. Ramaswamy testified that the results of Claimant's rhizotomy, and medial branch blocks, strongly suggest Claimant's headaches may be stemming from the cervical facets. He therefore opined that Claimant's headaches are more likely cervicogenic headaches than migraines.

19. Dr. Ramaswamy testified that there is evidence that Botox is no more effective than a placebo for treatment of cervicogenic headaches, and that Botox is not an appropriate treatment for cervicogenic headaches, citing the Medical Treatment Guidelines for treatment of traumatic brain head injury. He agreed that it would not be dangerous for Claimant to undergo additional Botox injections, but there was no indication to do so. He emphasized that medical treatment should be evidence based, and there is not substantial evidence that Botox is an appropriate treatment for cervicogenic headaches. He testified that it is difficult to scientifically explain how Botox injections would have helped with Claimant's dizziness, and that Botox is not a treatment for dizziness.

20. Dr. Ramaswamy testified he believes Claimant's headaches have a component of occipital neuralgia, and would recommend that Claimant undergo bilateral occipital nerve blocks, which have not been performed. He noted that Dr. Rafferty originally included "occipital neuralgia" as a possible diagnosis, but that no further evaluation for occipital neuralgia was performed. He opined that it would reasonable and necessary to evaluate Claimant for occipital neve blocks, and that Claimant could receive 2-3 such blocks per year if he experienced a positive response. Dr. Ramaswamy's testimony and opinions were credible and persuasive.

21. Claimant testified at hearing that he experienced some, but not complete relief from his headaches with Botox injections. Claimant testified that he received some relief of dizziness following Botox injections, and that he continues to experience headaches, dizziness, and balance issues today. He testified, credibly, that he has had continuous headaches since his work-related injuries, and has constant, but not severe dizziness. Claimant continues to experience constant neck pain as well.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Even where reasonable and necessary, medical maintenance care must be causally related to a claimant's industrial injury. In some cases, liability for treatment may be terminated by virtue of an intervening event. "Where the need for treatment results

from an intervening injury unrelated to the industrial injury, treatment for the subsequent condition is not compensable*." Lancaster v. Arapahoe County Sheriff Dept*., WC. Nos. 4-744-646 and 4-746-515 (ICAO. May 12, 2010) *citing Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).* However, "[t]he determination of whether the need for medical treatment is the result of an independent intervening cause is a question of fact for resolution by the ALJ." *In re Vargas*, W.C. No. 4-325-149 (ICAO August 29, 2002), *citing Owens, supra*.

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

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Claimant has failed to establish by a preponderance of the evidence that ongoing Botox injections are reasonably necessary to relieve the effects or prevent further deterioration of Claimant's condition. Claimant has experienced significant headaches and moderate dizziness since the October 30, 2018 as the result of his work-related motor vehicle accident.

Claimant was initially diagnosed with cervicogenic headaches, and possible occipital neuralgia. At some point, Claimant was referred to Mr. Reynek, who apparently diagnosed Claimant with migraine headaches. However, Mr. Reynek's records were not offered or admitted into evidence, and the only information related to his examination, diagnosis, and treatment of Claimant is references by other providers and IME physicians. No credible evidence was admitted indicating any other provider independently diagnosed Claimant with migraine headaches. Instead, it appears other providers merely reiterated Mr. Reynek's diagnosis.

No credible, persuasive evidence was admitted indicating that Claimant's headaches are migraine. The record contains no direct evidence of the basis for Mr. Reynek's diagnosis, or how Claimant's response to Botox injections was assessed at or around the time of the injections. For example, Claimant received his first Botox injections

on July 12, 2021, and underwent a cervical rhizotomy and medial branch blocks nine days later, on July 21, 2021. The next relevant treatment documentation in the record following these two procedures is Dr. Reichhart's August 12, 2021 record, in which he indicated Claimant's headaches may have decreased following the rhizotomy, but made no reference to the effect of the Botox injections. The lack of contemporaneous records of either the procedures performed or the Claimant's responses to the Botox injections vs. the cervical spine procedures renders it speculative to determine which procedure actually caused Claimant's headaches to improve. The next admitted medical record from an ATP referencing Botox injections is Dr. Rafferty's February 9, 2022 record (four months after Claimant's second Botox injections) which indicates Claimant received "some but incomplet[e] resolution of his headaches." The evidence is insufficient to determine that Claimant's headaches are migraine in nature.

The ALJ credits Dr. Ramaswamy's testimony and opinions that Claimant's headaches are more likely than not cervicogenic in nature, rather than migraine. Dr. Ramaswamy credibly, and persuasively opined that Botox injections are not an appropriate treatment for cervicogenic headaches. Dr. Ramaswamy's opinions are supported by the Colorado Medical Treatment Guidelines for Traumatic Brain Injury, W.C.R.P. Rule, 17, Exhibit 2, p. 68, which provides Botox injections are "not different from placebo for cervical pain and is not likely to be clinically more effective than placebo for cervicogenic headache." The MTG also provides that Botox injections "are no longer generally recommended for cervicogenic or other headaches" due to evidence of lack of effect.

Dr. Ramaswamy testimony that Claimant's headaches likely have a cervical facet component and that the initial concern about occipital neuralgia was not fully explored was persuasive. Similarly, his testimony that occipital nerve blocks would be a reasonable and necessary procedure for treatment of his headaches, was credible and persuasive, and supports his opinion that Claimant's headaches are not migraine in nature, and that Botox is not an indicated treatment for Claimant's headaches.

ORDER

It is therefore ordered that:

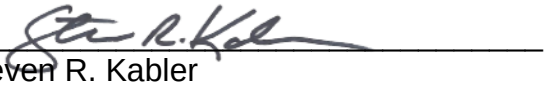
1. Claimant's request for authorization of ongoing Botox injections for as medical maintenance treatment is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2022



Steven R. Kabler
Administrative Law Judge
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Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-188-001

ISSUE

1. What is Claimant's pre-injury average weekly wage (AWW)?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant works as a lifeguard for Employer. Claimant was hired on May 18, 2021. (Tr. 9:10-15).

2. On July 1, 2021, Claimant was hit on the head by a large umbrella when the wind knocked it over and she sustained a concussion. (Ex. B).

3. Claimant was treated and placed at Maximum Medical Improvement ("MMI") on May 19, 2022. (Ex. A).

4. Respondents have admitted to medical benefits of $50,513.83 and Temporary Total Disability ("TTD") benefits from July 1, 2021 (the date of injury) through May 18, 2022 (the day before she was placed at MMI). (Ex. A).

5. Claimant testified that Employer hired her at a rate of $17.50 per hour, and she had an expectation of working 40 hours per week. (Tr. 9:19-25).

6. Claimant testified that she worked when her shift required, and the length of her shift varied. Claimant's supervisor determined her shift and when it ended each day. (Tr. 11:22-23:1 and 14:20-15:1).

7. Claimant testified that she was required to clock in an out each day, and her timecard reflected this. (Tr. 12:8-12).

8. Claimant never worked a full 40-hour week. (Ex. C).

9. Prior to being hired, Claimant notified Employer she had a vacation scheduled. She took a week-long vacation shortly after being hired. (Tr. 10:8). This is reflected in Claimant's first paycheck, where she only earned $52.50 for the period between May 10, 2021 and May 23, 2021. (Ex. C).

10. The ALJ finds that the period of time between May 10 and May 23, 2021 is not a reasonable or accurate reflection of Claimant's AWW.

11. Between May 24, 2021 and July 1, 2021, Claimant earned $2,704.66. (Ex. C)

12. There are 39 days between May 24, 2021 and July 1, 2021, which equates to an AWW of $485.45. ($2,704.66 / 39 days = $69.35/day * 7 = $485.45/week).

13. The ALJ finds that $485.45 is a reasonable and fair approximation of Claimant's AWW.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Average Weekly Wage

Section 8-42-102(2) of the Colorado Revised Statutes, requires the ALJ to base the claimant's AWW on her earnings at the time of injury. But under certain circumstances the

ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The ALJ has discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. C.R.S. §8-42-102(3); *Coates*, *Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra.

As found, Claimant earned $17.50 an hour and she had an *expectation* of working 40 hours per week. Claimant did not have control over her schedule, and at no time between May 24, 2021 and July 1, 2021 did Claimant work a 40-hour week. As found, Claimant's AWW is $485.85, which is a reasonable and fair approximation of her wage loss.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $485.45.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-189-623-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained injuries to his low back arising out of and in the course of his employment as parts manager for Employer on November 2, 2021.

II. If Claimant established that he sustained compensable injuries to his low back, whether he also established that his medical care through UC Health, Dr. Emily Burns and Dr. Kenneth Finn was reasonable, necessary and related to cure and relieve him of the effects of the November 2, 2021 industrial injury.

III. If Claimant established his entitlement to treatment, who is/are the provider(s) authorized to deliver care.

IV. If Claimant established that he suffered compensable work related injuries on November 2, 2021, whether he also established, by a preponderance of the evidence, that he is entitled to Temporary Total Disability ("TTD") benefits beginning November 10, 2022 through the present and ongoing.

V. If Claimant established that he sustained a compensable injury, depending on the date, whether Respondents established, by a preponderance of the evidence, that they are entitled to penalties pursuant to C.R.S. § 8-42-102(1)(a) for Claimant's alleged failure to timely report the injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Ms. [Redacted, hereinafter M] and Drs. Burns, Brunworth, and Castrejon, the ALJ enters the following findings of fact:

Background

1. Claimant is a 47-year old male who was employed as a parts to service manager by Employer. Among other things, Claimant's duties included stocking oil and various motorcycle parts, delivering those parts to the technicians who needed them and taking inventory. Claimant testified that he was required to lift items that weighed up to seventy pounds at times. Occasionally there were carts and dollies available to move heavier items but, since they were shared by other departments, they were not always available to Claimant.

2. Claimant testified that on November 2, 2021, he was stocking cases of oil when he injured his low back. Apparently, there was no cart/dolly available to Claimant

on this date. Regardless, Claimant explained that he was moving stacked cases of oil forward in the service area so that it would be readily available to the technicians for oil changes. Claimant testified that as he bent down to lift a case of oil from the stack, he felt something "pop/snap" in his back. Claimant testified that he then fell forward striking his left side/flank on the cases of oil.

3. Claimant testified that he had severe bruising on his left side and back toward the spine that lasted for a couple of weeks as a consequence of falling into the cases of oil. Moreover, he testified that following his fall into the stacked cases of oil, he developed progressive tingling in his left leg and toes. Ultimately, the entirety of his left leg went numb and he had difficulty standing upright and walking. He also reported symptoms of saddle aesthesia (sensation loss to the perineum) causing bladder retention and erectile dysfunction. (Resp. Ex. E, p. 20).

4. The incident was unwitnessed.

Claimant's October 27, 2021 Emergency Room Treatment

5. Approximately one week prior to the November 2, 2021 incident, Claimant presented to the Emergency Room (ER) at Grandview Hospital on October 27, 2021 after getting sick and vomiting at work. Upon arrival to the ER, Claimant described a five-day history of coughing, mild shortness of breath, vomiting, diarrhea and headaches. Claimant reported that just prior to his appearance in the ER, he had to vomit and as he was dry heaving, he felt something "exploded" (sic) in his left flank. (Resp. Ex. E, p. 14). Accordingly, he also complained of "flank pain" while in the ER. Per the medical report from this visit, Claimant described his flank pain as "constant, sharp and severe" and made worse by movement, coughing or heaving. *Id.* Claimant had no complaints of anterior abdominal discomfort/tenderness and had no urinary symptoms. *Id*.

6. While in the ER, concern was raised for a possible Covid infection or other viral syndrome and the risk that Claimant may have damaged a lead connected to an implanted spinal stimulator Claimant had placed following a previous injury. CT imaging was ordered which demonstrated the "left back stimulator lead [to be] intact". (Resp. Ex. E, p. 13). Indeed, no abnormality was demonstrated on CT imaging. *Id.* Claimant was assessed with a suspected Covid-19 infection, flank pain and a "strain of [the] lumbar region". He was subsequently discharged from the ER with documentation removing him from work until 11/1/2021. (Resp. Ex. E, p. 12-13, 17).

7. Based upon the evidence presented, the ALJ finds that Claimant's illness and treatment on October 27, 2021 was not in the course and scope of his employment. As such, any healthcare to cure or relieve the effects of what occurred to Claimant on or about October 27, 2021 and any subsequent wage loss caused thereby are not compensable.

Reporting of the November 2, 2021 Injury

8. The evidence presented supports a finding that Claimant had been taught to report all work related injuries to his supervisor. (Depo. Tr. Jackie Mogensen, p. 5). The evidence also supports a finding that Employer posted the Notice regarding the reporting of work-place injuries in four locations around the facility. *Id*. at p. 6, ll. 1-11. Accordingly, the ALJ is convinced that Claimant knew how to report any suspected work-related injury to his supervisor/management.

9. Claimant testified that he notified Doug [Redacted, hereinafter L], his direct supervisor of his November 2, 2021 injury but did not request medical treatment immediately because he believed that the injury was "not that bad" and would resolve quickly. Moreover, because he had missed work the week before with a suspected Covid-19 infection, he did not want to be out of work again for fear of losing his job. Consequently, Claimant testified he went to work, albeit in pain and in a reduced capacity on November 3rd, 4th and 5th.[1] Indeed, Claimant testified that he could not perform the full range of duties associated with his job without help from co-workers related to lifting, carrying and stocking of heavy items.

10. Based upon the evidence presented, including the testimony of Ms. Mogensen and Mr. L[Redacted], the ALJ is persuaded that while Claimant knew how to report on-the-job injuries, he probably failed to inform Mr. L[Redacted] that he developed back pain on November 2, 2021, while stocking cases of oil. Rather, the evidence presented persuades the ALJ that Claimant first reported his alleged November 2, 2021 workplace injury on November 9, 2021, prompting Doug L[Redacted] to complete a "First Notice of Accident Report Form". (Resp. Ex. A, p. 5).

11. The First Notice of Accident Report Form can be interpreted to indicate that Claimant was injured on November 7th or 9th. *Id.* Concerning the mechanism of injury (MOI) referenced on the form, Claimant noted: "I was picking up cases of oil to stock and felt something pop/snap in my back & I couldn't stand up straight". He listed a very similar MOI on the second page of the form. (See Resp. Ex. A, p. 6). Neither statement regarding the alleged MOI contains any reference to falling into the cases of oil. An Employer's First Report of Injury was completed November 16, 2021 and indicates that Employer was notified of Claimant's alleged injury on November 9, 2021 and that "[w]hile picking up cases of oil to stock them, [Claimant] felt a pop/snap in his lower back causing him difficulty in standing up straight". (Resp. Ex. C, p. 10). Similar to the Notice of Accident Form, the First Report of Injury contains no reference to falling into the cases of oil. Moreover, it lists the day of injury as November 7, 2021. (Resp. Ex. C, p. 10).

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[1] Claimant called into work sick on November 6, 2021. Nonetheless, he did not report to his supervisor that his inability to work was due to an alleged industrial injury that occurred on or about November 2, 2021.

The Testimony of WM[Redacted]

12. Claimant's co-worker, WM[Redacted] testified that he worked in Employer's shipping and receiving area, next to where Claimant worked. Mr. WM[Redacted] testified that after November 2, 2022, he noticed that Claimant appeared to be in pain. According to Mr. WM[Redacted], Claimant was having a hard time moving, walking and lifting heavy items at work. He helped Claimant move oil and parts and suggested that Claimant take it easy at work because he appeared to be in pain. He also recalled an episode where Claimant got sick and threw up at work, hurting his back. He testified that sometime later he observed a very large bruise on Claimant's left side and back extending from just below Claimant's left nipple to and below the belt line; however, could not recall when Claimant showed him this bruising. Nonetheless, when he saw the extent of Claimant's bruising, Mr. WM[Redacted] testified that he immediately notified their supervisor, DL[Redacted] who sent Claimant to Grandview Hospital.

The Initial Treatment for Claimant's Alleged November 2, 2021 Injury

13. Claimant presented to the ER at Grandview Hospital on November 9, 2021 reporting worsening pain in his left leg and foot. (Resp. Ex. E, p. 19). The report from this visit indicates: "About a week ago, his left side was still hurting him while he was at work. [H]e was trying to lift a case of oil. Because of the pain, he says he lifted awkwardly and lost his balance, falling and striking his left flank on a pallet. He did not strike his head or lose consciousness. At the time, he felt a popping sensation in his low back. He does have a history of previous lumbar surgery due to a disc herniation. Review of his chart shows that he had surgery with Dr. Roger Sung in October 2016, a left L3-L4 extrapedicular decompression discectomy. He also has a spinal cord stimulator placed". (Resp. Ex. E, p. 19). Medical documentation supports that the heavy bruising Claimant reported encompassed his left side was visible on this date, suggesting that he had suffered an insult to his flank sometime prior to November 9, 2021. (Resp. Ex. E, p. 27).

14. While in the ER on November 9, 2021, Claimant reported continued pain over the "past week", which was radiating down his left leg and into the foot. (Resp. Ex. E, p. 20). Claimant described a "pins and needle sensation in his left leg and decrease (sic) sensation to light touch. *Id.* He also reported that his left leg felt weak causing him to walk with a limp. *Id.* He reported increased pain with attempts to stand straight, when sneezing or laughing. *Id.* He also reported penile numbness, erectile dysfunction and trouble empting his bladder.[2] CT imaging of the abdomen and pelvis revealed a post void urine residual of 15 mL and a "small muscular injury along the lateral abdominal wall with small hematoma" (findings not present during Claimant's first CT scan of the abdomen and pelvis on October 27, 2021). *Id*. at p. 19; see also Resp. Ex. E, p. 13). Imaging also revealed degenerative disc disease along the lumbar spine,

[2] Claimant testified that he had never had any issues with emptying his bladder or his bowels nor any difficulties obtaining an erection prior to November 2, 2021.

without acute fracture or injury, greatest at "L3-L4 with disc height loss and small anterior osteophyte formation". *Id. (see also,* Resp. Ex. E, p. 25). Physical examination revealed decreased sensation about the left lower extremity and perineum. (Resp. Ex. E, p. 19). Based upon the evidence presented, including the Claimant's medical records and the deposition testimony of Drs. Burns, Brunworth and Castrejon, the ALJ finds that Claimant's reported symptoms and physical examination findings on November 9, 2021 raised concern for possible cauda equine syndrome. (Clmt's. Ex. 1, p. 76). Medical personnel recommended transfer to Memorial Central Hospital for evaluation by CT myelogram by neurosurgery.

15. Because Claimant did not have available childcare on November 9, 2021, he declined the transfer to Memorial Hospital for further evaluation. Instead, he returned to Memorial Central the next morning where he was admitted to the hospital for observation and additional testing. CT myelogram and additional testing[3] was performed. Claimant underwent CT myelogram studies of the cervical, thoracic and lumbar spine, because he was "ineligible" for MRI because of the placement of the aforementioned implanted stimulator in his lower back. An MRI could only be performed if the Claimant's permanent stimulator was physically removed. Upon arrival at the ER, Claimant demonstrated a positive straight leg raise test on the left and 4 out of 5 strength to the left lower extremity. He also complained of decreased sensation to the left groin and lower extremity. (Clmt's Ex. 1, p. 76). Post myelogram imaging (CT) of the lumbar spine demonstrated "no significant lumbar spinal canal stenosis"; however, did reveal "[m]oderate bilateral L3-L4 and L4-L5 foraminal stenosis. (Clmt's Ex. 1, p. 83). Post myelogram imaging of the thoracic spine revealed no thoracic spinal canal or foraminal stenosis. Nonetheless, imaging demonstrated changes to the spinal cord, which could be consistent with spinal dural AV fistula. Consequently, Claimant was referred for a spinal angiogram. (Clmt's Ex. 1, p. 81-82, 96, 100, 125-128). Claimant's angiogram was negative. *Id*. at p. 96. Finally, post myelogram imaging of the cervical spine revealed multilevel foraminal stenosis as multiple spinal segments. (Clmt's Ex. 1, p. 83).

16. As part of his workup on November 10, 2021, Claimant was evaluated by Dr. Janice Miller of the inpatient neurology service for the hospital. Dr. Miller obtained the following history from Claimant on November 12, 2021: "Patient states that a few days before the injury he was ill and had some forceful vomiting and felt like he strained a muscle in his left abdominal region. On the day of the injury he was a work and attempted to pick up a heavy pallet of motor oil and stated that he used slightly different lifting mechanics and immediately felt pain and felt a pop in his lower back". (Clmt's Ex. 1, p. 96). Claimant did not indicate that he had fallen and hit his left flank.

17. Dr. Miller reviewed the results of Claimant's CT myelogram and found "no compressive lesion. (Clmt's Ex. 1, p. 100).

[3] The consult report of attending neurologist Dr. Janice Miller indicates that Claimant also underwent a spinal angiogram to rule out a possible spinal dural AV fistula, which was negative of any vascular anomaly. (Clmt's Ex. 1, p. 95).

18. During his hospital stay, Claimant was also evaluated by physical therapist (PT), Tiffany Woods. Ms. Woods noted that the Claimant was functioning below baseline level of mobility. She recommended use of a walker but also provided the Claimant with education on the use of a cane pending improvement in his symptoms. (Claimant's Ex. 1, p. 106). The Claimant was discharged from the Hospital on November 11, 2021 with recommendations that he follow up with neurology as well as the UC Health Occupational Medicine.

19. Claimant was seen on December 27, 2021, by Physician Assistant (PA) Jayme Eatough under the direction of Dr. Elizabeth Bisgard, MD for evaluation of his back pain. PA Eatough obtained the following history from Claimant: "He was carrying cases of oil from the back hall up to the front. At the time of the injury he had one case in his right hand and went back to pick up another with his left. He did bend over and when he lifted it off the pallet, he felt a pop and immediate pain right away. He dropped everything and could not walk. He reported his injury had occurred when he was carrying cases of oil when he felt a pop and immediate pain". Claimant did not indicate to PA Eatough that he had fallen and hit his left flank.

20. Emily Burns, M.D. ultimately became Claimant's treating provider for his claimed injury. Dr. Burns fist saw Claimant on January 18, 2022 during which appointment she noted MOI of "lifting cases of oil". (Resp. Ex. H, p. 80). On April 20, 2022, Dr. Burns noted that Claimant tried additional physical therapy, which "made his symptoms worse. . ." She also noted that Claimant was "working on getting approval for possible steroid injections followed by nerve ablation. Finally, she noted that Claimant had been evaluated by a neurosurgeon who did not recommend surgical intervention or restrictions for his spine. (Resp. Ex. H, p. 93). Physical examination revealed Claimant's persistent pain was "centered in the area of the spinal cord stimulator pack." *Id*. at p. 94. It was suggested that Claimant consider removal of the stimulator outside of the workers' compensation system. *Id*. Claimant was released by to "very light duty" and scheduled for a follow-up in 3-4 weeks. *Id*.

The Independent Medical Examination and Testimony of Dr. Gretchen Brunworth

21. Gretchen Brunworth, M.D., performed an independent medical examination (IME) of Claimant on April 21, 2022, which included a physical examination and range of motion measurements. (Resp. Ex. I). Dr. Brunworth's diagnoses included low back and leg pain. *Id*. at p. 102-103.

22. In her April 21, 2022 IME report, Dr. Brunworth noted that Claimant had "significant nonphysiologic findings and pain behaviors on examination. (Resp. Ex. I, p. 103). She also noted that he was "not a good historian based upon his inability to recall details of his prior accidents/injuries outlined in a lettered drafted to her by Respondents' attorney. *Id*. Accordingly, Dr. Brunworth concluded that, Claimant appeared to be "consciously misrepresenting his history" and that "significant

psychiatric/psychological issues [were] affecting his presentation". *Id.* Because Dr. Brunworth did not have what she considered to be a "full set" of records, including records surrounding Claimant's prior accidents/injuries or an EMG report, she deferred further opinions regarding additional work-related diagnoses (other than low back pain), apportionment and additional treatment needs. *Id.* at p. 103-104.

23. Dr. Brunworth testified by Deposition on July 19, 2022. She reiterated her belief that there was a probable component of malingering in this case because Claimant is "very inconsistent with his histories" and because Claimant "obviously had significant back and left leg pain within a week of this [November 2, 2021] incident." (Depo. Tr. Dr. Brunworth, p. 18, ll. 11-18). Dr. Brunworth testified that Claimant's lumbar symptoms were inconsistent with his narrative that he was injured from moving cases of oil on November 2, 2021. (Depo. Tr. Dr. Brunworth, p. 23, l. 14-15).

24. Dr. Brunworth testified that medical record in the case is devoid of any objective medical evidence that would support a "theory" that the November 2, 2021 incident caused, aggravated or accelerated the pre-existing degenerative changes within Claimant's lumbar spine to become symptomatic. (Depo. Tr. Dr. Brunworth, p. 20, ll. 13-19). Moreover, she testified that there is no objective evidence to suggest that Claimant has an annular tear in a disc to support Dr. Castrejon's suggestion that Claimant's symptoms may be emanating from a chemical radiculitis. Id. at p. 25-26, ll. 1-13. Accordingly, Dr. Brunworth testified that there is not a candidate for discography. Id. at lines 14-25. The ALJ finds from Dr. Brunworth's testimony that she believes Claimant's lumbar stenosis and current symptoms, including his urinary retention, bowel urgency and erectile dysfunction are a product of the natural progression of the pre-existing degenerative changes in his lumbar spine without contribution from the November 2, 2021 incident.

25. Dr. Brunworth testified that Claimant "had had the upper extremity problems for quite some time, and that the implantation of the stimulator was to treat the symptoms related to Claimant's prior upper extremity injury. Accordingly, the upper extremity symptoms and treatment therefore including the use of a stimulator were not related to the alleged November 2, 2021 incident." (Depo. Tr. Dr. Brunworth p. 16, ll. 7-11).

The Independent Medical Examination and Testimony of Dr. Miguel Castrejon

26. Claimant was seen by Dr. Miguel Castrejon for an IME on May 23, 2022. Following a records review and a physical examination of Claimant, Dr. Castrejon opined that while Dr. Brunworth concluded that Claimant consciously misrepresented his medical history and presented with many nonphysiologic findings, he (Dr. Castrejon) found no evidence of "conscious misrepresentation, i.e. malingering. (Clmt's Ex. 2, p. 245). Rather, Dr. Castrejon concluded that what is clear from the record is that "there has been no diagnosis offered to explain [Claimant's] current condition despite the documentation by multiple examiners of similar abnormal findings". *Id.*

27. Dr. Castrejon testified that the Claimant presented at his office with a cane although he did not know who recommended it. The Claimant did not remember many specifics of his previous motor vehicle accidents or injuries (or even that they occurred) without prompting by the doctor. He did remember that he had no residual effects from any accident aside from an initial ER visit. In assessing the Claimant's range of motion, Dr. Castrejon used an inclinometer and based upon the Claimant's symptoms and known dermatomal patterns, Dr. Castrejon opined that L4-5 and L5-S1 are probably the affected levels of the spine the Claimant is dealing with. Generally, stocking glove distribution of numbness distal to the knee on the left ***can*** be evidence of L4-5 and L5-S1 nerve root compression. (Depo. Tr. Dr. Castrejon p. 23, ll. 7-15).

28. When asked about the CT evidence of moderate bilateral L3-L4 and L4-L5 foraminal stenosis, Dr. Castrejon could not conclude that it relates back to the surgery performed by Dr. Sung as Dr. Sung's procedure involved only the L3-L4 level. (Depo. Tr. Dr. Castrejon p. 26, ll. 10-22). Dr. Castrejon testified that a person can develop back pain with radiculopathy without any known inciting event. *Id.* at p. 20, ll. 4-8). He also agreed that foraminal stenosis is a degenerative condition that develops over time and is not typically caused by an outside entity/event. *Id*. at. p. 26, ll. 23-25 through p. 27, ll. 1-6.

29. EMG results reflected evidence of a left limb chronic L4-L5 radiculopathy but not necessarily ongoing denervation or radicular process at the L4-L5 level (Dr. Castrejon Depo. p. 28-29). He explained that an EMG study does not show sensory radiculopathies so if the Claimant had that at either the L4-L5 or any other level, it would be missed on an electrodiagnostic study. (Depo. Tr. Dr. Castrejon p. 27-30). Dr. Castrejon further opined that the Claimant could have suffered an annular tear causing chemical radiculitis but without being able to do an MRI, one cannot be sure. Id. at p. 30, ll. 19-25. According to Dr. Castrejon, the only other diagnostic testing available (other than an MRI) would be to have the Claimant undergo a discogram to determine which level is causing the Claimant's symptoms. Id. at p. 31, ll. 9-19.

30. Dr. Castrejon confirmed with the Claimant the alleged MOI noting that Claimant reported that he was lifting a case of oil, lifted, rotated slightly, experienced a popping sensation accompanied by moderate to severe pain that extended into the left leg. (Depo. Tr. Dr. Castrejon p. 35, ll. 2-5). He also noted that Claimant reported falling backward into the cases of oil, which the ALJ finds would be inconsistent with causing a contusion and bruising to the flank and back. Id. at p. 35, ll. 6-25. Upon questioning the Claimant as to why he did not report the November 2, 2021 incident immediately, Dr. Castrejon testified that Claimant stated that he thought he would get better and would not require medical care. (Depo. Tr. Dr. Castrejon p. 36, ll. 9-16). Dr. Castrejon testified that his review of the medical records supports the Claimant's described MOI and that Claimant experienced two separate conditions involving his back, one on October 27, 2021 and one occurring November 2, 2021 causing both back and leg pain. Id. at p. 38, ll. 10-22, & p. 53, ll. 9-25 through p. 55, ll. 1-5.

31. The ALJ interprets Dr. Castrejon's deposition testimony to indicate that Claimant's current back and left leg pain is causally related to the November 2, 2021 event based upon the Claimant's presentation at Grandview Hospital on October 27, 2021. Indeed, the ALJ understands Dr. Castrejon's testimony to indicate that following the forceful vomiting event on October 27, 2021, Claimant's symptoms in the ER that day did not implicate the presence of an acute radicular process typically associated with disc related pain. In contrast, Claimant's neurologic presentation, on November 9, 2021, including his left leg and foot symptoms and significant proximal sensory disturbances, support a conclusion that Claimant's symptoms are radicular in nature and related to a discogenic source caused by the lifting incident occurring November 2, 2021.

The Deposition Testimony of Dr. Emily Burns

32. Dr. Emily Burns testified by deposition on May 24, 2022 and June 29, 2022. Dr. Burns testified that Claimant had previously seen her colleague and had given a history of "carrying cases of oil from the back hall up to the front' when he was injured. (Depo. Tr. Dr. Burns, Vol. I, p. 9, ll. 16-25). According to Dr. Burns, Claimant reported that he had one case of oil in his right hand and went to pick up another with the left, so he had to bend over and when he lifted this second case off the pallet, he felt a "pop and immediate pain in his lower back with left sided numbness". Id. at p. 10, ll. 3-7. Claimant did not report falling. Id. at p. 11, ll. 11-12, p. 28, ll. 2-15. Dr. Burns suspected that the reference to a fall may have been "dropped" from the record at some point, but that did not mean that the Claimant did not have a back injury. Id. at p. 29, ll. 8-17.

33. Concerning the EMG performed February 17, 2022, Dr. Burns testified that that the primary finding was "moderate chronic lumbar polyradiculopathy . . . affecting levels L4 and L5 without active denervation". (Depo. Tr. Dr. Burns, Vol. I p, 37, ll. 6-9. She testified that she would leave the determination of whether this finding estyablished any pathology related to the alleged November 2, 2021 incident to neurology or neurosurgery because that was a "pretty specialized question about the exact time frame relative to [Claimant's] injury and what happened. Id. at p. 37, ll. 11-21. Nonetheless, she later testified that the EMG, by report, "showed moderate chronic lumbar, several root involvement at L5-5 without active denervation, which suggested to her that the results of Claimant's EMG supported the existence of an "older injury, not necessarily a newer injury". (Depo. Tr. Dr. Burns, Vol. II, p. 49, ll. 17-24). Accordingly, Dr. Burns testified that it was less probable that the EMG findings related to anything that happened sometime in November 2021 while Claimant was at work. Id. at p. 50, ll. 7-18. She also agreed that the CT myelograms performed November 10, 2021 did not establish that Claimant's pathology, i.e. foraminal stenosis was caused by the November 2, 2021 incident Claimant reported occurred at work. Id. at p. 52, ll. 7-23.

34. Given the inconsistencies/omissions, i.e. Claimant's failure to report a fall when describing the MOI in this case coupled with the lack of corresponding findings on physical examination and diagnostic testing, Dr. Burns testified that there is "plenty of suggestion" to support a conclusion that Claimant's current symptoms are not related to an alleged incident occurring at work. (Depo. Tr. Dr. Burns, Vol. II, p. 57, ll. 2-11). Accordingly, Dr. Burns testified that she was "leaning" towards the conclusion that it was possible that Claimant's current symptoms are related to an event occurring at work, but she could not say it was probable. Id. at p. 58, ll. 14-20. Thus, Dr. Burns concluded that Claimant's symptoms were more likely emanating from the progression of Claimant's underlying degenerative disc disease rather than a fall or industrial injury as described by Claimant. Id. at p. 58, ll. 21-25 and p. 59, line 1.

35. Dr. Burns testified that while a history of Claimant's fall was included in his medical records, in his statement to prior providers, she "hadn't been aware of the fall because that wasn't reported to us". (Depo. Tr. Dr. Burns, Vol. II, p. 60, ll. 8-22). She went on to testify that this made Claimant's evaluation difficult and she questioned, "I think the question is now why -- you know, why did the story change [?]" Id. at p. 65, ll. 3-6.

36. Dr. Burns testified that due to Claimant's inconsistent story, it made diagnosing him difficult, stating, **"**I can't honestly sort out exactly what happened . . . it does not sound as straightforward as everything was fine, then I lifted a can of oil at work, and then I had back pain and have had it ever since." (Depo. Tr. Dr. Burns, Vol. II p. 68, ll. 2-13). Thus, Dr. Burns concluded that it was not probable that Claimant's described MOI would aggravate his underlying pre-existing condition. Id. at p. 67-68.

Claimant's Hearing Testimony

37. The Claimant testified that he did not fill out all of the questions on the First Notice of Accident Report Form (Resp. Ex. A, p. 5). Indeed, Claimant testified that he did not fill out the sections of the form regarding the date, time, and location the incident was reported. Those specifics were filled out by Douglas L[Redacted]. The Claimant testified further that he did not fill out certain portions of the form entitled "Actions Preceding the Incident Completed by the Employee". (See Resp. Ex. A, p. 6). He testified that the date written on that form (on the same line as his signature) was not written by him.

38. The Claimant testified that he has a history of alcohol and drug addiction, but that he has been sober for three years. He acknowledged on cross-examination that, at times, he has problems with his memory and has to be reminded of things.

39. Claimant has a significant medical history of injury to his low back going back many years, which has resulted in prior surgery. He also underwent placement of a spinal cord stimulator secondary to an injury to his upper extremity. Claimant testified that in 2016 he had a previous successful lumbar spine surgery performed by Dr. Roger

Sung. He testified that he had no problems subsequent to the surgery. He also testified that he was involved in previous motor vehicle accidents. He explained that he did not remember some of them and that none of them involved any follow up care (post hospital ER visit). He explained that the fact that his memory is not good and that he did not receive any follow up care (post ER visit) were the main reasons that he did not mention the accident(s) to many of the physicians who saw him with regards to this injury. On cross-examination, the Claimant did not remember a claim he made against 7-11 in 2001; a motor vehicle accident in February of 2015; or a visit to UC Health in July of 2015 where he got x-rays of his neck. He did remember presenting to Memorial Hospital on July 21, 2017, with stroke like symptoms where he was informed his symptoms were a result of a migraine headache. He also remembered a rear-end motor vehicle accident on November 14, 2019, which he described as a "fender bender". He does not recall whether he sought any treatment as a result of this accident. He also acknowledged a motor vehicle accident, which occurred in January of 2020, where he did go to the emergency room but did not receive any follow-up treatment after that. Finally, he acknowledged the October 27, 2021, incident where he thought he had COVID and had broken or "popped" a rib due to coughing and vomiting. He does not remember complaining of any left leg pain at that time.

*The Hearing Testimony of D*L[Redacted]

40. DL[Redacted] testified as Claimant's direct supervisor. He testified that he did not witness the Claimant injure himself. He acknowledged Employer's immediate reporting policy if an employee is hurt on the job. Nonetheless, he could not recall [Claimant] contacted him on November 2, 2021 to report an industrial injury. Indeed, he could not remember if the Claimant contacted him at any time between November 2 and November 5 to report the alleged injury nor could he recall if Claimant, at any point in time during the week of November 2 through November 5, notified him that he was having difficulties performing his job duties. He testified that on November 6, 2021, he received a text message from Claimant stating that he would not be able to come into work but the text did not explain the reason for his absence.

41. Mr. DL[Redacted] also testified that on November 9, 2021, Mr. WM[Redacted] notified him that Claimant had a very large bruise on his back. He remembers that Claimant had a cane in his hand and was not moving very well at that time. He acknowledged that upon seeing the bruising, he sent immediately directed Claimant to the hospital. He acknowledged that he never asked Claimant the date of the accident. Rather, he completed much of the First Notice of Accident Report Form including the portion that called for the date and time of the accident, which he simply reported as 11/9/2021.

42. Mr. DL[Redacted] also acknowledged that he could not remember if November 9, 2021, was the first date that he had been made aware of the Claimant's injury. He testified that Claimant told him that he did not immediately report the incident because he was afraid he would lose his job.

43. Claimant's medical records support a finding that he was taken off work on December 27, 2021 by PA Eatough under the supervision of Dr. Bisgard. (Clmt's Ex. 1, p. 228). Moreover, Dr. Burns continued Claimant's off work status through April 20, 2022, when she noted she would return Claimant to "very light duty." While Dr. Burns released Claimant to light duty, the evidence presented fails to persuade the ALJ that Employer accommodated the restrictions outlined in Dr. Burns' April 20, 2022 report (Clmt's Ex. 3, p. 297) in a modified duty position.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The Alleged Mechanism of Injury (MOI) and Claimant's Credibility

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of

the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. Here, a question exists regarding whether the MOI described by Claimant may be causative of his alleged increased back/leg pain and the findings demonstrated on post injury imaging. As presented, the evidence persuades the ALJ that, consistent with the opinions of Dr. Castrejon, Claimant likely suffered two separate injuries causing pain in his low back and in reference to the November 2, 2021 incident, corresponding sensory disturbances and radicular pain in the left leg and foot. The ALJ credits Claimant's testimony and the opinions of Dr. Castrejon to conclude that the November 2, 2021 lifting incident, while Claimant was stocking cases of oil, probably aggravated an already compromised, surgically altered and diseased low back, worsening the pain caused by his vomiting episode on October 27, 2021, giving rise to new sensory disturbances, i.e. saddle aesthesia, urinary retention and erectile dysfunction in addition to radicular pain in the left leg/foot. While Claimant did not initially report that he fell forward striking his flank on the cases of oil after feeling a "pop/snap" in his low back, the severe bruising visible by medical personnel on November 9th, seven days after the alleged November 2, 2021, incident provides sufficient circumstantial evidence of a fall/insult to the left side of the body. Moreover, Claimant has consistently indicated that the lifting associated with his stocking duties on November 2, 2021 is causative of his symptoms, not the fall. Given Claimant's self-observed memory problems coupled with his consistent report that the lifting caused a pop/snap followed by pain which he thought would improve on its own, the ALJ is not surprised that Claimant failed to reference the fall as a major aspect of his November 2, 2021 injury. Given the totality of the evidence presented, the ALJ is convinced that Claimant probably did suffer an aggravation of a pre-existing condition, i.e. his degenerative disc disease, as a consequence of lifting cases of oil on November 2, 2021.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), ***aff'd*** *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous

and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). There is no presumption that an injury which occurs in the course of employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App.1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation. To the contrary, lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo.App.1986).* In this case, Claimant contends that the evidence supports a conclusion that he has proven that his low back injury occurred during the time and place limitations of his employment and arose out of his stocking duties for Employer.

H. On the other hand, Respondents contend that the inconsistencies in the record regarding the exact mechanism of injury (MOI) combined with the pre-existing condition of Claimant's lumbar spine warrant a very different conclusion. Respondents maintain that the evidence presented more convincingly supports the conclusion that Claimant's symptoms represent natural and probable progression of his underlying degenerative disc disease, which was probably aggravated by the events of 10/27/2021 involving forceful vomiting causing something to "explode" in his left flank rather than any incident occurring November 2, 2021. Simply put, Respondents contend that Claimant's low back/leg pain and his subsequent disability and current need for treatment are not related to any incident that occurred November 2, 2021. The ALJ is not persuaded.

I. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question*

Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Although there are inconsistencies in the record regarding the MOI in this case, the ALJ resolves those conflicts in favor of Claimant to find and conclude that he probably lifted a case of oil while bending to the left leading to a sudden outset of symptoms in his low back/leg, which caused him to fall forward into the product he was stocking for employer. In reaching this conclusion, the ALJ is mindful that Claimant had experienced back pain on October 27, 2021, yet the evidence presented supports a conclusion that Claimant had returned to work after getting sick on October 27, 2021 and was working without restriction on November 2, 2021. Contrary to the suggestions of Dr. Burns and Dr. Brunworth, the evidence presented fails to support a conclusion that Claimant's left-sided paresthesia's and radicular pain originated as a result of the October 27, 2021 or the natural progression of a pre-existing condition. Rather, the evidence presented supports a conclusion that the onset of Claimant's radicular symptoms and symptoms originally thought to represent cauda equina syndrome arose immediately after the November 2, 2021 lifting incident and progressively worsened until Claimant was forced to seek treatment on November 9, 2021.

J. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

K. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted by Respondents, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005).

L. Based upon the totality of the evidence presented, the ALJ credits the opinions of Dr. Castrejon to find and conclude that Claimant probably suffered an acute aggravation of a pre-existing condition in his low back on November 2, 2021 giving rise to his reported radicular pain and proximal neurologic symptoms, including saddle

aesthesia, urinary retention and erectile dysfunction. While the ALJ is not convinced that the November 2, 2021 incident caused any of the degenerative findings in Claimant's lumbar spine, the aforementioned symptoms/sensory disturbances are directly traceable to Claimant's stocking duties on November 2, 2021. The evidence presented persuades the ALJ that Claimant's symptoms and functional decline after November 2, 2021, as well as his need for treatment were probably related to this acute aggravation. In concluding as much, the ALJ rejects Respondents' suggestion, based primarily on the opinions of Dr. Burns and Dr. Brunworth that Claimant's disability and current need for treatment is the culmination of the natural progression of a pre-existing condition in Claimant's back following his prior injuries and subsequent surgeries to his lumbar spine. The ALJ finds and concludes that Claimant has established the requisite causal connection between his employment duties and his medical condition. Accordingly, the ALJ concludes that the claimed injury is compensable.

Claimant's Entitlement to Medical Benefits and Authorization to Treat

M. As noted above, Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. This includes medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, supra. Regardless, Respondents are only liable for authorized treatment. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997).

N. Under §8-43-404(5) (a) (I) (A), C.R.S. 2018 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

O. As noted, § 8-43-404(5) (a), C.R.S. affords an employer or its insurer the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on

the job injury, the employer or insurer shall provide the injured worker with a written list . . .” In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011).

P. In this case, the record contains substantial evidence to support a conclusion that the medical care Claimant received through UC Health, Dr. Emily Burns and Dr. Kenneth Finn was reasonable, necessary and related to the November 2, 2021 injury to cure and relieve his symptoms. Accordingly, the ALJ finds Respondent’s liable for the costs of this care. Moreover, the record supports a conclusion that Claimant probably requires additional treatment, to cure and relieve him of the ongoing effects of his November 2, 2021 industrial injury. Indeed, the medical reports outline persistent pain and functional decline secondary to neurologically correlated pain, lower extremity weakness and decreased sensation, leading Dr. Castrejon to recommended additional treatment and diagnostic testing. Nonetheless, it is necessary to determine who is authorized to provide such care.

Q. As noted above, an employer's duty to designate a medical provider in the first instance is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. The questions of whether Employer failed to timely tender the services of a physician and the right of selection passed to Claimant are questions of fact for resolution by the ALJ. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988); *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996). In this case, the ALJ concludes that Claimant probably informed Mr. P[Redacted] that he injured his back while stocking oil on November 9, 2021. Based upon the evidence presented, the ALJ finds/concludes that Employers duty to select a provider to treat Claimant’s injury was triggered November 9, 2021 and Employer timely tendered the services of a physician as required by statute at that time.

R. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an authorized treating provider (ATP) refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment

is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, Claimant was originally seen on an emergent basis at Grandview Hospital Emergency Room. The physicians then transferred him to Memorial Hospital Central who, at the point of discharge, referred Claimant to Dr. Emily Burns and for a neurosurgical evaluation. (Clmt's Ex. 1, p. 214). Respondents designated UC Health Occupational Medicine Clinic to treat the Claimant. He was seen by Dr. Elizabeth Bisgard and Dr. Emily Burns to attend to the claimed injury pursuant to W.C.R.P. 8-2(A) and C.R.S. § 8-43-404(5)(a)(I)(A). The Claimant has not been treated outside of the chain of referral for which benefits are sought. Consequently, the ALJ concludes that the providers at UC Health and those providers to whom they referred Claimant are designated providers and authorized to treat Claimant under this claim.

Claimant's Entitlement to Temporary Disability Benefits & Respondents Request for Late Reporting Penalties

S. To receive temporary disability benefits, a claimant must prove the injury caused a disability, he/she leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Here, the evidence presented persuades the ALJ that PA Eatough, under the direction of Dr. Elizabeth Bisgard, who reviewed PA Eatough's treatment record, removed Claimant from work due to the ongoing effects of his low back injury on December 27, 2021 (Clmt's Ex. 1, p. 228). Furthermore, the medical records reflect that Claimant continued to be restricted from working per Dr. Burns until April 20, 2022 when she released him to "very light duty". (*See* Clmt's Ex. A, pp. 250, 254, 269, 281, 297). Nonetheless, Respondents failed to demonstrate that they accommodated Claimant's restrictions by offering him modified duty. The ALJ credits the medical record and Claimant's testimony to find that he has been unable to perform the full range of his work duties since December 27, 2021 and Respondents failed to offer modified duty. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits from December 27, 2021 and ongoing. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

T. Respondents seek a penalty against Claimant for his alleged failure to timely to report the injury in writing as required by § 8-43-102(1) (a), C.R.S. Section 8-43-102(1) (a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing, "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left

to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4- 519-354 (ICAO March 6, 2003). In this case, the evidence overwhelming supports a conclusion that Claimant failed to submit a written report of injury until November 9, 2021. Based upon the evidence presented, including the testimony of Ms. M[Redacted] and Mr. DL[Redacted], the ALJ is persuaded that Claimant was probably aware of the reporting requirements for work-related injuries. Nonetheless, Claimant was not entitled to lost wages until December 27, 2021, more than one month after he filed his written report of injury, when he was taken off work by PA Eatough. Accordingly, the ALJ refuses to impose a penalty for late reporting.

ORDER

It is therefore ordered:

1. Claimant's November 2, 2021 claim for work-related injuries to his low back/left leg is compensable.

2. Respondents are liable for Claimant's treatment with UC Health in addition to any treatment he obtained as part of the referrals received from UC Health. All medical expenses shall be paid pursuant to the Workers' Compensation medical benefits fee schedule.

3. Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning December 27, 2021 and ongoing at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1).

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: September 28, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on February 3, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY,

II. Whether Claimant has proven that he is entitled to reasonably necessary medical benefits related to the February 3, 2021 incident.

III. Whether Claimant is entitled to reasonably necessary medical benefits and whether Claimant has proven that the treatment he obtained was authorized within the chain of referral and or by a provider on a designated provider list.

IV. Whether the lumbar spine, right shoulder and neck conditions were caused by that compensable event.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits as a consequence of the injuries sustained.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a specific average weekly wage.

VII. Whether Respondents have proven by a preponderance of the evidence that Claimant was either responsible for termination or that his wage loss was not a result of the compensable event.

VIII. Whether Respondents have proven by a preponderance of the evidence that there should be a reduction in compensation due to Claimant's late reporting of the injury pursuant to Sec. 8-43-102(1)(a), C.R.S.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on December 10, 2021 through prior counsel on the above listed issues. Respondents filed a Response to Application for Hearing dated January 6, 2022 adding the above defenses.

A hearing was convened on May 10, 2022 before this ALJ. Following a *pro se* advisement to the self-represented Claimant, Claimant made a motion to continue the hearing in order to obtain the services of another attorney. Claimant explained that he had hired two separate lawyers and that the last lawyer withdrew from representing him. The order approving the withdrawal of counsel was issued by ALJ Peter J. Cannici on April 28, 2022. Claimant indicated that he had no funds to pay an attorney and was requesting that he be assigned an attorney *pro bono.* This ALJ provided Claimant information that, under Colorado law, attorneys in workers' compensation matters were limited to charging fees based on Sec. 8-43-403(1), C.R.S. in the amount of twenty

percent on contested benefits, upon winning the claim. Over Respondents' objections, this ALJ found good cause for a continuance in this matter, issuing an order dated May 11, 2022. This ALJ suggested to Claimant that he to obtain a list of attorneys promulgated by the Colorado Bar Association Workers' Compensation Section from the OAC staff for his convenience. Claimant was further admonished that the case would be reset for hearing within 60 days of the date of this hearing and Claimant must have taken affirmative steps to secure the services of an attorney or the case would proceed without assistance of counsel. Claimant was provided with a large packet of records of approximately 2,424 pages which included all medical record in Respondents' possession. Respondents indicated that they would be culling the records to a more manageable size for the continued hearing and that it would be Claimant's responsibility to submit any exhibits he wished for the court to consider.

At the commencement of the July 8, 2022 hearing, Claimant indicated that he had contacted a couple new attorneys but that they had not yet responded. This ALJ found that this action was not sufficient affirmative steps to further continue the hearing and the hearing proceeded forward. This ALJ, again, provided a *pro se* advisement.

FINDINGS OF FACT

Based on the evidence presented at the hearings, the ALJ enters the following findings of fact:

1. Claimant was 55 years old at the time of the last hearing in this matter. He worked as a foreman assistant for Employer on February 3, 2021. Employer is a company providing landscaping and snow removal for residential and commercial clients. Snow was expected the following day, and Claimant was instructed to take one of the Employer's trucks and to hook up a snow plow on the truck before leaving the Employer's place of business. Claimant clocked out of work on February 3, 2021 at approximately 4:30 p.m. but was paid for an additional hour and one half to perform any tasks necessary to accomplish the work needed for the next day, including hooking up the plow to the work truck while at the shop and collect any other tools needed to perform the work the next day. Claimant was assigned to do the snow removal for specific client properties in Northwest Denver, close to where Claimant lived.

2. Claimant was driving away from Employer's shop, after having hooked up a snowplow to the Employer's truck, when he was involved in a hit and run motor vehicle accident while driving westbound on Arapahoe Road. Claimant stated that he was on his way to assess the parking lots where he was assigned to do snow removal on the following day, if there was any snow fall. The hit and run motor vehicle accident (MVA) occurred at approximately 5:08 p.m. in Greenwood Village, many miles south of his home and the properties Claimant was responsible for plowing. The truck was hit by a U-Haul truck on the front right side of the plow. Claimant stated that the person driving the U-Haul van immediately left the accident scene and parked at a Motel 6, then fled from the place of the accident, abandoning the U-Haul truck. Claimant followed the driver but was unable to locate him. He returned to his vehicle, and he flagged a police officer that was responding to another call at the Motel 6, where he found the abandoned the damaged U-Haul truck. That police officer called in further help and an investigation commenced

relating to the hit and run. Claimant also called the Employer's shop to report the accident.

3. The second officer arrived at the scene and was investigating the U-Haul truck when a woman approached. When questioned, she informed the officer that the driver had departed because he had outstanding warrants against him. She later revised her story, in order for the U-Haul not to be towed, stating that she was the driver of the vehicle. Claimant spoke with the police officer, denying that the woman was the driver, stating that the drive had been male, but that Claimant would not recognize his face. The police officer confirmed that the woman had not been driving the vehicle by reviewing video footage from the Motel 6 that showed that a male parked the U-Haul truck at the Motel 6 and departed.

4. Footage of the police body cameras were reviewed and did not show any significant indications that Claimant was injured. It specifically showed Claimant walking without any difficulty as he spoke to the officers and walked back and forth from his truck to the U-Haul truck to take photographs. He also got in and out of his truck and stood against his truck filling out paperwork at chest level, turning his head without difficulty.

5. The police reports failed to show any particular notifications or reports of injuries. Claimant did not request the services of an ambulance and was seen walking in the parking lot, completing paperwork without indications of injuries or altered movement patters. In fact, while Claimant stated that he was injured in the collision, including injuries to his neck, teeth, low back, right knee and right shoulder, Claimant confirmed that he did not report any injuries at the time of the accident to either the police or his employer justifying this omission because he was frightened and nervous. The officer body camera video failed to show Claimant as an individual that was either frightened or nervous and this assertion was not credible.

6. Mr. C[Redacted] was Claimant's direct supervisor. Mr. C[Redacted] testified that it did not snow on either February 3, 2021 or February 4, 2021. Mr. C[Redacted] testified that Claimant was not sent out on an assignment to clear snow on February 3, 2021 as it did not snow greater than two inches. Claimant was told that snow was expected, and told to get the truck at the shop, hook up the plow, and take the truck home so that, if it did snow, he could go to his assigned properties and plow. Mr. C[Redacted] stated Claimant was not being paid at the time the accident occurred. Claimant was not paid for travel time or to go to inspect the property he was to plow the next day, if it snowed, and he was not paid to be on call. Mr. C[Redacted]'s testimony was corroborated by other Employer witnesses and was credible.

7. Claimant called Mr. C[Redacted] from the motel after the incident occurred. Mr. C[Redacted] asked Claimant if he was hurt and Claimant just reported the damage to the truck and plow. Mr. C[Redacted] asked Claimant if the truck was operational, and Claimant said it was.

8. Claimant reported to work the next morning between 7 a.m. and 8 a.m. and met with Mr. C[Redacted] and Mr. W[Redacted], the Safety Manager. A report was completed regarding the incident with Claimant's assistance. There was no mention of injury in the report. Claimant, Mr. C[Redacted] and Mr. W[Redacted] were involved in the meeting, discussing the incident. During the meeting Claimant was asked if he was injured by both his supervisor and the Safety Manager and he responded that he was fine. In the meeting, all, including Claimant, agreed that Claimant was off the clock when the accident occurred and was on his way

home. Claimant returned to his regular work for several weeks, as shown by the check stubs, performing his regular job without limitations.

9. As found, there was no snow on February 3 or February 4, 2021. Claimant's timecard detail showed the date, location, type of work done and payment per hour. When he worked snow removal, "plowing" was indicated, and he was paid $25 per hour for that regular time and $37.50 for overtime worked. Claimant's regular work for clients was indicated as "Labor Hardscapes" or "Labor-Unbillable." and paid at a rate of $17.00 per hour. For example, on February 3, 2021, he was paid 9 hours for "Labor Hardscapes." This matches Claimant's handwritten sheet, with Claimant clocking out at 4:30. Claimant was not paid for plowing on February 3, 2021, February 4, 2021, or February 5, 2021. He was paid for landscaping work. Mr. C[Redacted] testified that there had been no snow and Claimant did not plow and did not say he had plowed when he met him the following morning, on February 4, 2021, to discuss the incident and complete the incident report.

10. Claimant submitted Exhibit 10 of 2, which contained a handwritten timesheet purporting to reflect plowing on February 4, 2021. This document was unfamiliar to the Employer witnesses. All testified that they had not seen it before. In general, Claimant used the same type of form, completed his time himself in his handwriting, and turned the forms in to be paid. The handwritten timesheets were the basis for his Timecard Details and pay.[1] Appearing a few times in the hearing packet was a handwritten Daily Job report which represented claimant working from 2 a.m. until 3:30 a.m. on February 4, 2021. Claimant represented this was evidence that he had plowed snow after the U-Haul incident and before appearing at work on February 4, 2021, apparently arguing that this put the incident that occurred on February 3, 2021 at 5:08 p.m. within the course and scope of employment. Mr. C[Redacted] testified that it appeared to him that Claimant had created the handwritten time sheet for purposes of the hearing.

11. Ms. E[Redacted], the Human Resources Manager, testified that Claimant had not turned in a February 4, 2021 timecard showing snow plowing for payment. Claimant's Timecard Detail did not reflect that this was claimed as time worked. Claimant testified that the plow had been damaged and that he had difficulty using it after the incident. Mr. C[Redacted] met Claimant that morning to look at the damage on the plow and do the report, and testified that it had not snowed, it would not make sense to plow, and Claimant did not mention plowing in the early morning with the damaged plow. Mr. C[Redacted]. testified that Claimant was not paid for plowing in the pre-dawn hours of February 4, 2021. They testified that Claimant never complained about not being paid for snow plowing work. There were several weeks between February 4, 2021 and when Claimant quit his employment in late March, 2021, and ample opportunity for him to rectify it if he had actually turned that time in and been unpaid. The handwritten timecard Claimant presented to the court showing plowing work on February 4, 2021 is not credible, and is not evidence that he was in the course and scope of his work at the time of the U-Haul incident.

12. On February 17, 2021, Employer was provided a letter regarding a UM/UIM and Med pay claim Claimant was bringing against Employer's auto carrier, Selective Insurance Company of America. Employer noted that this was the first they had learned that Claimant was alleging any injury associated with the incident of February 3, 2021.

[1] Timecard and handwritten sheet match: 6 hours at one client and 4 hours at another, neither of which was the assigned snow plowing addresses.

After receipt of that letter, Mr. C[Redacted], Mr. W[Redacted] and Ms. E[Redacted] called a meeting with Claimant, scheduled for February 18, 2021, to ask him about the claimed injury under their auto policy. For the first time during that meeting, Claimant indicated that he had started feeling right knee pain and hired an attorney. Claimant had brought an invoice for his initial visit along with an order from his doctor for a knee x-ray. Claimant was told that this would be passed on to the auto insurance carrier, which it was pursuant to an email dated the same day. Ms. E[Redacted] testified that Claimant agreed he was off the clock when the incident happened. Claimant testified that he said this because he was frightened and intimidated at this meeting, and that Ms. E[Redacted] stood behind him and yelled at him for retaining an attorney. Ms. E[Redacted], Mr. C[Redacted], and Mr. W[Redacted] all credibly testified this was untrue and denied that this occurred. Ms. E[Redacted] testified that she asked Claimant for a doctor's note regarding any restrictions he had as a result of his knee complaints. Claimant provided no restriction report. Ms. E[Redacted] followed up with Claimant three times, asking for restrictions, and he still did not provide one.

13. Claimant worked until March 25, 2021. At that time Claimant told Mr. C[Redacted] and Ms. E[Redacted] that he had found another job that paid him more money and was closer to his home. At hearing Claimant testified that Employer was taking away his hours. Mr. C[Redacted] testified that at the time he quit, Claimant did not complain that Employer was taking away hours. Mr. C[Redacted] testified that Employer was not taking hours away from him. Hours for the employees depended upon the needs of the clients and varied over time.

14. Claimant initially filed a Workers' Compensation Claim against the wrong employer and wrong carrier on or about July 13, 2021.[2]

15. Since February 18, 2021, Claimant sought treatment from several providers and underwent surgeries. By the time of the hearing, he had undergone a right knee surgery, a lumbar spine fusion, right shoulder surgery and cervical fusion. Most of these records were not made available to Respondents. These surgeries have been paid for through Medicaid, according to Claimant's testimony.

16. Dr. Fall evaluated Claimant on January 13, 2022 and testified by deposition on March 4, 2022 as an expert in occupational medicine, physical medicine and rehabilitation, causation analysis, as well as a Level II provider fully accredited by the Division. Her conclusion was that Claimant did not sustain any injury that required medical treatment as a result of the event of February 3, 2021. During her interview with Claimant, he was very evasive about how he claimed he was injured. Claimant eventually told her that he put pressure on his right leg applying the break, and damaged his right knee. He said he just felt pain in his neck, low back and right shoulder while he was sitting in the seat. He did not identify any movement inside the vehicle or say that he had hit anything inside the vehicle. Dr. Fall also pointed out that medical records reveal that Claimant experienced an intervening lumbar injury, reporting to the emergency room on August 2, 2021 and saying that he bent over and had immediate worsening of chronic low back pain. This lead to surgery on August 6, 2021 for Claimant's pre-existing severe

[2] Claimant's Workers' Compensation Claim form indicated Employer was Stake Center Locating, and S and N Communications Inc., and the insurer as First Liberty Insurance Corp. who were not parties to this claim. This was not notice of a work related injury to his Employer or their Insurer.

lumbar stenosis and degenerative spondylosis superimposed on L4-5 degenerative anterior spondylolisthesis.

17. Dr. Fall noted that, by description of the U-Haul accident, the main direction of the force from the U-Haul would be a sideswipe, which would not be expected to cause any significant force or movement to a restrained driver in the vehicle. Injuring the knee as the result of slamming on the breaks was highly unlikely. In addition, there was a lack of medical documentation and lack of a report of injury on the day of the event or even close to the MVA.

18. Dr. John Hughes evaluated Claimant, at claimant's request, for an independent medical examination on February 14, 2022. Claimant reported he had pain and symptoms all over his body immediately after the collision. After hearing Claimant's various complaints and history, including complaints of the neck, shoulders, arms, extremities and the low back pain, Dr. Hughes only concluded that Claimant's right knee was injured in the incident. His basis for this was Claimant's history and his conclusion that Claimant had developed an acute medial meniscus tear in the right knee. Among the history provided to Dr. Hughes was that Claimant was "perfect" after a prior 2016 work injury and a prior 2018 motor vehicle accident. Dr. Hughes did not have prior medical records and was dependent upon Claimant's representations. Dr. Hughes indicated Claimant was at MMI and had a work related rating of 10% lower extremity for the right knee.

19. Neither Dr. Fall nor Dr. Hughes had many relevant pre-injury records at the time of their reports. Neither of them viewed the body camera video on the date of the alleged injury. Review of those records shows clearly that Dr. Hughes' conclusions are based upon a faulty history provided by Claimant. Claimant's pattern of keeping one medical provider uninformed about what went before them is evident from the medical records. Claimant in fact already had a 12% rating for right knee pain under his prior 2016 work injury claim. This rating was admitted and PPD benefits were paid based upon that rating. Long after the settlement of that claim and a year before this claim, Claimant was awaiting surgery for the right knee.[3] He was taking medication because of his low back and right knee pain for years and continued to do so within months of the incident.

20. Dr. Hughes's opinion that the right knee was injured during the U-Haul event was based upon inaccurate information and is not credible or persuasive. Dr. Fall's opinion is found more credible than any contrary opinions. As found, Claimant did not sustain a new injury or aggravation of the preexisting condition because of the U-Haul incident.

21. Although Claimant is claiming new injuries, Claimant was certainly not "perfect" after his 2016 work injury as he attempted to obtain benefits and treatment after that incident. In fact, he claimed he was permanently and totally disabled.[4] As a result, he received a lump sum and structured settlement that continues to pay out. At the time of MMI on July 19, 2018, ATP Dr. Yusuke Wakeshima's notes show 13 alleged work related problems in his assessment. This included low back and neck pain, which had been treated under the 2016 work injury until a full medical record review showed they

[3] This was documented by Dr. Joshua Emdur, D.O. on February 6, 2020 at Clinica Colorado, who reported: "Right knee pain 9/10 constant sharp pain. Awaits surgery." It also reports "Back pain 6/10 sharp constant and radiates to left leg." See Ex. I, Bates 597

[4] See Ex. FF, Bates 2265, and 2277-2283, see specifically Bates 2280, Section 9(A)(8).

were in fact pre-existing and not related to the work injury. Claimant received a 13% whole person impairment and a 5% mental impairment under the 2016 workers' compensation claim. He signed the settlement documents in that claim on November 19, 2018 and an Order approving the settlement was signed by Director Paul Tauriello on November 21, 2022.

22. Claimant was involved in an MVA on October 14, 2018, before signing the settlement documents from his claim of permanent total disability due to his claimed knees, neck and back complaints. Records from the Bovidilla Clinic state,

> [Claimant] reported that before the 10-14-2018 accident he was under care for a workers comp left knee injury. [Claimant] states his right knee hit the inside of the car on impact. [Claimant] states his right knee, neck and back pain is all new after this 10-14-12018 crash.[5] [*Claimant's name, redacted*.]

Claimant settled his workers' compensation claim while overlapping with a new claim for the same body parts and conditions. This indicates that Claimant was not truthful with regard to his allegations of injuries related to the February 3, 2021 U-Haul incident.

23. Further records from Dr. Wakeshima, after the settlement, also show that the representation to Dr. Hughes that Claimant was "perfect" was incorrect. On February 1, 2019, Claimant was again evaluated by Dr. Wakeshima. He reported that his low back had worsened and was asking for injections for the low back pain. He did not give the history of the intervening MVA. He was using a cane, wearing knee braces on both knees, and an ankle brace. Dr. Wakeshima arranged for injections. However, when Claimant returned on March 1, 2019, Dr. Wakeshima discharged him for non-compliance with his opioid agreement based upon a urinalysis that showed morphine and diazepam metabolites, none of which appeared to have been prescribed. In the meantime, Claimant was also being treated in Chicago and Colorado for injuries attributed to the October 2018 MVA. In May, 2019, he was treating for that MVA and complained of low back, bilateral leg pain, bilateral shoulder pain, right knee pain, including popping clicking, give-way issues affecting his activities of daily living and function, neck pain, midback pain, headaches, tinnitus, sleep and mood issues. This is far from "perfect" as represented to Dr. Hughes. Dr. Robert Williams, of Clinica Colorado, noted that "He cancelled the Ortho referral here and on the advice of his attorney went to Chicago (where he was injured in 2018) to see an orthopedist there. They are planning on giving him some injections in the back and neck." On September 11, 2020 he continued to diagnose musculoskeletal pain, chronic radicular low back pain among other diagnosis.

24. The 2016 workers' compensation claim and the 2018 MVA were not the first accidents Claimant had alleged caused injury to his neck, back, shoulders and knees as well as psychological issues including depression. On October 12, 2013 Claimant was evaluated for neck and low back injuries related to another MVA the prior month. Then on November 24, 2013 Claimant reported another injury three days prior causing mid back, low back and left knee injuries. There are also indications that Claimant's psychological problems date back many years. On March 27, 2014 Claimant was seen at Riverside Community Hospital in California with a history of depression, substance abuse in the ED with psychosis, exhibiting paranoia, delusions, and disorganized thought process due to being off psycho meds. Claimant was hospitalized from March 28, 2014

[5] Ex. N, Bates 697

to April 2, 2014. These complaints clearly goes back many years. Claimant's back pain was described as "chronic" in 2013, as were his "severe" psychological issues.

25. As found, Claimant has failed to show by a preponderance of the evidence that he sustained compensable injuries on February 3, 2021 in the course and scope of his employment. In fact, it is more likely than not that Claimant had chronic ongoing low back, mid back, bilateral shoulder, bilateral lower extremity, teeth, or face injuries, as well as psychological conditions that were ongoing for many years prior to the February 3, 2021 event, none of which were aggravated or accelerated as a result of the 2021 MVA.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, *supra*.

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S*., supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

In this matter, an incident occurred on February 3, 2021, however, there was no injury caused as a result. The substantial amount of video of Claimant immediately after the incident makes it quite clear that he was not in pain and did not experience any injury at the time of that incident. He did not display any injury or speak of any injury to the police. His co-workers are credible in their testimony that he did not display or speak of any injury for weeks after the incident, despite being directly asked about it. The fact that he underwent surgery for unquestionably chronic symptomatic preexisting conditions after the incident occurred does not lead to the conclusion that this was because of the incident.

An injury may be compensable if, at the time of the injury, the employee was performing services arising out of and in the course of the worker's employment. C.R.S. § 8-41-301(1)(b). "For an injury to occur 'in the course of' employment, the Claimant must demonstrate that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions*." Madden*

v. Mountain W. Fabricators, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose out of employment, "the Claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Id.* "In general, a Claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment." *Id.* The established reasoning behind this is that travel to the worksite does not confer a benefit upon the employer other than arrival at work, which has been rejected as justification to expand the course and scope of employment. This doctrine is commonly called the "going to and from work" rule. *Id.; Berry's Coffee Shop, Inc. v. Palomba,* 423 P.2d 2 (1967): *Colorado Civil Air Patrol v. Hagans,* 662 P.2d 194 (Colo. App. 1983).

There are exceptions to the going to and from work rule that establish a causal connection between employment and a travel injury, but these do not apply in this case. See, e.g. *Perry v. Crawford & Co.* 677 P.2d 416 (Colo. App. 1983). Under *Madden,* variables that would support an exception to the rule include: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer premises, (3) whether the travel was contemplated by the employment contract and (4) whether the obligations or conditions of employment created a "zone of special danger' out of which the injury arose. The question of whether travel was contemplated by the employment contract is satisfied only if travel is a substantial part of the service to the employer, shown by, for example, (a) whether a particular journey is assigned or directed by the employer, (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, and (c) when travel is singled out for special treatment as an inducement to employment. *Madden* at 865. One of the most recent ICAO cases to use the *Madden* analysis was *Essary v. General Dynamics* WC 5-117-912 (ICAO December 1, 2020), aff'd, Colo. Ct. App, 10CA2103, August 12, 2021, unpublished. In that decision, the ICAO found that Claimant's travel to work when on call did not create an exception to the "going to and from work" rule.

Essary and *Madden* both cite to the case of *Varsity Contractors v. Baca*, 709 P.2d 55 (Colo. App. 1988), which discusses that the use of a company vehicle does not create an exception to the "going to and from work" rule. In *Baca,* the car and gas were provided by the employer for personal and business use and Claimant was on call when driving at the time of the accident. This still did not mandate a finding that the accident involved was an exception to the "going to and from work" rule.

In this case, Claimant did not receive additional remuneration for travel to and from work, no payment for being on call, no persuasive evidence that Claimant was on his way to his plow snow on the properties at the time of the U-Haul incident, and no persuasive evidence that travel to and from the job site was an inducement to employment. See, *Hafner v. Stergeon Electric*, W.C. Nos. 4-507-018 and 4-506-807 (ICAO June 26, 2007)(Claimants were paid additional wages for a particular job, which was determined to be for travel costs driving to a Casino Project in Black Hawk, therefore an incentive to travel); *Sanchez v. Accord Human Resources,* W.C. 4-551-435, 4-552-982 (ICAO May 19, 2003). As found, Claimant was driving the company pick up with the plow home, but was not on the clock, and was not on his way to perform services for the employer with that truck. In the end, as found, there was no snow and no need to use the plow. It is

found and concluded that, Claimant's situation is not an exception to the going and coming rule as he was not in the course and scope of employment when this incident occurred.

Claimant failed to prove that he experienced a compensable work injury on February 3, 20221 as he was clearly not injured in that event as demonstrated by observing the video, which lasted a substantial amount of time after the event. As found, the lack of damage to his vehicle, his failure to complain of any injury or report any injuries to the police, his ability to walk, bend, lift, stand, and turn his head, with no difficulty at all, support the finding that he, in fact, sustained to injury or disability. Further, as found his current history and testimony is unlikely as he was not a credible historian. He mislead his own IME physician, Dr. Hughes by not disclosing prior complaints and injuries. Even Dr. Hughes didn't support him in his "whole body" claim, and narrowed his opinion down to the knee. That opinion was based upon his lack of knowledge of the history of that knee. After reviewing the medical records, it is clear that Claimant has monetized his body in multiple personal injury and workers' compensation claims. The records show has occurred from at least the 2016 workers' compensation claim. He then claimed PT in 2018, and just as he was settling his 2016 claim, including claiming to be permanently and totally disabled, he claimed a new accident had caused new injuries or aggravations. As found, Claimant provided an incomplete history to those providers, and started up a new personal injury claim for the same body parts. It is clear that all the records of prior injuries have not been provided by the parties as there is mention of a motor vehicle accident in Chicago and treatment for the same body parts in California. Claimant may have had surgeries since the February 3, 2021 incident, as he testified, (as the records of all the surgeries were not in evidence), but the treatment for any of those conditions alleged by Claimant were not proximately caused by the U-Haul incident.

Claimant had ample opportunity to present evidence to prove that the incident of February 3, 2021, may have caused injuries, to his neck, low back, head, jaw, teeth, right shoulder, right knee, light headedness, blurry vision, ringing in his ears, sensitivity to light and anxiety, but, as found he specifically failed to prove by a preponderance of the evidence that any of the claimed conditions were proximately caused by the incident as he claims. Claimant simply did not present evidence that could overcome the clear medical and factual record. No treatment was necessitated by the February 3, 2021 incident. The video is clear. Everything claimed was clearly pre-existing. As found, the large gap of time before Claimant sought treatment, while continuing to perform his regular duties for Employer, is a key factor in the determination that no disability was created by the U-Haul incident of February 3, 2021. Even if Claimant was injured, it is found that he was not in the course and scope of employment at the time as he was off the clock and heading home after work. This is simply not a compensable work injury.

All other issues are moot in light of a finding that the claim is not a compensable event.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to prove by a preponderance of the evidence (that it was more likely than not) that he was injured in the course and scope of his employment on February 3, 2021, and his claim is *denied* and *dismissed.*

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of September, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of his claim.

II. Whether Claimant established that the uninsured Employer is subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's May 12, 2020 order, specifically for failing to cover reasonable, necessary, and related medical care to cure and relieve the effects of Claimant's compensable injury, and pay temporary total disability (TTD) benefits and interest on all TTD owed and not paid when due.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This claim has been the subject of a prior hearing held before ALJ Patrick Spencer on March 12, 2020. The issues presented at that hearing included compensability of an alleged September 7, 2019 injury and whether Claimant was entitled to reasonably necessary medical benefits and lost wage benefits, i.e. temporary total disability (TTD) commencing September 7, 2019.

2. Despite proper notice, Employer failed to appear for the March 12, 2020 hearing. Accordingly, ALJ Spencer took Claimant's testimony at the March 12, 2020 hearing and issued an Order to Show Cause to Employer. Employer did not respond to the show cause order prompting ALJ Spencer to issue his order on May 12, 2020. As part of his May 12, 2020 order, ALJ Spencer found Claimant's September 7, 2019 injury compensable and ordered Employer to "cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury." ALJ Spencer also ordered Employer to pay "Claimant $6,200 in TTD benefits from September 8, 2019 through May 12, 2020" and "$175 per week in TTD benefits commencing May 15, 2020 and continuing until terminated by law." Finally, ALJ Spencer ordered Employer to pay interest on all past due TTD.

3. The ALJ adopts ALJ Spencer's Findings of Fact, as articulated in the May 12, 2020 order, as follows:

   a. Employer hired Claimant in August 2019 to tear off and re-cover a 1500 square foot roof on a customer's home. Employer told Claimant it was a "simple" one-layer job.

b. Employer agreed to pay Claimant $35 “per square” to tear off and replace the roof. A “square” is 100 square feet of roof, so there were 15 “squares” in the 1500 square foot roof. Claimant estimated it would have taken two weeks to complete the job had it been a single-layer roof as anticipated.

c. When he got on the roof and started the job, Claimant realized there were four layers of existing roof to tear off.

d. Employer was supposed to supply the materials for the project and stock them on the roof. Employer also told Claimant he would provide a worker to help with the project. Employer provided a helper the first day, but after that, Claimant was left to finish the job by himself.

e. Claimant worked on the project for a couple of days but his progress was stymied by weather. Then a representative from Regional Building came and shut the project down because Employer had not pulled a permit.

f. Two days later, Employer called and informed Claimant he had secured the building permit and work could resume.

g. Employer stopped responding to Claimant’s calls after that. The homeowners also tried to reach Employer without success. They had paid Employer $3,200 for materials, but he had not brought materials to the job site. Repeated heavy rains were causing leaking into the home, so Claimant used his personal funds to buy materials to cover the roof. The homeowners then gave Claimant additional money so he could purchase the materials needed to finish the job.

h. Claimant purchased the materials and loaded them onto the roof by himself because Employer provided no one to help him. Throughout the project, Claimant struggled to move roofing materials and complete repeated trips up and down the ladder. He developed progressively worsening low back and leg pain during the project as a direct and proximate result of the physically demanding work. The lack of help during the project probably contributed to Claimant’s injury.

i. Employer appeared at the job site on September 7, 2019, when Claimant was almost finished with the project. Claimant informed Employer he could not keep working because of his severe low back and leg pain. Employer took over work on the project.

j. Claimant filed a Workers’ Claim for Compensation form on September 20, 2019. He mailed a copy to Employer.

k. On October 15, 2019, Employer appeared at Claimant's home and berated him for filing a workers' compensation claim. He told Claimant, "You are not getting anything." Employer never paid Claimant for his work on the project.

l. Employer never referred Claimant to a physician for treatment.

m. In December 2010, Claimant sought treatment for his back pain at the VA Rocky Mountain Regional Medical Center. He underwent x-rays on December 10, 2019, but the results are not in the record. Claimant was referred for a lumbar MRI and a physical medicine evaluation before he could have a surgical consultation.

n. Claimant proved he was performing services for pay for Employer when he was injured. There is no persuasive evidence he was free from direction and control or customarily engaged in an independent trade or business related to the service provided.

o. Claimant proved he suffered an injury to his low back arising out of and occurring within the course and scope of his employment for Employer.

p. The right to select a physician passed to Claimant and he selected the VA Medical Center.

q. Under the terms of hire, Claimant would have been paid $525 for the roof project. Claimant estimated it would have taken two weeks to complete the project. Claimant's AWW is $262.50 ($525 ÷ 2 = $262.50). This equates to a weekly TTD rate of $175 and a daily rate of $25.

r. Claimant proved he is entitled to TTD benefits commencing September 8, 2019 and ongoing. Claimant stopped work on September 7, 2019 because of the effects of the work injury. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

s. The total past-due TTD is $6,200 through the date of this decision. The total accrued statutory interest is $161.58 through the date of this decision. TTD will continue to accrue at the rate of $175 per week until terminated by law. Interest will continue to accrue at the rate of $1.39 per day until the past-due TTD is paid in full.

t. Employer must pay an additional $1,550 to the Colorado Uninsured Employer Fund because it was uninsured at the time of Claimant's injury ($6,200 x 25% = $1,550).

u. Employer knew Claimant had to stop working because of the injury on September 7, 2019. Employer was required to formally admit or deny liability no later than Monday, October 7, 2019. Employer never filed an admission of liability or notice of contest with the Division of Workers' Compensation.

v. Employer should be penalized $25 per day, from October 7, 2019 through the date of this decision (May 12, 2020), for failing to admit or deny liability.

4. Claimant testified that after the May 12, 2020 order of ALJ Spencer was issued, he filed a new application for penalties because Employer never paid his lost wages as ordered. (Clmt's. Ex. 2). Claimant filed his Application for Hearing on April 15, 2022; more than a year after ALJ Spencer's May 12, 2020 order was issued. *Id.* Claimant sent a copy of the Application for Hearing to Employer's address on file with the OAC, namely: 1819 West 22nd Street, Pueblo, Colorado 81003. This is the same address that the prior May 12, 2020 and Show Cause orders were sent to without response by Employer. There is no indication that the prior mailings were undeliverable and returned to sender. Accordingly, the ALJ finds that Claimant's April 15, 2022 Application for Hearing was probably delivered to Employer as was the prior May 12, 2020 Order of ALJ Spencer.

5. Based upon the evidence presented, the ALJ finds that Employer has made no effort to abide by the May 12, 2020 order of ALJ Spencer. Similar to his non-appearance for hearing on March 12, 2020, Employer failed to appear for the August 11, 2022 hearing despite proper notice. Moreover, he did not respond to either Show Cause Order. Based upon the evidence presented, the ALJ finds that Employer has elected to ignore the proceedings and the prior orders of ALJ Spencer. Indeed, the evidence presented, including Claimant's testimony supports a finding that Employer has failed to perform a duty lawfully mandated within the time prescribed by ALJ Spencer, namely the payment of TTD as ordered. Accordingly, for the reason set forth below, the ALJ finds that the imposition of penalties is appropriate in this case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

II. Penalties

C. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo.App. 1995). If the ALJ finds a violation, the ALJ must then determine whether the insurer or employer's actions, which resulted in the violation, were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App. 2003). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

D. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order, which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds

an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004). Employer did not assert that any alleged penalty had been cured. Indeed, Employer failed to respond in any fashion to ALJ Spencer's May 12, 2020 order or Claimant's April 15, 2022 Application for Hearing despite those documents being served on Employer's address of record.

E. In this case, Claimant has asserted penalties pursuant to § 8-43-304(1) for Employer's failure to follow ALJ Spencer's May 12, 2020 order requiring payment of, among other things, lost wage benefits. (Clmt's Ex. 2). As noted, a violation of an order occurs when a party authorized or obligated to perform performs an action prohibited by the order, or fails to take an action required by the order. *See Dworkin, Chambers and Williams, P.C. v. Provo,* 81 P.3d 1053, 1058 (Colo. 2003). Before analyzing Claimant's penalty claim, the ALJ notes that ALJ Spencer's May 12, 2020 order became final on June 1, 2020 as Employer did not appeal it. Moreover, the evidence presented supports finding that Employer has failed to follow the order to date. Accordingly, the asserted penalty is ongoing.

F. In this case, the Application for Hearing filed April 15, 2022, specifically notes that Claimant was seeking penalties beginning "May 12, 2020 and ongoing pursuant to § 8-43-304(1) for failure to "[respond] to the order by ALJ Spencer to pay benefits. Although Claimant did not indicate the rate at which he requested penalties be paid, he did indicate that he was seeking penalties pursuant to § 8-43-304(1), which provides that penalties for refusing to obey lawful orders shall be punished by a fine of not more than $1,000.00/day. Based upon the evidence presented, the ALJ concludes that the basis for Claimant's penalty assertions was sufficient, pursuant to § 8-43-304(4), to place Employer on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's May 12, 2020 order, specifically that portion which required Employer to pay TTD benefits.

G. Based upon the totality of the evidence presented, the ALJ concludes that Employer violated ALJ Spencer's May 12, 2020 order requiring the payment of TTD benefits. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation, which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). As ALJ Spencer's May 12, 2020 order did not become final until June 1, 2020, the imposition of penalties extends from June 2, 2020 and is ongoing.

H. While the evidence presented supports that a violation of ALJ Spencer's May 12, 2020 order occurred for failure to pay TTD benefits, it is necessary to analyze

whether Claimant filed his request for penalties timely and whether Employer's failure to pay TTD was objectively unreasonable. Here the evidence presented establishes that Claimant filed his Application for Hearing requesting penalties in excess of one year after the date that he reasonably should have known of the facts giving rise to the penalty. Indeed, Claimant did not file his request for penalties for approximately 23 months after ALJ Spencer issued his Order. Claimant was represented by Counsel at the time the May 12, 2020 Order was issued. Accordingly, the ALJ finds it reasonable to infer that his counsel would have advised him regarding the potential repercussions; including the imposition of penalties should Employer fail to abide by the Order shortly after it was issued.

I. Section 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5) constitutes a statute of limitations. *Spracklin v. Industrial Claim Appeals Office, supra.* While the ALJ is convinced that the "statute of limitations" probably ran out before Claimant filed his Application for Hearing, Employer failed to respond to the request for penalties. Indeed, review of the file materials finds them devoid of any response to the claim for penalties. Raising the statute of limitations is an affirmative defense that is subject to procedural waiver if not explicitly plead and proven in a timely fashion. *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995); *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Based upon the evidence presented, the ALJ is convinced that Employer waived any statute of limitations defense by not filing any response to Claimant's request for penalties. Moreover, the ALJ concludes that Employer has unreasonably failed to cooperate in the proceedings by failing to appear for hearing despite proper notice or respond to two separate Orders to Show Cause for his failure to appear. Based upon the evidence presented, the ALJ concludes that Employer has consciously decided to ignore the claim in hopes that Claimant will tire of the matter and cease all efforts to recover under the claim. Accordingly, the ALJ finds and concludes that Employer's actions in failing to follow the May 12, 2020 order of ALJ Spencer are objectively unreasonable.

ORDER

It is therefore ordered that:

1. Employer shall pay to Claimant a penalty in the amount of fifty ($50.00) dollars per day beginning June 2, 2020 and continuing through the date of this order, October 3, 2022, for a total of 853 days for $42,650.00 in penalties. The assessment of penalties shall continue beyond October 3, 2022 at the same rate until such time that the temporary total disability and interest payment ordered May 12, 2020 by ALJ Spencer is paid.

2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty

percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

3. All issues not decided herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 3, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021?
- Is Claimant entitled to a closed period of TTD benefits from August 11, 2021 through January 16, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment?
- Did Claimant prove entitlement to medical benefits?
- The parties stipulated to an average weekly wage of $770.

FINDINGS OF FACT

1. Claimant's customary profession is a hairdresser. She stopped that work in late 2020 because of issues related to COVID protocols and exposures.

2. In the end of December 2020, Claimant was hired by Employer to work on a cheese packing line. After completing a period of orientation, classroom training, and "job shadowing," Claimant worked on the packing line, packing blocks of cheese into large totes. Workers in the packing area rotate through several stations during each shift, changing tasks approximately every 30 minutes.

3. Claimant alleges injuries to her left wrist and right middle finger on January 5, 2021. There is uncertainty in the record about the exact date of injury, but the persuasive evidence shows the incidents she described occurred on her first full day working on the packing line.[1]

4. Claimant developed pain in her left wrist while packing 7" x 9" x 2" blocks of cheese into totes, To pack the cheese, Claimant would grasp four blocks of cheese and press them together, lift the cheese off the conveyor belt, turn to the side, and place the cheese into the tote. She repeated this procedure approximately every second. Claimant was later told she should only have been lifting two blocks of cheese at a time.

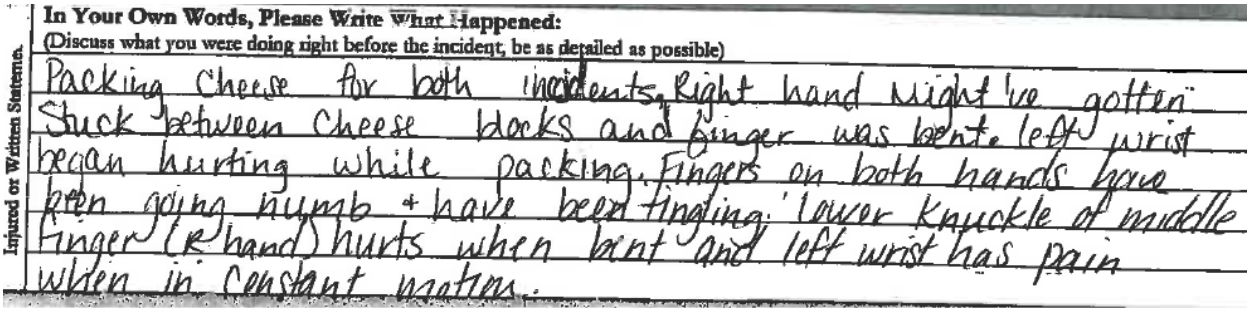
5. Claimant's supervisor noticed her shaking her left hand and moved her to the tote liner station, which requires less hand and arm use.

[1] Claimant's time cards suggest the correct date of injury is probably January 4, 2021. Nevertheless, using January 4 or January 5 as the date of injury makes no practical difference to the claim.

6. While working at the liner station, Claimant was repositioning cheese inside the tote when a block of cheese hit her right middle finger and caused the finger to abduct and hyperextend. She felt immediate pain in the base of the finger extending into the palm.

7. Claimant finished her shift that day, and continued working her regular position for approximately three weeks. She did not report an injury to Employer and sought no treatment.

8. On January 24, 2021, Claimant filed an incident report with her supervisor, Mr. DG[Redacted]. Claimant testified she reported the incident because her wrist and finger were still bothering her. Claimant wrote,


Injured or Written Statement

In Your Own Words, Please Write What Happened:

(Discuss what you were doing right before the incident, be as detailed as possible)

Packing Cheese for both incidents, Right hand might've gotten stuck between Cheese blocks and finger was bent. left wrist began hurting while packing. Fingers on both hands have been going numb + have been tingling. Lower knuckle of middle finger (R hand) hurts when bent and left wrist has pain when in constant motion.

9. Mr. DG[Redacted] gave Claimant a list of designated provides but Claimant declined to seek medical attention. Mr. DG[Redacted] said "someone from safety" would contact Claimant to discuss the injury. He also gave her names and telephone numbers of three members of management she could contact if she had questions about the situation.

10. No one from the safety department contacted Claimant about the accident.

11. Claimant continued working her regular job for approximately three months.

12. On April 23, 2021, she informed another supervisor, CB[Redacted], that she wanted treatment for her wrist and finger. Mr. CB[Redacted] recommended Claimant try physical therapy at Colorado In Motion. Claimant attended two therapy sessions, on April 23 and 28, 2021.

13. At the April 23 PT session, Claimant reported the gradual onset of left wrist pain in January, and sudden pain in her right long finger. She was not certain what caused the finger pain, but said she may have "jammed" or "caught" it. The finger was not painful that day but was painful if bumped. She also described "numbness and tingling, in both arms when sleeping or when holding her hands in front of her body." The examination showed tenderness to palpation of both forearms at the wrist, and over the right palm. Tinel's was positive bilaterally at the cubital tunnels. Finkelstein's test was mildly positive on the left. Range of motion was normal bilaterally. The therapist provided no specific diagnoses. The therapist gave Claimant a "quick" forearm massage, recommended stretches, and dispensed a thumb splint for the left hand.

14. At the April 28 visit, Claimant stated she was "fine now." She was wearing the brace at work "because her left wrist was bothering her when transferring the 7x9 cheese blocks." Her right middle finger hurt with twisting or bearing weight. The therapist massaged Claimant's right hand and demonstrated stretches. She also suggested changing postures during the day and wrapping the middle finger. No follow up was scheduled.

15. Claimant continued working regular duties until late June 2021.

16. On June 22, 2021, Claimant contacted Mr. CB[Redacted] and was directed to Workwell.

17. Claimant saw Dr. Lloyd Luke at Workwell on June 23, 2021. She told Dr. Luke, "I was packing 7x9 cheese and a piece fell on my finger (right-hand) and caused pain towards middle of hand/middle finger. Packing 7x9 cheese in the line and [left] wrist began to hurt." The right middle finger was still painful. She also described continued left wrist pain with movement, and paresthesias over the extensor surface. The symptoms were aggravated by grasping. Dr. Luke noted Claimant had tried a splint without significant benefit. Examination of the left wrist showed decreased sensation over the extensor surface, limited range of motion, and decreased strength. The right finger was painful to palpation and with motion. Dr. Luke diagnosed a right middle finger contusion and a left wrist "strain." He was also concerned about possible unhealed fractures given the length of time since the onset of symptoms. Dr. Luke opined the history and objective findings were consistent with a work-related injury. He put Claimant on work restrictions of no lifting over five pounds and no repetitive tasks involving the left wrist.

18. Employer accommodated the restrictions with modified duties. Initially she was assigned to the sealer and liner stations, which were less demanding than the packer station. Later she was assigned to a "hold and release" position, which primarily involved administrative duties. There is no persuasive evidence Claimant lost any wages while working modified duty.

19. Claimant started PT on July 2, 2021. She attended approximately 11 PT sessions between July and October 2021.

20. On July 20, 2021, PA-C Daniel Downs documented, "she has been working in a light-duty position . . . and this has been helpful. She is not manipulating heavy cheese." Claimant's right middle finger was "feeling a lot better" and the numbness and tingling had resolved. However, she still had aching pain in the left wrist.

21. On July 27, 2021, Claimant gave two-week notice that she was resigning. Claimant stated her last day would be August 10, 2021, "as I have chosen to pursue other ventures outside" the company. She made no mention of the work injury.

22. Claimant followed up with Mr. Downs on August 5, 2021, five days before the effective date of her resignation. Her right hand was doing well. She estimated approximately 50% improvement in the left wrist but progress was slow. She stated the symptoms were aggravated by her work and "she cannot tolerate her regular duties at

this time." There is no persuasive indication she was having any difficulty with the modified duty assignment. Claimant did not mention that she had tendered a resignation.

23. An MRI of the left wrist was completed on August 19, 2021. It showed a third metacarpal carpal boss with focal mild arthritic change, and a 7mm dorsal ganglion cyst with possible mile surrounding soft tissue edema.

24. Examinations by multiple providers before the MRI documented pain to palpation around the dorsal left wrist.

25. After reviewing the MRI, Dr. Luke referred Claimant for an orthopedic evaluation.

26. Claimant saw Dr. Christopher Stockburger, an orthopedic surgeon, on September 29, 2021. She described "extensive repetitive motion with her left wrist" that caused worsening pain since January. She reported intermittent swelling over the dorsal aspect of the wrist. She had some pain-free days but generally was "quite bothered" by wrist pain. Dr. Stockburger opined Claimant had "pretty mild early dorsal bossing with a mild dorsal cyst." He thought Claimant should respond well to conservative treatment, and gave her a cortisone injection.

27. The injection initially caused Claimant's symptoms to flare, but the symptoms were "almost completely resolved" a week later.

28. In mid-October 2021, Claimant attempted to return to work in a salon, but her symptoms quickly flared.

29. On October 28, 2021, Dr. Luke documented Claimant "generally has no pain, or minimal achy pain but has flares of intense carpal row pain." But the same report documented, "left wrist has gotten worse to the point where she is not able to work in the salon at all."

30. Claimant returned to Dr. Stockburger on November 17, 2021. She stated the injection helped briefly but "she has had a complete recurrence of symptoms and actually now has multifocal complaints in areas where she did not have pain previously, including volarly over her FCR, more on the ulnar side of her wrist and proximally into her forearm. These are areas where there is no obvious abnormality on the MRI." He opined her symptoms were "difficult to hone in on" and were "inconsistent with her MRI." If she were just having focal pain over the dorsal ganglion and dorsal boss area, Dr. Stockburger would consider surgery. But her new complaints raised concern about a "more global issue." He recommended a rheumatological panel to look for an autoimmune or inflammatory disorder that could be contributing to her symptoms. He also recommended she continue bracing, NSAIDs, and PT.

31. On November 19, 2021, Claimant reported more pain and reduced ROM. The pain had spread throughout her wrist and hand. Dr. Luke ordered blood work, which showed a positive ANA in a diffuse, dense, fine speckled pattern. Rheumatoid factor, CRP and ESR were normal. It was noted that the dense fine speckled pattern could be

seen in normal individuals and was rarely associated with the lupus, Sjogren's syndrome, and systemic sclerosis.

32. Claimant started a new job as a customer service representative on January 17, 2022. The job involves telephone and computer work. Claimant has tolerated the work without difficulty.

33. Claimant saw Dr. Barry Ogin on May 6, 2022 for an IME at Respondents' request. She described ongoing pain in her left wrist. Dr. Ogin noted the pathology on the MRI "does seem to match the area where she is most tender on my examination today." He opined pathology shown on MRI probably existed before the claimed injury date, but might have been aggravated to her work.

34. Dr. Ogin reviewed the Medical Treatment Guidelines (MTGs) for risk factors associated with aggravated osteoarthritis. Based on Claimant's and Mr. DG[Redacted]'s description of the job, he saw no primary risk factors. Dr. Ogin thought it plausible Claimant was exposed to the secondary risk factor of at least two pounds of pinch force or 10 pounds of hand force three times or more per minute occurred. But he opined a cumulative trauma disorder is unlikely given the short exposure, *i.e.,* the onset of symptoms during the first day on the job. Dr. Ogin opined the potential diagnosis of aggravated left wrist osteoarthritis did not fit Claimant's clinical course. The steroid injection gave no relief, and the development of multifocal complaints in new areas were not consistent with aggravated arthritis affecting the carpal boss at the base of the third metacarpal. Further, if there was aggravated arthritis, and it was caused by the claimant's occupational duties, the symptoms should have diminished once the job duties were modified, and especially once they ended entirely. Instead, Claimant's pain complaints and perception of functional disability seemed to worsen, even after she left Employer. Ultimately, Dr. Ogin concluded Claimant's complaints of refractory left wrist pain, right hand pain, and numbness and tingling to both extremities are unrelated to occupational exposures with Employer.

35. Dr. Ogin makes a well-reasoned argument, particularly regarding causation of the new and worsening symptoms starting in November 2021. However, the ALJ credits Dr. Luke's causation assessment regarding the initial left wrist "strain" and right middle finger contusion.

36. Claimant proved she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021. She consistently reported dorsal left wrist pain triggered and perpetuated by work activities. The MRI confirmed mild objective findings in the same area. Even if the underlying conditions were not caused by her job, they were probably aggravated and became symptomatic because of the work. The right finger became symptomatic after a minor trauma, and remained so for several months. Even though Claimant sought no treatment until April 2021, the symptoms that ultimately prompted her to request medical attention were the same symptoms of which she initially complained. The injury-related symptoms were sufficient to warrant evaluation and conservative treatment, including PT.

37. Respondents proved Claimant was responsible for termination of her employment on August 10, 2021. Claimant resigned her job, and the argument she left work because of the injury is not corroborated by persuasive evidence. Employer accommodated Claimant's work restrictions and there is no persuasive reason she could not have continued working for Employer after August 10. Mr. DG[Redacted]'s testimony is credible regarding Claimant's modified duty assignments. Claimant's resignation letter stated nothing about the injury, and there is no persuasive evidence she reported difficulties to a manager in any other context. Claimant's medical records contain no persuasive evidence she was having difficulty tolerating the modified duty. To the contrary, contemporaneous records indicate the activity modifications were "helpful" and Claimant was doing better. The preponderance of persuasive evidence shows Claimant voluntarily resigned on August 10, 2021 for reasons unrelated to her injuries.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury requires medical treatment or causes a compensable disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

A pre-existing condition does not disqualify a claim for compensation or medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing

condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021. She consistently reported dorsal left wrist pain triggered and perpetuated by work activities. The MRI confirmed mild objective findings in the same area. Even if the underlying conditions were not caused by her job, they were probably aggravated and became symptomatic because of the work. The right finger became symptomatic after a specific incident, and remained so for several months. Even though Claimant sought no treatment until April 2021, the symptoms that ultimately drove her request for medical attention were the same symptoms of which she initially complained. The dorsal left wrist pain and right middle finger pain Claimant reported to the therapist in April and to Dr. Luke in June 2021 were probably a continuation of the symptoms she developed on January 5, 2021. The injury-related symptoms were sufficient to warrant evaluation and conservative treatment, including PT.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant proved evaluations and treatment by and on referral from Dr. Luke and Workwell was reasonably needed and authorized.

C. TTD

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” A claimant’s responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial*

Claim Appeals Office, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns her job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002).

As found, Respondents proved Claimant was responsible for termination of her employment. Claimant resigned her job, and the argument she left work because of the injury is not corroborated by credible evidence. Employer accommodated Claimant's work restrictions and there is no persuasive reason she could not have continued working for Employer after August 10. Mr. DG[Redacted]'s testimony about Claimant's modified duty assignments is credible. Claimant's resignation letter stated nothing about the injury. Nor is there persuasive evidence she reported difficulties to a supervisor in any other context. Claimant medical records contain no persuasive evidence she was having difficulty tolerating the modified duty. Instead, contemporaneous records indicate the activity modifications were "helpful" and Claimant was doing better. Claimant voluntarily resigned her job for reasons unrelated to the work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Claimant's average weekly wage is $770.

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injuries, including but not limited to evaluations and treatment received from Workwell, the August 19, 2021 MRI, and Dr. Stockburger.

4. Claimant's claim for TTD benefits from August 11, 2021 through January 16, 2022 is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the

order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 4, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on November 30, 2021, she suffered an injury arising out of and in in the course and scope of her employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that recommended psychological therapy with Dr. Melissa Carris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that recommended physical therapy treatment is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

4. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

5. Following the hearing, the parties stipulated that the claimant would withdraw the previously endorsed issues of temporary partial disability (TPD) and temporary total disability (TTD) benefits through September 20, 2022.

FINDINGS OF FACT

1. The claimant worked for the employer as a sales associate at the Grand Junction, Colorado location. The claimant testified that on November 30, 2021, she was walking quickly through the store and caught her foot on a free standing mirror. This caused her to lose her balance and fall into a clothing rack. The claimant testified that she injured both of her wrists and her knees when she fell.

2. This incident was reported to the employer, specifically to Jacob Jones, Operations Manager. The claimant was offered medical treatment on November 30, 2021. The claimant declined medical treatment at that time. The claimant was then sent home by Mr. J[Redacted].

3. The claimant continued working for the employer in her regular position and performing her normal job duties following the November 30, 2021 incident until December 27, 2021. On December 27, 2021, the claimant requested medical treatment related to the November 30, 2021 incident. The claimant testified that she requested

medical treatment at that time because she was approached about deficiencies in her job performance.

4. On December 27, 2021, Mr. J[Redacted] prepared an Employer's First Report of Injury. The body parties identified in that document were the claimant's "LOWER EXTREMITIES-ANKLE" (emphasis in the original). The incident was described as "[a]ssociate came around a corner, and tripped after catching her foot on a free standing mirror."

Medical Treatment Prior to November 30, 2021

5. On March 9, 2015, the claimant was seen by Dr. Craig Gustafson at Appleton Clinics. The medical record of that identifies a diagnosis of fibromyalgia.

6. On March 21, 2015, an x-ray of the claimant's left knee showed calcific density in the joint space medially and laterally, which was consistent with chondrocalcinosis (also called pseudogout).

7. On June 9, 2017, the claimant was seen by Dr. Donald Adams with Memorial Medical Group in Collinsville, Illinois. A number of issues were addressed with Dr. Adams on that date. Relevant to the present matter is the identification of a diagnosis of fibromyalgia. The claimant reported to Dr. Adams that her fibromyalgia symptoms were well controlled with Lyrica. The claimant's Lyrica prescription was refilled on that date.

8. On September 14, 2017, the claimant returned to Dr. Adams and reported that she wanted to try a different medication to treat her fibromyalgia. As a result, Dr. Adams prescribed gabapentin .

9. On September 27, 2021, the claimant was seen at Appleton Clinics by Dr. Lawrence Stelmach. At that time, the claimant reported bilateral leg and knee pain and swelling. Dr. Stelmach noted that the claimant had significant venous varicosities in both legs. He diagnosed the claimant with venous insufficiency and leg pain. Dr. Stelmach recommended the claimant use compression stockings and footwear with arch support.

10. On November 4, 2021, the claimant returned to Appleton Clinics and was seen by Jared Barjenbruch. On that date, the claimant reported left lower back pain that radiated down her buttock and posterior thigh. The claimant also reported this pain began without a specific incident or injury. The claimant was instructed to take ibuprofen and tylenol. The claimant was also prescribed cyclobenzaprine (Flexeril).

11. On November 15, 2021, the claimant was seen by Alison Weirich at Appleton Clinics. On that date, the claimant reported two weeks of sciatic pain. The claimant reported that the pain radiated from her low back down her buttock and left thigh. The claimant further stated that "she works a [Employer, redacted]'s so she would like something to help because by the end of her shift she can barely walk". The previously

prescribed cyclobenzaprine did not help her symptoms. Ms. Weirich advised the claimant on sciatic specific stretches. In addition, she recommended and administered a trigger point injection.

12. On November 24, 2021, the claimant was seen by Dr. Stelmach. The claimant reported that the trigger point injection did not help her low back pain. Dr. Stelmach recommended that the claimant avoid frequent and prolonged bending. He also recommended the use of a backrest. On that same date, Dr. Stelmach prescribed prednisone to treat the claimant's low back symptoms. Dr. Stelmach noted that the claimant "feels the need to work without interruption. It could take some time to settle this down."

Treatment after November 30, 2021

13. After requesting medical treatment from the employer on December 27, 2021, the claimant was seen at St. Mary's Occupational Health[1] on December 28, 2021. On that date, the claimant saw James Harkreader, NP. The claimant reported that she was experiencing pain in left knee, left wrist, and low back. PA Harkreader ordered x-rays of the claimant's left wrist, left knee, and lumbar spine. He restricted her to lifting no more than 10 pounds and no kneeling, squatting, or climbing.

14. The recommended x-rays were performed on December 28, 2021. For the claimant's left wrist, the x-ray showed no fracture or bony lesion. The radiologist noted chondrocalcinosis that "may represent CPPD arthropathy". The left knee x-ray also showed no fracture. There was also a finding of chondrocalcinosis in the claimant's left knee. The lumbar spine x-ray showed no acute fracture and minimal degenerative disc disease, and a renal stone was noted.

15. On December 29, 2021, the claimant returned to NP Harkreader to review the x-rays. At that time, NP Harkreader identified the claimant's diagnoses as left wrist strain, lumbosacral back strain, and left knee contusion with improving suprapatellar bursitis. NP Harkreader also noted that the claimant had CPPD (pseudogout). He opined that the claimant's fall could have aggravated the CPPD. The claimant was referred to physical therapy.

16. On January 11, 2022, the claimant reported to NP Harkreader that she was doing better and her knee pain was a three out of ten. She also requested a low back injection, as she had received one from her primary provider in November. Despite this request the claimant stated that she felt she had returned to baseline for her low back. NP Harkreader continued to recommend physical therapy.

[1] St. Mary's Occupational Health is the claimant's authorized treating provider (ATP) for this claim.

17. On January 25, 2022, NP Harkreader identified the claimant's diagnoses as left knee contusion and strain with underlying CPPD, and work related aggravation of lumbosacral back strain.

18. On February 2, 2022, the claimant returned to NP Harkreader and reported soreness and swelling in her left knee at the end of a workday. She also reported pain in her left wrist. The claimant asked for a work restriction that would allow her to work four days in a row, with three days off. NP Harkreader provided the requested recommendation regarding the claimant's work schedule.

19. On February 14, 2022, the claimant was seen by NP Harkreader. At that time she reported that physical therapy was beneficial. NP Harkreader recommended six additional physical therapy visits. He also requested to review the claimant's prior medical records to assess her back pain.

20. On March 23, 2022, the claimant returned to PA Harkreader. On that date, PA Harkreader noted the claimant's complaints of low back pain prior to November 30, 2021. Based upon his review of the prior medical records, NP Harkreader opined that the claimant's low back pain began prior to her injury. He recommended further physical therapy and referred the claimant to a knee specialist, Dr. Justin McCoy.

21. On April 26, 2022, the claimant was seen by Dr. Stagg. In the medical record of that date, Dr. Stagg noted that the claimant has a long history of low back symptoms and treatment. Dr. Stagg noted that the claimant had been referred to Dr. McCoy for an orthopedic consultation, and to Dr. Melissa Cariss "for stressors". In addition, Dr. Stagg referred the claimant to Dr. Rooks regarding her left wrist.

22. On May 6, 2022, the claimant was seen by Dr. McCoy. In the medical record of that date, Dr. McCoy listed the claimant's diagnoses as: 1) chronic bilateral knee pain; 2) left wrist pain; 3) chronic bilateral low back pain, without sciatica; 4) chondrocalcinosis; 5) pseudogout in multiple joints; and 6) back spasm. Dr. McCoy recommended a Medrol Dosepak to address the symptoms related to the CPPD. He also recommended that the claimant see a specialist regarding her left wrist and physical therapy for her back symptoms.

23. On June 7, 2022, NP Harkreader authored a response to questions posed to him by the claimant's counsel. NP Harkreader opined that the claimant's mechanism of injury could have produced or exacerbated the claimant's left wrist and left knee symptoms. He further opined that treatment of the claimant's low back should be addressed by her primary care provider.

24. At the request of the respondents, on June 16, 2022, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak obtained a history from the claimant, performed a physical examination, and reviewed the claimant's medical records. In his IME report, Dr. Lesnak opined that although an incident occurred on November 30, 2022, the claimant did not sustain an injury at that time. Dr. Lesnak further opined that the claimant did not experience an aggravation or exacerbation of any pre-existing condition on November 30, 2021. In support of his opinions, Dr. Lesnak noted that imaging studies done of the claimant's left wrist, left knee, and lumbar spine showed no evidence of an acute injury. Dr. Lesnak also noted that prior to November 30, 2021, the claimant had reported low back pain, left buttock pain, and left leg sciatica to her PCP. In addition, the claimant was previously diagnosed with fibromyalgia, and recently diagnosed with CPPD/pseudogout.

25. On June 17, 2022, the claimant returned to Dr. McCoy. At that time, the claimant reported that the Medrol Dosepak did not provide any relief of her symptoms. The claimant also reported that the back pain she was experiencing was different from her past sciatica type symptoms. The claimant's knees continued to bother her. Dr. McCoy recommended magnetic resonance imaging (MRI) of the claimant's knees. He opined that the claimant's fall at work could have caused an acute flareup of her pre-existing CPPD.

26. The claimant testified that her current symptoms include pain in her left hand, left wrist, and left knee. The claimant also testified that she has numbness in her left wrist and swelling in her left knee.

27. Dr. Lesnak's deposition testimony was consistent with his IME report. Dr. Lesnack reiterated his opinion, that based upon the medical evidence, the claimant did not suffer any injuries as a result of the November 30, 2021 incident. Therefore, medical treatment is not reasonable, necessary, or related to that incident. Dr. Lesnak also testified that there was no evidence of any acute injury in the claimant's wrists or left knee.On the contrary, the imaging supports a diagnosis of pseudogout or chondrocalcinosis, which is a type of arthritis. Dr. Lesnak also noted that the claimant has been diagnosed with fibromyalgia and chronic venous varicosities, which can cause pain and swelling in the legs and knees.

The Claimant's Last Day of Employment

28. The claimant's last day of employment with the Employer was February 4, 2022. The claimant testified that she had a confrontation with a coworker. Ultimately, the claimant decided that she no longer wished to work at the store and informed Mr. T[Redacted] that she was putting in a two week notice.

29. Mr. T[Redacted]s testified that the claimant was not going to be fired on February 4, 2022. Mr. T[Redacted] was going to investigate what occurred between the claimant and her coworker. However, before that process was completed, the claimant indicated her intention to provide her two week notice. Mr. T[Redacted] accepted the resignation as "effective immediately", and the claimant's employment ended that same date[2]. If the claimant had not resigned, continuing work was available to her with the employer.

Additional testimony on September 9, 2022

30. Following the conclusion of the July 19, 2022 proceeding, the respondents filed a motion asking to recall various witnesses due to an allegation regarding notes left on cars belonging to Ms. C[Redacted] and Mr. T[Redacted]. The ALJ granted the respondents' motion, over the objection of the claimant. The parties returned to hearing on September 9, 2021. On that date, Ms. L[Redacted] testified that she authored the notes in question and placed them on the individuals' cars. Ms. L[Redacted] further testified that she did so because she was upset with what she understood to be Ms. C[Redacted] and Mr. T[Redacted]'s testimony at the hearing. The claimant had no involvement in the creation or placement of these notes.

The ALJ's Factual Conclusions

31. The ALJ credits the medical records and the opinions of Dr. Lesnak over the contrary opinions of PA Harkreader. While it is undisputed that the claimant fell at work on November 30, 2021, that incident did not result in an injury necessitating medical treatment. The ALJ also credits the claimant's testimony that she requested medical treatment only after she was approached about deficiencies in her job performance. The ALJ finds that the claimant's current need for treatment of her left knee and left wrist is due to pre-existing conditions. It is clear from the medical records that the claimant suffers from fibromyalgia, chronic venous varicosities, and CPPD/pseudogout. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury arising out of and in the course and scope of her employment with the employer. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her fall on November 30, 2021 aggravated or accelerated the pre-existing conditions in her left knee and left wrist.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure ~~the quick and efficient deli~~very of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section

[2] The ALJ recognizes that the paperwork the claimant signed indicating her resignation lists a date of January 21, 2022 as the date of resignation. This effectively "backdated" the claimant's resignation to allow for a two week period that ended on February 4, 2022. The ALJ recognizes that this was not an ideal way for the employer to accept the claimant's resignation as effective immediately. However, this does not change the fact that the claimant resigned from her position with the employer.

8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, than she suffered an injury arising out of and in the course and scope of her employment with the employer on November 30, 2021. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her fall on November 30, 2021 aggravated or accelerated the pre-existing condition in her left knee and left wrist. As found, the medical records and the opinions of Dr. Lesnak are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated October 6, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-120-710-001

ISSUES

1. Did Claimant waive his right to the lower extremity impairment ratings Respondent admitted to previously by not requesting that the DIME physician examine his left and right knees?

2. If Claimant did not waive his right, what is the appropriate impairment rating for Claimant's lower extremities?

3. What is the propriety of Respondent's February 22, 2022 Final Admission of Liability?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant sustained an admitted injury on September 11, 2019 in the course and scope of his employment as a security guard with Employer. Claimant suffered bilateral knee injuries when a student knocked him backwards over another student.

2. Claimant was diagnosed with an acute medial meniscus tear of his right knee. Claimant did not improve with physical therapy, so he had a right knee surgery. Claimant developed post-surgery sepsis in his right knee, and had a second surgery to drain his right knee. (Ex. C).

3. On January 17, 2020, Claimant presented with two weeks of diarrhea and his stool was C difficile positive. Claimant continued to have digestive issues over the next year related to the post-surgery infection. (Ex. C).

4. Felix Meza, M.D., Claimant's authorized treating physician (ATP), referred Claimant to John Aschberger, M.D., for an impairment assessment. Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, a 22% right lower extremity impairment rating, and a 10% whole person impairment rating for the gastrointestinal (GI)/digestive issues Claimant developed as a result of treatment for the knee injuries. (Ex. 1).

5. Respondent filed a Final Admission of Liability (FAL) on August 31, 2021, admitting for medical benefits of $93,303.79, Temporary Total Disability ("TTD") benefits of $26,481.61 and medical maintenance care after reaching MMI. Respondent further admitted for an MMI date of August 17, 2021, a 14% left lower extremity scheduled impairment rating, a 22% right lower extremity scheduled impairment rating, and a 10% whole person impairment rating for digestive issues. (Ex.1).

6. Claimant objected to the August 31, 2021 FAL and requested a Division Independent Medical Examination (DIME) to evaluate Claimant's GI issues. The objection and request for a DIME were not submitted into evidence.

7. The ALJ finds that Respondent was on notice that Claimant was challenging the impairment rating for Claimant's GI issues.

8. Caroline Gellrick, M.D. was selected as the DIME examiner. Claimant paid Dr. Gellrick's $1,000 DIME fee. On January 2, 2022, Dr. Gellrick notified counsel that the DIME fee was $1,400, because the date of injury was more than two years before the DIME. Claimant paid Dr. Gellrick the additional $400. Dr. Gellrick also noted in her email: "IR has been given for the knees with Dr. Ashberger [sic]. Am I suppose [sic] to address just the Digestive system OR do the knees and the DIGESTIVE????" (Ex. 3)

9. Claimant's attorney responded to Dr. Gellrick on January 3, 2021, saying "[j]ust the digestive system." Dr. Gellrick's question and counsel's response were copied to the IME Unit and Respondent's counsel. (Ex. 3).

10. The ALJ finds Claimant did not dispute the lower extremity impairment ratings admitted by Respondent in the August 31, 2021 FAL. The ALJ further finds that Respondent knew Claimant was only challenging Dr. Acheberger's GI impairment rating.

11. Claimant underwent a DIME with Dr. Gellrick on January 6, 2022. According to, Dr. Gellrick's DIME report, she was asked "to determine MMI, impairment, and apportionment of [Claimant's] digestive system." Dr. Gellrick further noted "[a]lthough the MRR shows the knees were injured and one knee had surgery, this examiner was only asked to consider the digestive system." (Ex. 2).

12. Dr. Gellrick concluded that Claimant did not require any further invasive treatment, but did need medical management and medication. She found Claimant was at MMI on October 29, 2021. Dr. Gellrick assigned Claimant a 20% whole person impairment rating for his digestive issues. (Ex. 2).

13. Respondent filed an FAL on February 22, 2022, admitting for medical benefits of $93,303.79, TTD benefits of $26,481.61 and medical maintenance care after reaching MMI. Respondent further admitted for an MMI date of October 29, 2021 and a 20% whole person impairment rating based on Dr. Gellrick's DIME report. (Ex. 2).

14. Although Respondent previously admitted to a 14% left lower extremity impairment rating and a 22% right lower extremity impairment rating, Respondent listed the scheduled impairments as 0% for Claimant's left and right lower extremities in the February 22, 2022 FAL. (Ex. 2).

15. Respondent relied on W.C.R.P. 5-5(f) when filing the February 22, 2022 FAL, and admitted liability strictly in conjunction with Dr. Gellrick's DIME report.

16. Claimant objected to the FAL and filed an Application for Hearing on March 16, 2022, endorsing penalties for failure to admit for Claimant's physician's extremity ratings as well as DIME rating, attorney's fees, Permanent Partial Disability ("PPD"), medical benefits, and TTD benefits. (Ex. D). In the Response to the Application for Hearing, Respondent endorsed, in addition to several other issues, Claimant's failure to meet his burden to overcome the DIME. (Ex. E).

17. At hearing, Claimant's counsel clarified that the issue at hand was PPD, and specifically, the impairment ratings for Claimant's lower extremities. Respondent's counsel agreed with this recitation of the issue.

18. In communications to Claimant's counsel, Respondent's counsel asserted "Respondent cannot unilaterally admit to any rating it so chooses and is required to take a position on the DIME's rating as stated via admission or file an application for hearing to overcome the DIME. Respondent asserts Claimant waived his right to have the extremity ratings addressed by failing to include those body parts in the DIME application." Respondent further stated "there was no agreement between the parties that respondent would maintain an admission for the extremity ratings assigned by the authorized treating physician in addition to any rating assigned by the Division IME doctor." (Ex. 3).

19. In his impairment assessment, Dr. Aschberger described Claimant's meniscal tear, the surgical intervention, and subsequent infection. Dr. Aschberger also described the degenerative changes in both of Claimant's knees and the restricted range of motion in his right knee. (Ex. 1).

20. Claimant credibly testified at hearing that his left and right knee symptoms, including pain and restricted range of motion, remain.

21. The ALJ finds that Claimant did not waive his right to the lower extremity impairment ratings admitted by Respondent, in the August 31, 2021 FAL.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Scheduled and Non-Scheduled Injuries

As agreed at hearing, the issue here is PPD, specifically Claimant's lower extremity impairment ratings, and Respondent's argument that Claimant waived his right to have his lower extremity ratings addressed because these body parts were not listed in the DIME application. Scheduled and non-scheduled injuries are treated differently under the Act for purposes of determining permanent disability benefits. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). It is undisputed that Claimant suffered an admitted injury in the course and scope of his employment. Claimant suffered a meniscus tear in his right knee that required surgical intervention. Claimant has degenerative changes in both knees, and a loss of range of motion in his right knee. (Findings of Fact ¶¶ 9-10). These are scheduled injuries. *See* § 8-42-107(2) C.R.S. Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, and a 22% right lower extremity impairment rating. If Claimant wanted to challenge the impairment ratings for his scheduled injuries, he could have proceeded to hearing, and he did not have to go through the DIME process. *See Delaney* 30 P.3d at 693 (there is no absolute right to a DIME as a prerequisite to a hearing in cases that clearly involve only scheduled injuries). As found, Claimant did not challenge the impairment rating for his scheduled injuries. (Findings of Fact ¶ 10).

Waiver

Respondent, relying on *Michael Baldrey v. RTD,* WC 5-092-210, asserts that Claimant waived his substantive right to an examination of his lower extremities by the DIME physician by not requesting an evaluation of those areas of the body. In *Baldrey*, the claimant's ATP placed him at MMI and found he had no permanent medical

impairments. The claimant requested a DIME, and on the DIME form the claimant selected region 3 (psychological) and region 5(ENT-face). The claimant did not endorse region 1 (upper extremity) or region 4 (spine), nor did he pay the fee for the additional parts of his body. When the claimant was evaluated by the DIME physician, he reported neck and left shoulder pain as well as left arm numbness and weakness, and the claimant expected the DIME physician to evaluate those areas of his body. The ALJ found the Claimant waived his right to have these other areas of his body evaluated by not selecting these regions on the DIME form and not paying for them. *Baldrey*, however, is distinguishable. First, the claimant in *Baldrey* was found to have no impairment ratings. Here, Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, a 22% right lower extremity impairment rating, and a 10% whole person impairment rating for digestive issues. (Findings of Fact ¶ 4). Second, the claimant in *Baldrey* wanted the DIME physician to evaluate his upper extremity and spine, but intentionally did not select those areas on the DIME form, nor did he pay for them. In contrast, Claimant only wanted the DIME physician to evaluate his digestive system, and this is what was marked on DIME form. (Findings of Fact ¶¶ 9-10). Lastly, the respondents in *Baldrey* never admitted liability, but here Respondent filed an FAL and admitted liability. (Findings of Fact ¶ 5).

"Waiver is the intentional relinquishment of a known right. Waiver may be express, as when a party states its intent to abandon an existing right, or may be implied, when a party engages in conduct that manifests its intent to relinquish the right, or that is inconsistent with its assertion." *Ross v. Republic Insur.*, 134 P.3d 505, 510 (Colo. App. 2006) (emphasis added); *see also Leprino Food Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 479 (Colo. App. 2005); *In re Marriage of Robbins*, 8 P.3d 625 (Colo. App. 2000). Respondent argues Claimant waived his substantive right to an examination of his lower extremities by the DIME physician by not requesting an evaluation of those areas of the body. *See* Ross *v. Republic In. Co.,* 134 P.3d 505, 510 (Colo. App. 2006). As found, Claimant was not seeking an examination of his lower extremities. Claimant's decision to accept the lower extremity ratings assigned by Dr. Aschberger does not constitute a waiver of Claimant's previous admission regarding the lower extremity ratings. Respondent admitted liability to the lower extremity rating, and as found, Claimant did not challenge the impairment ratings for this scheduled injuries. Claimant did not waive Respondent's admission of liability in the August 31, 2021 FAL with respect to his lower extremity impairment ratings.

ORDER

It is therefore ordered that:

1. Claimant did not waive his right to the previously admitted lower extremity ratings.

2. Respondent shall pay Claimant PPD based on a 14% lower left extremity impairment rating, a 22% lower right extremity impairment rating, and a 20% whole person impairment rating for Claimant's digestive issues.

3. Respondent is entitled to a credit for PPD benefits previously paid.

4. Respondent shall pay statutory interest at 8% on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 6, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove he suffered a compensable low back injury on January 29, 2021?

- Whether the medical treatment provided by Brandi Olson, N.P. on February 4, 2021 was authorized, reasonable, necessary and related to the claimed work injury?

STIPULATIONS

- The low back surgery performed by Dr. Chung on April 2, 2021 was unauthorized.

FINDINGS OF FACT

1. Claimant has worked as a trucker and mechanic for his own company. As part of his trucking business, he performs maintenance on his trucks and trailers. The maintenance work is physically demanding and includes lifting truck tires weighing 175 to 200 pounds.

2. On January 29, 2021, he had just finished performing work on one of his 3 trucks and was putting the tires back on the truck. The tire was next to a wall and had fallen over. As he attempted to lift the tire to put it back on the truck, he bent and had extreme pain. He could not stand due to the pain. He called his wife at approximately 8:30 p.m. and let her know he had injured his back and needed help.

3. Claimant's wife, K[Redacted] testified that after she spoke with the Claimant, she called their son, Joshua and informed him that they needed to go from their homes in Rye, Colorado to the shop in Pueblo to help the Claimant since he could not stand due to his low back pain. They drove from Rye to the shop in Pueblo where they found the Claimant sitting next to a wall. When she arrived with her son, the truck Claimant had been working on was half way in and half way out of the shop. She and her son, Joshua helped the Claimant get up on his feet and they put him in her car. Joshua finished putting the tires back on the vehicle and put the vehicle outside the shop and closed up the shop.

4. K[Redacted] drove the Claimant home and she and Joshua placed him on the bed. They did not take him to the emergency room since Claimant thought he would get better on his own. This occurred on a Friday. He spent that weekend on the bed. She had never seen him hurt that badly before. On the morning prior to the incident of lifting the tire Claimant was pain free. That weekend, after the incident, K[Redacted] would have to assist him in going to the restroom since he was in so much pain.

5. S[Claimant's son redacted] testified that after his mother called him on the date of injury she picked him up and they drove to the shop. When they arrived, Claimant was sitting on the floor near a wall. He was unable to get up and they helped him get up and get to her vehicle. He put on the remaining 2 tires on the truck. He estimated the tires weighed between 150 to 200 pounds. After the tires were on the truck, he moved the truck out of the truck bay, cleaned up and then secured the shop. He followed his mother's vehicle in his father's truck home. He helped his mom to get the Claimant into the house since he could not walk on his own. They helped him into the house.

6. Claimant testified that he was self-employed and had worked for his company for a total of 14 years, both under the current name and a previous company name. His job duties included long-haul truck driver, mechanic and processing the final payroll. In a typical week he would spend 60 to 70 hours on the road. The company had 3 trucks and 4 trailers. The trucks had 10 tires and the trailers had 8 tires. He would normally change the tires every 7 months on average. He would perform maintenance work on the weekends. Prior to the date of the incident, he was never unable to change the tires or perform his mechanic work due to back pain.

7. On the date of the incident Claimant performed general maintenance on the trucks. He was replacing bushings on the truck which required him to remove the tires. He started this project around 2:00 p.m. He worked by himself. He had pulled eight of the 10 tires off to perform this work. He had put 6 of the tires back on and was lifting the 7th tire off the ground. As he was lifting, he felt immediate pain in his back and right leg. His pain level was a 10 out of 10 and he had tingling and numbness in his right leg. After his wife and son took him home, he had to utilize a walker and a cane to ambulate.

8. K[Redacted], Claimant's wife, called Nurse Practitioner, Brandi Olson at Parkview Internal Medicine on Monday morning. They were able to get an appointment with Brandi Olson for February 4, 2021. In the medical record for that day, the reason for the appointment is listed as "Annual". (Respondents Ex. C, p. 32). The document appears to document an annual physical with items such as preventive care items. However, in the treatment portion of the report, she identifies that he had lumbar back pain with radiculopathy affecting right low extremity. She recommended, among other things, x-rays, MRI and a referral to neurosurgery. The History of Present Illness does not list any mechanism of injury. It is devoid of any history to explain the reason why he was experiencing low back pain with radiculopathy requiring x-ray, MRI and referral to neurosurgery.

9. The Claimant testified that when he saw Brandi Olson on February 4, 2021 he told her that he injured himself while he was picking up a tire and heard a "pop" and fell to the floor and had pain in his right leg. Claimant's wife testified that she heard Claimant tell Ms. Olson that he injured himself lifting a tire at work. However, the medical record for that date does not reflect the mechanism of injury.

10. Claimant came under the care of Dr. Chung. It is unclear as to whether Claimant was referred to Dr. Chung by N.P. Olson based on the initial report from his office dated March 18, 2021. The more specific statement on how he got there was that

he was self-referred appears to be more accurate based on the specificity of the information rather that the more general statement under the chief complaints section of the medical report. (Respondents Exhibit E, p. 054). After consideration of conservative care, the Claimant elected to have surgery which was performed on April 2, 2021. The surgery included posterior wide complete bilateral laminectomies at L2-S1 for stenosis leading to lumbar radiculopathy and neurogenic claudication to decompress and explore the neural elements. It also included transforaminal lumbar interbody fusions at L2-3, L3-4, L4-5 and L5-1 using cages. "(Respondents Exhibit F, pp. 98 – 105).

11. Claimant has a history of low back problems, and had treated periodically with Donald Dressen, D.C. (Respondents Ex. B). He would see him infrequently for everyday soreness or after "rough-housing" with his grandchildren. He had injured his back about 32 years ago when he was hauling gravel for Kirkland Construction and the truck rolled on its side. He injured his back just below the shoulder blades. He did not injure his low back at that time.

12. Claimant did not file a workers compensation claim prior to March 9, 2022 since he thought that as an owner he could not make a claim. He changed his mind after speaking with a social security representative to make a disability claim. After speaking with her, he filed a claim on March 9, 2022 which was about 4 or 5 days after the conversation.

13. Dr. Brian Reiss performed an IME for Respondents and issued a report dated July 13, 2022. Dr. Reiss stated in his report that "Diagnosis of claimant's lumbar condition includes lumbar strain with pain along with preexistent degenerative disc disease, spondylolisthesis and spondylolysis and persistent chronic pain." (Respondents' Exhibit A, p.006).

14. Dr. Reiss further opined as to the course of treatment that: 'A visit to his primary care provider would have been reasonable after a work incident. Some imaging studies may have been reasonable but with pre-existing symptomatology it is not clear that the imaging studies would necessarily be related to any work incident. He would have been sent for some physical therapy and perhaps injections with a rehabilitation physician but never was. I do not believe surgical intervention was indicated in relationship to the work incident and would not be considered related to the work incident. The physical therapy after surgery was reasonable but as the surgery was not reasonable or related, therapy also would not be related to any work incident. The ALJ determines that Dr. Reiss' opinion surgery performed by Dr. Chung was not reasonably necessary or related to cure and relieve the effects of Claimant's the work injury is not credible. Prior to this work incident, the Claimant was capable of performing his job duties of driving long distances and mechanical work on his vehicles that involved periodic lifting of heavy weights including tires, truck batteries and other truck parts without difficulty. It was not until after this incident that Claimant had pain running down his leg which interfered with his ambulation and which ultimately required extensive surgery.

15. Claimant proved he suffered a compensable injury to his low back on January 29, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. These facts are sufficient to establish a compensable claim.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury to his low back on January 29, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. Although Brandi Olson's initial report on February 4, 2021 does not document the mechanism of injury, Claimant and Claimant's wife credibly testified that she was given the details of the work related injury. Although Claimant did seek occasional chiropractic treatment before the tire lifting incident, the nature and extent of the symptoms and pain he experienced after the incident on January 29, 2021 differed in degree. He was unable to ambulate without assistance and the pain radiated into his right lower extremity. This sequela emanated from the tire lifting incident of January 29, 2021.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

In addition to proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). The parties have stipulated that the surgery performed by Dr. Chung was unauthorized.

The parties have indicated that in addition to compensability, the second issue to be determined is whether the medical treatment provided by Brandi Olson, N.P. on February 4, 2021 was authorized, reasonable, necessary and related to the claimed work injury. There appears to be no question that the treatment provided by Ms. Olson was reasonable, necessary and related to the work injury. The real issue is authorization. Since the injury was not reported to the carrier in this case, the carrier had no opportunity to designate a medical provider, the question is whether the treatment provided was emergent in nature.

Emergent medical care is compensable. *Marks v. Continental Airlines, Inc.* W.C. 4-170-455 (February 27, 1998); *Lucero v. Jackson Ice Cream,* W.C. 4-170-105 (January 6, 1995). However, after the incident, the Claimant did not seek emergency care, but instead waited over the weekend to contact his regular provider. The visit to Brandi Olson, N.P. was not emergent. The care provided by Brandi Olson on February 4, 2021 is unauthorized.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on January 29, 2021 is compensable.

2. Insurer is not liable for the treatment provided by Brandi Olson, N.P., on February 4, 2021, as unauthorized.

3. As stipulated, the surgery performed by Dr. Chung on April 2, 2021 is unauthorized.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 11, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Should Respondents be penalized under § 8-43-304(1) for violation of WCRP 5-5(A)?
- Whether the Final Admission of Liability is void *ab initio*?
- Whether Respondents are entitled to attorney's fees and costs based on §C.R.S. 8-43-211(2)?

FINDINGS OF FACT

1. Claimant filed an Application for hearing on January 12, 2022 asserting a penalty against Respondents for violation of W.C.R.P 5-5. Specifically, Claimant alleged the following: "The Respondents are subject to a penalty of up to $1,000 per day for each rule violation pursuant to C.R.S. section 8-43-304(1). The Respondents violated W.C.R.P. 5-5(A) for filing a final admission of liability without a report attached from a treating physician. When a final admission is predicated upon medical reports, a narrative report and appropriate worksheets MUST accompany the admission. The attachment of the physician's report of workers compensation injury form is required in cases where such document is supplied by the physician concurrently with the narrative report. Attached documentation must provide a statement from an authorized treating physician regarding the date of maximum medical improvement, permanent impairment and maintenance medical benefits. The penalty violation started on March 11th, 2021 and is ongoing." (Respondents Exhibit K, p. 38).

2. A hearing was set on this application for May 12, 2022 and the hearing was cancelled on February 15, 2022. (Respondents Exhibit N). A second Application for Hearing dated March 11, 2022 was filed. In addition to the language set forth above, Claimant added: "The Claimant is only requesting $1.00." (Respondents Exhibit O, p. 46).

3. The Final Admission of Liability (FAL) that was filed on March 11, 2021 did have attached to it the Closing Physician's Report of Worker's Compensation Injury dated July 7, 2022 signed by Steven Quackenbush, PA-C and electronically counter-signed by John Reasoner, M.D. (Respondents Exhibit B, page 10). Additionally, a narrative report, also dated July 7, 2022 was also attached to the Final Admission. (Respondents Exhibit B, pages 12 – 15).

4. Both reports address maximum medical improvement (MMI) which occurred on July 7, 2020, provided for 0 percent permanent impairment and indicated there was no need for maintenance care after MMI.

5. Claimant testified at hearing that prior to the MMI determination, he was never examined by Dr. Reasoner and was only seen by Mr. Quackenbush.

6. Claimant filed an objection to the Final Admission of Liability and a notice and proposal and application for Division IME. (Respondents Exhibit C and D).

7. A prehearing conference was held before PALJ Laura Broniak on March 30, 2022. In addition to the stipulated issue of allowing the DIME to proceed, Respondents also raised the issue of ripeness of the issues set forth in Claimant's application for hearing; namely penalties and whether the FAL was void *ab initio*. Claimant argued that the issues were ripe since he was never evaluated by a physician in violation of the rules of procedure. Judge Broniak determined that issues brought by Claimant were ripe. (Respondents Exhibit P).

8. The Division IME was performed by Dr. Douglas Scott on June 22, 2022. Dr. Scott determined that the Claimant reached MMI on July 7, 2020 and had 0% impairment. He also determined that the Claimant required no maintenance medical treatment. (Respondents Exhibit T).

CONCLUSIONS OF LAW

Section 8-43-304(1) provides that an insurer "who violates any provision of [the Workers' Compensation Act] . . . shall be punished by penalties of up to $1,000 per day."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statue or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). An insurer acts unreasonably if it fails to take action a reasonable insurer would take to comply with a statute, rule or order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*.

If the alleged violator cures the violation within 20 days of the mailing of an application for hearing seeking penalties, no penalty shall be assessed unless the party seeking the penalty proves by clear and convincing evidence that the alleged violator knew or should reasonably have known they were in violation. Section 8-43-304(4).

Claimant argues Respondents violated W.C.R.P. 5-5 since the medical reports attached to the FAL were based primarily on the opinions of the physician's assistant and the reviewing doctor, despite the fact that Dr. Reasoner never examined the Claimant. W.C.R.P. 16-3(E)(2) provides "The Physician must evaluate the injured worker at least once within the first three visits to the Designated Provider's office." The only evidence as

to whether Claimant was seen by Dr. Reasoner is Claimant's testimony and his testimony is credible. However, Claimant did not plead a violation of W.C.R.P. 16-3(E)(2). 8-43-304 requires that a penalty be pleaded with specificity. Since Claimant did not afford Respondents the opportunity to cure the penalty violation he cannot pursue the penalty violation.

Claimant further argues that Doctor Reasoner's failure to examine the Claimant renders the FAL void ab initio. The basis for this argument is the decision in *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). In that case, the court of appeals held that the FAL did not include the entire report of the rating physician and was legally insufficient and did not operate to close the claim. The court's rationale for the holding was that the statute required medical reports to be filed in order to put the claimant on notice of the exact basis of the admitted or denied liability so that the claimant can make an informed decision whether to accept or contest the final admission. Here, the Claimant does not allege that he did not have the requisite notice of the basis of the FAL. To the contrary, he did have notice which prompted him to object to the FAL and request a DIME. Therefore, it is evident that Claimant was afforded the opportunity to dispute the FAL with sufficient notice based on the FAL, despite the fact that Claimant was not examined by Dr. Reasoner prior to the Final Admission of Liability. The Claimant did obtain a DIME which was performed by Dr. Douglas Scott. This independent evaluation validates the prior determinations by the authorized treating physician, despite the fact that Claimant testified that was never examined by Dr. Reasoner. The rationale in *Paint Connection Plus v. Industrial Claim Appeals Office, supra*. does not apply in this case.

Respondents have requested attorney's fees and costs for Claimant's alleged prosecution of an unripe issue. C.R.S. 8-43-211(3) provides for reasonable attorney fees when an attorney requests a hearing on an issue that is not ripe for adjudication at the time the request or filing is made. As noted by Judge Broniak in her prehearing order, an issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006. The term "fit for adjudication" refers to a disputed issue for which there is not legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. Olivas-Soto v. ICAO, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). The ALJ determines that both issues brought by Claimant; namely penalties and whether the FAL was void *ab initio* were ripe and have been decided by this order. There is nothing speculative or contingent with respect to the determination of these issues. Respondent argues that since Dr. Reasoner was not joined by Claimant in the claim for penalties the issue is not ripe as against Respondent. While that argument may be valid if the penalty sought was for a violation of W.C.R.P.16-3(E)(2), the specific penalty actually alleged was for Respondent's violation was of W.C.R.P. 5-5(A). As such, the issue of penalties asserted against Respondent is ripe. However, as previously determined, there was no violation of that Rule by Respondent.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties is denied and dismissed.

2. Claimant's request to render the FAL void *ab initio* is denied and dismissed.

3. Respondent's request for attorney's fees and costs is denied and dismissed.

4. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 12, 2022

/s/Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable injury to her left knee on July 11, 2021?
- If compensable, did Claimant prove entitlement to TTD benefits from July 13, 2021 through January 11, 2022?
- Did Respondents prove TTD should be reduced because of late reporting?
- Did Respondents prove Claimant's eligibility for TTD terminated on or after November 2, 2021 because she was released to her regular employment?
- Did Claimant prove the left knee treatment she received was reasonably necessary and causally related to the compensable injury?
- Did Claimant prove treatment she received was authorized?
- The parties stipulated to an average weekly wage (AWW) of $150.50, with a corresponding TTD rate of $100.33.

FINDINGS OF FACT

1. Claimant worked part-time for Employer as a barista. She injured her left knee on July 11, 2021 when she slipped on a wet section of floor. Her left knee "popped" and she felt immediate pain.

2. Claimant did not report the injury to anyone at work that day. Instead, she called her mother during a break and stated she almost fell "again," her knee popped, and it was hurting. The "again" to which Claimant referred was an incident a few weeks prior, when she slipped on a wet floor and fell. Claimant suffered no injuries during the fall. She and some co-workers "laughed [about it] and that was the end of it."

3. Claimant finished her shift on July 11, 2021 and went home. She and her mother applied ice to the left knee, and she rested it.

4. Claimant worked her regular shift the next day. Despite having "a lot of pain and discomfort," she said nothing about the accident to her supervisor.

5. The knee remained swollen and painful, so Claimant saw her PCP, Dr. Davison-Tracy, on July 13, 2021. Dr. Davison-Tracy documented a "2D[ay] history of knee pain after she slipped and 'caught herself' from falling and the knee buckled? Some inc pain and swelling and that is the knee she had repaired her medial meniscus in 2017 and again in 2019. Pain seems worse to patient than her prev[ious] injuries." Examination

of the left knee showed swelling, tenderness, decreased range of motion, and laxity with varus and valgus maneuvers. Dr. Davison-Tracy ordered an MRI and referred Claimant to Dr. Albright, an orthopedic surgeon.

6. As mentioned in Dr. Davison-Tracy's report, Claimant had significant problems with the left knee before July 11, 2021. She first injured the knee in 2015 or 2016 while playing basketball. She underwent an arthroscopic partial lateral meniscectomy July 2016 with Dr. Albright. She recovered well and returned to sports in September 2016.

7. Claimant played basketball with no problems until 2019, when the knee started swelling during a tournament. An MRI showed a recurrent lateral meniscus tear and she underwent a second arthroscopic surgery. Claimant attended post-operative PT for approximately two months and was released from regular follow up. Claimant resumed running but did not return to playing basketball. She had no significant ongoing issues related to the left knee until the work accident in July 2021.

8. On July 14, 2021, Claimant spoke with a nurse in Dr. Albright's office. She explained she injured her left knee on July 11 at work. The report documents, "The floor was slick and she almost slipped. Patient caught herself but in so doing she may have twisted and she did feel and hear a pop from her knee. Since then it has been very painful . . . lacking range of motion . . . her knee is very swollen and she can't bear any weight." Dr. Albright was on vacation, so Claimant was scheduled for the earliest available appointment on July 26. The nurse advised Claimant to wrap the knee, wear her old knee brace, and use crutches to avoid weightbearing.

9. Claimant texted her supervisor, Ms. SC[Redacted], the morning of July 16, 2021. She stated, "I injured myself and am supposed to be immobile until at least the 26th. I have a doctors note, where do you want me to send it?" She said nothing about hurting herself at work. Ms. SC[Redacted] replied that she would call [Insurer, Redacted] and request medical leave so Claimant would have time to recover without having to worry about her job.

10. [Insurer, Redacted] handles workers-related injuries, short-term disability, and nonwork-related leaves of absence for Employer. Ms. SC[Redacted] contacted [Insurer, Redacted] about personal medical leave for Claimant because she had been given no reason to think the condition was work-related.

11. Claimant had an MRI of the left knee on July 21, 2021, which showed a radial tear of the lateral meniscus and chondromalacia.

12. Claimant saw Dr. Albright on July 26, 2021. She stated her knee pain started a few weeks ago after she slipped on a wet spot at work. Before the injury she felt some "occasional" knee pain that generally resolved within a day or two. However, after the work accident "pain did not resolve, and she has had persistent swelling. She has increased pain with prolonged standing or walking activities as well." She described 5/10

knee pain at rest, 7/10 with ADLs and 10/10 with physical activities. Dr. Albright reviewed the MRI and diagnosed an acute lateral meniscus tear. He recommended surgery.

13. Claimant and her mother testified they stopped by Employer's store for coffee as they were on their way to the appointment with Dr. Albright the morning of July 26. They testified Ms. SC[Redacted] was outside taking orders from customers in the drive-through. They testified Claimant's mother told Ms. SC[Redacted] they were on their way to a medical appointment for the injury "she had at work." They testified Ms. SC[Redacted] responded by merely offering a free coffee and asking them to "keep her posted." Claimant and her mother initially thought the conversation took place on July 21, but later decided it was July 26 because they were on the way to a medical appointment.

14. Ms. SC[Redacted] denied being outside taking orders on July 26, or speaking with Claimant or her mother about Claimant's knee on July 26. Ms. SC[Redacted] testified her standard procedure when an employee reports an injury is to complete an incident report, contact [Insurer, Redacted], and inform the district manager.

15. Claimant and her mother's testimony regarding the alleged conversation the morning of July 26 is no more credible than Ms. SC[Redacted]'s testimony. Claimant failed to prove she reported the injury on July 26, 2021.

16. Claimant texted Ms. SC[Redacted] the evening of July 26 and stated she had been scheduled for surgery the following week. Claimant stated she had not heard from [Insurer, Redacted]. Ms. SC[Redacted] asked Claimant to check her spam folder because "I had them send your information to email." The text exchange contains no mention of any work-related injury.

17. On July 29, 2021, Claimant's mother spoke with the physical therapist and "requested information about waiting until 8/24/21 for surgery." The records do not explain why Claimant postponed the surgery, nor could Claimant recall a reason when asked about it at hearing.

18. On September 6, 2021, Dr. Albright performed a left knee arthroscopy with a partial lateral meniscectomy and lateral compartment chondroplasty. Intraoperative inspection showed a radial lateral meniscus tear and grade 1 to 1 lateral compartment chondromalacia. Claimant was admitted to the hospital and discharged on September 8.

19. An Employer's First Report of Injury was completed on September 10, 2021. The form lists Claimant as the preparer, although that is questionable given some of the verbiage used. Claimant testified she did not know who completed the form. In any event, Respondents accept September 10, 2021 as the date Claimant first provided notice of the injury. The form describes the accident as "slipped on wet floor heading towards cold bar, locked knee and heard a pop and jerked leg." The form lists July 11, 2021 as the date Employer was notified. This notation is inaccurate; Claimant admitted she told no one about the accident on July 11 and testified the first mention of a work-related injury was on July 26.

20. Employer did not refer Claimant to a medical provider after being notified of the injury on September 10, 2021. As a result, Claimant had the right to select her own treating physician.

21. Claimant had a post-op appointment with Dr. Albright on September 17, 2021. This appointment effectuated Claimant's selection of Dr. Albright as her ATP.

22. As with the previous surgeries, Claimant recovered well from the September 2021 surgery.

23. On November 2, 2021, Dr. Albright gave Claimant a work excuse stating her only restrictions were "walking only, no high-impact (running or jumping) activities." Claimant acknowledged receiving a copy of the work note from Dr. Albright's office.

24. Claimant's regular job with Employer required no high impact activities such as running or jumping. Dr. Albright's November 2, 2021 restrictions would not have precluded Claimant's regular work.

25. Claimant saw Dr. Mark Failinger on April 16 2022 for an IME at Respondents request. Claimant described the accident and onset of symptoms consistent with her statements to other providers and her testimony. Claimant told Dr. Failinger about her previous knee injuries and surgeries, and that she had no significant residual problems with the knee after the second surgery and no difficulties before the work accident on July 11, 2021. Dr. Failinger performed an extensive review of Claimant's pre- and post-injury medical records. Dr. Failinger stated radial meniscal tears are generally caused by an acute, traumatic event rather than a degenerative process. He opined the accident as described by Claimant could have created a radial tear and accelerated pre-existing chondromalacia. Dr. Failinger concluded the work accident probably caused, accelerated, or permanently aggravated the pathology in Claimant's left knee.

26. Dr. Failinger testified via deposition consistent with his report. He agreed surgery was a reasonable option given the pathology and Claimant's failure to improve with time.

27. Claimant received and reviewed an employee handbook when she was hired by Employer. The handbook states, "a partner who suffers a work-related injury or illness must notify the store manager as soon as possible. The partner or manager must report the injury by calling . . . or by using the online service . . . ." Claimant interpreted the handbook to allow a verbal report of an injury. Her interpretation is reasonable because the handbook does not explicitly state the method by which the employee should "notify" the store manager. Additionally, the alternative procedure of calling the toll-free number would necessarily result in a verbal report. Nevertheless, Claimant's failure to report the injury in any form is clearly inconsistent with the instructions in the handbook.

28. Employer prominently displays a large poster with labor-related notices, including procedures regarding work-related injuries. The poster clearly states, in large type, "IF YOU ARE INJURED ON THE JOB, WRITTEN NOTICE OF YOUR INJURY MUST BE GIVEN TO YOUR EMPLOYER WITHIN FOUR WORKING DAYS AFTER THE

ACCIDENT." The section about reporting injuries is the largest and most readily noticeable part of the poster. There is also a second notice in smaller typeface that repeats the instruction to report all injuries in writing within four working days. This poster is displayed in a location where all employees would be reasonably expected to see it. Claimant admitted she was aware of the poster.

29. Claimant proved she suffered a compensable injury to her left knee on July 11, 2021. Claimant's description of the accident and resulting symptoms is credible. Although Claimant had previous left knee problems, here is no persuasive evidence she had any residual limitations or required any treatment before the work accident.

30. Claimant proved the left knee evaluations and treatment she received starting July 13, 2021 was reasonably needed to cure and relieve the effects of her injury.

31. Claimant failed to prove she reported the injury or otherwise gave put Employer on notice of a potential work-related injury before September 10, 2021.

32. Claimant failed to prove the treatment she received before September 10, 2021 was authorized. There is no persuasive evidence of, and Claimant did not argue, a bona fide emergency that would render treatment authorized before Employer was notified of the injury.

33. Claimant had the right to select her own physician after September 10, 2021. She selected Dr. Albright, who became authorized as of September 17, 2021.

34. Respondents proved Claimant's TTD benefits should be reduced for failure to timely report the injury. The ALJ finds it appropriate to reduce TTD benefits to zero until September 6, 2021, when Claimant had surgery and no longer would have been capable of even modified duty.

35. Respondents proved Claimant was given a release to regular employment on November 2, 2021. The persuasive evidence shows the remaining restrictions as of that date would not have precluded her regular job as a barista.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A pre-existing condition does not disqualify a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms during or after work activity does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition that manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved she suffered a compensable injury to her left knee on July 11, 2021. Claimant's description of the accident and resulting progression of symptoms is credible. She described the injury in a consistent manner to multiple providers starting with the first evaluation on July 13. Dr. Failinger's opinions and conclusions regarding causation are credible. Although Claimant had two prior left knee surgeries, there is no persuasive evidence of any residual limitations or need for treatment before the work accident. The accident probably caused or new radial tear, aggravated or accelerated an underlying condition, or some combination thereof.

B. Medical treatment was reasonably needed

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. As found, Claimant proved the left knee treatment she received starting July 13, 2021 was reasonably needed and causally related to the work accident.

C. Treatment before September 10, 2021 was not authorized

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). The respondents are only liable for treatment rendered by authorized treating providers. Absent an emergency, the ALJ cannot award medical treatment provided by unauthorized providers, even if the treatment was otherwise reasonably needed or causally related. *E.g., Torres v. City and County of Denver*, W.C.

No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995).

Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

The obligation to designate a physician arises when the employer receives information indicating to a reasonably conscientious manager that a potential compensation claim might be involved. *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984).

Claimant failed to prove she or her mother notified Employer of a potential work-related injury before September 10, 2021. Claimant concedes she did not report the injury on July 11 or July 12 while working. Nor did she say anything about a work injury in her texts with Ms. SC[Redacted]. The only possible notification before September 10 is the alleged conversation between Claimant's mother and Ms. SC[Redacted] in the drive-through. Claimant and her mother were unsure about the date of the conversation but eventually settled on July 26. Claimant and her mother appeared credible in describing the alleged conversation with Ms. SC[Redacted]. But Ms. SC[Redacted]'s testimony also appeared credible. It is possible the conversation took place. It is also possible it was on a different day or simply did not happen at all. Given the description of an essentially off-hand comment during a brief conversation in a drive-through line, Ms. SC[Redacted] may have not heard, or misunderstood Claimant's mother's comment that the knee injury occurred at work. Ms. SC[Redacted]'s alleged response does not sound like the reaction one would expect from an experienced manager had she understood Claimant's mother to be reporting a work injury. Claimant has the burden of proof on this issue, and the aforementioned uncertainties prevent her from crossing the threshold of "more likely than not." Claimant failed to prove she or her mother reported a work accident at any time before September 10, 2021.

Employer has no obligation to designate a treating physician before September 10, 2021 because it had no notice of the injury. Although Ms. SC[Redacted] knew Claimant was having problems with her left knee, she did not know it was work-related because Claimant did not inform her of such. Accordingly, evaluations and treatment Claimant received before September 10, 2021 were unauthorized and not the responsibility of Respondents.

D. Dr. Albright became authorized on September 17, 2021

There is no persuasive evidence Employer referred Claimant to a physician after she reported the injury on September 10, 2021. Therefore, the right of selection passed

to Claimant. A claimant "selects" a physician when she demonstrates by words or conduct she has chosen a physician to treat the industrial injury. *Squitieri v. Tayco Screen Printing*, Inc., W.C. No. 4-421-960 (September 18, 2000). Claimant saw Dr. Albright on September 17, 2021, which constitutes the "selection" of Dr. Albright as her ATP as of that date.

E. TTD commencing July 13, 2021

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. As found, Claimant proved she was disabled from her regular job and suffered an injury-related wage loss commencing July 13, 2021. Ordinarily, Claimant would be entitled to TTD benefits retroactive to the date she left work. But Respondents have requested the ALJ impose a "late reporting" penalty until September 10, 2021, the date Claimant provided notice of the injury.

Section 8-43-102(1)(a) requires a claimant to notify their employer of the injury *in writing* within four days of its occurrence. If the claimant does not timely report the injury in writing, the ALJ "may" impose a penalty of "up to one day's compensation for each day's failure to so report." The term "may" means the imposition of a "late reporting" penalty is not mandatory but is left to the ALJ's discretion. *Lefou v. Waste Management*, W.C. Nos. 4-519-354 & 4-536-799 (March 6, 2003). The penalty for late reporting is an affirmative defense on which the respondents bear the burden of proof. *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

Respondents proved Claimant's TTD benefits should be reduced to zero until September 6, 2021. The requirement to report an injury in writing serves several functions, not the least of which is to ensure a record of exactly when an injury was reported and remove ambiguity as to whether the claimant believes a medical problem is potentially work-related. Another important purpose is to allow the respondents to timely comply with their statutory obligations regarding the provision of medical benefits and mitigate their liability for indemnity benefits. Those concerns were directly implicated here. Although Ms. SC[Redacted] knew Claimant was having problems with her knee, she reasonably assumed it was a personal issue. The written notice need not take any particular form, and Claimant could have easily referenced the work injuries in a text message to Ms. SC[Redacted]. At a minimum, Claimant could have simply told Ms. SC[Redacted] about the accident. Claimant offered no persuasive explanation for not reporting the injury before September 10, 2021. The ALJ further notes Claimant postponed the surgery over a month for no known reason, which prolonged the period of disability. Based on the foregoing factors, it is appropriate to penalize Claimant one day's compensation for each day from July 13, 2021 through September 5, 2021.

Claimant had surgery on September 6, 2021, at which point she would have been off work regardless of any modified duty Employer might have offered. Once she had surgery, the late reporting no longer impacted Respondents' liability in any meaningful way. Claimant is entitled to TTD benefits commencing September 6, 2021.

F. Termination of TTD effective November 2, 2021

Once commenced, TTD benefits continued until one of the events enumerated in § 8-42-105(3)(a)-(d). Here, Respondents seek to apply § 8-42-105(3)(c), which mandates termination of TTD when "the attending physician gives the employee a written release to return to regular employment." Section 8-42-105(3)(c) is an affirmative defense on which Respondents have the burden of proof. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004); *Schuldies v. United Sporting Good Wholesale*, W.C. No. 4-413-232 (January 7, 1999). Whether a claimant has been released to regular employment duty by the attending physician is a question of fact for the ALJ. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

Dr. Albright is Claimant's primary ATP, so he qualifies as "the attending physician." Claimant acknowledged receiving a copy of the November 2, 2021 release. The only remaining question is whether Claimant was released to "regular employment" despite the fact she still had some limitations on certain types of activities.

The phrase "regular employment" in § 8-42-105(3)(c) refers to the claimant's regular employment at the time of the injury. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995); *see also Plotner v. Westran, Inc*., W.C. No. 3-108-724 (March 9, 1995) ("8-42-105(3)(c) reflects the General Assembly's view that once the attending physician finds the claimant to be physically capable of performing all the functions of his preinjury employment, any subsequent wage loss is the result of the claimant's own actions or general economic circumstances and not the industrial injury."); *Estes v. Schlage Lock*, W.C. No. 4-154-405 (December 11, 1995); *Morgan v. Bear Coal Company, Inc.,* W.C. No. 3-105-057 (December 1, 1995).

Dr. Albright released Claimant to return to work on November 2, 2021 with the only restrictions of "walking only, no high impact (running or jumping) activities." Those restrictions would not have prevented Claimant from performing her regular job as a barista. Respondents proved Claimant's attending physician gave her a release to return to regular employment on November 2, 2021.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left knee injury on July 11, 2021 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably need to cure and relieve the effects of Claimant's compensable injury, including but not limited to treatment by Dr. Albright and his referrals on or after September 17, 2021.

3. Claimant's claim for medical benefits related to evaluations and treatment received before September 10, 2021, including the September 6, 2021 left knee surgery, is denied and dismissed.

4. Claimant's average weekly wage is $150.50, with a corresponding TTD rate of $100.33.

5. Insurer shall pay Claimant TTD from September 6, 2021 through November 1, 2021.

6. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

7. Claimant's claim for TTD from July 13, 2021 through September 5, 2021 is denied and dismissed.

8. Claimant's claim for TTD from November 2, 2021 through January 11, 2022 is denied and dismissed.

9. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 12, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-067-268-008

ISSUES[1]

1. Whether Respondents established by clear and convincing evidence that the opinion of DIME physician, Dr. McAlpine is incorrect based on her failure to apportion Claimant's permanent impairment rating.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to permanent total disability benefits.

3. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or to prevent further deterioration of his condition pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

PROCEDURAL ISSUE

Claimant originally endorsed the issue of disfigurement. However, due to video and logistic issues, Claimant was permitted to withdraw the issue of disfigurement without prejudice and to refile an application for hearing on that issue.

FINDINGS OF FACT

1. The parties stipulated that Claimant's average weekly wage is $723.53.

2. Claimant is a 44-year-old native of Oaxaca, Mexico who moved to the United States in 1999. Claimant's primary language is Spanish, and he has limited ability to speak English. Claimant earned a high school degree in Mexico, and has no additional formal education. Claimant was unable to provide a detailed work history, and testified his work history is primarily limited to construction jobs, including performing stucco installation.

3. On January 12, 2018, Claimant sustained admitted injuries arising out of the course of his employment with Employer on January 12, 2018, when a large pile of wood planks fell on him at a construction site where he was working. As a result of the incident, Claimant sustained an open fracture of his right femur, and other injuries. At the scene, Claimant was evaluated by emergency medical personnel, for a right leg fracture and

[1] Claimant's Position Statement identifies as issues: Injury to Claimant's right hip & knee; Soft-tissue injury to Claimant's neck & back; and Injury to Claimant's left shoulder." Based on Claimant's Position Statement, it appears Claimant seeks a determination regarding the compensability of these alleged injuries. Although "compensability" was identified in Claimant's Application for Hearing, it was not identified in Claimant's Case Information Sheet, nor was it identified as an issue for decision at the outset of hearing. (Hrg. Tr., p. 9, l. 10 – p. 12, l. 14). Accordingly, the ALJ does not address the compensability of alleged injuries to Claimant's right hip, right knee, neck, back or left shoulder, except as relevant to deciding the issues identified for determination.

swelling and abrasions of his left hand. Claimant was then transported by ambulance from the site to North Suburban Medical Center (NSMC) (Ex. N).

4. On January 12, 2018. At NSCM, Jared White, M.D., performed an open reduction internal fixation (ORIF) surgery to repair Claimant's right femoral shaft fracture. Claimant remained hospitalized until being discharged on January 15, 2018. During his hospitalization, Claimant reported left arm and abdominal pain, indicating he shielded himself with his left arm when the wood fell on him, and that wood fell on his abdomen. Claimant denied pain elsewhere in the body. X-rays of Claimant's chest, left wrist, left hand, and right knee performed were negative for fractures. (Ex. O).

5. On February 26, 2018, Claimant began treatment at Colorado Occupational Medical Partners (COMP). From February 26, 2018 through May 2, 2018, Claimant's treatment at COMP was primarily post-surgical physical and occupational therapy directed at his right leg. During that time, Claimant reported pain in his right leg, right knee, and groin. (Ex. R). In April 2018, Claimant received a brace for his right knee. (Ex. T).

6. On May 8, 2018, Claimant was evaluated by Tom Chau, PA-C, at COMP for complaints of left arm pain and numbness, neck, and back pain. Mr. Chau diagnosed Claimant with left arm pain, dorsalgia, and cervicalgia. He recommended additional physical therapy and ordered a cervical MRI. (Ex. 18). The MRI was taken on May 18, 2018, and showed mild degenerative changes and no acute pathology. (Ex. V).

7. Claimant was then evaluated by Matthew Lugliani, M.D., at COMP, on May 23, 2018. Dr. Lugliani recommended chiropractic care, and massage for Claimant's neck, and back. On June 6, 2018, Dr. Lugliani referred Claimant for a left shoulder MRI. (Ex. R). The left shoulder MRI showed mild tendinosis without a tear, and was otherwise normal. (Ex. W).

8. From May 9, 2018 through July 24, 2018, Claimant attended physical therapy at COMP, during which he was noted to have an antalgic gait and required the use of a cane. Physical therapy addressed Claimant's right leg, left arm, neck and back. (Ex. R). At discharge from COMP on July 24, 2018, Claimant continued to experience pain and weakness in his right leg, and was using a cane for ambulation. The therapist noted Claimant had plateaued with strength and could continue independently with exercise at home. (Ex. R).

9. On June 25, 2018, Claimant was evaluated by Rafer Leach, M.D., at MSK Medical, reporting headaches, neck pain, back pain, abdominal pain, left shoulder and elbow pain, right hip pain, and right knee pain. Dr. Leach referred Claimant for cervical and lumbar x-rays, which were normal, with the exception of mild lumbar discogenic endplate changes. (Ex. 13). Dr. Leach referred Claimant for chiropractic care and massage at MSK, which Claimant attended for approximately one month. (Ex. 16 & X).

10. On July 30, 2018, Claimant began treatment with Kristin Mason, M.D., at Rehabilitation Associates of Colorado. Dr. Mason's initial diagnosis was a femoral shaft

fracture and probable tibial plateau fracture, left shoulder sprain, with possible rotator cuff injury and scapular myofascial pain; cervical sprain/strain; lumbar sprain-strain; and prior thoracic injury with impairment rating. Dr. Mason referred Claimant to Jason Gridley, D.C., for chiropractic care directed at his spine, and to Denver Physical Therapy. In October 2018, Dr. Mason added a diagnosis of right hip labral tear, and referred Claimant for evaluation to Brian White, M.D., authorization for the referral was denied, and Claimant has not been treated for his right hip. (Ex. Z).

11. Claimant saw Dr. Gridley eight time between August 6, 2018 and September 26, 2018. At Claimant's final visit, he reported improved pain in his lower back, and shoulder. (Ex. 8).

12. Claimant attended three courses of physical therapy at Denver Physical Therapy. From August 17, 2018 to October 12, 2018; from April 29, 2019 through November 5, 2019; and from August 20, 2020 through November 5, 2020. (Ex., AA). At Claimant's final visit on November 5, 2020, Claimant continued to have pain in his right knee and left shoulder, and difficulty walking. (Ex. AA).

13. On November 26, 2018, Dr. Mason referred Claimant to Patrick McNair, M.D., for evaluation of his knee and concerns about Claimant's hardware from the ORIF procedure. In April 2019, Dr. McNair performed hardware revision surgery due to screw failure and also performed a right meniscectomy, chondroplasty, and lysis of adhesions. (Ex. 20).

14. Claimant remained under Dr. Mason's care for approximately four years, with his last documented visit on June 30, 2022. In February 2021, Dr. Mason assigned permanent restrictions, including lifting limited to thirty pounds, repetitive lifting limited to 15 pounds, and carrying limited to 30 pounds. On March 1, 2021, Dr. Mason added a restriction of limiting pushing and pulling to thirty pounds. Between March 1, 2021, and June 30, 2022, Claimant saw Dr. Mason thirteen times, for each visit, Dr. Mason completed a WC 164 form, which assigned the same restrictions, without modification. (Ex. Z).

15. During Claimants visits with Dr. Mason between March 1, 2021 and June 30, 2022, he reported swelling around his knee on March 1, 2021, and again on June 30, 2022. On January 3, 2022, Dr. Mason noted "generalized swelling" after Claimant had sustained a fall two weeks earlier. Otherwise, no lower extremity swelling was noted, and specifically noted as not being present on several occasions. At Claimant's June 30, 2022 visit with Dr. Mason, Claimant reported that his knee continues to "swell at time" and she noted slight swelling in the knee on examination. (Ex. Z).

Kristin Mason, M.D.

16. Dr. Mason testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Dr. Mason testified that as a result of the January 12, 2018 incident, Claimant sustained a right hip labral tear, and a right knee medial meniscal tear (in addition to the conditions previously diagnosed). She opined that Claimant's April 2019 knee surgery was causally related to Claimant's accident. Dr. Mason also opined that

Claimant's spinal issues are myofascial in nature, and that his prior lower back and neck issues were aggravated by the January 12, 2018 injury, and the alteration in his gait was due to his leg injury. Additionally, she indicated although Claimant had some left rotator cuff tendinosis, there was no discrete significant tear. She testified that Claimant is at maximum medical improvement.

17. With respect to medical maintenance, Dr. Mason testified Claimant is on medications for which he needs to be monitored, and he requires orthotics, a TENS unit, and single-point cane. She also testified it would be reasonable for Claimant to follow up with orthopedics and to see Dr. Gridley for chiropractic care. Dr. Mason's testimony was credible and persuasive.

18. Dr. Mason testified she had Claimant on 30-pound lifting restrictions for a long period of time, and that Claimant has gait difficulties which are caused by a leg length discrepancy and pain. Claimant's right leg is approximately one inch shorter than his left, which is managed with shoe modifications and orthotics. Claimant uses a cane in his right hand to support himself.

19. Dr. Mason does not believe Claimant can return to work in construction. She recommended a 30-pound lifting restriction (but that Claimant could not carry that weight due to his use of a cane). She testified Claimant continues to require a cane for ambulating and standing, and he is limited to 20-30 minutes of walking or standing per hour and 2 hours of standing in an eight-hour shift. She further opined Claimant needs to elevate his leg four times per day for approximately ten minutes per session, that Claimant is unable to stoop, kneel, crouch or crawl (i.e., positional restrictions), and that Claimant can work while seated and frequently lift five pounds, with the ability to elevate his leg.

20. Many of the work restrictions in Dr. Mason's testimony were not identified in her medical records or the WC 164 forms she completed since February 2021, and, in at least one instance, not supported by Claimant's medical records. For example, although Dr. Mason testified that Claimant would need to elevate his leg four times per day for 10 minutes to address swelling, during the thirteen visits between March 1, 2021 and June 30, 2022, Claimant reported knee swelling three times, one of which was related to a fall. Claimant also indicated at the June 30, 2022 visit that his knee would swell "at times," and Dr. Mason documented "slight" swelling. Claimant's contemporaneous records are inconsistent with the recommendation that Claimant elevate his leg four times daily to address swelling. Moreover, Claimant demonstrated "elevating" his leg by resting it on his cane, which he can do while seated.

Kathie McAlpine, M.D. - DIME

21. On November 17, 2020, Kathie McAlpine, M.D., performed a Division Independent Medical Examination (DIME). As the result of her review of Claimant's medical records and examination, Dr. McAlpine diagnosed Claimant with a comminuted right femur fracture with ORIF repair; right hip labral tear and mild chondral degeneration; left shoulder sprain; left shoulder chronic distal infraspinatus tendinosis; cervical spine sprain with mild degenerative changes; and mild lumbar spine degenerative changes with mild

bilateral sciatica. She placed Claimant at MMI effective November 17, 2020. Dr. McAlpine assigned Claimant the following permanent impairment ratings:

Left upper extremity 8% scheduled impairment
Left lower extremity 9% scheduled impairment
Cervical spine 8% whole person impairment
Lumbar spine 13% whole person impairment.

The cervical and lumbar spine impairments assigned by Dr. McAlpine combined for a 20% whole person impairment.

22. Dr. McAlpine did not apportion Claimant's impairment noting: "No impairment ratings were provided concerning any previous injury/conditions of the Right Hip, Left Shoulder, Cervical & Lumbar spines, therefore an apportionment was not done." (capitalization original). (Ex. M).

23. Dr. McAlpine recommended the following work restrictions for Claimant: "Standing and walking should be done for no more than 20-30 mins per time up to a maximum of 1-3 hours per shift with rest periods between the periods of standing or walking. Lifting and carrying up to 25-30 lbs. as tolerated. (Ex. M).

24. With respect to maintenance care, Dr. McAlpine opined that reasonable maintenance care included 12 weeks of physical therapy with exercise and massage for the cervical and lumbar spine, upper and lower extremities. She also recommended providing an in-home TENS unit and adaptive shoe inserts. (Ex. M).

John Burris, M.D.

25. John Burris, M.D., at Respondents' request, performed two independent medical examination (IME) of Claimant – one on December 10, 2019 and a second on April 27, 2021. In both reports, Dr. Burris indicated he was not provided a significant portion of Claimant's medical records. In his first report, Dr. Burris opined Claimant reached maximum medical improvement on July 8, 2018, and that Claimant had near full range of motion of the right hip and right knee, and normal neurologic function. He opined that Claimant had no ratable impairment, no work restrictions, and that no further medical treatment was reasonable or necessary. He also indicated Claimant had no measurable leg length discrepancy based on Dr. Burris' measurements. (Ex. L).

26. In his second report dated April 27, 2021, Dr. Burris indicated he disagreed with Dr. McAlpine's assigned impairment ratings, and opined that Claimant's symptoms were not work-related. He reiterated his opinion that claimant reached MMI on July 18, 2018, and that no impairment was appropriate.

27. Dr. Burris testified by deposition, and was admitted as an expert in occupational medicine. Dr. Burris opined that Claimant's sole work-related injury was his right femur fracture, and that Claimant had no evidence of a residual deficit associated with the injury.

28. In his testimony, Dr. Burris provided additional information about his examinations taking place in April 2021 and December 2019 not documented in his IME reports or inconsistent with his reports. For example, Dr. Burris testified that the only objective findings in his examination of Claimant were a slight shortening of the right leg and atrophy of the quadriceps muscle. He characterized the leg length discrepancy as two centimeters. However, in his December 10, 2019 report he specifically indicted there was no measurable discrepancy, and did not document a leg length examination in the April 27, 2021 report. In his December 10, 2019 report, Dr. Burris indicated "[d]uring many provocative maneuvers, he reports pain in unrelated anatomic regions," without describing or documenting the maneuvers. In testimony, he offered examples that were not otherwise documented. In his testimony, Dr. Burris indicated Claimant showed signs of "Waddell's testing" indicating non-physiologic complaints, although he did not document Waddell's testing in either of his IME reports.

29. In large measure, Dr. Burris' opinions regarding restrictions and permanent impairment rating are based on his view that Claimant's only work-related injury was a fractured femur, and that the femur has completely healed. Dr. Burris' opinions are inconsistent with Claimant's treating providers, in that no treating provider has opined that Claimant's only work-related injury was his femoral fracture, that he has no restrictions or that he has no impairment. The ALJ does not find Dr. Burris' opinions persuasive.

Claimant's Prior Injury and Impairment Rating

30. Claimant also sustained a work-related injury in September 2014, when a sheet of drywall fell on him. As the result of that event, Claimant underwent treatment with Lawrence Lesnak, D.O., and other providers. On April 2, 2015, Dr. Lesnak assigned Claimant a 5% whole person impairment rating for a mild closed head injury. He further opined that Claimant did not qualify for any type of impairment for his low back, buttock, or neck. (Ex. U).

31. On December 22, 2015, Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel assigned Claimant a 16% impairment for his cervical spine; 26% impairment for his lumbar spine, and a 12% psychiatric impairment. Claimant's cervical and lumbar spine impairment ratings convert to a combined 38% whole person impairment. (Ex. DD).

32. In addition, in association with Claimant's 2014 injury, treating provider Lon Noel, M.D., assigned permanent restrictions based on a functional capacity evaluation, including the following:

a. Overhead lifting: 5-10 pounds occasionally, no frequent overhead lifting;

b. floor-to-waist, waist-to-shoulder lifting: 30 pounds occasionally, 10 pounds frequently;

c. Bilateral upper extremity carrying: Maximum 20 pounds for total of 50 feet occasionally;

d. Right/left upper extremity carrying: Maximum 15 pounds for total of 50 feet occasionally;

e. Bilateral push/pull: Maximum of 45 pounds/50 pounds respectively;

f. Sitting for 1 hour, standing for 2 hours; walking for 2 hours, before changing position.

g. No working in unprotected heights, such as high ladders or scaffolding; and

h. No use of heavy vibrating machinery such as jackhammers.

(Ex. GG).

33. Although these restrictions were recommended, Claimant was able to obtain and maintain full time employment working construction, and work without accommodations for restrictions..

Katie Montoya – Vocational Expert

34. Vocational consultant, Katie Montoya, testified at hearing. Ms. Montoya was admitted as an expert in vocational rehabilitation, job placement, training, and evaluation. Ms. Montoya met with Claimant by video and performed a vocational assessment in April 2021. Ms. Montoya testified that Claimant's vocational profile was that of an unskilled worker, with the ability to perform a limited set of semiskilled jobs. Ms. Montoya opined that absent Claimant's injuries, he would be qualified to perform semiskilled jobs, including construction work, labor work, landscaping, some heavy equipment operation, restaurant/kitchen work, and machine operation. She testified that but for his injury, Claimant would have been able to perform any job in "any work classification that didn't require more than a semiskilled profile."

35. Ms. Montoya opined that the work restrictions recommended by Dr. Mason limit Claimant to sedentary work. She indicated Claimant cannot, based on is work restrictions, return to construction labor positions, and that the Claimant's use of a cane limits the environments in which he is able to work, although it would not prevent Claimant from working entirely. She testified that the additional work restrictions identified by Dr. Mason in her testimony, including Claimant's need to change positions, take breaks and elevate his leg, and limitations on operating a vehicle make it unlikely that Claimant would be able to perform competitive full-time work. She further opined that it is unlikely that Claimant could be retrained for other work. Ms. Montoya testified that if the restrictions recommended by Dr. McAlpine were applied, there may options for employment.

36. Ms. Montoya prepared a preliminary report regarding her opinions in April 2021, which was not offered or admitted into evidence. She did not prepare a final report. She testified that she performed labor market research, but did not perform a labor market survey with respect to Claimant, although she routinely performs labor market surveys. (A labor market survey involves contacting potential employers to determine the availability of suitable employment). Ms. Montoya's determination of available work is

based, in part, on labor market research which consists of reviewing employment listings and postings, and determining based on that information whether Claimant could perform the work available. The ALJ finds Ms. Montoya's opinion that Claimant is unlikely to engage in competitive employment unpersuasive.

Cynthia Bartmann – Vocational Expert

37. Vocational expert, Cynthia Bartmann testified at hearing. Ms. Bartmann was admitted as an expert in vocational rehabilitation, job placement training and evaluation. Ms. Bartmann authored two reports regarding Claimant's ability to obtain employment considering the work restrictions assigned by Dr. McAlpine and Dr. Mason prior to hearing.

38. Ms. Bartmann prepared two employability evaluations of Claimant, one dated July 26, 2021, and one dated March 19, 2022. Based on Dr. McAlpine's work restrictions (i.e., lifting 20-30 pounds, standing, and walking for 20-30 minutes for up to three hours per day. Ms. Bartmann was present for hearing and was aware of the additional restrictions about which Dr. Mason testified, and indicated the additional restrictions did not affect her opinions regarding Claimant's employability, although she indicated that they would reduce Claimant's employment options to the sedentary work category. In such a position, lifting would be limited to 10 pounds or less, and sitting at least six to eight hours per day.

39. She opined Claimant would be eligible for employment in positions falling into the sedentary work category. Ms. Bartmann performed labor market research and a labor market survey to assess Claimant's employment opportunities, within the Claimant's restrictions assigned by Dr. McAlpine. Ms. Bartmann's survey included contacting potential employers to obtain information regarding available employment opportunities. She opined that she believes job opportunities exist for Claimant within his vocational skills and work restrictions.

40. Examples of such employment included working light packing, labeling, and assembly positions. Ms. Bartmann provided several examples of light assembly positions which would fit with Claimant's restrictions, and would not be affected by Claimant's limited English proficiency. These included sedentary work packing paper products for restaurants that would require lifting less than 10 pounds, packaging dental products, packaging tea, and working at a bindery. She testified these types of positions are available locally, and do not require transferrable skills.

Claimant

41. Claimant testified at hearing that he was not aware of prior work restrictions related to his 2014 injury, and that he was able to work without difficulty prior to his January 2018 injuries. He has had no prior injuries to his left shoulder, right knee, or right hip prior to the January 12, 2018 injury. Claimant testified that his right hip currently swells "a lot" and that his legs are not strong. Claimant testified that he has constant pain, and that he has pain in his neck and arm, which waxes and wanes. He testified that he uses a cane the majority of the time, but at home he finds other objects to support himself. Claimant

testified that he elevates his leg during the day, and uses his cane to do so. Claimant demonstrated “elevating” his leg by placing his right leg extended on his cane, while the end of the cane rests on the ground.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME - Apportionment

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician’s opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear

and convincing evidence. “Clear and convincing evidence means evidence which is stronger than a mere ‘preponderance’; it is evidence that is highly probable and free from serious or substantial doubt.” *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME’s determination of whole person impairment rating must present “evidence demonstrating it is ‘highly probable’ the DIME physician’s MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician’s opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents assert Dr. McAlpine’s permanent impairment rating is incorrect because she did not deduct the 2015 impairment rating for Claimant’s cervical and lumbar spine from her calculations. The version of § 8-42-104 (5), C.R.S., in effect prior to September 7, 2021[2], provides “In cases of permanent medical impairment, the employee’s award or settlement shall be reduced: (a) When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under [the Act] or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.”

As found, Claimant received permanent medical impairment ratings for his cervical and lumbar spine from Dr. Orgel regarding his 2014 injury and from Dr. McAlpine regarding his 2018 injury. Dr. McAlpine did not deduct Dr. Orgel’s cervical and lumbar impairment ratings from her own because she was not provided with any records related to the prior impairment. The assignment of a prior impairment rating does not, by itself, require apportionment. Instead, the Act requires deduction of the prior impairment rating where the employee has “received an award or settlement,” and the prior rating is “established by an award or settlement.” The record before the ALJ contains no evidence that Claimant received an award or settlement. That is, no documents reflecting an award or settlement were offered or admitted into evidence, and no testimony was elicited to establish that Claimant’s 2015 impairment rating was reduced to an award or settlement.

[2] The version of section 8-42-104(5), C.R.S., effective September 1, 2021, only modifies the first sentence of the section to state: “In cases of permanent medical impairment, the employee’s award shall not be reduced except:,” and does not change the standard for apportionment.

In position statements, Respondents contend, “Claimant and Big Horn Plaster, Inc. reached a settlement agreement for $95,000 in November 2016.” Respondents’ contention, however, is not supported by evidence before the ALJ. Respondents therefore argue “The Court should take judicial notice of files in the Division of Workers Compensation and the Office of Administrative Courts. This settlement was filed and approved by the Division and this Court can take judicial notice of the same.” (Respondents’ Position Statement, p. 5).

Colorado Rule of Evidence 201 permits an ALJ to take judicial notice (*i.e.*, administrative notice) of an adjudicative fact that is “one not subject to reasonable dispute in that it is either (2) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Because an alleged settlement is not “generally known”, the analysis falls under the second prong of C.R.E. 201. An “ALJ's decision to take administrative notice is discretionary unless the party requesting administrative notice provides the ALJ with the necessary information." *In Re Mendez*, W.C. No. 4-330-270 (ICAO Jan. 19, 2001); see also C.R.E. 201 (c) and (d). Respondents did not provide the ALJ with the documents for which administrative notice is sought. Consequently, administrative notice is discretionary.

The ALJ declines to take administrative notice of documents contained within the Division files for several reasons. First, Respondents did not provide the ALJ with the necessary information permitting the ALJ to take administrative notice. The OAC has no record of any settlement related to Claimant’s 2014 claim, thus the ALJ cannot merely refer to the court’s own records. Instead, the records for which notice is requested are asserted to be in Division files. Division files are not maintained by the OAC, and the ALJ nor does not have direct access to Division files. While the ALJ may, within his discretion take administrative notice of Division records, “[i]t is the obligation of the party desiring the ALJ to consider documents in the Division’s file to obtain certified copies from the Division.” *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (Jun. 9, 2009). W.C.R.P. 9-10 provides a mechanism for the parties to obtain certified files from the Division, and renders such certified documents self-authenticating. Respondents, however, did not obtain the Division file, and instead seek to place the burden on the court to obtain the Division file.

Respondents’ position statement refers to a purported settlement in November 2016, without identifying the case number or specific documents for which administrative notice is requested. Consequently, Respondents’ request places the burden on the court to determine the case number of Claimant’s prior claim, request the entire certified file from the Division, and determine the documents for which administrative is sought. The ALJ sees no basis to engage in an exercise available to the parties under W.C.R.P. 9-10, and of which they chose not to avail themselves.

Second, even assuming the OAC independently obtains the Division file, the “fact” of which Respondents request the ALJ take notice is more nuanced than merely determining Claimant entered into a settlement for $95,000 in November 2016. The issue

is whether Claimant received a settlement for a prior permanent impairment rating to his cervical and lumbar spine. Thus, the ALJ would be tasked with reviewing and analyzing the Division file to determine the scope of any settlement and whether the criteria for apportionment under § 8-42-104 (5) are met. Given it is Respondents' burden of proof to establish these elements, the ALJ declines to devote the OAC's resources to this task.

Finally, it would be prejudicial to the Claimant for the ALJ to take administrative notice of this issue at this stage in the proceedings. Although judicial notice may be taken at any stage in the proceeding, the facts for which notice is sought are elements of the Respondents' claim not otherwise supported in the record. Because Respondents bear the burden of proof, Claimant was not obligated to (and did not) elicit evidence on the issue. It would be manifestly unfair to permit a party to establish an essential element of its claim after the close of evidence through an untimely request for administrative notice. Doing so would deprive the Claimant of the opportunity to present evidence or argument regarding the effect of such a settlement or award on his current impairment rating.

Because Respondents have failed to present credible evidence that Claimant received a prior settlement or award for permanent partial disability to the same body parts at issue in the present case, Respondents have failed to establish that the permanent partial disability rating assigned by the DIME physician is incorrect.

Permanent Total Disability (PTD)

To prove permanent total disability the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, 487 P.3d 1007 (Colo. App. 2019). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Grant v. WalMart Assoc., Inc.,* WC 4-905-009 (ICAO, Mar. 18, 2019). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter, supra*. The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Bymer*, *supra*; *Blocker v. Express Pers.,* WC 4-622-069-04 (ICAO July 1, 2013). The question of whether the claimant proved the inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995); *see Yeutter, supra* (reasoning that DIME opinion held no special weight in a subsequent hearing where claimant sought permanent total disability benefits).

Claimant has failed to establish an entitlement to permanent total disability benefits or that he is unable to earn any wages. As found, Claimant has been assigned permanent work restrictions limiting his lifting and pulling to thirty pounds. He also has mobility restrictions which prevent him from walking or standing for more than 30 minutes per hour. The ALJ finds the opinions of Ms. Bartmann to be more persuasive than those of Ms. Montoya with respect to Claimant's employability. Specifically, Ms. Bartmann's opinion that Claimant can engage in sedentary work and that his limited English proficiency does not exclude Claimant from employment. The ALJ finds credible Ms. Bartmann's testimony that she has contacted and spoken with potential employers who have or may have available work Claimant can perform considering his restrictions, including the restriction that Claimant elevate his leg four times per day. Because Claimant's restrictions do not prevent Claimant from earning any wages, the ALJ concludes Claimant is not entitled to permanently total disability benefits.

Medical Maintenance Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Both Dr. Mason and Dr. McAlpine credibly opined that Claimant will likely require durable medical equipment in the future, including orthotics and a TENS Unit. Further, Dr. Mason credibly opined that Claimant should be permitted follow up appointments with orthopedics to address his leg, and chiropractic care as needed. No evidence was presented that Claimant requires any current medical maintenance benefits. The ALJ credits the opinions of Dr. Mason and Dr. McAlpine, and concludes Claimant has established that future medical treatment is reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

Because no specific medical treatment has been requested by Claimant's ATP at this time, the issue of whether any specific medical treatment should be authorized as medical maintenance benefits is not ripe, and the ALJ is without jurisdiction to authorize any specific treatment. *See Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). The ALJ makes no findings or conclusions regarding the reasonableness, necessity, or relatedness of any specific treatment.

ORDER

It is therefore ordered that:

1. Respondents' request to apportion Claimant's cervical and lumbar impairment ratings is denied and dismissed.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Claimant's request for a general award of medical maintenance benefits is granted. Respondents shall pay for reasonable and necessary medical maintenance treatment causally related to Claimant's January 18, 2018 work injury.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 13, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the admitted average weekly wage (AWW) of $1,154.00 should be increased for purposes of permanent partial disability (PPD) benefits.

Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

FINDINGS OF FACT

1. On January 30, 2020, the claimant suffered an injury at work. The respondent has admitted liability for the claimant's work injury. At the time of her injury, the claimant worked as the Chief Deputy Clerk and was paid $28.85 per hour. During her employment with the employer, the claimant had medical insurance, dental insurance, and vision insurance.

2. After her work injury, the claimant received various pay increases before resigning from her position on August 25, 2022. Those increases are as follows:

a) On June 15, 2020, the claimant's pay was increased to $34.00 per hour.

b) On December 11, 2020, the claimant's pay was increased to $35.70 per hour.

c) On January 28, 2021, the claimant's pay was increased to $42.2692 per hour; ($7500.13 per month).

3. In April 2022, the claimant was placed on administrative leave without pay. On May 9, 2022, the claimant received a letter regarding continuation of medical insurance coverage pursuant to COBRA. In that letter, the claimant was informed that the monthly premium to continue her health insurance coverage would be $806.10. The claimant did not pay this premium.

4. On May 20, 2022, the respondent filed a Final Admission of Liability (FAL) admitting for a permanent impairment rating of 18 percent, whole person. The average weekly wage (AWW) identified in the FAL was $1,154.00

5. On June 20, 2022, the claimant received a letter from the Social Security Administration (SSA) confirming that the amount of $170.10 would be withheld for medical insurance premiums under Medicare.

6. The claimant asserts that her AWW should be increased to $1,726.15 to reflect the various raises she received after the work injury.

7. Due to her January 30, 2020 work injury, on September 24, 2020, the claimant underwent low back surgery that included L2-L3 microdiscectomy with laminectomy.

8. As a result of the September 24, 2020 lumbar surgery, the claimant has a disfigurement on her lower back consisting of a well-healed surgical scar that runs from just below her belt-line up her spine and measures 18 cm in length. This scar is a different color than the surrounding skin.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force **at the time of the injury**. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply Section 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp., supra*.

5. A claimant's AWW must also include the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. Section 8-40-201(19)(b), C.R.S. It is not required that the employee actually purchase the insurance coverage for the AWW to be increased. *Ray v. Industrial Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005), aff'd. 145 P.3d 661 (Colo. 2006).

6. The claimant's AWW shall be increased to reflect the cost of continuation of insurance coverage. Therefore, claimant's AWW shall be increased by $806.10 for a total AWW of $1,960.10. The ALJ recognizes that the SSA is withholding $170.10 for the claimant's Medicare coverage. However, the ALJ finds that the cost identified in the May 9, 2022 COBRA letter is reasonable and appropriate in determining the cost of replacement insurance coverage. Therefore, that amount is also reasonable in calculating the claimant's AWW. The ALJ declines to include the claimant's post-injury raises to her AWW.

7. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

8. As a result of her January 30, 2020 work injury and related surgery, the claimant has sustained a permanent disfigurement to areas of the body normally exposed to public view.

ORDER

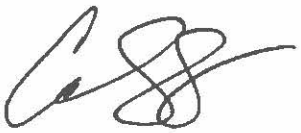
It is therefore ordered:

1. For purposes of calculating PPD benefits, the claimant's AWW is increased to $1,960.10.

2. The respondent shall pay claimant $2,000.00 for her permanent disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined here are reserved for future determination.

Dated October 18, 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant prove the admitted 10% scheduled ratings should be "converted" to the equivalent 6% whole person rating?

- Did Claimant prove entitlement to an award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant worked as a licensed psychiatric technician at the Colorado Mental Health Institute and had done so for over 16 years. He suffered an admitted injury to his left shoulder on October 6, 2020 while reaching to open a heavy metal door. As he was doing so, he felt a pop in his shoulder.

2. Claimant was initially diagnosed with a left shoulder strain.

3. An MRI performed on December 28, 2020 showed mild glenohumeral arthritis along with tendinosis and fraying of the supraspinatus. No full thickness tear was seen. (Claimant Exhibit 14, p. 355).

4. After several months of conservative care, Dr. Kobayashi performed surgery consisting of left shoulder arthroscopic subacromial decompression/rotator cuff repair (supraspinatus) and left proximal biceps tenodesis (subpectoral) on July 14, 2021. The surgery included insertion of a double loaded Y-knot anchor in the greater tuberosity with sutures placed through the supraspinatus tendon. Additionally, the subpectoral biceps tenodesis was performed with 2 Mitek Panalok suture anchors. (Claimant's Exhibit 8, pp. 219 – 220).

5. Following the surgery, Claimant received physical therapy with Synergy Physical Therapy & Wellness. He received therapy from November 22, 2021 through February 14, 2022, when he was discharged. At the time of discharge, the assessment was "Loss of motion since last PN. Improvements made in functional strength and able to perform a 10# shelf lift to 72" for 5 reps. Continuation of home program should allow maintenance of symptomatic elimination over time and lessen chance of recurrence." (Claimant's Exhibit 11, p. 336).

6. Claimant's primary ATP, Dr. Thomas Centi, put Claimant at MMI on February 16, 2022. (Claimant Exhibit 6, p. 195). Physical examination showed well healed surgical scars. There was no edema and no ecchymosis. There was mild tenderness with palpation to the bicep region. Range of motion was slight limited in all planes. Strength was good. Dr. Centi provided a right shoulder impairment rating of 10% extremity which converted to 6% whole person. Dr. Centi opined Claimant required no maintenance treatment and released him from care.

7. Respondent filed a Final Admission of Liability (FAL) on March 21, 2022 admitting for the 10% scheduled extremity rating assigned by Dr. Centi. The FAL denied medical benefits after MMI.

8. Claimant timely objected to the FAL and requested a hearing. Claimant endorsed "Permanent Partial Disability Benefits" on the Application for Hearing.

9. Respondents filed a timely Response to Application for Hearing on April 11, 2022.

10. At the request of Respondent, Dr. Fall performed an IME on August 10, 2022. (Respondent's Exhibit A). In her report, which is consistent with her testimony, she states, "Regarding the functional deficit, there is no indication of any functional deficit proximal to the shoulder."

11. Claimant credibly testified that currently he can accomplish most tasks involving his left shoulder, but that the pain builds up and he has to take Tylenol. He also has loss of strength with lifting. Because of the loss of strength, he has to lift closer to his core. When he is doing the laundry, he has to take the laundry basket with the clothes with his right hand. Claimant's testimony has demonstrated that he has limitations extending beyond his left extremity. Dr. Fall's IME did not consider the limitations that Claimant testified to at the hearing. Although the examination and testing done by Dr. Fall did not replicate the Claimant's symptoms, the Claimant's testimony with respect to his pain and loss of strength is more credible since the IME was a single time and of limited duration.

CONCLUSIONS OF LAW

A. Claimant proved that his impairment should be converted to a whole person impairment.

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-

705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgery performed by Dr. Kobayashi was directed to anatomical structures proximal to the "arm," including the supraspinatus tendon. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *see also Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). More importantly, Claimant credibly described pain and associated functional limitation in areas proximal to his arm. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. Centi provided Claimant with a 6% whole person. Neither party requested a DIME, so Dr. Centi's rating is binding under § 8-42-107.2(b). Claimant is entitled to PPD benefits based on Dr. Centi's 6% whole person rating.

B. Claimant failed to prove entitlement to medical benefits after MMI

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove he needs additional treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required. Claimant testified he would like to return to an ATP "to get the thing fixed and get on with - - get on with my life." Dr. Centi was aware of Claimant's ongoing symptoms but did not think he needed any further treatment. There is no persuasive evidence of any change in Claimant's condition or other factor that would reasonably be expected to change his ATPs mind on that subject.

ORDER

It is therefore ordered that:

1. Claimant's request for an award for whole person impairment based on 6% whole person is granted.

2. Claimant's request for a general award of medical benefits after MMI is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 19, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove a revision total knee arthroplasty is reasonably necessary and causally related medical treatment after MMI?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right knee on March 4, 2019 when he slipped on ice.

2. An MRI showed an unstable osteochondral lesion, and Dr. Lucas King performed an arthroscopic chondroplasty on April 22, 2019.

3. The surgery was not helpful and Dr. King eventually performed a total knee arthroplasty (TKA) on October 9, 2019. Manipulation of the knee at the conclusion of the surgery showed good stability and full range of motion.

4. Postoperative x-rays on October 9, 2019 showed the prosthetic components were in satisfactory position with no fracture, dislocation, or other complication.

5. Claimant struggled with post-operative pain and limited range of motion. On October 24, 2019, Dr. King advised Claimant to become more aggressive with PT and exercises, or his knee would continue to stiffen.

6. At a follow up with Dr. King on December 10, 2019, Claimant's pain was fairly well controlled but he had only 75 degrees of flexion. Claimant was ambulating with a very stiff, one-legged gait. Dr. King obtained x-rays, which showed a well-placed prosthesis with no signs or loosening or acute pathology. Dr. King did not think additional PT would improve Claimant's range of motion and recommended a manipulation under anesthesia (MUA) to break up scar tissue.

7. Dr. King performed an MUA on December 16, 2019. He noted that the October 2019 TKA was successful from a technical standpoint "but unfortunately, the patient did not go to therapy right away and became extremely stiff, despite going to therapy finally." Before the MUA, Claimant had motion from 20-80 degrees. During the procedure, Dr. King obtained full extension and 135 degrees of flexion.

8. On January 14, 2020, Dr. King's PA-C noted Claimant was not going to therapy as prescribed. Claimant inquired about another MUA. Examination showed Claimant was lacking 30 degrees of full extension and had only 90 degrees of extension. According to Dr. King, the reason Claimant was in this situation was because he was not going to therapy and was not pushing to get his motion back. A repeat MUA would not help without therapy.

9. Claimant followed up with Dr. King on February 11, 2020. His knee was still severely limited despite going to therapy and working with home exercises. He had only 90 degrees of flexion and -20 degrees of extension. Claimant was very frustrated and wanted another manipulation. Dr. King requested authorization for a repeat MUA with arthroscopy to remove scar tissue. Dr. King noted post-op PT would be "critical" to regaining ROM.

10. Dr. William Ciccone II reviewed the surgery request for Respondents. He opined the first MUA was reasonable but a second procedure would probably not be helpful given the prior poor outcome. Dr. Ciccone recommended a second opinion from a fellowship-trained joint replacement specialist to evaluate other factors such as implant position and extensor mechanism function.

11. Dr. King performed an MUA and arthroscopic synovectomy and debridement on February 21, 2020. His report notes that Claimant "did not get into physical therapy right away [after the first MUA] and became extremely stiff once again." Dr. King removed "significant" and "abundant" scar tissue. During the procedure, Dr. King obtained full extension and 125 degrees of flexion "without difficulty at all."

12. Claimant started PT immediately and was given a continuous passive motion (CPM) machine to use at home.

13. Claimant's pain and range of motion slowly improved over the next several months. On July 23, 2020, Claimant had no pain and was "pleased with his progress." He demonstrated 120 degrees of flexion and full extension.

14. At a September 22, 2020 appointment with Dr. King, Claimant was described as "doing very well" and "happy with his recovery." Range of motion testing showed full extension and 110 degrees of flexion "without difficulty." Claimant was a "little bit disappointed that he cannot get full flexion as of yet, but he knows that he need to continue to work on it." Dr. King released Claimant to annual follow up.

15. Claimant had a right knee MRI on December 17, 2020 that showed extensive artifact from the TKA, possible patella baja, and a small joint effusion. No structural issue related to the implants was suggested in the report.

16. Claimant was put at MMI on January 26, 2021 by his ATP, Dr. Thomas Centi. His ROM had decreased to 88 degrees of flexion. Dr. Centi assigned a 37% lower extremity impairment rating, and recommended three years of orthopedic follow up as maintenance care.

17. Respondents filed a Final Admission of Liability (FAL) on February 8, 2021 based on Dr. Centi's report. The FAL admitted for post-MMI maintenance care.

18. Claimant returned to Dr. King on February 25, 2021. His knee was still limiting his activity and "he is not very happy at this point." Claimant had full extension but only 90 degrees of flexion. Dr. King obtained updated x-rays and reviewed them with Claimant, along with the prior films. Dr. King could not see any difference from the

previous x-rays. The prosthesis looked "well aligned" with no sign of loosening or acute pathology. Dr. King suggested additional PT but Claimant was frustrated and did not think therapy would to anything more for him. Claimant wanted to pursue another MUA and arthroscopy because "he needs to get that flexion better." Dr. King noted, "The patient understands that he is very prone to having scar tissue."

19. Dr. King performed the arthroscopy and MUA on March 8, 2021. He again lysed and debrided "significant" scar tissue in multiple areas of Claimant's knee. During the manipulation, Dr. King obtained almost 130 degrees of flexion and full extension with no evidence of instability.

20. Claimant saw Dr. King again on September 16, 2021. His knee was still very stiff despite the multiple manipulations. Dr. King noted, "He did seek a second opinion over at St. Mary's and was told that it might be some overstuffing of his anterior compartment." [1] Dr. King obtained updated x-rays, and compared them to the previous x-rays. The prosthesis was "well placed" with no sign of loosening. Dr. King was unsure if overstuffing was the issue "as much as just significant scar tissue." Claimant requested another opinion, and Dr. King referred Claimant to his partner, Dr. Shane Rothermel, who specializes in revision arthroplasty.

21. Dr. Rothermel evaluated Claimant on September 20, 2021. He saw no obvious cause for Claimant's continued symptoms from physical exam and radiographic imaging. He reviewed multiple x-rays and opined they showed "overall good alignment of components with no evidence of loosening osteolysis or hardware complications." Dr. Rothermel asked Claimant to obtain inflammatory lab work to rule out any concern for infection.

22. Claimant completed the bloodwork, and returned to Dr. Rothermel on September 23, 2021. Dr. Rothermel opined, "I am unable to identify any correctable aspect of his prior total knee arthroplasty." Dr. Rothermel thought the most likely explanation was recurrent scar tissue. He concluded, "I do not believe that I can make him better by revising his knee arthroplasty."

23. Dr. King met with Claimant again on December 2, 2021, and reiterated he saw no surgical solution to Claimant's situation. Claimant was insistent he wanted a revision, so Dr. King referred him for another opinion with a different total joint surgeon.

24. Claimant saw Dr. Centi on December 15, 2021, who concurred with the referral to another specialist. Dr. Centi and/or Dr. King referred Claimant to Dr. David Walden.

25. Dr. Walden evaluated Claimant on January 13, 2022. Claimant explained he had received no sustained benefit from any of the previous procedures, and the ongoing lack of mobility significantly limited his activities. Claimant referenced second opinions from Dr. VanManen[2] and Dr. Rothermel regarding a possible revision TKA. Dr.

[1] Based on information in later reports, the provider was probably Dr. VanManen.
[2] No records from Dr. VanManen were offered at hearing.

Walden reviewed x-rays taken on August 23, 2021[3] and opined, "there may be a rotational abnormality of the femoral component." Dr. Walden called a partner in his practice who specializes in joint replacements and revisions, Dr. William Howarth, to review the images. Dr. Howarth agreed "there appears to be some malpositioning of the components including a rotational problem with the femoral component and an inferior positioning of the patella." He opined Claimant would likely need a revision TKA.

26. Claimant saw Dr. Howarth on February 10, 2022. Dr. Howarth opined the August 23, 2021 x-rays show evidence of internal rotation of the femoral component and a revision TKA was indicated.

27. Claimant saw Dr. Mark Failinger on May 28, 2022 for an IME at Respondents' request. Dr. Failinger found no indication of misalignment based on the physical examination. He noted some mild laxity, which argues against malpositioning of the femoral component. Dr. Failinger opined it is possible but not probable the femoral component is malpositioned. But even if it were malpositioned, is it not probable a revision TKA will improve Claimant's range of motion and function. Dr. Failinger could not corroborate Dr. Howarth's interpretation of the August 23, 2021 x-rays because he did not have access to the images or even the report. However, no such problem was identified on any previous imaging. Dr. Failinger emphasized any misalignment would have occurred at the first TKA because there was no evidence of loosening or shifting of the hardware. Therefore, it should have been visible on all imaging done since the TKA. Dr. Failinger concluded Claimant's pain probably stems from a combination of pre-existing degenerative changes and post-surgical scar tissue.

28. Dr. Howarth testified via deposition on August 10, 2022. He described two "radiographic findings" he believes he can remedy with a revision TKA. The first issue is "apparent" malpositioning of the femoral component. Dr. Howarth opined the malpositioning is subtle and would not necessarily require a revision absent Claimant's clinical presentation. The second issue Dr. Howarth identified is excessive posterior tibial slope. Although the tibial slope is not causing a problem at present, it will inevitably fail in the future. Dr. Howarth testified a revision TKA is the only surgical option that can improve Claimant's condition. He opined doing multiple MUAs would "never work" and "if someone is doing three [MUAs] . . . they don't know what they are doing." Dr. Howarth emphasized a revision TKA is a "very difficult procedure" and would entail a "very difficult rehab" to regain function because Claimant's knee ROM has been limited for several years.

29. Dr. Failinger testified at hearing to elaborate on the opinions in his report and address some of the issues raised in Dr. Howarth's deposition. Dr. Failinger noted Claimant's knee demonstrated full range of motion immediately after the TKA components were installed, and later after each MUA. The ability to move the knee normally while Claimant is unconscious is a strong indicator that the hardware is properly positioned. Given the disagreement between surgeons regarding the x-ray findings, Dr. Failinger recommended a CT scan as the "gold standard in determining whether or not that femoral component is positioned properly." Dr. Failinger agreed the tibial slope angle

[3] The August 23, 2021 x-rays were not offered at hearing.

discussed in Dr. Howarth's deposition may cause premature failure of the TKA in the future, but it has no impact on Claimant's current symptoms or restricted range of motion. Dr. Failinger testified Claimant is predisposed to forming excessive scar tissue, which leads to inflexibility and decreased range of motion. Scar tissue was cited by more than one provider as a likely source of Claimant's symptoms and limitations. Dr. Failinger opined that even if Claimant were to undergo a revision TKA, he will probably still struggle with knee motion because his body will inevitably produce more scar tissue. Dr. Failinger also noted Claimant's underlying diagnosis of rheumatoid arthritis, which is known to cause poor outcomes after a TKA.

30. Claimant failed to prove a revision TKA is reasonably needed to relieve the effects of his injury or prevent deterioration of his condition.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Medical benefits can continue after MMI if necessary to relieve the effects of the injury and prevent deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Surgery can be a permissible form of post-MMI treatment, if it is undertaken for the purposes outlined in *Grover*. *E.g., Shipman v. Larry's Transmission Center*, W.C. No. 4-721-918 (August 25, 2008) (surgery to correct a leg-length discrepancy approved as post-MMI treatment); *Hayward v. UNISYS Corp., supra* (knee surgery may be curative or may be *Grover*-style maintenance treatment designed to alleviate deterioration of the claimant's condition). Even if the respondents admit liability, they retain the right to dispute the reasonable necessity of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The claimant must prove entitlement to specific medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove the revision TKA recommended by Dr. Howarth is reasonably needed to relive the effects of the work injury or prevent deterioration of his condition. There is no doubt Claimant is severely limited by his knee problems and he is quite understandably searching for a solution. The difficult question is whether a revision procedure will probably help. Multiple surgeons have looked at Claimant's situation and reached well-reasoned but conflicting conclusions. Dr. Rothermel and Dr. King saw no correctable abnormality after reviewing multiple imaging studies conducted over several years. No interpreting radiologist suggested a problem either. Dr. Walden and Dr. Howarth looked at different x-rays and saw an issue with femoral rotation. Dr. VanManen apparently saw a different issue (patellofemoral overstuffing), although his report was not offered at hearing. Dr. Failinger did not have the opportunity to review the August 2021 x-rays, but based on the available evidence he concluded a revision TKA probably will not help Claimant. Dr. Howarth and Dr. Walden are no more persuasive than Dr. King, Dr. Rothermel, and Dr. Failinger regarding the need for a revision TKA. Moreover,

regardless of whether femoral malpositioning is contributing to Claimant's symptoms and disability, Dr. Failinger persuasively explained that Claimant's propensity to form scar tissue will significantly hamper his ability to improve after a revision TKA, as will his underlying rheumatoid arthritis. The preponderance of persuasive evidence fails to establish that Claimant "more likely than not" will benefit from a revision TKA.

ORDER

It is therefore ordered that:

1. Claimant's claim for a revision total knee arthroplasty is denied and dismissed.

2. All issues not decided herein, and not previously closed by operation of law, are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 19, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. The issue addressed in this decision involves Claimant's entitlement to maintenance medical treatment. The specific question answered is whether Claimant established, by a preponderance of the evidence, that she is entitled to a maintenance medical appointment with Dr. Robert Leland to determine the integrity of the surgical hardware in her right foot and whether he is a candidate for removal of the same.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's November 18, 2019 Injury

1. Claimant works as a teacher for Employer. She sustained an admitted work-related injury on November 18, 2019, when her right foot inadvertently got caught between two desks and she fell forward as she was passing out papers to her students.

2. Claimant testified she experienced "instant" pain and asked to go to the emergency room (ER) for treatment. She presented to the emergency department of Prowers Medical Center where x-rays were taken. X-rays revealed "[n]o evidence of acute or concerning boney abnormality in the right foot or ankle." (Resp. Ex. I, p. 217). Claimant was diagnosed with an acute right foot ligamentous injury but with concern for Lisfranc injury based on the location. *Id.* She was discharged to home with crutches and recommendations to ice and elevate the foot. *Id*. at p. 217-221.

3. On November 26, 2019, Claimant was evaluated during her initial workers' compensation medical appointment by Physician Assistant (PA) Dan Klepacz. Physical examination revealed no swelling, redness or bruising about the right foot. Claimant reported tenderness over the dorsum of the foot, especially over the right 2nd, 3rd, and 4th metatarsals. (Resp. Ex. I. p. 224). She also demonstrated limited dorsi and plantar flexion of the right ankle due to pain. *Id*. Claimant was advised that full healing could take a "couple of weeks". *Id*. She was again advised to ice and elevate the foot frequently and take NSAIDs (non-steroidal anti-inflammatory drugs) as needed and scheduled for a follow-up appointment. *Id.*

4. Claimant returned to PA Klepacz on December 18, 2019 for a follow-up appointment. During this encounter she reported continued pain and daily swelling especially with standing and walking. (Resp. Ex. I, p. 227). Because Claimant's progress had plateaued but was still symptomatic, PA Klepacz referred her to physical therapy for exercise, stretching, and alternative treatment to include ultrasound and dry needling. *Id.* at p. 228. (Rs' Ex. I, p. 215).

5. Claimant returned to PA Klepacz for a follow-up on January 10, 2020. During this appointment, Claimant reported ongoing right foot pain. PA Klepacz referred Claimant to podiatry for evaluation. (Resp. Ex. I, p. 237).

6. Claimant presented to the offices of Dr. Robert Leland at UC Health Foot and Ankle Center for an orthopedic evaluation on January 24, 2020. (Resp. Ex. G, p. 26). Dr. Leland opined that review of Claimant's previously obtained x-rays were "strongly suspicious for widening of her first intercuneiform and intermetatarsal base space consistent with a Lisfranc disruption. *Id*. at p. 26-27. Dr. Leland recommended a weight bearing CT scan to "better delineate [Claimant's] injury". *Id*. at p. 26.

7. CT of the right foot performed February 14, 2020 demonstrated "comminuted fracture fragments involving the base of the second metatarsal with slight widening of the Lisfranc joint with increased distance between the medial cuneiform and the second metatarsal base. (Resp. Ex. G, p. 31).

8. Based upon Claimant's imaging, Dr. Leland diagnosed a right subtle right ligamentous Lisfranc injury. (Rs' Ex. G, p. 36; *see also* p. 40). He noted that Claimant was at "high" risk for continued pain as the displacement seen on imaging would not improve over time. Accordingly, he proposed surgical intervention. *Id.*

9. Claimant underwent an open reduction internal fixation (ORIF) of the right tarsometatarsal disruption, right midfoot arthrodesis, right gastrocnemius recession, and a local bone graft on March 5, 2020. (Resp. Ex. G, p. 48). The operative note included a description of the potential risks of the operation, to include but not be limited to "bleeding, infection, neurovascular damage leading to loss of limb or limb function, malunion, nonunion, *need for hardware removal*, pain or functional limitations despite operative treatment and anesthetic risks". *Id*. (emphasis added). Moreover, the operative note supports a finding that three, 3.5 mm surgical screws were implanted into the right foot as part of the March 5, 2020 procedure. *Id*. at p. 49, 53.

10. Post-operative x-rays were obtained April 16, 2020. (Resp. Ex. I, p. 249). These images showed three threaded screws present from the operation and no evidence of hardware fracture or loosening. *Id.* Following a telemedicine appointment with Claimant on April 23, 2020, Dr. Leland documented that the x-rays taken April 16, 2020, demonstrated "maintenance of hardware and arthrodesis position". (Resp. Ex. G, p. 124). He also opined that there was "early favorable signs of healing across her arthrodesis site". *Id.*

11. Dr. Leland discharged Claimant from his care on May 28, 2020. (Resp. Ex. G, p. 126). Closing x-rays of the right foot showed status post Lisfranc fixation without visualized complication. (Rs' Ex. G, p. 129).

12. On June 2, 2020, Claimant participated in a telehealth visit with PA Klepacz. (Resp. Ex. I, p. 256). During this visit, Claimant denied pain in the foot and reported that

she had completed her physical therapy. *Id.* PA Klepacz noted that Dr. Leland had taken Claimant out of her walking boot, had prescribed some exercises and reported to Claimant that "*there may need to be a screw removal at a later date"*. *Id*. at p. 256 (emphasis added).

13. On June 29, 2020, Claimant presented to her primary care physician ("PCP"), High Plains Family Health Center, for follow up of conditions unrelated to the work-injury. (Rs' Ex. H, p. 135). During the evaluation she reported that her foot was improving following the workers' compensation injury, that she was no longer wearing the walking boot, but that she had some occasional pain with walking. *Id*. Her PCP recommended she inquire into physical therapy under the workers' compensation claim. *Id*. Claimant testified that she continued with physical therapy after the surgery and did well with it. (Hrg. Tr. p, 14, ll. 2-3).

14. Claimant completed additional post-surgical physical therapy (PT) between June 25, 2020 and August 14, 2020. (Resp. Ex. I, pp. 259-277). At her discharge from PT on August 14, 2020, it was documented that Claimant was "doing great" and according to her doctor, "did not need more physical therapy". *Id*. at p. 277.

15. Claimant returned to PA Klepacz on August 21, 2020. (Resp. Ex. I, p. 278). PA Klepacz noted that Claimant had been "doing a lot of activities such as light jogging, hiking, waiting (sic) in a riverbed" and was "functioning at work like she would expect to without any restrictions needed. *Id*. PA Klepacz placed Claimant at maximum medical improvement (MMI) during this appointment, noting that Claimant had no permanent impairment and no permanent work restrictions. (Resp. Ex. I, p. 278). While he indicated that Claimant had no maintenance care needs after MMI, PA Klepacz noted that he "discussed future imaging needs with Claimant should there be any new onset or worsening of pain". Id. at p. 278, 281. PA Klepacz' August 21, 2020 report of MMI and impairment was not countersigned by a physician until September 1, 2020. (Resp. Ex. I, pp. 278-281).

16. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Frank Polanco on February 11, 2021. (Resp. Ex. F, p. 21). After completing a records review and a physical examination, Dr. Polanco agreed that Claimant reached MMI on August 21, 2020. *Id*. at p. 23. He also opined that Claimant had no permanent impairment and did not "require further active treatment or diagnostics", noting specifically that "maintenance care is not required". *Id*.

Respondents' February 23, 2021 Final Admission of Liability and Claimant's March 22, 2022 Application for Hearing

17. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Polanco's DIME opinions. (Resp. Ex. B, p. 2). The FAL is dated February 23, 2021 and was purportedly mailed to Claimant and the Division of Workers' Compensation (Division). *Id.* While the February 23, 2021 FAL was supposedly mailed to the Division, there is no record showing that it was received there. Indeed, after Claimant filed an

Application for Hearing on March 22, 2022, endorsing medical benefits and her request for a "reevaluation" of her permanent medical impairment, the parties attended a prehearing conference (PHC) before Pre-hearing Administrative Law Judge (PALJ) Craig Eley on July 13, 2022. (Resp. Ex. E, p. 16). The PCH was convened to address Respondents' Motion to Engage in Discovery with an Unrepresented Claimant. *Id.* During the PHC, Respondents argued that they needed information from Claimant regarding whether and when she received the February 23, 2021 FAL in order to determine if Claimant's time to request a hearing to overcome the DIME determination regarding impairment had expired. *Id.* Because the DIME process was closed by the Division on February 11, 2021 and Claimant did not file an application ostensibly challenging the impairment rating opinion of Dr. Polanco for more than a year after that closure, Respondents asserted that an order to engage in discovery was appropriate. *Id.* at p. 17.

18. PALJ Eley observed that pursuant to C.R.S. § 8-43-203(2)(b)(II), "Claimant's right to apply for hearing to overcome the DIME opinion arises upon the filing of a Final Admission of Liability by Respondents adopting the DIME opinion. PALJ Eley went on to note that "regardless of whether Claimant ever received a Final Admission, the Division [had] not. Thus, PALJ Eley noted that "[e]ven if a Final Admission [had] been sent to Claimant, unless filed with the Division it is of no effect". (Resp. Ex. E, p. 17). During the PHC, Claimant explained that she did not intend to pursue an effort to overcome the DIME opinion. Rather, she noted that she was seeking an order for maintenance medical benefits. *Id.*

19. PALJ Eley struck the issue of reevaluation of Claimant's permanent impairment as an issue for hearing and determined that the issue of medical maintenance benefits was ripe, despite the lack of an FAL being filed with the Division, based on Respondents' representation that maintenance care was being denied. (Resp. Ex. E, p. 19).

20. The record supports a finding that Respondents did not endorse claim closure in their June 22, 2022 response to Claimant's Application for Hearing nor did they appeal PALJ Eley's July 13, 2022 PHC order. (Resp. Ex. D, E). The evidence presented also supports a finding that Respondents did not move to add claim closure or any other affirmative defense to the claim for maintenance medical benefits as an issue for hearing. Most importantly, Respondents did not object to proceeding to hearing on September 15, 2022 on the issue of maintenance care. Consequently, the ALJ finds that Respondents waived "claim closure" as a defense when challenging the request for maintenance treatment despite Claimant's admission that she received a copy of Respondents February 23, 2021 FAL denying maintenance medical benefits.

Claimant's Treatment With her Primary Care Physician (PCP) Following the February 11, 2021 DIME with Dr. Polanco

21. On April 28, 2021, Claimant presented to her PCP with reports of continued pain in her right foot following her workers' compensation injury. (Rs' Ex. G, p. 153). She

wanted to try something for "chronic pain". *Id.* Physical examination revealed that all extremities moved with full range of motion and there was no appreciable joint tenderness or swelling. *Id*. She was prescribed Duloxetine for her increased right foot complaints. *Id*. at 154.

22. On May 6, 2022, Claimant presented to her PCP and it was noted that she was having significant pain in her hips, thigh, and elbows for which she was seeing a chiropractor and massage therapist. (Rs' Ex. H, p. 163). The pain in her hips was reported to cause her to toss and turn at night and cause deep muscular pain. *Id*. It was further noted that the massage therapy was deep therapeutic massage mainly to the lateral hips and medial thighs, as well as low back and elbows. *Id*. She was diagnosed with pain in the right hip and pain in the left hip. *Id*. at 165. There is no mention of right foot complaints in the report from this date of visit. *Id*.

23. On June 17, 2022, Claimant presented to her PCP for follow up of the hip and leg pain. (Rs' Ex. H, p. 168). It was noted that she had undergone blood tests and x-rays which were essentially normal, and she continued to see the chiropractor and massage therapist but still had pain with movement. *Id*. She reported having gone to Hawaii with the ability to do most things except one of her hikes due to pain. *Id*. Physical therapy for the left hip was recommended. *Id*. Claimant made no mention of right foot complaints. *Id*.

24. On August 12, 2022, Claimant presented to her PCP for follow up of the hip pain. (Rs' Ex. H, p. 211). It was reported that she had approximately seven-week history of left hip pain for which she was seeing physical therapy. *Id*. During this visit it was noted that Claimant reported increasing right foot pain and her surgeon previously indicated that due to having small bones she may need to have the screws removed a couple of years after surgery. *Id*. It was noted that over the last couple of months she had increased pain and numbness in her right foot that was limiting her ability to hike and go down stairs. *Id*.

25. During the August 12, 2022, visit with her PCP, Claimant reported that approximately two weeks prior she was lifting a kayak and pulled her groin muscles for which she had to take a muscle relaxant with significant improvement. (Rs' Ex. H, p. 211). It was further reported that Claimant stated she may have a hip labral tear, possibly bilateral, for which a bilateral hip MRI was recommended. *Id*.

Claimant's Hearing Testimony

26. At hearing Claimant testified that since her February 11, 2021 DIME with Dr. Polanco, the condition of her right foot has worsened. She reported increasing pain and testified that she has "[d]aily pain, swelling, and [a] decrease in ability to do activities, and increased pain in work activities". (Hrg. Tr. p. 15, ll. 9-23). Claimant testified that she was having increasing difficulties with activities that require her to put extra weight on her right foot, including hiking, basic walking, paddle boarding, housework, ascending/descending stairs and performing yardwork that required repetitive any repetitive bending up and down movements. (Hrg. Tr. p. 16, ll. 3-6).

27. During cross-examination, Claimant testified that while Dr. Leland discharged her from his care without the need for follow-up visits, he indicated that she may need a screw removal at a later date. (Hrg. Tr. p. 23, ll. 9-17). She also agreed that by his report, Dr. Polanco did not recommend maintenance treatment. (Hrg. Tr. p. 24, ll. 6-8).

28. Claimant disagreed with Respondents' contention that "no medical provider has determined that you actually need hardware removal", testifying: "I have not been approved to see the surgeon, so I have not gotten that message from him". (Hrg. Tr. p. 28, ll. 2-5). In response to the question of whether her PCP recommended hardware removal, Claimant responded: "That's not her expertise, so she has not even discussed that. She referred me to see Dr. Leland". *Id.* at ll. 6-9. Nonetheless, Claimant did not produce a medical record evidencing that her PCP recommended she follow up with Dr. Leland or orthopedics.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion

of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Maintenance Medical Benefits

D. A claimant is entitled to ongoing medical benefits after MMI if he/she presents substantial evidence that future medical treatment will be reasonably necessary to relieve the claimant of the effects of the injury or prevent deterioration of the his/her condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995). When the respondents challenge a request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits by a preponderance of the evidence. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015).

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra.* In announcing its decision in *Grover*, the Court stated that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Subsequent Courts have indicated that ongoing medical treatment can be ordered if a claimant's condition can be expected to deteriorate so that greater disability results in the absence of such care. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo.App. 1995). Indeed, in *Milco,* the Court of Appeals refined the test for awarding maintenance medical benefits by noting that irrespective of its nature, maintenance treatment "must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Milco Construction v. Cowan, supra*. If the Claimant reaches this threshold, the Court in *Milco* stated that the ALJ should then, as a second step, enter a "general order similar to that described in Grover." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial*

Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

F. In this case, Respondents argue principally that Claimant failed to demonstrate that any need for continued treatment directed to the right leg/foot is causally related to her November 18, 2019 industrial injury. Rather, Respondents seemingly argue that Claimant's current need for treatment, including any treatment directed to the right foot is related to her onset of non work-related hip and thigh pain. Indeed, Respondents note as follows:

> [Claimant's] chiropractic treatment and massage therapy were prescribed in response to the onset of Claimant's hip and thigh pain complaints. In fact, it was not until three months after the onset of hip and thigh pain that Claimant first reported right foot pain. By that time, she had been receiving chiropractic treatment and massage therapy specifically focused on the lateral hips and medial thighs for approximately three months. The record does not support a causal connection between Claimant's alleged right foot pain and these treatments, nor does it support the relation of these treatments to Claimant's alleged right foot pain complaints. Claimant cannot use treatment rendered to two unrelated body parts as support for her claim that she has treated for alleged right foot symptoms.

Based upon the evidence presented the ALJ is not persuaded that Claimant is attempting to "use" the treatment directed to her bilateral hips/thighs, i.e. two non work-related body parts to justify her claim for a maintenance medical appointment with the authorized surgeon in this case. While Claimant testified that she believes her increasing right leg/foot pain and functional decline are related to her November 18, 2019 industrial injury, the evidence presented persuades the ALJ that Claimant made it clear that her hip pain is unrelated to that injury. The ALJ credits Claimant's testimony to conclude that her condition of her right foot has worsened since her surgery and DIME appointment. The ALJ is convinced that Claimant is probably experiencing daily swelling and increased pain/difficulty with activities that require her to put extra weight on her right foot, due to the deteriorating nature of her right foot condition.

G. Based upon the evidence presented, the ALJ is convinced that Claimant's reoccurring right lower extremity pain and functional decline is likely emanating from and in part caused by her November 18, 2019 right foot injury. While it is clear that Claimant's bilateral hip pain may be impacting her functional abilities, her increasing right foot pain, which is impinging on her ability to engage in weight bearing activities combined with the indication that she is at risk for a hardware removal supports a conclusion that there is a periodic need to monitor (evaluate) the condition of Claimant's right foot. Because the ALJ is convinced that Claimant's persistent and worsening right leg/foot pain is related to her November 18, 2019 industrial injury and because her PCP is not an orthopedist who has opined regarding the cause of Claimant's persistent and worsening right foot pain,

the ALJ finds Claimant's request to return to Dr. Leland for further evaluation reasonable and necessary.

H. In this case, the ALJ concludes that there is substantial evidence in the record to support an ongoing need to assess and if necessary, treat the injuries Claimant sustained during his admitted claim. As noted, without such evaluation, the ALJ is convinced that Claimant's present condition will likely deteriorate further resulting in greater functional decline. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that she is entitled to a follow-up examination with Dr. Leland to assess the integrity of the surgical hardware used to treat her work-related Lisfranc fracture and otherwise address/prevent further deterioration of her condition. Respondents retain the right to challenge any/all treatment recommendations, including a request for hardware removal on the grounds that the recommended treatment is no longer reasonable, necessary or related to Claimant's November 18, 2019 industrial injury. *See*, *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003).

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary post-MMI medical treatment from authorized providers to relieve Claimant from the ongoing effects of her industrial injuries and/or prevent deterioration of her condition, including authorization of a follow-up medical appointment with Dr. Leland.

2. Respondents retain the right to challenge future requests for maintenance treatment on the grounds that such care is maintenance in nature, is not reasonable, necessary or related to Claimant's November 18, 2019 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For

statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 19, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-204-318-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on July 1, 2021.

II. If found compensable, whether Claimant is entitled to temporary disability benefits.

III. If found compensable, whether a penalty of one day of indemnity benefits for each day Claimant did not report a work injury should be found.

IV. If found compensable, whether Claimant is entitled to a general award of medical benefits and whether the treatment Claimant received at Salud Clinic, and its referrals, is authorized.

V. If found compensable, the appropriate average weekly wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 65-year-old, Spanish speaking man, who worked for Employer, a plant nursery, for approximately 30 years, full time and then seasonally in 2020 and 2021. The last day he worked for Employer for the 2021 season was September 24, 2021. *Ex. F, 61, 68, 73, 76.*
2. Claimant's performed irrigation work. He would complete this work by using a tractor, hoe, and shovel.
3. Following his departure at the end of the 2021 season, Claimant claimed and received unemployment benefits. *Ex. F, 69; Test. Cl.* In January 2022, he represented to the unemployment office that he intended to return to his employment and asked for an exception and waiver of his work search requirement. *Ex. F, 67*. In early spring, 2022, Claimant contacted his supervisor, Mr. TG[Redacted], and told him he was having trouble with unemployment. *Test. of TG[Redacted] and Claimant.* In early April 2022, Mr. TG[Redacted] told Claimant that he did not have a position for him at that time. On May 3, 2022, approximately 10 months after his alleged injury, Claimant filed a claim for workers' compensation, stating that he sprained his low back digging irrigation on July 1, 2021, at 11:00 a.m. *Ex. N, 103.*
4. In April 2022, Claimant began drawing social security retirement benefits. *Ex. 8, 75.* He testified that he did not intend to go back to work.
5. Claimant testified that on July 1, 2021, he was shoveling for irrigation and experienced a

back injury. He testified that he told his supervisor, Mr. TG[Redacted], that his back was bothering him and that he had made an appointment to be seen at the clinic. He did not, however, tell Mr. TG[Redacted] that he suffered a work injury. Claimant testified that on July 2, 2021, he went to his PCP Salud Family Health Centers, and was provided a letter with restrictions. *CL's Ex. 4, Bates 30.* He testified that he took that letter to Mr. DZ[Redacted], the General Manager, with his son and gave it to Mr. DZ[Redacted]. Claimant contends that that was his report of a work injury. He testified that he did not say anything to Mr. DZ[Redacted] at all during this meeting, because the letter speaks for itself. The letter, however, makes no reference to a work-related injury. It says, "Please be aware [Claimant] is currently being treated for lumbago that affects the right lower extremity. At this time, recommend [Claimant] to avoid activities that worsen current symptoms. Also recommend light duty and avoid heavy lifting/pushing or pulling for the next 4-6 weeks."

6. During his testimony, Claimant denied complaining to a medical provider that he has had back pain for five years. This testimony, however, is in direct conflict with the medical record from May 2022 that documents Claimant has had back pain since about 2017 and that his back pain had been getting worse since about 2019. *Ex. E, p. 13.*

7. Claimant testified that he gave Employer the July 2, 2021, letter issued by Diana Kessel, PAC, that set forth his work restrictions. Based on the credible and persuasive testimony of Mr. TG[Redacted], and Mr. DZ[Redacted], as set forth below, the ALJ finds that Claimant did not give Employer the July 2, 2021, letter that set forth his restrictions.

8. Two witnesses from Claimant's employer, Mr. TG[Redacted] and Mr. DZ[Redacted], testified. Mr. DZ[Redacted] testified that Employer is a tree nursery and employed seasonal and full-time workers such as Claimant. He testified that Claimant had worked for the company for several years and that Claimant received unemployment benefits in the off season in 2020 and 2021. He also testified that when Claimant had issues he wanted to discuss with him, Claimant would bring his son in to translate and they would have a meeting. Claimant did not hesitate to arrange for these meetings when he apparently felt it was important. Mr. DZ[Redacted] testified that Claimant did not at any time meet with him and report a work injury. Claimant did, however, meet with Mr. DZ[Redacted] and discuss retirement. Mr. DZ[Redacted] testified, contrary to Claimant, that Claimant did not meet with him and provide him the letter seen at *Ex. 4, 30*. Mr. DZ[Redacted] had not seen that letter before the hearing. The ALJ finds Mr. DZ[Redacted]'s testimony to be credible and persuasive.

9. Mr. TG[Redacted], who speaks Spanish, was Claimant's supervisor. Mr. TG[Redacted] testified that Claimant never informed him of a back injury. He testified that on July 1, 2021, Claimant did tell him that walking over uneven or muddy ground hurt his leg. Claimant therefore asked not to do particular things at work. Mr. TG[Redacted] accommodated this request and assigned Claimant to driving the tractor. Mr. TG[Redacted] was not informed of a back injury or of a work-related injury. Mr. TG[Redacted] testified he was not provided any written letter regarding restrictions for Claimant. He further testified that Claimant worked the entire 2021 season, ending in late September 2021, working his regular hours on the tractor and doing other things, based upon Claimant's indication of what he preferred to do and what hurt him. According to Mr. TG[Redacted], Claimant did not at any time during the rest of his time working that

season report a work injury or a back injury to Mr. TG[Redacted]. Mr. TG[Redacted] testified that Claimant did not request medical treatment for a work injury. But, Claimant did call and speak to Mr. TG[Redacted] sometime in February of 2022, asking when work would start, and represented that he was ready to work. He did not report a work injury at that time either. Mr. TG[Redacted] also spoke to Claimant in March or April of 2022, when again Claimant represented he was ready to work. He did not, however, report a work injury during this phone call. Mr. TG[Redacted] told Claimant that the nursery was at a stage in the season where Claimant's preferred work was not available yet. Claimant was not brought back to work at that time and his workers' compensation claim followed. Based on his interaction with Claimant, at no time did Mr. TG[Redacted] get the impression that Claimant was contending that he hurt himself at work – until Claimant filed a claim in 2022. The ALJ finds Mr. TG[Redacted]' testimony to be credible and persuasive.

10. Both Mr. TG[Redacted] and Mr. DZ[Redacted] credibly testified that the required notification regarding workers' compensation reporting was posted in the greenhouse and the office where meetings took place. This was not disputed by Claimant.

Medical Treatment and Records

11. On June 18, 2021, Claimant presented to his PCP at Salud Family Health Centers. At this visit, Claimant complained of having 2 weeks of back pain on the right with pain radiating down the back of his leg. Thus, his symptoms started almost one month before his alleged work injury of July 1, 2021. At this visit, Claimant also stated that there was no fall or injury, but he "thinks he tweaked [his back] at work picking up a heavy object." Claimant was diagnosed with acute right-sided low back pain with right sided sciatica. X-rays were also taken and showed signs of arthritis in his lower back. Based on Claimant's complaints and presentation, he was prescribed physical therapy for 6-12 weeks. Absent from this report is any indication that he hurt his back doing irrigation work with a shovel. Moreover, the medical report indicates that Claimant merely said that he 'thinks" he injured himself at work. *Ex. E, pp. 29-32.*

12. On July 2, 2021, Claimant returned to his PCP complaining of back pain. At that time, however, he had already been in treatment through Salud Family Health Centers for back complaints which began around June 4, 2021. He already had had an x-ray and his doctor had called him to let him know that he had arthritis in his back. *Ex. E, pp. 32, 33.* Absent from this report is any indication Claimant stated that he injured his back the day before doing irrigation work and working with a shovel. At this visit, his PCP recommended Claimant continue taking his medications and also issued restrictions which included avoiding heavy lifting, pushing, and pulling for the next 4-6 weeks. *Ex. E, pp. 33, 34; Ex. 4, p. 30*.

13. After the July 2, 2021, medical appointment, Claimant underwent PT and indicated that his back was better. *Ex. E, p. 38*.

14. On October 13, 2021, after being laid off from work, Claimant returned to his PCP and indicated that his right sided back pain and sciatica had returned. He also indicated that his back pain returned after he performed his physical therapy. But, he also stated that his back pain was better when he was not working. *Ex. E, p. 38*.

15. On November 30, 2021, Claimant returned to Salud Family Health Services. At this appointment, Claimant treated for a UTI, and underwent a urinalysis. Claimant did not complain of back or leg pain at this visit. *Ex. E, pp. 45-47*.

16. On March 30, 2022, Claimant returned to Salud. At this appointment, Claimant sought additional medical treatment for his back and leg pain which continued to worsen. At this appointment, it was noted that Claimant's condition continued to worsen and that he now had pain radiating down to his calf area and that these symptoms occurred more frequently. Thus, Claimant's condition continued to worsen – despite the fact that he had not worked since September 2021.

17. Dr. Reiss was retained by Respondents to perform an independent medical examination (IME). Claimant showed up for the evaluation, but without an interpreter. Dr. Reiss, or Respondents, were ultimately able to arrange for an interpreter, but Claimant had already left and refused to return to his office to complete the IME with an interpreter. As a result, Dr. Reiss performed a medical records review and set forth his opinions in his report. Dr. Reiss also testified at hearing and was qualified as an expert in orthopedics. The opinions set forth in his report are consistent with his testimony.

18. In his report, Dr. Reiss noted a number of discrepancies in Claimant's medical history when compared to Claimant's contention that he injured his back on July 1, 2021, while digging with a shovel. Dr. Reiss noted the following:

    - The June 18, 2021, medical report demonstrates a history of back pain starting in early June. The history provided in the report does not correlate well with Claimant's claim of injuring himself while digging. The complaints of back pain significantly predate his claimed injury of July 2021.
    - The July 2, 2021, report does not appear to mention a work injury.
    - The July 2021, physical therapy records appear to demonstrate that Claimant became asymptomatic.
    - The October 13, 2021, medical report seems to demonstrate that Claimant was sent to physical therapy to treat his back pain that started in June of 2021, and that the physical therapy in July resolved Claimant's complaints.
    - The March 30, 2022, report demonstrates episodes of right low back pain worsening over time, but yet there does not appear to be any mention of a work-related injury.
    - The medical records demonstrate Claimant's back condition is long standing, chronic, and preexisting.

    Ex. A, pp. 1-4.

19. Dr. Reiss ultimately concluded that Claimant's current diagnosis is most likely low back pain associated with degenerative disc disease of the lumbar spine with some degree of spinal stenosis and possible neurogenic claudication – all of which were preexisting and not related to Claimant's work. The ALJ finds Dr. Reiss' opinions and conclusions that Claimant's low back pain, need for medical treatment, and disability, was not caused by his work activities to be credible and persuasive.

Ultimate Findings of Fact

20. Based on the totality of the evidence, Claimant's testimony is not found to be credible.

21. Claimant has had ongoing low back pain since 2017.

22. Claimant's back pain started to worsen in 2019.

23. On approximately June 4, 2021, approximately one month before Claimant's claimed work injury, Claimant's back pain continued worsening and he developed pain radiating down his leg.

24. On June 18, due to his back and leg symptoms that started around June 4, 2021, Claimant went to Salud for medical treatment to address his worsening back and leg pain.

25. Claimant returned to Salud Family Health Services on July 2, 2021, for ongoing back pain with radiation down his leg. Claimant was evaluated and provided work restrictions. The report from this visit does not indicate Claimant injured his back while performing irrigation duties while digging at work. Moreover, despite Claimant's testimony to the contrary, the ALJ finds that Claimant did not provide the July 2, 2021, letter from Diana Kessel that set forth Claimant's restrictions to Employer or report a work injury.

26. After Claimant stopped working for Employer in September 2021, Claimant's condition still continued to worsen.

27. Claimant failed to establish by a preponderance of the evidence that his need for medical treatment was caused by his work activities. Claimant also failed to establish by a preponderance of the evidence that the restrictions and resulting disability was caused by his work activities.

28. Claimant also failed to establish by a preponderance of the evidence that his work activities aggravated a preexisting condition and necessitated the need for medical treatment or caused any disability.

29. Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on July 1, 2021.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to carry his burden to prove by a preponderance of the evidence that he suffered a compensable work injury. Claimant did testify consistent with his claim for compensation, alleging a specific injury occurring while shoveling at a specific time on a specific day: July 1, 2021. Claimant also contends that he reported an injury that day and asked for treatment, but Mr. TG[Redacted] credibly denies a report of a work injury occurred. Mr. TG[Redacted] credibly testified that Claimant made him aware that his leg hurt when he did particular things. But Claimant did not report a back or work injury. Mr. TG[Redacted] did not understand him to ever be complaining of a back issue, let alone a work-related injury. Claimant was allowed to avoid work that gave him difficulty and to do the type of work that he preferred. Claimant had been working for this employer for many years, is an older worker, and that accommodation, unrelated to any work injury, makes sense.

As found, on July 2, 2021, Claimant reported to his personal medical provider and did not give any report of a work injury. By then, he had already been seen for back pain that had worsened around June 4, 2021, had x-rays taken, and had been notified by his PCP that he had arthritis in this back. Moreover, Claimant had reported that he had experienced problems with his back for 5 years. Plus, if Claimant had reported a specific injury, the medical records would not read as they do.

Mr. TG[Redacted] allowed Claimant to do the things that did not bother his leg, and Claimant finished the season with regular pay. Claimant is 65 years old and has a degenerative back, which hurts with and without activity, and has continued to worsen – even after he stopped working for Employer.

The ALJ finds and concludes that Dr. Reiss' ultimate opinion is that Claimant did not suffer a work-related injury and that his back and leg pain is due to a degenerative back condition that has continued to degenerate, without any contribution from Claimant's work. The ALJ has credited and found persuasive the opinion of Dr. Reiss because the ALJ finds and concludes that his opinion is consistent with, and supported by, Claimant's medical records.

The ALJ has considered whether Claimant's work activities caused a new and discrete injury or whether they aggravated his preexisting back condition. The ALJ finds and concludes that his work activities did not cause his back condition in the form of a discrete injury, or aggravate his preexisting back condition, and cause the need for medical treatment or cause any disability.

Based upon the totality of the evidence, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 21, 2022

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of his claim.

II. Whether Claimant established that the uninsured Employer is subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's May 12, 2020 order, specifically for failing to cover reasonable, necessary, and related medical care to cure and relieve the effects of Claimant's compensable injury, and pay temporary total disability (TTD) benefits and interest on all TTD owed and not paid when due.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This claim has been the subject of a prior hearing held before ALJ Patrick Spencer on March 12, 2020. The issues presented at that hearing included compensability of an alleged September 7, 2019 injury and whether Claimant was entitled to reasonably necessary medical benefits and lost wage benefits, i.e. temporary total disability (TTD) commencing September 7, 2019.

2. Despite proper notice, Employer failed to appear for the March 12, 2020 hearing. Accordingly, ALJ Spencer took Claimant's testimony at the March 12, 2020 hearing and issued an Order to Show Cause to Employer. Employer did not respond to the show cause order prompting ALJ Spencer to issue his order on May 12, 2020. As part of his May 12, 2020 order, ALJ Spencer found Claimant's September 7, 2019 injury compensable and ordered Employer to "cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury." ALJ Spencer also ordered Employer to pay "Claimant $6,200 in TTD benefits from September 8, 2019 through May 12, 2020" and "$175 per week in TTD benefits commencing May 15, 2020 and continuing until terminated by law." Finally, ALJ Spencer ordered Employer to pay interest on all past due TTD.

3. The ALJ adopts ALJ Spencer's Findings of Fact, as articulated in the May 12, 2020 order, as follows:

   a. Employer hired Claimant in August 2019 to tear off and re-cover a 1500 square foot roof on a customer's home. Employer told Claimant it was a "simple" one-layer job.

   b. Employer agreed to pay Claimant $35 "per square" to tear off and replace the roof. A "square" is 100 square feet of roof, so there were

15 “squares” in the 1500 square foot roof. Claimant estimated it would have taken two weeks to complete the job had it been a single-layer roof as anticipated.

c. When he got on the roof and started the job, Claimant realized there were four layers of existing roof to tear off.

d. Employer was supposed to supply the materials for the project and stock them on the roof. Employer also told Claimant he would provide a worker to help with the project. Employer provided a helper the first day, but after that, Claimant was left to finish the job by himself.

e. Claimant worked on the project for a couple of days but his progress was stymied by weather. Then a representative from Regional Building came and shut the project down because Employer had not pulled a permit.

f. Two days later, Employer called and informed Claimant he had secured the building permit and work could resume.

g. Employer stopped responding to Claimant’s calls after that. The homeowners also tried to reach Employer without success. They had paid Employer $3,200 for materials, but he had not brought materials to the job site. Repeated heavy rains were causing leaking into the home, so Claimant used his personal funds to buy materials to cover the roof. The homeowners then gave Claimant additional money so he could purchase the materials needed to finish the job.

h. Claimant purchased the materials and loaded them onto the roof by himself because Employer provided no one to help him. Throughout the project, Claimant struggled to move roofing materials and complete repeated trips up and down the ladder. He developed progressively worsening low back and leg pain during the project as a direct and proximate result of the physically demanding work. The lack of help during the project probably contributed to Claimant’s injury.

i. Employer appeared at the job site on September 7, 2019, when Claimant was almost finished with the project. Claimant informed Employer he could not keep working because of his severe low back and leg pain. Employer took over work on the project.

j. Claimant filed a Workers’ Claim for Compensation form on September 20, 2019. He mailed a copy to Employer.

k. On October 15, 2019, Employer appeared at Claimant’s home and berated him for filing a workers’ compensation claim. He told

Claimant, “You are not getting anything.” Employer never paid Claimant for his work on the project.

l. Employer never referred Claimant to a physician for treatment.

m. In December 2010, Claimant sought treatment for his back pain at the VA Rocky Mountain Regional Medical Center. He underwent x-rays on December 10, 2019, but the results are not in the record. Claimant was referred for a lumbar MRI and a physical medicine evaluation before he could have a surgical consultation.

n. Claimant proved he was performing services for pay for Employer when he was injured. There is no persuasive evidence he was free from direction and control or customarily engaged in an independent trade or business related to the service provided.

o. Claimant proved he suffered an injury to his low back arising out of and occurring within the course and scope of his employment for Employer.

p. The right to select a physician passed to Claimant and he selected the VA Medical Center.

q. Under the terms of hire, Claimant would have been paid $525 for the roof project. Claimant estimated it would have taken two weeks to complete the project. Claimant’s AWW is $262.50 ($525 ÷ 2 = $262.50). This equates to a weekly TTD rate of $175 and a daily rate of $25.

r. Claimant proved he is entitled to TTD benefits commencing September 8, 2019 and ongoing. Claimant stopped work on September 7, 2019 because of the effects of the work injury. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

s. The total past-due TTD is $6,200 through the date of this decision. The total accrued statutory interest is $161.58 through the date of this decision. TTD will continue to accrue at the rate of $175 per week until terminated by law. Interest will continue to accrue at the rate of $1.39 per day until the past-due TTD is paid in full.

t. Employer must pay an additional $1,550 to the Colorado Uninsured Employer Fund because it was uninsured at the time of Claimant’s injury ($6,200 x 25% = $1,550).

u. Employer knew Claimant had to stop working because of the injury on September 7, 2019. Employer was required to formally admit or deny liability no later than Monday, October 7, 2019. Employer never

filed an admission of liability or notice of contest with the Division of Workers' Compensation.

v. Employer should be penalized $25 per day, from October 7, 2019 through the date of this decision (May 12, 2020), for failing to admit or deny liability.

4. Claimant testified that after the May 12, 2020 order of ALJ Spencer was issued, he filed a new application for penalties because Employer never paid his lost wages as ordered. (Clmt's. Ex. 2). Claimant filed his Application for Hearing on April 15, 2022; more than a year after ALJ Spencer's May 12, 2020 order was issued. *Id.* Claimant sent a copy of the Application for Hearing to Employer's address on file with the OAC, namely: 1819 West 22nd Street, Pueblo, Colorado 81003. This is the same address that the prior May 12, 2020 and Show Cause orders were sent to without response by Employer. There is no indication that the prior mailings were undeliverable and returned to sender. Accordingly, the ALJ finds that Claimant's April 15, 2022 Application for Hearing was probably delivered to Employer as was the prior May 12, 2020 Order of ALJ Spencer.

5. Based upon the evidence presented, the ALJ finds that Employer has made no effort to abide by the May 12, 2020 order of ALJ Spencer. Similar to his non-appearance for hearing on March 12, 2020, Employer failed to appear for the August 11, 2022 hearing despite proper notice. Moreover, he did not respond to either Show Cause Order. Based upon the evidence presented, the ALJ finds that Employer has elected to ignore the proceedings and the prior orders of ALJ Spencer. Indeed, the evidence presented, including Claimant's testimony supports a finding that Employer has failed to perform a duty lawfully mandated within the time prescribed by ALJ Spencer, namely the payment of TTD as ordered. Accordingly, for the reason set forth below, the ALJ finds that the imposition of penalties is appropriate in this case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and

resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

II. Penalties

C. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo.App. 1995). If the ALJ finds a violation, the ALJ must then determine whether the insurer or employer's actions, which resulted in the violation, were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App. 2003). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

D. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order, which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v.*

Hewuse, 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004). Employer did not assert that any alleged penalty had been cured. Indeed, Employer failed to respond in any fashion to ALJ Spencer's May 12, 2020 order or Claimant's April 15, 2022 Application for Hearing despite those documents being served on Employer's address of record.

E. In this case, Claimant has asserted penalties pursuant to § 8-43-304(1) for Employer's failure to follow ALJ Spencer's May 12, 2020 order requiring payment of, among other things, lost wage benefits. (Clmt's Ex. 2). As noted, a violation of an order occurs when a party authorized or obligated to perform performs an action prohibited by the order, or fails to take an action required by the order. *See Dworkin, Chambers and Williams, P.C. v. Provo,* 81 P.3d 1053, 1058 (Colo. 2003). Before analyzing Claimant's penalty claim, the ALJ notes that ALJ Spencer's May 12, 2020 order became final on June 1, 2020 as Employer did not appeal it. Moreover, the evidence presented supports finding that Employer has failed to follow the order to date. Accordingly, the asserted penalty is ongoing.

F. In this case, the Application for Hearing filed April 15, 2022, specifically notes that Claimant was seeking penalties beginning "May 12, 2020 and ongoing pursuant to § 8-43-304(1) for failure to "[respond] to the order by ALJ Spencer to pay benefits. Although Claimant did not indicate the rate at which he requested penalties be paid, he did indicate that he was seeking penalties pursuant to § 8-43-304(1), which provides that penalties for refusing to obey lawful orders shall be punished by a fine of not more than $1,000.00/day. Based upon the evidence presented, the ALJ concludes that the basis for Claimant's penalty assertions was sufficient, pursuant to § 8-43-304(4), to place Employer on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's May 12, 2020 order, specifically that portion which required Employer to pay TTD benefits.

G. Based upon the totality of the evidence presented, the ALJ concludes that Employer violated ALJ Spencer's May 12, 2020 order requiring the payment of TTD benefits. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation, which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). As ALJ Spencer's May 12, 2020 order did not become final until June 1, 2020, the imposition of penalties extends from June 2, 2020 and is ongoing.

H. While the evidence presented supports that a violation of ALJ Spencer's May 12, 2020 order occurred for failure to pay TTD benefits, it is necessary to analyze whether Claimant filed his request for penalties timely and whether Employer's failure to pay TTD was objectively unreasonable. Here the evidence presented establishes that Claimant filed his Application for Hearing requesting penalties in excess of one year after the date that he reasonably should have known of the facts giving rise to the penalty.

Indeed, Claimant did not file his request for penalties for approximately 23 months after ALJ Spencer issued his Order. Claimant was represented by Counsel at the time the May 12, 2020 Order was issued. Accordingly, the ALJ finds it reasonable to infer that his counsel would have advised him regarding the potential repercussions; including the imposition of penalties should Employer fail to abide by the Order shortly after it was issued.

I. Section 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5) constitutes a statute of limitations. *Spracklin v. Industrial Claim Appeals Office, supra.* While the ALJ is convinced that the "statute of limitations" probably ran out before Claimant filed his Application for Hearing, Employer failed to respond to the request for penalties. Indeed, review of the file materials finds them devoid of any response to the claim for penalties. Raising the statute of limitations is an affirmative defense that is subject to procedural waiver if not explicitly plead and proven in a timely fashion. *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995); *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Based upon the evidence presented, the ALJ is convinced that Employer waived any statute of limitations defense by not filing any response to Claimant's request for penalties. Moreover, the ALJ concludes that Employer has unreasonably failed to cooperate in the proceedings by failing to appear for hearing despite proper notice or respond to two separate Orders to Show Cause for his failure to appear. Based upon the evidence presented, the ALJ concludes that Employer has consciously decided to ignore the claim in hopes that Claimant will tire of the matter and cease all efforts to recover under the claim. Accordingly, the ALJ finds and concludes that Employer's actions in failing to follow the May 12, 2020 order of ALJ Spencer are objectively unreasonable.

ORDER

It is therefore ordered that:

1. Employer shall pay to Claimant a penalty in the amount of fifty ($50.00) dollars per day beginning June 2, 2020 and continuing through the date of this order, October 3, 2022, for a total of 853 days for $42,650.00 in penalties. The assessment of penalties shall continue beyond October 3, 2022 at the same rate until such time that the temporary total disability and interest payment ordered May 12, 2020 by ALJ Spencer is paid.

2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

3. All issues not decided herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 3, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-183-987-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable accidental injury or occupational disease.

II. If compensable, whether Claimant proved by a preponderance of the evidence that the medical treatment he received was reasonable, necessary, and related to his to his work injury and whether he is entitled to a general award of medical benefits.

III. If compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits.

PRELIMINARY ISSUES - STIPULATIONS

- The parties stipulated that they are reserving a determination of the Claimant's average weekly wage. If the case is found compensable the parties agreed to confer on the time period for temporary partial disability or temporary total disability benefits.
- Though penalties were initially endorsed on Claimant's January 5, 2022, Application for Hearing, Claimant asserted at hearing that penalties were no longer being sought.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 59-year-old Package Driver for [Employer] in Boulder, Colorado. *RHE A.* [EMPLOYER] employed Claimant since January 19, 2015. *Id.*
2. On a typical workday, Claimant would arrive at the Boulder [Employer] center about 8:30 in the morning. Upon his arrival, his truck would be pre-loaded with packages that have to be delivered that day. Claimant works as a "swing" driver, meaning he is assigned different routes by [Employer], but works full-time. Claimant's truck on average would have 250-300, but sometimes up to 700, packages at the start of his shift. Claimant would spend the first part of his day quickly re-organizing the packages in the truck to conform to his delivery route. Because of the number of packages that have to be delivered, [Employer] puts a lot of pressure on drivers to get their routes done quickly, but 9 to 10-hour days were not uncommon. Claimant delivered packages that weighed up to 150 pounds maximum and that 70-to-100-pound packages of various shapes were not uncommon. Packages were packed all the way to the back of the truck which was 700 to 1,000 square feet in size. *Hrg.Tr*. 19:22 to 21:7, 22:15 to 23:11, and 23:16 to 24:1.

3. During the years that Claimant worked for Employer he had experienced pain when moving boxes, but he would ordinarily continue working and usually the problem subsided. *Hrg.Tr*. 24:2-14.

4. Claimant testified that he felt a left wrist twinge while working that he felt worsened rather than improved, and that his best estimate of the date this occurred was July 29, 2021 – because it took the wrist pain awhile to worsen to the point that he reported it to his supervisor and obtained treatment. *Hrg.Tr*. 14:17 to 25:4, 27:5-8, and 29:9-16.

5. Claimant reported a left wrist injury on September 15, 2021. He stated that the left wrist "just started hurting." *RHE A; Tr. 41:22-25.*

6. The First Report of Injury was completed by Employer and lists September 16, 2021, which is the first date Claimant received medical treatment, as the date of first reporting. *CHE 3*.

7. Claimant at first did not provide a specific mechanism of injury, date, or time as to the occurrence of the condition.

8. On September 16, 2021, Claimant sought treatment at Concentra Medical. *RHE I.* He reported to PA Devon Jacobs that he was uncertain as to the cause of his left wrist pain and offered no specific mechanism of injury. Claimant merely felt the condition may have been related to job duties. *Id.* Claimant denied any specific injury, fall, or trauma and described the gradual onset of aching discomfort. *Id.* There was no mention of him feeling a twinge in his wrist while working and then it not getting better. Following a physical exam, an x-ray of the left wrist was performed and was negative for fracture or acute findings. *Id.* Claimant was diagnosed with osteoarthritis of the left wrist and work-related causality was not established by the Concentra provider. Thus, Claimant was referred to his PCP or an orthopedist under his private insurance for further evaluation and treatment. *Id.*

9. Later that same day, on September 16, 2021, Claimant was seen by Kathleen Jegapragasan, M.D. at Boulder Centre for Orthopedics. Dr. Jegapragasan reviewed the X-rays and did a physical examination which revealed that Claimant likely had a TFCC (triangular fibrocartilage complex) tear. Dr. Jegapragasan informed Claimant he should be restricted from work and ordered an MRI to confirm the diagnosis. *CHE 5*, p. 18**.**

10. On September 29, 2021, Dr. Jegapragasan reviewed the MRI of the left wrist, identifying a "complex TFCC tear, with some foveal detachment and severe ECU (extensor carpi ulnaris) tendonitis." Dr. Jegapragasan prescribed injections and bracing for the TFCC and ECU. *CHE 5*, p. 23.

11. Respondents filed a Notice of Contest on October 7, 2021, asserting that the illness was not work-related based on the ATP findings. *RHE B.*

12. Upon being referred to an orthopedist under his private insurance for further evaluation, Claimant received ongoing treatment through April 2022 at Boulder Centre for Orthopedics. *RHE F; RHE H.* Though various treatments were discussed to address Claimant's TFCC tear to the left wrist (including physical therapy, injections, and surgery), at no point during Claimant's treatment at Boulder Centre for Orthopedics was the injury determined to be work-related. *Id.* Nor do the medical

records indicate that Claimant was ever referred back to an ATP at Concentra to pursue treatment through workers compensation. *Id.*

13. On January 4, 2022, Claimant underwent a TFCC repair and debridement by Dr. Daniel Master at Boulder Surgery Center to address the following diagnoses: (1) left wrist triangular fibrocartilage complex tear; (2) left wrist ulnar impaction syndrome; and (3) left wrist extensor carpi ulnaris tearing. *RHE K.*

14. Claimant filed an Application for Hearing on January 5, 2022, endorsing the following issues: compensability; medical benefits, authorized provider; reasonably necessary; average weekly wage; temporary total benefits; and penalties. *RHE C.* Respondents filed their Response to the same on February 4, 2022. *RHE D.*

15. Respondents arranged for Claimant to undergo an independent medical examination (IME) with L. Barton Goldman, M.D. A prehearing was held to limit the scope of Dr. Goldman's Questionnaire, which was requested to be completed by Claimant before the IME. It was Claimant's position that he did not have to complete the entire Questionnaire. Pursuant to the prehearing order that was issued, Claimant was not required to complete the entire questionnaire. The prehearing ALJ determined that Claimant did not have to answer a number of questions, including providing information about his prior hospitalizations, accidents, and injuries. He was also not required to provide information about his hobbies and recreational activities. But the prehearing order indicated that Dr. Goldman could still inquire about the information Claimant did not answer on the Questionnaire if he felt it was relevant or pertinent to his evaluation. *RHE E* pp. 13, 36, 37.

16. Following the prehearing conference on Claimant's motion to limit the scope of information for the IME, Claimant attended the IME with Dr. Goldman on July 8, 2022, and July 11, 2022. *RHE E.* On interview with Dr. Goldman, Claimant reconfirmed that he did not recall a specific injury or incident with respect to the gradual onset of wrist pain. But he did state that he felt a twinge while repositioning a box. *Id.*

17. Dr. Goldman did ask Claimant to provide certain information he left off the Questionnaire, such as hobbies and recreational activities, but Claimant declined. *Hrg*. *Tr*, p. 100.

18. Dr. Goldman persuasively testified consistent with his comprehensive report. In his IME report, Dr. Goldman concluded that symptoms for a TFCC tear should mainly be on the ulnar side of the wrist, which did appear to be the case with Claimant. *RHE E.* He concluded that the diagnosis had been accurately assessed but the causation was not work-related. *Id.* Claimant described variable and multi planar activities related to his work responsibilities that did not rely specifically on repetitive unilateral left ulnar wrist supination nor prolonged wrist extension with repetitive supination of the forearm or elbow extension. *Id.* Thus, Dr. Goldman concluded that Claimant's subjective history did not provide sufficient medical evidence that would support an occupational illness causation determination for his left wrist symptoms and diagnosis consistent the evidence-based medicine analysis. *Id.*

19. Dr. Goldman also relied on the Medical Treatment Guidelines during his assessment of Claimant's injury. *RHE E.* He referred to page 12 of Rule 17, Exhibit 5, Cumulative

Trauma medical treatment guidelines. *Id.* He noted that a TFCC tear symptoms should mainly be on the ulnar side of the wrist with tenderness over the TFCC complex, localized pain, clicking findings, and abnormal motion with one of the following movements: (1) forced supination and pronation with axial pressure on an ulnar deviated wrist; (2) the patient pushing up from a seated position using the hand; and/or (3) ballottement of the distal ulna with the wrist supinated causes of normal motion as compared to the asymptomatic side. *Id.*

20. Regarding his causality analysis, Dr. Goldman considered that Claimant described "variable and multi planar activities that do not rely specifically on repetitive unilateral left ulnar wrist supination and extension nor prolonged wrist extension with repetitive supination of the forearm or elbow extension." *RHE E.* Further, Claimant did not consistently describe a discrete wrist hyperextension trauma, and his history noted more symptoms with flexion as compared to extension. *Id.*[1]

21. Instead, Dr. Goldman provided that for the type of repetitive injury asserted, "you're generally talking about repetitive motion on a frequent basis within, in this case . . . certain plains of motion for four to six hours." *Tr. 66:14-18.* He elaborated that "I see it more with . . . factory works, people who are doing fine work on production lines where they can't move around very much. It's the same thing over and over and over and over again." *Id. 66:21-25.* In contrast, Dr. Goldman testified that "[Claimant] also has a job where he can use his hands in all kinds of different ways." *Tr. 67:9-12.*

22. Again, when asked about activities outside of work during the IME with Dr. Goldman, Claimant declined to answer whether he participated in any strength training of recreational activities that would repetitively use his upper extremities in a more restricted fashion than the essential duties of his work. *RHE E, p. 23.* Claimant also refused to share the specific avocational or recreational activities he was either currently participating in or would like to resume. *Id.*

23. Considering Rule 17, Exhibit 5 of the Medical Treatment Guidelines, the objective medical diagnoses, and Claimant's subjective account of his pain symptoms, Dr. Goldman concluded in his IME report that it was not more likely than not that his essential duties at [Employer] were the causative reason for the development of his left wrist pain and subsequent treatment. In other words, he found Claimant's work activities did not cause Claimant's left wrist condition and need for medical treatment. *RHE E.*

24. While Dr. Goldman did state at the beginning of his testimony that he thinks Claimant's condition and need for medical treatment is based on an aggravation of a preexisting condition, he clarified his testimony by stating that it is his opinion that the aggravation was not caused by Claimant's work activities. It was his opinion that Claimant's work activities did not contribute at all to Claimant's need for medical treatment. *Hr'*g *Tr*., p. 62, 88, 89. Thus, Dr. Goldman also analyzed this case as an aggravation or exacerbation of a preexisting condition due to Claimant's slightly longer ulnar styloid.

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[1] Although Claimant did not describe a discrete wrist hyperextension occurring at work with Dr. Goldman, the medical records establish that Claimant attempted to climb over a fence and ultimately fell onto his left outstretched hand, an apparent hyperextension, in July 2019. *RHE F,* p. 43.

Hr'g Tr., p 64. In doing so, Dr. Goldman made an individualized causation assessment based on the Claimant's preexisting condition and his conditions of employment.

25. The ALJ finds Dr. Goldman's ultimate conclusion, that Claimant's work activities did not cause or aggravate Claimant's condition, or contribute to his pain and need for medical treatment, to be credible and persuasive for several reasons. First, he interviewed Claimant to determine his job duties. Second, he has experience evaluating delivery drivers for various medical conditions. Third, he has experience evaluating and treating Claimant's condition(s). Fourth, his use of the Medical Treatment Guidelines to assist in his causation assessment. Fifth, he teaches the Accreditation class for physicians, which includes teaching Rule 17, i.e., the Medical Treatment Guidelines. See *RHE E*; *Hrg, Tr*., p. 69. Sixth, he took into consideration Claimant's predisposition to this type of condition based on Claimant's slightly longer ulnar styloid. Seventh, he used all of the information he gathered, combined with his experience and expertise, to make his causation determination.

26. On June 29, 2022, Dr. Gary Zuehlsdorff was retained by Claimant to conduct an IME. Claimant, however, canceled the day before the evaluation. As a result, Dr. Zuehlsdorff was instructed to just issue an opinion based on the records supplied to him. *CHE 1*. p. 2.

27. Dr. Zuehlsdorff determined that "the patient's current clinical situation is positive work causal." *CHE 1*, p. 5. Dr. Zuehlsdorff pointed out that Claimant had "a preexisting abnormality of an excessively long ulnar styloid" – which was shortened by Dr. Master in the January 4, 2022, surgery. Dr. Zuehlsdorff stated:

> [W]hile the patient's preexisting ulnar positive variance syndrome, due to an excessively long ulnar styloid, was obviously preexisting and nonwork causal, it was only due to the application of years of multiple repetitive forces at the wrist and elbow, and thus an ulnar impaction syndrome that required surgical intervention. In other words, but for the application of the repetitive high physical forces in his job, as a [EMPLOYER] driver, with repetitively lifting, pushing, pulling, and carrying multiple boxes on a daily basis, the patient would not have progressed to a clinically positive subjective ulnar impaction syndrome. I would thus hold strongly that this case is 100% work causal." *RHE 1***,** p. 5.

28. Dr. Zuehlsdorff noted that Mr. Jacobs, the PA Claimant saw one time at Concentra, failed to appreciate the "obvious repetitive nature of his job, which is recognized as a form of cumulative trauma and is recognized in the work comp community as a viable work contributing factor." *Exhibit 1*, p. 6.

29. Dr. Zuehlsdorff also pointed out that with Claimant's excessively long ulna, "in certain positions you can cause compression of the TFCC between the ulnar styloid and the triquetrum, one of the carpal bones . . . due to (1) repetitive flexion and ulnar deviation when the forearm is pronated with the elbow flexed to 90 degrees and (2) supination/extension/ulnar deviation of the wrist on a repetitive basis." *Exhibit 1*, p. 5.

30. Dr. Zeuhlsdorff's report and analysis, however, is not as persuasive, credible, and comprehensive when compared to Dr. Goldman's report and hearing testimony. For example, Dr. Zuehlsdorff did not interview Claimant and obtain a detailed history – including any prior injuries or accidents. He was also unable to interview Claimant and obtain information about recreational activities or hobbies that might be the cause of Claimant's condition. Moreover, since Claimant failed to attend the IME, Dr. Zeuhlsdorff did not set up a telephone conference or virtual conference with Claimant to get pertinent information necessary to complete a comprehensive IME. *Tr. 47:16-20.* Instead, he just relied on a single interrogatory answer from Claimant and went to [EMPLOYER]' website to get a job description. At no point during the pendency of this litigation did Claimant speak with Dr. Zuehlsdorff. *Id. at 47:22-25.* Thus, his inability to get this critical information from Claimant detracts significantly from his causation analysis. In addition, the IME report written by Dr. Goldman was not provided to Dr. Zuehlsdorff at any time during the record review. *Tr. 49:6-20.* Thus, he did not get any additional historical information or analysis from Dr. Goldman's report that might have helped him perform his IME.

31. Additionally, Dr. Zuehlsdorff did not perform a causality analysis, like Dr. Goldman did, of Claimant's injury based on the Medical Treatment Guidelines. *CHE 1.*

32. In his report, Dr. Zeuhlsdorff also indicated that in formulating his opinion, he reviewed the "UpToDate medical website." There is not, however, any information about the quality of the information provided by this website or the breadth of the information. For example, is it a medical dictionary, is it a single page of basic information, does it contain articles - and if so - are the articles peer reviewed? Moreover, the phrasing of his opinion, "after reviewing UpToDate," gives the impression that his opinion is primarily based on the information contained on the website, and not his own opinion based on his own experience, knowledge, and training. While an expert is allowed to support his opinion with research, and the information obtained through such research, the credibility of that opinion is diminished when the foundation of the opinion might be based on information that could be from a source of questionable quality.

33. In addition, Claimant's actions of not attending the IME with Dr. Zeuhlsdorff and refusing to provide Dr. Goldman with details regarding his hobbies, recreational activities, and other information, detracts from Claimant's overall credibility. In essence, Claimant's refusal to attend the IME and refusal to provide Dr. Goldman such information prevented each IME physician, as well as the court, from determining whether any hobbies, recreational activities, or something else, did or did not, cause or contribute to Claimant's wrist problems and cause the need for medical treatment. In other words, Claimant refused to provide each physician with pertinent information necessary to determine whether work, or something else, caused Claimant's condition and need for medical treatment. While Claimant did admit on redirect examination that he did not engage in yoga, weightlifting, pushups, or hiking and using hiking poles, he did not indicate that he did not engage in golfing or playing tennis, which can affect the causation assessment. *See Tr.,* pp.72, 105,106*; MTG, Exhibit 5*, pp. 9, 18. Moreover, he did not provide this information when the causation assessments were being made by each physician before the hearing. As a result, Claimant providing

some of this information during the hearing does not overcome the negative credibility determination which has been found based on his failure to provide such information at the time of each IME.

34. Claimant failed to establish by a preponderance of the evidence that his left wrist symptoms represent the result of, or progression of, a condition that is related to his employment or was aggravated by his employment.

35. Claimant failed to establish by a preponderance of the evidence that he was involved in a work accident that caused an injury to his left wrist and caused the need for medical treatment or caused any disability.

36. Claimant failed to establish by a preponderance of the evidence that his left wrist condition(s) and need for medical treatment resulted directly from his employment or the conditions under which his work was performed.

37. Claimant failed to establish by a preponderance of the evidence that his left wrist condition(s) and need for medical treatment followed as a natural incident of his work activities. Therefore, Claimant failed to establish that his left wrist condition(s) can be fairly traced to the employment as a proximate cause.

38. Claimant also failed to establish by a preponderance of the evidence that his work activities aggravated an underlying preexisting condition of Claimant's left wrist and caused or accelerated his need for medical treatment or caused any disability.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See*

Bodensleck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Furthermore, proof of causation regarding a compensable injury or occupational disease is not limited to credible medical evidence, but may be established by lay testimony. *See Savio House v. Dennis*, 665 P.2d 141, 142-43 (Colo. App. 1983).

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable accidental injury or occupational disease.

a. Whether Claimant Sustained an Accidental Injury

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce the need for medical treatment or disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression

of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's left wrist pain complaints came on gradually without any specific work incident or accident causing his wrist pain, need for medical treatment, or disability. While Claimant contends that at some point, he felt a twinge in his wrist at times while at work, the ALJ has not found that contention to be credible. Therefore, the ALJ does not find that to contention to be persuasive evidence of a work accident and resulting injury. Instead, the ALJ finds and concludes that Claimant's underlying condition was painful while he was at work, but the work did not cause the pain, need for treatment, or disability. Thus, the underlying condition and need for medical treatment was not caused or aggravated by his work activities. In reaching this ultimate conclusion the ALJ has relied on Dr. Goldman's opinions as set forth in his report and testimony-which have been found to be credible and persuasive. The ALJ has also considered Claimant's credibility, based on his refusal to provide Dr. Goldman information about his recreational activities and hobbies-when asked during the IME. The ALJ has also considered Claimant's cancellation of his in-person IME with Dr. Zeuhlsdorff. This refusal to answer fully all of Dr. Goldman's questions during the IME and his failure to attend the IME with Dr. Zeuhlsdorff detracts from Claimant's credibility and his contention that his condition was caused or aggravated by his job duties. As a result, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable accidentally injury.

b. Whether Claimant Sustained an Occupational Disease

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo. App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

In this case, Claimant has asserted that he suffered either an injury or an occupational disease-which may be in the form of an aggravation of a preexisting condition. In response to this assertion, Dr. Goldman evaluated Claimant, and credibly and persuasively concluded that there was no causal connection between Claimant’s work activities and his wrist condition and the resulting need for medical treatment or disability. Thus, he concluded that there was no causal connection between Claimant’s work activities and Claimant’s need for medical treatment and no causal connection between Claimant’s work activities and any disability.

Proof of causation regarding a compensable injury or occupational disease is not limited to credible medical evidence, but may be established by lay testimony. In this case, the ALJ found the expert opinion of Dr. Goldman to be credible and highly persuasive for the reasons found above as well as the following: Dr. Goldman used the Medical Treatment Guidelines to support his conclusions about the cause of Claimant’s wrist condition and need for medical treatment. He also used Claimant’s medical history, objective diagnostic reports, description of job activities, in-person interview, and his examination to form his conclusion in this case. Plus, Rule 17, Exhibit 5 of the Medical Treatment Guidelines, sets forth risk factors to consider, including the following: (1) traumatic hyperextension, (2) wrist posture in extension and repetitive supination of the

forearm and/or elbow extension; and/or (3) for occupational illness, usually unilateral with ulnar wrist pain while supinating and extending the wrist as part of the regular work duty. Dr. Goldman elaborated at hearing that Claimant's daily work activities did not qualify as risk factors per the Medical Treatment Guidelines. Alternatively, Claimant would have to have been using his wrist in a repetitive motion four to six hours per day, similar to the work of a factory worker. However, Claimant's job allowed him to use varying movements, and required a balance between driving and carrying boxes. Dr. Goldman emphasized that Claimant instead described variable and multi planar activities that did not rely specifically on repetitive unilateral left ulnar wrist supination and extension, nor prolonged wrist extension with repetitive supination of the forearm or elbow extension. In contrast, his history noted more symptoms at the time with flexion as opposed to extension. In addition, Dr. Goldman also analyzed this case as an aggravation or exacerbation of a preexisting condition. In doing so, Dr. Goldman made an individualized causation assessment based on the Claimant's preexisting condition and his conditions of employment.

While Dr. Goldman does acknowledge that the left wrist injury/condition could be symptomatic during work (and also while performing daily activities such as lawncare or grocery shopping), he ultimately concluded that the causation of the injury, per the Medical Guidelines, is not consistent with the repetitive work required by Claimant's job.

Claimant, on the other hand, introduced Dr. Zuehlsdorff's record review report into evidence as support for his argument that an occupational illness occurred due to Claimant's role at [EMPLOYER]. However, the report by Dr. Zuehlsdorff fails to establish a causal relationship for several reasons. First, Claimant confirmed at hearing that he was never examined by Dr. Zuehlsdorff before the report was authored, nor did he ever have a conversation or any communication with Dr. Zuehlsdorff. Second, Dr. Zuehlsdorff concluded that Claimant's situation was "positive work causal", noting that causality was based on the limited information claimant provided in his interrogatory answers to Respondents and his review of the medical records. Relying on Claimant's answers to interrogatories and underlying medical records to base a causality opinion is not a replacement of the physician engaging in firsthand questioning of the Claimant regarding the mechanism of injury, history of recreational activities, or a discussion of Claimant's actual day-to-day job duties. His analysis would be similar to a Respondent-sponsored IME that bases a causality opinion primarily on a written job description, without the opportunity to be able to question the Claimant as to the actual job duties performed on a day-to-day basis which would be determinative of causality per Level II training and the Medical Treatment Guidelines. Further, as Claimant never spoke with Dr. Zuehlsdorff, no type of information was relayed to Dr. Zuehlsdorff for the completion of his report related to Claimant's activities outside of work. Finally, Dr. Goldman's comprehensive IME report was not even provided to Dr. Zuehlsdorff. While Dr. Goldman's IME report relied on the Medical Treatment Guidelines, an examination of Claimant, an interview with Claimant, and prior treatment records, Dr. Zuehlsdorff's report only relies on the information provided to him by Claimant's interrogatory answer and what is contained in the medical records provided to him.

As with the determination of Claimant's claim for benefits in the form of an accidental injury, the ALJ relies on the same credibility factors in assessing whether Claimant has an occupational disease. This includes Claimant's refusal to provide Dr. Goldman certain information as well as his refusal to attend the IME with Dr. Zuehlsdorff- both of which detract from his credibility. The ALJ finds and concludes that Claimant has not proven that his left wrist condition(s) can be fairly traced to any aspect of his employment by a preponderance of the evidence. Moreover, Claimant withheld information related to outside activities that could have shown that he had been equally, or entirely, exposed to life events causing Claimant's left wrist condition and symptoms outside of work, bolstering the argument that a finding of compensability and occupational illness is not warranted. Thus, the ALJ finds and concludes that Claimant has failed to put forth credible and persuasive evidence that demonstrates a causal connection between his employment and the injury in the form of an accident or occupational disease.

As a result, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that his work activities caused or aggravated his wrist condition(s) and proximately caused the need for Claimant's medical treatment or resulted in any disability. Thus, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury in the form of an occupational disease.

Since Claimant failed to establish that he suffered a compensable accidental injury or occupational disease, the remaining issues are moot.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's Claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2022.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the admitted average weekly wage (AWW) of $1,154.00 should be increased for purposes of permanent partial disability (PPD) benefits.

Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

FINDINGS OF FACT

1. On January 30, 2020, the claimant suffered an injury at work. The respondent has admitted liability for the claimant's work injury. At the time of her injury, the claimant worked as the Chief Deputy Clerk and was paid $28.85 per hour. During her employment with the employer, the claimant had medical insurance, dental insurance, and vision insurance.

2. After her work injury, the claimant received various pay increases before resigning from her position on August 25, 2022. Those increases are as follows:

a) On June 15, 2020, the claimant's pay was increased to $34.00 per hour.

b) On December 11, 2020, the claimant's pay was increased to $35.70 per hour.

c) On January 28, 2021, the claimant's pay was increased to $42.2692 per hour; ($7,500.13 per month).

3. In April 2022, the claimant was placed on administrative leave without pay. On May 9, 2022, the claimant received a letter regarding continuation of medical insurance coverage pursuant to COBRA. In that letter, the claimant was informed that the monthly premium to continue her health insurance coverage would be $806.10. The claimant did not pay this premium.

4. On May 20, 2022, the respondent filed a Final Admission of Liability (FAL) admitting for a permanent impairment rating of 18 percent, whole person. The average weekly wage (AWW) identified in the FAL was $1,154.00

5. On June 20, 2022, the claimant received a letter from the Social Security Administration (SSA) confirming that the amount of $170.10 would be withheld for medical insurance premiums under Medicare.

6. The claimant asserts that her AWW should be increased to $1,726.15 to reflect the various raises she received after the work injury.

7. Due to her January 30, 2020 work injury, on September 24, 2020, the claimant underwent low back surgery that included L2-L3 microdiscectomy with laminectomy.

8. As a result of the September 24, 2020 lumbar surgery, the claimant has a disfigurement on her lower back consisting of a well-healed surgical scar that runs from just below her belt-line up her spine and measures 18 cm in length. This scar is a different color than the surrounding skin.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force **at the time of the injury**. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply Section 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp., supra.*

5. A claimant's AWW must also include the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. Section 8-40-201(19)(b), C.R.S. It is not required that the employee actually purchase the insurance coverage for the AWW to be increased. *Ray v. Industrial Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005), aff'd. 145 P.3d 661 (Colo. 2006).

6. The claimant's AWW shall be increased to reflect the cost of continuation of insurance coverage. The monthly cost of insurance is $806.10. When multiplied by 12 months and then divided by 52 weeks in a year, this results in a weekly cost of $186.02. Therefore, the claimant's AWW shall be increased by $186.02 for a total AWW of $1,340.02. The ALJ recognizes that the SSA is withholding $170.10 per month for the claimant's Medicare coverage. However, the ALJ finds that the cost identified in the May 9, 2022 COBRA letter is reasonable and appropriate in determining the cost of replacement insurance coverage. Therefore, that amount is also reasonable in calculating the claimant's AWW. The ALJ declines to include the claimant's post-injury raises to her AWW.

7. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

8. As a result of her January 30, 2020 work injury and related surgery, the claimant has sustained a permanent disfigurement to areas of the body normally exposed to public view.

ORDER

It is therefore ordered:

1. For purposes of calculating PPD benefits, the claimant's AWW is increased to $1,340.02.

2. The respondent shall pay claimant $2,000.00 for her permanent disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined here are reserved for future determination.

Dated October 25, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained compensable work related injuries within the course and scope of her employment on February 17, 2022.

ONLY IF COMPENSABILITY IS PROVEN, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to authorized, reasonably and necessary medical benefits that are related to the work related injury.

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from February 17, 2022 to the present and ongoing until terminated by law.

STIPULATIONS

Claimant withdrew the issue of permanent partial disability benefits as premature. Respondents withdrew the issue of offsets.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

A. Claimant's testimony:

1. Claimant was 31 years old at the time of the hearing and had been working for Employer for over 8 years. She was in the sales office as a Sales Agent. On the day of the incident on Thursday, February 17, 2022, Claimant was working the ticket window. She saw a man that looked like he was having a seizure. She joined the security officer, who was trying to get the man to lay flat on the floor. She went to get gloves on to go see if she could help, but another individual was helping the officer. The security officer could not find a pulse. He called for an ambulance and Claimant went outside to direct the Emergency Medical Technician to the lobby where the man was on the floor.

2. When she returned, the defibrillator that was placed on the man was reading no pulse, so the paramedics began CPR. Once she had directed the EMTs she started to have a panic attack. The EMTs started CPR but they could not revive the man. She had returned to her desk by this time, and she had a full view of what was going on in the lobby from her position at the window. She contacted her supervisor and requested to leave the premises and the response was she could leave but would not be paid for hours

not worked. Claimant stayed at her position as she could not afford the loss of pay. She watched while they tried to revive the man. She testified that they had continued with CPR for about forty minutes. Then the man was pronounced dead. The body was left in the lobby, which was closed by this point in time, while the coroner arrived. She stated that the body was left in the lobby for about two hours with a sheet over him. Several hours later, at approximately 1:30 p.m., her supervisor advised that she could go home if she felt the need to and would, after all, get paid for the rest of the day.

3. Claimant contacted the employee assistance program (EAP) requesting counselling. She was feeling very upset by what she had seen. She was able to reach them on that Thursday and was able to get counselling through the hotline by phone. They provided her with a list of therapists, and none she contacted were available to see her for several weeks. She also contacted her primary care provider (PCP) to get an appointment.

4. Claimant testified she had been diagnosed with anxiety prior to the February 17, 2022 work incident. Claimant stated that she had personal health conditions that were not work-related. She worried about these conditions. She further testified she was anxious about her medical conditions and had been diagnosed with insomnia. However, she denied having been diagnosed with depression or posttraumatic stress disorder (PTSD) before the incident.

B. Post-incident medical records:

5. On February 19, 2022 Claimant was attended by M. Shannon Arnsberger, D.O., her family medicine physician (PCP). Dr. Arnsberger noted that Claimant was diagnosed with post-traumatic stress disorder, for which she was prescribed medication, anxiety and acute reaction to situational stress. Dr. Arnsberger documented that Claimant required intensive therapy and she did not know how to obtain help from EAP since she could not get an in-person appointment. Dr. Arnsberger stated that she needed assistance through “WorkComp” to get therapy moving forward quickly. Claimant had reached out to a Kaiser therapist who talked to her by phone on Friday and was advised that she could follow up the following week by phone. Dr. Arnsberger took Claimant off work at that time, until she could get therapy.

6. Dr. Arnsberger took a history from Claimant that she had witnessed a death at work. Claimant initially saw the deceased having a seizure in the lobby where she worked. She watched security try to assist the person, including CPR being attempted and watched for approximately two hours until the individual was pronounced dead. She watched the lobby with the dead individual until the coroner came to take the body. Claimant requested leave from her boss but was told she wouldn’t get paid if she left early. A few hours later, her boss advised her she could leave if she felt the need. Dr. Arnsberger documented that Claimant was able to get phone counselling from EAP on the Thursday due to feeling very upset. Dr. Arnsberger documented that she had preexisting depression, anxiety and PTSD and was taking medications. Dr. Arnsberger noted that Claimant was crying through most of the visit. Dr. Arnsberger made a referral for a Psychologist through Clinical, Health and Forensic Psychology. The first available

visit set was for March 3, 2022. Patient tentatively scheduled for video visit with Dr. Moe on Friday at 8 am.

7. Dr. Arnsberger took Claimant off of work beginning February 19, 2022 and stated that maximum medical improvement (MMI) was unknown. She specifically noted that the objective findings were consistent with the history and work related mechanism of illness.

C. Reports of the incident:

8. On February 22, 2022 a Workers' Compensation Claim Intake Form was completed by Employer's investigating Adjuster, stating Claimant had worked for Employer since November 18, 2013. The investigator's description of the injury was that Claimant was working the window (ticket window). She looked out the window as she heard commotion and saw a man having a seizure. She observed the security officer (TSO) helping the man and laying him on the floor. Claimant went to get gloves on to see if she could help. The TSO could not find a pulse. Claimant went outside to show EMTs and the fire department (FD) personnel where the man was and started to have a panic attack. The EMT started CPR but they could not revive the man. Claimant advised her supervisor and took a break, getting some tea, trying to calm down. They noted that Claimant's window was closed and that Employer subsequently closed the lobby until the coroner was done. Eventually Claimant's supervisor told Claimant she could go home and would get paid. The report noted that Claimant first talked to EAP and to an online therapist, as well as her own therapist. On February 19, 2022 she went to her PCP and was referred to a specialist. The report noted Claimant was taking medications, and was having problems answering the Investigating Adjuster's questions, so they waived completing a questionnaire. The adjuster noted that she advised Claimant that this kind of claim would not be covered by workers' compensation as there would have needed to be an act of violence that caused a death that she had witnessed and Claimant did not report any acts of violence. Adjuster also advised Claimant that they would not be paying Claimant for her lost time from work.

9. The intake form included attached dispatch notes that stated as follows:

Dispatch Notes
CALL TYPE: MEDICAL
55/M 2/17/2022 9:38:39 AM
Currently seizing 2/17/2022 9:38:48 AM
Located inside west door 2/17/2022 9:39:01 AM
Requesting EMS 2/17/2022 9:39:21 AM
EMS responding 2/17/2022 9:39:46 AM
BTC 01 -3285 2/17/2022 9:39:57 AM
B1- requesting emergent response 2/17/2022 9:41:59 AM
Unconscious/Breathing 2/17/2022 9:42:09 AM
B1- has grabbed the AED 2/17/2022 9:43:22 AM
B1- has moved the party to the floor 2/17/2022 9:43:34 AM
updating EMS 2/17/2022 9:43:49 AM
B1- party has minimal breathing 2/17/2022 9:44:31 AM
Fire os 2/17/2022 9:45:02 AM
FD on scene 2/17/2022 9:45:04 AM
CPR in progress by FD 2/17/2022 9:45:22 AM

EMS on scene 2/17/2022 9:48:42 AM
CPR is still in progress 2/17/2022 10:02:23 AM
C4 via CCTV 2/17/2022 10:04:12 AM
PD on scene 2/17/2022 10:08:27 AM
PD requesting video, gave them VI phone number 2/17/2022 10:12:23 AM
CPR stopped 2/17/2022 10:13:34 AM
Party sits down on bench @ 930:45 2/17/2022 10:15:39 AM
FD and EMS are no longer OS 2/17/2022 10:21:11 AM
PD still OS waiting for coroner 2/17/2022 10:21:21 AM
Boulder Lobby shut down per Pd 2/17/2022 10:21:54 AM
BD notified 2/17/2022 10:25:30 AM
PIO notified 2/17/2022 10:33:07 AM
C4 via CCTV 2/17/2022 10:34:38 AM
name is [Deceased] 12-3-1973 2/17/2022 10:48:37 AM
BPD case number 2/17/2022 10:48:56 AM
22- 1535 2/17/2022 10:49:14 AM
SMS and Email sent 2/17/2022 10:57:45 AM
C4 via CCTV 2/17/2022 11:17:22 AM
Coroner is OS 2/17/2022 11:20:34 AM
C4 via CCTV 2/17/2022 11:42:01 AM
Corner is gone with body at 1135 hrs 2/17/2022 11:49:46 AM
Lobby shut down yet until cleaning crew cleans up. 2/17/2022 11:50:28 AM

10. The Narrative report of the investigator was consistent with the timeline issued by the dispatch notes and stated as follows:

> On Thursday, February 17, 2022, at approximately 0938 hours I, Officer [for Employer] along with Field Training Corporal [Redacted], responded to the Boulder Station located at [Redacted address] in the City of Boulder and County of Boulder for a report of a medical incident.
>
> Prior to arrival, Transit Police Communications two (TPC2) advised a male was in the lobby currently seizing. TPC2 noted Transit Security Officer (TSO)[1] [Redacted name] requested Emergency Medical service (EMS) and retrieved the Automated External Defibrillator (AED) for the male. [TSO] advised TPC2 the party had minimal breathing and EMS was on scene. TPC2 stated the responding fire department started CPR at 0945 hours and ended at 1013 hours. TPC2 stated the Boulder County Coroner was contacted for the incident. Upon arrival, I contacted Boulder Police Officer Morris (Badge #:1774) who stated Boulder fire department and American medical rescue were the responding medical services. Officer Morris explained Dr. Lund from Boulder Community Hospital was the Doctor that pronounced the male, [deceased], deceased at 1011 hours on 02/17/2022. Officer Morris stated the Boulder Police Department's case number is 22-1535 relating to this incident. A short time later, a Boulder Police department detective, Sarah Cantu (Badge #:5485) arrived on scene and took photographs of the scene. I also took photographs of the scene which will be uploaded to the case.
> I contacted [TSO] and asked if he would fill out a written statement to which he agreed. {TSO} stated he noticed [Deceased] at 0933 hours seated at the circular bench near the west side of the station. [TSO] explained he noticed [Deceased] was talking out loud to no one. At 0935 hours [TSO] asked [Deceased] to wear a mask to which [Deceased] stated he had a mask and would put it on. [TSO] then asked [Deceased] where he was headed. [Deceased] replied he had just got off a bus. [TSO] mentioned [Deceased] stated he was going to Pearl St.

[1] This ALJ infers that TSO from the Investigator's report and B1 from dispatch are one and the same person.

> {TSO] stated he returned to his desk for about 1-2 minutes after speaking with [Deceased], when he heard a female getting loud from the restroom area. [TSO] stated he went into the hallway to address the female in the bathroom area. After addressing the female, {TSO] noticed [Deceased] leaning to his right side and shaking as if he was having a seizure.
>
> [TSO] noted that [Deceased] had a blank stare on his face, and [TSO] was not able to get a strong pulse from multiple locations. At this point [TSO] observed [Deceased]'s breathing had slowed down, and he began to gasp. A patron in the lobby, later identified as Rey Alcala (unknown date of birth), offered to help. [TSO] stated Alcala helped place [Deceased] on his side. [TSO] stated he heard gurgling coming from [Deceased]. [TSO] explained him and Alcala put [Deceased] on the ground next to the bench. [TSO] noticed [Deceased] seemed to not be breathing and went to his desk to grab the AED.[2] [TSO] applied the AED and the device stated, "no shock was advised". Shortly after, [TSO] noticed Boulder Fire had arrived on scene, they began to preform CPR, and took control of the scene. See [TSO]'s written statement, which will be attached to the original case, for further.
>
> Boulder County Coroner Andrew Melvin arrived on scene at 1120 hours and took over the investigation. The Boulder County Coroner, Melvin, stated the initial investigation looks like a natural death and they would eventually take custody of the body. The investigation will be referred to [Employer] video investigations for further review.
>
> No further information at this date and time in reference to this incident.[3]

There was also a video timeline which was consistent with the investigator's report and the dispatch report above.

11. On March 7, 2022 Respondents filed a Notice of Contest stating that the claimed injury or illness was not work related.

D. Robert Kleinman, M.D.

12. On June 17, 2022 Dr. Robert Kleinman, a psychiatrist, evaluated Claimant at Respondent's request. He examined Claimant on June 15, 2022. The history taken by Dr. Kleinman was consistent with Claimant's testimony and the investigator's report. Claimant reported that she saw from her desk a man having a seizure. She put on gloves and went to the lobby to help the TSO, but when she got there, another man was helping. She watched the man have the seizure and then go limp. The TSO went to get the defibrillator. Claimant went to direct the paramedics to the man that had had the seizure. She noted that the defibrillator showed the man no longer had a pulse. She watched the paramedics try to resuscitate the man without result. Claimant asked her supervisor to allow her to go home as she felt traumatized by the incident. She was advised that she could go home but would not be paid. Claimant remained at work, since she could not afford to lose her pay. She was at her desk during the time the dead man laid on the ground. The investigator questioned her about what happened. They eventually closed the lobby and her supervisor allowed Claimant to go home with pay. Dr. Kleinman noted that Claimant contacted her therapist at Kaiser, who advised Claimant to get help from her employer. Claimant followed up with Employer, who completed some workers'

[2] Automated external defibrillator.
[3] Names redacted from the report and replaced with other identifiers.

compensation paperwork and, within a couple of days went to the WC doctor, who advised she had a lot of trauma and prescribed Ativan every eight hours. However, the adjuster told Claimant her claim was denied because she did not witness an act of violence. Dr. Kleinman noted that Claimant had not been back to work because of her emotional status.

13. Claimant explained to Dr. Kleinman that she had increased anxiety, depression and symptoms of traumatic stress, because she has her own medical conditions, and a defibrillator was used on her before. She had anxiety that she works behind a glass window and no one would see her if she had an episode. She dwelled on what happened to the man, thinking this could also happen to her. She had symptoms of anxiety, including racing heart, and feeling shaky. The anxiety attack gave her tingling, increased heart rate, sweating, feeling like she was having a heart attack. She also had depression, thinking she is worthless and useless, feeling exhausted, tired and her sleep patterns had varied. She also noted posttraumatic stress disorder, with distressing images of what happened in the lobby, with her mind racing, all of which are triggered by her own health problems. She struggled as she did not wish to be alone but could not tolerate being around people and she also was avoiding going back to the scene of the death.

14. Dr. Kleinman noted Claimant had a psychiatric medical history that dates back to when she was thirteen years old and currently continued seeing a therapist at Kaiser once a month at Kaiser Permanente. She was attending mental health appointments with Ms. Forest, went to an anxiety group for four (4) weeks in February and March 2022 and taking medications including Hydroxyzine, Ativan and a medication she could not recall. Claimant had open heart surgery in 2013 but subsequently had to undergo bypass surgery. She was in a medically induced coma, which is when she first started with anxiety. Following the birth of her child in 2015, Claimant had an embolic stroke, which caused some residual trauma. In 2018 she had a hysterectomy, and subsequent sepsis complications. In January 2022 her cardiologist advised her she required a defibrillator implant.

15. Dr. Kleinman noted that claimant continued to feel anxious, was not tolerant of being outside her home, and continued to feel exhausted. She felt she had no energy and her stepdaughter and her husband have had to help with her chores. Before this incident, Claimant was working forty hours a day for the past 9 years, took care of her children, completed her chores, and only missed work due to medical problems. Claimant reported that she had never missed work due to psychological problems.

16. Claimant was tearful throughout most of the interview with Dr. Kleinman. She was actively crying when discussing the incident. She was anxious and had anxiety attacks. Dr. Kleinman stated that Claimant had symptoms consistent with Posttraumatic Stress Disorder including intrusive memories, avoidance of triggers, negative alteration in cognition and increased arousal.

17. Dr. Kleinman reviewed the available medical records, which will be addressed below. He noted a history of depression and anxiety as well as multiple other medical problems as stated above, in addition to Marfan's disease. He opined that Claimant has had traumatic experiences in the past sufficient to cause Posttraumatic

Stress Disorder. Those include childhood abuse and more significantly medical crises with near death medical emergencies. With that, prior to and at the time of the date of injury, she was significantly stressed by concerns about her own chronic medical conditions. In addition, at about that time, her father had medical problems, as well. Despite that, she had been working full time for RTD and reported that she did not miss work for mental health problems. After the incident of February 17, 2022 Claimant reported symptoms that Dr. Arnsberger considered to be Posttraumatic Stress Disorder caused by the incident. Dr. Kleinman opined that it would have been more accurate to say that the incident triggered Claimant's anxiety about her own health, near death experiences, and fears of dying while at work, which included symptoms of PTSD. Nevertheless, witnessing a nonviolent death of a stranger, from a distance, would not typically be a sufficiently traumatic event to cause PTSD, though witnessing a death is one of the criteria listed in the DSM. But, taking into account the entire picture, considering Claimant as a whole, it was sufficient to trigger and exacerbate Claimant's anxiety about her own health and that she could have died already, and could die at work. Dr. Kleinman opined that Claimant's diagnosis were generalized anxiety disorder, persistent depressive disorder, posttraumatic stress disorder, psychological factors affecting a medical condition. He particularly noted that this event was traumatic to Claimant because of her personal medical history that included heart disease, heart surgery, stroke, and recent recommendation of a defibrillator implant. Medical records from Kaiser confirmed that Claimant's physical health stressors come first and are the major contributing factor to her depression and anxiety. Claimant's unique ongoing medical stressors and the several medical traumas that she has experienced predisposed her to anxiety and posttraumatic stress disorder (PTSD) symptoms after witnessing a death. Dr. Kleinman opined that another employee under the same circumstances would not have had the same response.

18. Dr. Kleinman testified at hearing that part of his Level II Accreditation training by the Division included determining causation as to whether a Claimant met the criteria for a compensable injury for a mental health condition. Dr. Kleinman addressed causation and opined, [Claimant] "does not meet the criteria for a compensable injury." Dr. Kleinman testified consistently with his IME report and his conclusions in which Claimant does not meet the criteria to have sustained a work injury on February 17, 2022 as her preexisting health conditions are the root of her ongoing mental health problems.

E. Medical Records prior to the incident:

19. While the Kaiser medical records are hard to read as they are not organized in a sequential manner and are riddled with abbreviations, for which this ALJ has had to extrapolate the meaning from the totality of record, they showed that Claimant had a significant prior history of psychological problems. For example, on visit date of January 22, 2016 there was a notation that Claimant had major depressive disorder (MDD)—recurrent episode, with a notation from PA Kristen Walden dated October 24, 2011, one from Felicia Gutierrez dated April 2, 2018 and another by Dr. Danette Silaban dated February 26, 2019. Then, on the same visit date of January 22, 2016, there was a diagnosis of major depressive episode—single episode, with a notation by Nicole Awuah on May 21, 2012 and one from Dr. James Walle on February 16, 2022. It looks like

Claimant was referred to a Licensed Clinical Social Worker for treatment of depression and prescribed bupropion (Wellbutrin), an antidepressant used for MDD.

20. The diagnosis of MDD continued on the January 28, 2016 visit date. On visit date of July 8, 2016 there was a mention that Mirtazapine, also an antidepressant, was being discontinued. Dr. Avi Kurtz recommended that Claimant try Remeron, another antidepressant to treat both the depression and problems sleeping. The diagnosis of MDD continued on December 8, 2017. On December 15, 2017 Claimant was seen due to depression (MDD-recurrent-moderate), anxiety and insomnia, which Claimant reported was worse over the last three months, and was again referred for counselling. At that time Dr. Silaban recommended an SSRI[4] medication. Also on this date Claimant was diagnosed with a generalized anxiety disorder (GAD). This also showed a notation by Dr. Daniel Smith dated February 11, 2021 and an overview addendum by Dr. Walle on February 16, 2022. This was followed by the following notations:

> Recently following with Psychiatry
> Complicated by panic attacks
> Was connected with therapists - poor rapport with 1st, 2nd left Kaiser, 3rd “changed departments”
> Rare Ativan p.r.n. use
> November 2021 starting p.r.n. Atarax for mild symptoms of anxiety, as needed - in February 2022 reports that had not been taken
> Patient with concern in the past that Zoloft 25 mg cause her to "hate her children”

21. On March 20, 2018 Claimant was referred by Mary Steele, PA to start chronic medication to treat her depressive symptoms. The clinical pharmacy specialist noted Claimant was prescribed Sertraline,[5] despite Dr. Silaban noting at that time that the MDD was in partial remission. However, it is clear to this ALJ that some of the notes are copied from one visit to the next as they had an identical wording and format.

22. On February 26, 2019, Claimant was diagnosed with Major Depressive Disorder, recurrent episode in partial remission.

23. Claimant reported on August 12, 2019 she had depression and anxiety. She was diagnosed with Depression—unspecified (chronic). Dr. Thomas Tsai noted that they had spent 20 minutes discussing her anger/depression/anxiety regarding her situation. This included near-death experiences with procedures. Claimant was referred to mental health.

24. On March 9, 2020, Dr. Danette Silaban evaluated Claimant. She diagnosed Claimant with insomnia and generalized anxiety disorder. She noted the anxiety disorder was uncontrolled. Claimant had tried medications in the past, which were not tolerated. She discussed alternatives. Claimant declined. Claimant was prescribed Trazadone for the insomnia.[6] Dr. Walle noted that Claimant had been non-compliant with her medication regime as she was taking medications intermittently.

25. On November 16, 2020 Claimant requested a letter from her cardiologist, Dr. Tsai because there were employees that were positive for COVID-19 and Claimant

[4] Selective serotonin reuptake inhibitors, a widely used antidepressants.
[5] Sertraline is a medication commonly used to treat MDD as well as anxiety and panic attacks.
[6] The notation found on December 15, 2017, cited in paragraph 20 above, was also found on March 9, 2020.

was terrified to go to work. Dr. Tsai issued the letter excusing her. Claimant continued to have the MDD and GAD diagnosis.

26. Dr. Tsai spoke with Claimant on January 5, 2021. She reported she had been having a lot of anxiety and panic attacks. It was noted the panic attacks were typical for her. She was meeting with a new behavioral health therapist.

27. Claimant reported on January 12, 2021, her anxiety was getting worse. She was “done trying to talk to the doctor.” Medications scared her and gave her more anxiety. She was worried about side effects. Claimant called and spoke to Andrea Machacek, RN who let her know Dr. Tsai had signed a letter to return Claimant to work. Claimant advised her that she really didn’t want to go back to work. She was continuing to have dyspnea and attributed it to Colorado altitude. She was tearful and said she was a "wreck." She stated that she could not function due to her anxiety, and trouble sleeping. Her father had CABG[7] and that added to her anxiety. She asked if Dr. Tsai would help her to get on disability due to her cardiac history and ongoing symptoms.

28. On February 11, 2021, Claimant was diagnosed with Generalized Anxiety Disorder complicated by panic attacks and rarely treated with Ativan.

29. Claimant reported on June 9, 2021 she had anxiety on a daily basis. She started Zoloft, but this made her hate her children, so she stopped. Dr. Walle noted that medications were subtherapeutic due to Claimant’s intermittent use. She had 10 pills of Ativan from her psychiatrist that she had not used. Dr. Walle recommended follow-up with psychiatrist however could trial SNRI in the future or Atarax

30. On July 16, 2021 Claimant followed up with Dr. Laura Caragol who documented that claimant was inconsistent with taking her heart medications, including the warfarin and antibiotics. Claimant talked to her counselor and was diagnosed with PTSD. Claimant reported that she didn’t have energy to do everything she needed to do, work 8 hours a day, then getting home so exhausted that didn't want to play with her 2 kids and felt guilty about this, stating it was not fair to her children. She worked in the sales department; and said it was not a stressful job.

31. On September 10, 2021 Dr Elisa Zaragoza Macias followed up with Claimant regarding the importance of taking her medications. They discussed change in medications she could take once per day at night. Dr. Zaragoza Macias noted Claimant continued with depression, anxiety and posttraumatic stress disorder and should follow up with the mental health clinic. Claimant reported that she felt fatigued, tired, breathless with even minimal activity, and that it was hard to take care of her 5 year old child as she continued to feel depressed, anxious and had PTSD as well as pain all over her joints.

32. On November 15, 2021, Claimant was prescribed Atarax for mild symptoms of anxiety as needed up to twice daily (changed from Ativan due to addictive nature). Her providers included a long list of diagnosis, for which they were providing, or attempting to provide, care, including but not limited to attention deficit disorder without hyperactivity, mitral valve disorder and mitro valve prolapse, Marfans Syndrome, dilatated aortic arch, idiopathic scoliosis, migraines, underweight, history of tobacco use, major depressive disorder, thoracic aortic aneurysm, cardiomyopathy, history of aortic valve replacement,

[7] Coronary artery bypass graft (CABG).

history of CABG, left facial weakness due to late effect of stroke, alteration of sensation due to stroke, mixed hyperlipidemia, long term anticoagulant therapy, history of DVT, adult obstructive sleep apnea, vitamin D deficiency, bacterial endocarditis, history of sepsis, tachycardia, diarrhea, gastroesophageal reflux disease, generalized anxiety, panic disorder, insomnia, posttraumatic stress disorder, urticarial and non-compliance with medication regime.

33. On January 17, 2022, Claimant reported having insomnia. This was due to multiple life stressors. She was requesting an appointment with Dr. Walle and he prescribed two weeks of doxepin for the insomnia.

34. The day prior to the work incident, on February 16, 2022, Claimant reported daily anxiety with many life stressors including pills. She reported thinking about her pills frequently. Her provider recommended a trial of Venlafaxine for generalized anxiety disorder. Dr. Walle noted that Claimant was intermittently tearful. He was concerned that the low range tachycardia was being caused by the anxiety.

F. Definitive Findings:

35. Claimant failed to show by a preponderance of the evidence that she has a compensable claim. This is a threshold question. Here, Claimant had to prove by a preponderance of the evidence that the incident of February 17, 2022 caused or aggravated her mental distress, which caused her disability and inability to return to work. The record shows a plethora of documentation that Claimant has a substantial psychological problem prior to the incident in question. Claimant was noncompliant with the treatment of her depression, anxiety and insomnia and declined to treat them with the medications that her providers were prescribing. It is clear that Claimant had an aversion to taking medications due to either concerns about her significant other medical problems, including the heart condition and the Marfans syndrome, and/or to becoming addicted to the medications.[8] Regardless of the reason, Claimant had a very significant preexisting history of conditions which have been present for a very long time, including the major depressive disorder, the anxiety, the posttraumatic stress disorder, the generalized anxiety disorder, the panic disorder as well as the insomnia. These diagnosis are repeated throughout the years of her care with Kaiser. While witnessing the death of an individual may have triggered a panic attack, it was not the cause of Claimant's continuing conditions and did not aggravate those conditions. Dr. Kleinman is credible in his opinion that Claimant does not meet the criteria to have sustained a work injury on February 17, 2022 as her preexisting health conditions are the root of her ongoing mental health problems.

36. Claimant argued that she was ready to assist the TSO with the man when she saw him have a seizure, going so far as to put on gloves in order to help, until she saw another individual helping the TSO. As found, Claimant did not stay to assist with

[8] Antidepressants are generally not a medical treatment that can be taken as needed. For them to work, a patient must take the medication on a daily basis, and even then, they do not start to work right away. It takes time to change the chemical composition of the body.

the deceased but went outside to guide the Fire Department EMT and paramedics/EMS to where the man was in the lobby, once they had arrived.

37. As found, the dispatch notes highlight that the medical call was made at 9:38 a.m. noting that a man was having a seizure. At 9:39 a.m. EMS was requested, EMS responded immediately and were on their way. At 9:42 a.m. the man was unconscious but breathing and the TSO (B1) retrieved the AED. At 9:44 a.m. the man had minimal breathing. By 9:45 a.m. the Fire Department personnel was on the scene and started CPR. At 9:48 a.m. the EMS ambulance was on the scene and took over CPR, and by 10:08 the police were on the scene.

38. If Claimant was the one to guide both the Fire Department and the Ambulance personnel to the correct area where the man was in the lobby, then Claimant was away from the scene from the time after emergency services were requested between 9:39 and when EMS arrived at 9:48 a.m. Claimant stated she started to have a panic attack at this time and that she returned to her desk once the personnel was present, so most of what Claimant saw was at a distance. Further, she was in the process of calling her supervisor and asking to be allowed to leave work and discussing whether she would be paid or not for the time off.

39. CPR was stopped by 10:13 a.m. Therefore, CPR was attempted for approximately 28 minutes. By 10:21 a.m. both FD and EMS were no longer on the scene and the lobby area was shut down. This ALJ infers that the deceased was covered at this time and the police were still on the scene awaiting the coroner. The coroner arrived at 11:20 a.m. and took the body by 11:35 a.m. Therefore, the body was in the lobby for approximately one hour and twenty minutes after EMS stopped CPR. According to Claimant, she was at her desk for this time period.

40. Further, while Claimant stated she did not miss any time from work due to any mental health conditions, this ALJ concludes from the evidence to the contrary. Claimant requested time off on November 16, 2020, as she was “terrified” of contracting COVID-19. She was also off when she was under mental distress due to her father undergoing coronary artery bypass surgery and feared for his life. She specifically told her cardiologist’s nurse on January 12, 2021, that she really didn’t want to go back to work. She was continuing to have dyspnea and attributed it to Colorado altitude. She was tearful and said she was a "wreck." She stated that she could not function due to her anxiety, and trouble sleeping. Her father had CABG and that added to her anxiety. She asked if Dr. Tsai would help her to get on disability due to her cardiac history and ongoing symptoms. This ALJ infers that Claimant was off work because of her ongoing symptoms, including her MDD and anxiety. Dr. Tsai issued the return to work letter, despite Claimant’s ongoing symptoms. This ALJ concludes Claimant was not off work the entire time from November 16, 2020 through January 12, 2021 but for two separate periods of time, and that her psychological condition played a great roll in obtaining time off, including her depression, posttraumatic stress disorder and anxiety causing panic attacks.

41. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives

of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant is making a claim for a mental impairment. As such, these claims are treated differently, effective July 1, 2018, pursuant to HB17-1229. Section 8-41-301(2) (a), C.R.S. (2022) governs any "mental-mental" claims and provides "A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist." While it was any "physician" prior to the statutory change, now it is any psychiatrist or psychologist. It further states that "The mental impairment that is the basis of the claim must have arisen primarily from the Claimant's then occupation and place of employment in order to be compensable."

Further, Sec. 8-41-301(2)(c), C.R.S. states that "The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment." And under Sec. 8-41-301(2)(d) "The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment." And Sec. 8-41-301(3) (b)(I) provides that "Psychologically traumatic event" means an event that "is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances."

When interpreting a statute, we must give effect to the legislative intent and "construe all terms of a statute harmoniously, avoiding a strained or forced construction of any of its terms." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1036 (Colo.2004); see also *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 326 (Colo.2004). ("The plain and ordinary meaning of the statute, if clear." *Anderson,* 102 P.3d at 326; *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1252 (Colo.1998).

To receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his or her employment. § 8–41–301(1)(c), C.R.S.2011; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000) ("Proof of causation is

a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded."). This case falls within the scope of "mental-mental" injuries, in which "mental impairment follows solely an emotional stimulus." *Oberle v. Indus. Claim Appeals Office*, 919 P.2d 918, 920 (Colo.App.1996). An injury that is "the product of purely an emotional stimulus that results in mental impairment," (*id*. at 921), requires a "heightened standard of proof" to "help prevent frivolous or improper claims." *Davison*, 84 P.3d at 1029. Under the express terms of the statute, "the testimony of a psychiatrist or psychologist" is required to establish a claim for mental impairment. *Oberle*, 919 P.2d at 921. The Colorado Supreme Court has interpreted this phrase broadly to include "the work product" of a provider which "may include letters, reports, affidavits, depositions, documents, and/or oral testimony." *Colo. Dep't of Labor & Emp't v. Esser,* 30 P.3d 189, 196 (Colo.2001).

However, not all components of such a claim must be proven by expert testimony. Rather, "[e]xpert testimony is necessary to prove that the event was psychologically traumatic, but the other elements can be proved by lay and/or expert evidence." *Davison*, 84 P.3d at 1033; *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 951 (Colo.App.2006). In addition, an expert need not use the precise statutory language to opine on a claimant's condition. "What is required is the presentation of sufficient facts such that the ALJ can find there existed a psychologically traumatic event or events." *City of Loveland*, 141 P.3d at 951; *Kieckhafer v. Indus. Claim Appeals Office of State*, 2012 COA 124, 284 P.3d 202 (Colo. App. 2012)

Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment claimant is seeking. *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. ICAO*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the medical care for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

Whether a claimant has met his or her burden of establishing a compensable mental impairment is a question of fact for determination by the ALJ. See *Pub. Serv. v. Indus. Claim Appeals Office*, 68 P.3d 583, 585 (Colo.App.2003) ("The causes of a claimant's mental impairment and the commonality of those causes are questions of fact to be resolved by the ALJ.").

Here, Claimant testified she had panic attacks, depression, insomnia following the February 17, 2022 incident of watching an individual through a seizure, unsuccessful attempts at resuscitation, and subsequent death. While they may be traumatic, they are not what caused the Claimant's need for medical care or for her loss of employment or disability from employment. The Claimant has underlying chronic conditions which

included her multiple medical conditions. Claimant has, requested work excuses due to her medical conditions, including her "anxiety," as well as requesting her providers' assistance with obtaining disability due to her medical conditions including heart disease. However, Claimant also has a long standing history of diagnosis of major depressive disorder, generalized anxiety disorder, posttraumatic stress disorder and insomnia as well as fatigue, and multiple other problems. The record of requesting medical assistance with these medical conditions was as recent as January and February 2022, before she witnessed the death on the job site. The records show that even when prescribed medication to assist with these problems, Claimant was not taking the medications as prescribed or was taking them intermittently, which is certainly contraindicated for most SSRI, depression or anxiety medications. Claimant also was inconsistent in taking other medications, such as the warfarin, a blood thinner medication.

Dr. Kleinman correctly opined and credibly testified another employee under the same circumstances would not have had the same response as Claimant. Dr. Kleinman credibly opined and testified Claimant does not meet the causative criteria to have sustained a mental health related work injury on February 17, 2022.

Claimant has failed to meet her burden of proving that it is more probably true than not that she suffered a mental health injury while in the course and scope of her employment on February 17, 2022. The persuasive and credible evidence shows that Claimant's asserted conditions were preexisting and do not meet the statutory criteria.

The ALJ finds the testimony of Dr. Kleinman as to the issues of causation of the asserted injury credible and persuasive. This ALJ accepts Dr. Kleinman's opinion the work incident of February 17, 2022 did not meet the criteria she sustained a mental health injury.

As Claimant has failed to show that she has a compensable claim, all other issues are moot.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits related to the incidents of February 17, 2022 is *denied* and *dismissed*.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 26th day of October, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on February 17, 2022?

- If the claim is compensable, did Claimant prove he is entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked for the employer as an equipment operator for about 10 years. The Employer picks up trash and recycles. Claimant is a lead operator and operates a John Deere front-end loader. His job is to move recycling with his front-end loader from a pit to a belt where the recycling is sorted by two teams.

2. On February 17, 2022, Claimant alleges he injured his left shoulder when he was opening a large overhead warehouse door by pulling a chain. Claimant testified that he had excruciating pain immediately in the left side of his arm. Within 5 to 10 minutes after the incident he reported it to the facilities manager, EG[Redacted]. Claimant also testified that he was taken to Dr. Cynthia Schafer, the workman's comp doctor, following the injury by Mr. EG[Redacted]. (Hearing Transcript, p.19). Dr. Schafer is at UCHealth. (Claimant's Exhibit 7, p7). However, it does not appear that Claimant saw Dr. Schafer at UCHealth until after his initial visit UCHealth on March 9, 2022. He was actually seen by Jason Baker, PA-C at the time of the initial visit. He gave a history that he started having pain in early February and that when he was opening a heavy door with a chain and he felt a pop and sudden pain. (Claimant's Exhibit 7, p. 3).

3. The Claimant actually saw Dr. Schafer on March 15, 2022. The history given to Dr. Schafer is confusing. She took a history that on February 17 is when he pulled out on a chain on a rollup door with his right hand and felt a pop in the right shoulder with increased pain, a "stinger". It is unclear as to whether Claimant gave an inconsistent history or if Dr. Schafer incorrectly referred to the right shoulder instead of the left shoulder. Dr. Schafer eventually concludes that the left shoulder condition is not work related. However, because of the discrepancies in the history from the other medical records and the Claimant's testimony, I cannot accept her opinion as to the left shoulder condition as not being work related, and must look to other evidence to determine causation.

4. Prior to this incident, Claimant had a history of left shoulder pain. On November 26, 2018 he was seen at Optum Atrium by Megan Bartusek, N.P. with a chief complaint of "Left shoulder pain and range of motion". In the history portion of the report she states "Shoulder Pain: The patient present with complaints of gradual onset of constant episodes of severe left shoulder pain, described as sharp, radiating to the left upper arm. Episodes started 2 months ago. Symptoms are improved by restricted activity. Symptoms are made worse by shoulder motion and internal rotation Symptoms are unchanged (Pain started about 2 – 3 months ago, not injury related. Pain initially was

intermittent but now constant. Pain is worst with reaching, internal rotation. No locking but hears some clicking. Occasional tingling. Feels weak, but no troubles with grasping. Does a lot of steering with his left arm for work and the steering motion aggravates his arm symptoms.)." Ms. Bartusek prescribed Naproxen Sodium 550 mg and home exercises. (Respondents' Exhibit D, pp. 25 – 27).

5. The Claimant returned to Ms. Bartusek on January 18, 2019 to discuss the pain in his left shoulder. His diagnosis was "Biceps tendinitis of left upper extremity". He was prescribed Dicolofenac Sodium 1% transdermal Gel and referred to Orthopedics. She also order an X-ray of the left shoulder. (Respondents' Exhibit D, pp 28 – 30).

6. The next visit to Optum was on February 8, 2019 when the Claimant was seen by Dr. Plachta. He noted that the X-ray showed AC joint arthritis. His assessment was AC joint arthropathy. In addition to the Diclofenac Sodium gel, he prescribed Tramadol. (Respondents' Exhibit D, pp. 31 – 33).

7. Claimant had several visits to Optum for right shoulder pain between February 8, 2019 and November 18, 2021. On November 18, 2021, he complained of chronic pain of both shoulders. He denied any injury. Virginia Quiroz, N.P. administered cortisone injections into both shoulders. (Respondents' Exhibit D, pp. 50 – 54).

8. On February 1, 2022, Claimant was seen by Dr. Lockett and reported chronic shoulder problem for several months. She noted the prior cortisone shot in September and that he did ok until the past 2 weeks. He was also seen for left ring finger symptoms. (Respondents' Exhibit D, pp. 55 – 57).

9. Claimant returned to Optum on February 15, 2022, just 2 days prior to the incident with the warehouse door, complaining of bilateral shoulder pain. He was seen by Virginia Quiroz. Her assessment was Rotator cuff disorder. The plan was for an MRI of the left shoulder. Claimant was to follow up after the MRI was completed. (Respondents' Exhibit D, 58 – 61).

10. An MRI of the left shoulder was performed on February 17, 2022 at 5:18 p.m. (Respondents Exhibit E, p.79). The MRI showed:

> "1. AC joint arthrosis and mild osteoarthritis.
>
> 2. Complex SLAP tear with extension into the anterior labrum and horizontal split tear of the biceps tendon long head.
>
> 3. Partial thickness supraspinatus and infraspinatus tears.
>
> 4. Subacromial/subdeltoid bursitis.
>
> 5. Marrow reconversion."

11. Claimant returned to see Ms. Quiroz on February 24, 2022 to discuss the MRI. Based on the results, Ms. Quiroz referred the Claimant to an orthopedic surgeon for evaluation and treatment. (Respondents' Exhibit D, pp. 62 – 66).

12. Claimant was seen by Dr. Purcell at Orthopedic Centers of Colorado on March 8, 2022. Dr. Purcell's assessment was partial nontraumatic tear of both rotator cuffs. His impression was bilateral shoulder partial-thickness rotator cuff tears left greater than right; bilateral shoulder biceps tendinopathy; and work-related injury. He did not elaborate on his impression of work-related injury. He discussed surgery with the Claimant and indicated that surgery would be scheduled at their convenience. (Respondents' Exhibit F, pp. 135 – 139).

13. Claimant was referred to Dr. Lesnak by Respondents for an IME. Dr. Lesnak performed an IME of the Claimant on July 12, 2022. Dr. Lesnak performed a physical examination of the Claimant and reviewed medical records that predated and postdated the alleged work-related incident. Dr. Lesnak credibly testified in response to a question regarding whether the incident on February 17, 2022 caused a new injury or aggravated his preexisting problem in left arm that "his symptoms as documented by Ms. Quiroz, both before, right before and right after this reported incident are the same. His exam findings documented by Ms. Quiroz right before and right after this incident were the same. And his MRI showed no evidence of acute abnormalities that would in any way relate to an incident that was reported just several hours before that MRI was performed. So there's no evidence of any injury, no evidence of any aggravation of pre-existing symptomatic pathology as it pertains to the incident of February 17th." (Hearing Transcript p. 60).

14. Dr. Lesnak further opined that the need for the surgery recommended by Dr. Purcell is not related to the incident of February 17, 2022. (Hearing Transcript p.62). Dr. Lesnak's opinion is credible with respect to the cause of the need for surgery.

15. Claimant failed to prove he suffered a compensable injury to his left shoulder on April 5, 2021.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc*., W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than

its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove he suffered a compensable injury to his left shoulder on February 17, 2022. Although it is plausible that [Claimant] experienced pain in his left shoulder as reported to his supervisor, I conclude that the pain was a manifestation of the natural progression of preexisting shoulder pathology instead of as the result of a new injury or an aggravation of his preexisting condition. As found previously, Dr. Lesnak's testimony and written opinions, which are credible, supports this conclusion.

Claimant had a documented history of progressive shoulder pain for several years before the alleged accident. Claimant failed to prove his left shoulder condition was caused by or aggravated the incident on February 17, 2022 when he pulled on the chain to lift the warehouse door.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 26, 2021

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-190-326 & 5-192-760

ISSUES

1. Did Respondents establish by a preponderance of the evidence that they met the statutory predicates to assert the intoxication penalty pursuant to section 8-42-112.5, C.R.S.?

2. If Respondents met their burden, did Claimants establish by clear and convincing evidence that Decedent's accident was not caused by the presence of any controlled substances?

STIPULATION

1. The parties stipulated that Decedent's average weekly wage was $824.17.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Decedent was a 31 year-old male who worked for Employer since February 26, 2020. (Ex. I).

2. On December 7, 2021, Decedent and DS[Redacted] were pulling new wire for a lighting repair in the parking lot, at DriveTime Auto in Denver, Colorado. Decedent was using an Elliot HiREACH L60 bucket truck. The truck has a walkway that extends from the main platform over the cab to the basket. (Ex. I).

3. Decedent and Mr. DS[Redacted] completed the job in the afternoon. Mr. DS[Redacted] went to another job, and Decedent stayed at the site to clean up and pick up his tools. Decedent called JN[Redacted] at Employer's office just before 2:00 p.m. to let him know the project was complete, and he planned to clean up. (Ex. I).

4. There is no evidence in the record that Mr. DS[Redacted] thought Decedent was impaired in any manner while they were working together on December 7, 2021.

5. There is no evidence in the record that Mr. JN[Redacted] thought Decedent was impaired in any manner when he spoke with Decedent around 2:00 p.m., on December 7, 2021.

6. Sometime between 2:00 p.m. and 3:00 p.m., Decedent attempted to egress from the man basket to the platform, but he slipped off the platform and fell head first on the pavement below. (Ex. I and Ex. 19).

7. At approximately 3:20 p.m. on December 7, 2021, the manager of DriveTime Auto found Decedent slumped over in his truck, disoriented, and "not acting normal." The manager called 911. (Ex. I).

8. Denver Health Paramedics responded to the scene. Decedent was groaning and unable to answer questions. The paramedics suspected that Decedent had been electrocuted. There were no medications or paraphernalia at the scene. The paramedics transported Decedent to the University of Colorado Health (UC Health) in Aurora. (Ex. 11).

9. According to the medical records, Decedent was admitted to the UC Health emergency department at 4:09 p.m. Decedent was agitated and at 5:20 p.m., Decedent was screaming in pain, "[p]lease let me go, I'm gonna freak out." Decedent was persistently confused and could not answer questions about what happened. The emergency department noted that no drugs or alcohol were found in Decedent's vehicle. (Ex. 12).

10. Decedent was intubated and taken to the neurosurgery operating room emergently for an intracranial hemorrhage. (Ex. 12) The medical team performed a suboccipital craniectomy for evacuation of the epidural hematoma. (Ex. G).

11. Despite substantial treatment at UC Health, Decedent died on December 21, 2022.

12. During the course of treatment, UC Health collected a sample of Decedent's whole blood, and a sample of Decedent's blood plasma. Both samples were collected at 4:15 p.m. on December 7, 2021, shortly after Decedent's admission. (Ex. 2 and Ex. 7).

13. UC Health also collected a sample of Decedent's urine, via catheter, at 9:29 p.m., about five and a half hours after his admission, on December 7, 2021. Decedent's urine test came back positive for benzodiazepines and cannabinoids. (Ex. G).

14. The ALJ finds that UC Health, a medical facility, conducted a forensic drug or alcohol test by testing Decedent's urine.

15. On December 10, 2021, a representative of Insurer called UC Health and requested a copy of Decedent's medical records. (Ex. G).

16. On December 13, 2021, Respondents sent a letter to UC Health demanding the hospital preserve Claimant's blood sample taken on December 7, 2021. (Ex. N).

17. On December 15, 2021, Respondents filed a General Admission of Liability, asserting a 50% penalty pursuant to section 8-42-112.5, C.R.S., and based on a safety violation. (Ex. A).

18. On December 15, 2022, Derrick McMillon, a Manager at UC Health, received an email indicating that specimens of Decedent's blood ***and*** urine samples had been retrieved and stored for preservation. He personally inspected and set aside three tubes of Decedent's fluids for preservation. One tube contained Decedent's whole blood (EDTA

anticoagulant). The second tube contained Decedent's plasma (lithium heparin with gel). The third tube contained Decedent's urine. (Ex. 14).

19. Respondents requested an emergency prehearing conference and represented that Decedent was in the ICU, incapacitated, and was not yet represented by counsel. Based on this representation, the PALJ held an *ex parte* hearing. Respondents were seeking to preserve "Claimant's blood sample taken on 12/7/21 that led to the positive controlled substance test results." On December 17, 2021, the PALJ granted Respondents' motions to preserve Decedent's blood sample and for leave to issue a subpoena to obtain a duplicate blood sample. (Ex. 17).

20. Decedent's medical records, which Respondents requested and reviewed, unequivocally state that the positive test for benzodiazepines and cannabinoids came from Decedent's urine sample, not his blood sample.

21. On January 12, 2022, Respondents filed a Fatal Case-General Admission and asserted a 50% penalty pursuant to section 8-42-112.5, C.R.S. In support of the penalty, Respondents attached the record of Decedent's December 7, 2021, positive urine drug test. (Ex. C).

22. On January 25, 2022, a pre-hearing conference was held on Claimants' request for the PALJ to reconsider his December 17, 2021 Order. Claimants asserted that the PALJ's Order "was based on incorrect factual information provided by Respondents' counsel. There was no blood sample tested for intoxicants. Rather, a urine drug screen indicated positive results for benzodiazepines and cannabinoids. This was indicated in medical records obtained from UC Health dated 12/7/21, which was in possession of Respondents as of 12/17/21." Ex. 18, p.75.

23. The PALJ found Claimant's request to reconsider his order to preserve the blood sample moot, as the blood was already preserved. Regarding Respondents' right to subpoena the blood, the PALJ stated "[w]hether or nor Claimant chooses to obtain the preserved blood sample for testing, if still available, will remain within Claimant's discretion. Nevertheless, there is no basis to permit Respondents to subpoena the blood sample and this portion of the 12/17/21 order is vacated." (Ex. 18).

24. On January 28, 2022, Mr. McMillon transferred the three tubes of Decedent's fluids to Wendy Degelman at Rocky Mountain Instrumental Laboratories. He stated in his affidavit that Decedent's urine sample, as established in the medical record, was taken and tested on December 7, 2021. (Ex. 14).

25. On January 28, 2022, Rocky Mountain Instrumental Laboratories took custody of the three tubes of Decedent's fluids: one tube of whole blood, one tube of plasma, and one tube of urine. (Exs. 1-10)

26. The Evidence Record – Custody form, from Rocky Mountain Instrumental Laboratories, notes a request for a quantitative analysis of Decedent's blood sample for THC/Benzos. There is no evidence in the record regarding the quantitative testing of Decedent's blood samples. (Ex. 1).

27. The ALJ finds that the only drug test that was positive for controlled substances, was the test conducted by UC Health on Decedent's urine on December 7, 2021.

28. According to the itemization of services, UC Health administered Midazolam to Decedent twice on December 7, 2021. They administered two units of Midazolam 1 mg/ml SOLN, and 50 units of Midazolam IN NS 50 mg/ 50 ml. There is no evidence in the record regarding the time Decedent received Midazolam on December 7, 2021. (Ex. 12, p.31).

29. Claimants retained Caroline M. Gellrick, M.D. to review Decedent's medical records and issues regarding his positive urine drug screen on December 7, 2021. Dr. Gellrick explained that Midazolam is a sedative hypnotic benzodiazepine used in emergency situations at hospitals, the ICU, and surgery centers. She specifically noted, "[i]t is well known that preop drugs and drugs that are used for agitation and sedation are in the benzodiazepine class and in this situation, Midazolam is a sedative hypotic benzodiazepine, and could have caused the positive drug screen for benzodiazepines." Dr. Gellrick opined that Decedent's positive test for benzodiazepines could be due to the Midazolam. (Ex. 13).

30. The ALJ finds that Decedent received benzodiazepines at UC Health on December 7, 2021.

31. Claimants assert that Decedent's urine sample was not separated into two samples prior to testing. Claimants further argue that an untested sample of urine was not saved, but the entire sample was tested and "dumped back into the tube." There is no evidence in the record to support this assertion.

32. Respondents retained toxicologist Michael Kosnett, MD., and he was admitted as an expert in medical toxicology. (Tr. 34:1-2).

33. Dr. Kosnett credibly testified that in his clinical experience with drug testing on urine, the original sample acts as a duplicate, as tests are not run on the whole sample, but on the portion that is separated off and tested, an aliquot. The remainder of the sample is untested and available for subsequent testing. He testified "when we talk about duplicate samples, we essentially would say that taking the same sample and then separating it represents a duplicate." (Tr. 37:14-38:24).

34. The ALJ finds that UC Health preserved a duplicate sample of Decedent's urine and made it available for testing.

35. In his report, Dr. Kosnett opined that Decedent's "positive urine drug test interpreted in isolation contributes relatively little if any information regarding the magnitude of the dose consumed, the date and time of consumption, and whether the donor was ever intoxicated by or under the influence of the drug. Many drugs and/or their metabolites, including those of THC and benzodiazepines, may be detectable in the urine for days to many weeks after the drug has last been consumed. This period of detection extends far beyond the interval of time that the drug exerts any pharmacodynamics effects, including neurocognitive or psychomotor impairment or intoxication. Acute

cannabis-induced decrements in psychomotor or neurocognitive performance, which may occur in some but not all users, typically resolve within six hour of cannabis smoking or vaping or within eight hours of cannabis ingestion." (Ex. J).

36. In his report, Dr. Kosnett cited a position statement from the American College of Medical Toxicology. The position statement noted: "[a] positive test for [THC] metabolite indirectly indicates that THC, a psychoactive compound in cannabis has been present in the body…The test results do not identify route of THC exposure, source of exposure, specific timing of exposure, dose, intentional or accidental nature of exposure, or clinical impairment." (Ex. J).

37. Dr. Kosnett credibly testified that the only test performed on Decedent, for controlled substances, the urine test, does not indicate when Decedent may have consumed any controlled substances. The test also does not indicate whether there were any active controlled substances present in Decedent's urine, or merely metabolites. Further, the positive urine test does not indicate whether Decedent was impaired in any way when he fell from the platform. (Tr. 44:18-45:9).

38. Dr. Kosnett opined "[i]n comparison to urine drug tests, analytical toxicology testing conducted on blood offers more informative data regarding the type of drug consumed, the dose administered, and the time since administration. . . . [T]here is a consensus that drug concentrations in the blood, rather than those in the urine, offer a better insight into the potential presence of impairing effects in an individual." (Ex. J)

39. The ALJ finds the opinions of Dr. Kosnett to be credible and persuasive.

40. The U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) issued a citation to Employer on April 29, 2022 for a serious level violation with respect to this incident. OSHA cited Employer for not providing and ensuring each employee uses a safe means of access and egress to and from walking-working surfaces. OSHA found Employer exposed employees to slip, trip and fall hazards, and that Decedent sustained serious injuries after falling to the parking lot while he was attempting to egress from the man basket to the platform. (Ex. 16).

41. OSHA determined that Employer modified the walking-working surface on Decedent's work truck. The platform that allowed Decedent to access and egress the bucket, while it was stowed over the head of the vehicle, was modified to a lower position. (Ex. 16).

42. Hellman & Associates conducted an investigation of the accident for Employer, and issued a report after viewing security footage and conducting interviews. In the report, Decedent's post-incident drug screen was noted as being positive for THC/Marijuana. This, however, was not listed as a contributing factor to the incident. Items that contributed to the incident included: used equipment unsafely, improper position/posture, and faulty design/construction. The "influence of intoxicant/drugs" was not found to be a contributing factor to the accident. (Ex. I).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Presumptive Intoxication Offset

The presumptive intoxication statute states:

> Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed or of a blood alcohol

> level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. **A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense.** If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

§ 8-42-112.5, C.R.S. (emphasis added).

As the party seeking to impose a penalty, Respondents have the burden of proof to establish the predicates for application of the presumption. *Ray v. New World Van Lines,* W.C. No. 4-520-251 (ICAO Oct. 12, 2004) (citing *Lori's Family Dining v. ICAO,* 907 P.2d (Colo. App. 1995)). To apply the presumptive intoxication offset, Respondents must prove three factors: (1) the presence of a controlled substance during working hours; (2) as evidenced by a forensic drug test conducted by a medical facility or laboratory licensed or certified to conduct such test; and (3) that a duplicate sample from any test conducted was preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. §8-42-112.5, C.R.S.; *SkyWest v. Indus. Claim Appeals Office,* 2020 COA 131.

Respondents have met their burden of proof with respect to the first two factors. As found, on the day of the accident, Decedent underwent a forensic drug test at UC Health, a Medical Facility, and Decedent's urine drug screen was positive for benzodiazepines and cannabinoids. (Findings of Fact (FOF) ¶ 13). The disputed issue is whether the urine sample preserved by UC Health, and transferred to Rocky Mountain Laboratories, constitutes a ***duplicate sample*** for purposes of conducting a second test. While Decedent's blood and plasma samples were also preserved, made available for testing, and likely tested, these samples are not relevant. The only positive drug test was the test on Decedent's urine. (FOF ¶ 27).

Claimants argue that the single tube of Decedent's tested urine, does not constitute a "duplicate/second" sample of urine. Claimants rely on *Stohl v. Blue Mountain Ranch Boys Camp,* W.C. No. 4-516-764 (ICAO Feb. 25, 2005) for their position. In *Stohl,* the ICAO discussed the legislative intent behind the statutory requirement of a duplicate sample: "[t]he legislative history indicates that the requirement to preserve a second sample was enacted as a procedural protection against the possible reduction of benefits from a false positive result in the first blood sample testing. The General Assembly determined that given the magnitude of the evidentiary presumption created by an initial [positive] test result…the availability of a second sample for the Claimant to independently test is a necessary safeguard to the wrongful loss of benefits. . . . Therefore, the General

Assembly conditioned application of the penalty statute on the availability of a second sample for use by the Claimant to contest the accuracy of the initial test." *Stohl, supra.*

To discern the intent of the General Assembly, the examining authority must first examine the language of the statute. If the statutory language is clear and unambiguous, the words and phrases of the statute should be given their plain and ordinary meaning, and the statute must be applied as written unless the result is absurd. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 553 (Colo. 1998); *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176, 178 (Colo. App. 2002). Statutory interpretations that render provisions superfluous or meaningless must be avoided. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998).

To the extent the language in the intoxication statute regarding a duplicate sample is ambiguous, the statute must be construed in light of the apparent legislative intent and purpose. *Henderson v. RSI, Inc*., 824 P.2d 91 (Colo. App. 1991). This language, however, is not ambiguous. The *American Heritage College Dictionary* (Third Ed.) defines duplicate as "identically copied from an original" and "existing or growing in two corresponding parts." Dr. Kosnett credibly testified that when a urine sample is tested for drugs, the original sample acts as a duplicate, as tests are not run on the whole sample, but on the portion that is separated off and tested, an aliquot. The remainder of the sample is untested and would be available for subsequent testing. (FOF ¶ 33). This testimony is uncontroverted. As found, UC Health preserved a duplicate sample of Decedent's urine and made it available for testing. (FOF ¶ 34). There is no evidence in the record of any test results from the duplicate sample of Decedent's urine.

The ALJ finds that Respondents proved by a preponderance of the evidence that the intoxication presumption applies. Claimants, however, can overcome this presumption by clear and convincing evidence. Clear and convincing evidence is evidence that is highly probable and free from serious and substantial doubt. *Metro Moving & Storage Co v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

As found, OSHA cited Employer for modifying the walking-working platform on Decedent's work truck. OSHA considered this a serious level safety violation, and cited and fined Employer. OSHA determined that this modification exposed employees to slip, trip, and fall hazards. (FOF ¶¶ 40-41).

Notwithstanding the positive urine drug screen, there is no evidence in the record that Decedent was impaired in any way on December 7, 2021, leading up to and including his fall. First, the investigation report specifically noted the following contributed to the incident: used equipment unsafely, improper position/posture, and faulty design/construction. Notably, the "influence of intoxicant/drugs" was not found to be a contributing factor to the accident. (FOF ¶ 42). Second, there is no evidence in the record, that Decedent's colleague, Mr. DS[Redacted], who worked with him on the day of the incident, had any concerns that Decedent was impaired in any way. (FOF ¶ 4). Third, Decedent spoke with Mr. JN[Redacted] at Employer's office shortly before the fall. There is no evidence in the record that Mr. JN[Redacted] thought Decedent was impaired in any

way. (FOF ¶ 5). Fourth, the paramedics noted that no drugs, medications, or paraphernalia were found on Decedent or in his work truck. (FOF ¶ 8).

As found, Decedent received benzodiazepines at UC Health on December 7, 2021. (FOF ¶ 30). Further, Respondents' expert credibly testified that a urine test does not indicate whether Decedent had any active controlled substances in his system at the time of the accident. Similarly, the urine test does not indicate the timing, dose, and intentional or accidental exposure to any controlled substances. Lastly, the urine test does not indicate that Decedent was impaired in any way at the time of his fall. (FOF ¶¶ 35-37). Based on the totality of the evidence, the ALJ finds that it is highly probable that Claimant's fall was not caused by the presence of any controlled substances.

The ALJ finds that Claimant has established by clear and convincing evidence that Decedent's fatal fall was not due to intoxication.

ORDER

It is therefore ordered that:

1. Respondents established by a preponderance of the evidence that the statutory predicates have been met to assert the intoxication penalty under section 8-42-112.5, C.R.S.

2. Claimant has established by clear and convincing evidence that Decedent's fatal fall was not caused by intoxication.

3. Respondents shall pay unreduced death benefits under W.C. No. 5-192-760-001 from December 7, 2021, until terminable by law.

4. Respondents shall pay unreduced temporary total disability benefits from December 7, 2021 until December 21, 2021.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 26, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the right shoulder arthroscopy with biceps tenodesis versus tenolysis and SAD requested by authorized treating physician (ATP) Michael Hewitt, M.D. is reasonable, necessary, and related to Claimant's admitted September 18, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is 47 years of age. Claimant has worked for Employer for approximately 14 years as a Technician I.

2. Claimant sustained an admitted industrial injury on September 18, 2020 when he was riding as a restrained passenger in the backseat of a work truck. The driver of the truck was reversing approximately 5-10 miles per hour to park and struck the dock.

3. Claimant testified at hearing that the vehicle was going at "high speed" and, immediately upon the truck hitting the dock, he was pushed back into the seat, his neck hit the head rest, and he experienced an immediate onset of neck and right-sided pain.

4. On September 21, 2020 Claimant presented Kelsey Smithart, M.D. at Denver Health with complaints of pain throughout the left side of his body. The "Location" section of the medical report lists left back, left hip, left knee, left lower leg and left shoulder. Claimant reported that he was in the jumpseat in the back of a truck that backed into a loading dock at approximately 5-10 miles per hour. Claimant reported that he did not feel much pain initially but realized he was in a lot of discomfort when he got home. Claimant complained of back stiffness/spasms, pain shooting down to the left knee, tingling in his left neck, and hip pain. Dr. Smithart noted,

> Pt reports his back was initially injured approx 9 years ago when he was driving snowplows for the city when he slid into a lightpole. Pt had lasting damage to the right side of his body and continues to work through the pain on a regular basis. Pt uses Tizanidine for his previous injury and takes Percocet every night. Pt stretches and continues his home PT exercises for right sided pain…Pt reports the left sided musculoskeletal pain is all new and from this most recent injury.

(Resp. Ex. A, p. 12.)

5. No new right-sided injury or complaints were noted. On examination, Dr. Smithart noted tenderness with the left-sided straight leg raise, as well as tenderness to the left clavicle and trapezius. There was tightness with palpation to the left trapezius. No

examination to the right side was documented. Dr. Smithart assessed Claimant with a muscle strain of lower back and placed Claimant on bilateral upper extremity restrictions. She referred Claimant for physical therapy and chiropractic treatment.

6. Claimant saw Alissa Koval, M.D. at Denver Health on October 28, 2020. The location of pain was noted as back, hip, neck and left shoulder. Dr. Koval noted Claimant presented for follow-up of his neck, left shoulder, upper back, and left hip. Claimant reported that the pain in his neck and left shoulder was largely unchanged, and that the pain was radiating into his hand and down into his upper back. No right-sided complaints were documented. Dr. Koval noted that she examined the general appearance and condition of the patient. No specific exam findings were documented. Dr. Koval assessed Claimant with a lower back strain, myalagia, and segmental and somatic dysfunction of the cervical, thoracic and lumbar regions. She referred Claimant to Robert Kawasaki, M.D.

7. On November 20, 2020 Dr. Koval again noted the location of Claimant's symptoms as his left neck and low back with no mention of right-sided complaints or findings.

8. On December 18, 2020, Claimant reported to Dr. Koval that his neck was bothering him more than his back. Neck and back exams were unchanged. Nothing was specified regarding Claimant's left or right side.

9. Claimant presented to Dr. Kawasaki on December 22, 2020. Dr. Kawasaki was familiar with Claimant, having provided maintenance treatment to Claimant for a prior low back injury. Regarding the mechanism of injury, Claimant reported that he was riding in the crew cab seat when the vehicle rammed into the loading dock in reverse traveling 5-10 miles per hour. Claimant reported that the crew cab seat was very tight and that the back seat did not have a headrest so the top of his shoulders were above the top of the seat, leaving his neck unsupported. Claimant further reported that he felt a jolting pain through his neck and low back when the collision occurred, and had since experienced pain from his neck down into his low back with increased pain in the neck and shoulder girdle region. Dr. Kawaski noted, "His pain was initially more on the left side but currently bilateral." (Resp. Ex. B, p. 54). Dr. Kawasaki did not document any examination of the left or right shoulders. He assessed Claimant with, *inter alia*, chronic pain syndrome, lumbosacral spondylosis without myelopathy and cervical spondylosis without myelopathy. He opined that Claimant suffered a new cervical strain with findings consistent of whiplash mechanism, and cervical spondylosis with facetogenic pain causing shoulder girdle myofascial irritation. Dr. Kawasaki ordered a cervical spine MRI.

10. Claimant continued to report pain at a telephone appointment with Dr. Smithart on January 8, 2021. Regarding the pain, Dr. Smithart noted, "Today it is primarily in his R shoulder and neck though it is typically in the center of his neck and in both shoulders." (Resp. Ex. A, p. 24).

11. At a follow-up evaluation with Dr. Kawasaki on January 18, 2021 Claimant reported increased pain, numbness and tingling down his right upper extremity. Dr. Kawasaki also noted pain in Claimant's neck and left shoulder.

12. Claimant returned to Dr. Smithart for a follow-up evaluation on January 22, 2021. The location of Claimant's injury was now noted to be the right neck and right shoulder. Claimant also endorsed occasional numbness and tingling of his right hand. On examination, Dr. Smithart noted active range of motion was limited by pain in the right upper extremity, full range of motion of the left upper extremity, and tenderness to palpation of right shoulder in the superior anterior quadrant, right upper scapula, and low thoracic spine.

13. On February 9, 2021 Claimant complained to Dr. Kawasaki of pain through his neck and shoulder girdles and into the right upper extremity.

14. On February 19, 2021 Claimant reported to Dr. Smithart fewer radicular symptoms in his right upper extremity, with sensations now only from the neck to right shoulder.

15. On February 23, 2021 Claimant's chiropractor, Mark Testa, D.C. remarked that Claimant's pain seemed to be more on the right, going into the right trapezius region.

16. On March 12, 2021, Dr. Kawasaki ordered an MRI of the right shoulder, which was obtained on March 24, 2021. Craig Stewart, M.D. gave the following impression of the MRI: "1. Moderate grade partial-thickness tear of the distal superior fibers of the subcapularis tendon. 2. Intact supraspinatus and infraspinatus tendons. 3. Sequela of an age-indeterminate low-grade acromioclavicular joint separation which may be chronic. Coracoclavicular ligaments are intact." (Cl. Ex. 4, p. 13).

17. Claimant reported pain in his neck, shoulder girdles and right shoulder at a follow-up evaluation with Dr. Kawasaki on April 6, 2021. On examination of the right shoulder, Dr. Kawasaki noted positive impingement signs, tenderness to palpation of the deltoid region, some give way pattern weakness with rotator cuff testing of supraspinatus testing, and some crepitus with motion particularly with abduction into overhead. He reviewed the right shoulder MRI, noting that Claimant had a partial tear of the subscapularis tendon.

18. Claimant presented to Michael Hewitt, M.D. on June 7, 2021. Claimant reported to Dr. Hewitt that he was injured when riding in the backseat of a work truck that struck a dock in reverse at approximately 20 miles per hour. Claimant reported that he experienced an immediate onset of cervical and shoulder pain, but did not lose consciousness. He denied a previous history of right shoulder issues. Claimant complained of lateral shoulder pain and night pain and radicular pain extending into his hand. On examination, Dr. Hewitt noted significant restriction of range of motion of the cervical spine. On the right side Dr. Hewitt noted positive impingement and positive biceps, and diffuse acromioclavicular bicipital groove and impingement. Dr. Hewitt reviewed the right shoulder MRI, noting no rotator cuff muscular atrophy, mild supraspinatus tendinopathy, leading edge subcapularis tearing with moderate biceps tendinopathy, and no displaced labral tear. He assessed Claimant with right diffuse shoulder pain with radicular symptoms status post whiplash injury. He noted that Claimant's shoulder findings on exam and MRI did not account for his primary pain complaints. Dr. Hewitt discussed treatment options, including conservative treatment,

injections and surgery. He recommended focusing on conservative management as Claimant's cervical spine appeared to be his primary pain generator.

19. On January 14, 2022 Dr. Kawasaki noted that Claimant had no relief from cervical medial branch block procedures. He noted that Claimant had a right C5-6 transforaminal steroid injection on December 17, 2021 with improvement 60-70% and improvement in his right arm but continued right arm pain. Dr. Kawasaki's January 14, 2022 report made no indication of a subacromial injection.

20. Dr. Hewitt reevaluated Claimant on February 7, 2022. He noted that Claimant underwent a subacromial injection with Dr. Kawasaki with significant improvement, but that Claimant's symptoms had since returned. A January 25, 2022 ultrasound report revealed subcapularis tendinopathy and medial subluxation of the biceps tendon. Dr. Hewitt opined that Claimant had undergone extensive conservative management and, given his persistent symptoms, MRI and ultrasound findings, as well as clinical examination, shoulder arthroscopy was medically appropriate.

21. On February 15, 2022, Dr. Hewitt requested authorization for right shoulder arthroscopy with biceps tenodesis vs. tenolysis and SAD, which was denied by Respondent.

22. On April 13, 2022, Michael Striplin, M.D. performed an Independent Medical Examination (IME) at the request of Respondent. Regarding the mechanism of injury, Dr. Striplin noted that Claimant was riding in the rear bench seat, the driver of the vehicle was backing up to the dock at the transportation department when the vehicle collided with the dock at approximately 20 to 25 miles per hour. Claimant reported being thrown forward and then thrown backward, striking his neck and right shoulder against the seatback and headrest. Claimant noted no immediate symptoms but an onset of neck pain and right shoulder girdle pain approximately 1.5 hours after the incident. Claimant complained of neck pain and right shoulder girdle pain and swelling of the right shoulder girdle and arm, limited right shoulder motion, and paresthesias in the right ring and little fingers occasionally involving the entire right hand. Claimant denied prior injuries or problems to his cervical spine, right shoulder and right upper extremity. On physical examination Dr. Striplin noted mild diffuse tenderness over the right shoulder girdle, and limited right shoulder range of motion.

23. Dr. Striplin noted that Claimant's report to him of neck and right shoulder pain the evening of the accident is inconsistent with medical records which indicate initial neck and left-sided symptoms, with focused attention to the right shoulder not occurring until March 12, 2021. He opined that Claimant's cervical pain is related to the September 18, 2020 work incident, but that Claimant's right shoulder complaints and right shoulder pathology on and ultrasound cannot be attributed to the work incident. Dr. Striplin explained that the March 2021 right shoulder MRI findings suggested a prior age undetermined injury. He noted that a right shoulder ultrasound performed on January 25, 2022 ultrasound showed an unremarkable right pectoralis tendon, apparent subcapularis tendinopathy or strain with at least moderate partial moderate partial articular surface

tear, and medial subluxation of the long head biceps tendon suggesting apparent biceps pulley mechanism dysfunction in addition to subcapularis tear.

24. Dr. Striplin's report documents a January 19, 2022 letter from Dr. Hewitt to Dr. Kawaski indicating that Claimant reported transient benefit from a right shoulder injection performed by Dr. Kawasaki, but the exact location of the injection was unclear. Dr. Striplin concluded that there was no actual evidence that Dr. Kawasaki performed a subacromial injection, let alone that Claimant had a diagnostic response to one. He opined that the diagnostic response that Claimant reported appeared to be from the cervical spine injections from the January 14, 2022 visit.

25. Claimant saw Jennifer Pula, M.D. on May 23, 2022. Dr. Pula noted that Claimant underwent a C5-6 transforaminal steroid injection and a C7 nerve block on the right on May 18, 2022. He reported that his right shoulder pain resolved for a few days but had since returned.

26. On June 3, 2022, Dr. Kawasaki noted that he was uncertain if the May 18, 2022 cervical transforaminal steroid injection was significantly helpful. Claimant continued to report pain in the right shoulder and down the right arm. Dr. Kawasaki stated he did not recommend additional injections for Claimant.

27. Claimant testified at hearing that prior to his admitted industrial injury he had no right upper extremity symptoms or limitations and was able to perform the full duties required of his position, that he has had pain in his right shoulder at the top going into the base of the trapezius and scapula since his admitted industrial injury of September 18, 2020. Claimant testified that references to left-sided complaints and symptoms in his early medical records are incorrect. He testified that he initially reported right-sided pain and was treating his right shoulder despite the medical records referencing the left shoulder. Claimant stated that he was unaware of any tear in his shoulder prior to March 24, 2021. Claimant testified that he had an injection in his shoulder performed by Dr. Kawasaki which provided temporary relief, but that the symptoms complained of in the shoulder extending into the scapula had returned.

28. On cross-examination, when Claimant was directed to a copy of the January 8, 2021 report by Dr. Smithart, Claimant testified that he did not know whether the subjective complaints in the report were accurate. Respondent's counsel pointed to the statements about the pain being primarily in Claimant's right shoulder and that the report documented Claimant reporting the pain typically being "in the center of his neck and both shoulders." Claimant responded, "I don't remember, honestly." (Hr'g Tr. 21:15). When asked to confirm that he did not remember specifically where his pain was, Claimant responded, "It was a year ago, honestly." (Hr'g Tr. 21:21). When asked whether he saw Dr. Koval after his first visit with Denver Health, Claimant testified that he did not see Dr. Koval until March 2021, despite the records showing that he saw Dr. Koval three times prior to March 2021, the earliest being October 28, 2020. Claimant then testified, "I don't really remember. It was so long ago. I think I seen about every doctor in that office." (Hr'g Tr. 20:16-18).

29. Dr. Striplin testified at hearing on behalf of Respondent as an expert in occupational medicine. He explained that it is difficult to be certain regarding Claimant's source of pain, stating it could be any or all of Claimant's MRI findings. He testified that does have pathology of the right shoulder evidence on MRI, but that the MRI does not evidence an acute injury. Dr. Striplin explained that the radiologist noted that the findings could suggest a prior injury. Dr. Striplin testified that the reported mechanism of injury is inconsistent with Claimant's MRI findings. He explained that shoulder injuries typically occur when falling onto a hand, when reaching over head or out to the side, or falling from a height and grabbing on to prevent the fall, and that being pressed back into a car seat would not cause injury to the shoulder. He discussed the discrepancies between Claimant's reports of the speed of the vehicle, testifying that he found it implausible that the vehicle was going 20-25 miles per hour. He testified that striking the dock at 5-10 miles per hour would not be expected to cause damage to the AC joint or produce a rotator cuff tear. Dr. Striplin further testified that he had never seen a shoulder injury whose symptoms did not manifest until months later. With regard to Dr. Hewitt's note that Claimant had a diagnostic response to a right shoulder injection, Dr. Striplin testified that he found no documentation in Dr. Kawasaki's reports that Dr. Kawasaki actually performed a right shoulder injection.

30. On cross-examination, Dr. Striplin testified that the recommended surgery is reasonable and that he does not dispute the necessity of the surgery. Dr. Striplin testified that, although there are references to the right shoulder in reports earlier than March 12, 2021, there remained a significant delay in Claimant's reports of right shoulder issues.

31. The ALJ finds the testimony of Dr. Striplin, as supported by the medical records, more credible and persuasive than the testimony of Claimant and the opinions of Drs. Kawasaki and Hewitt.

32. While the recommended right shoulder surgery is reasonable and necessary, Claimant failed to prove it is more probably true than not that the surgery recommended is causally related to his September 18, 2020 industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonably necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Claimant failed to prove it is more probably true than not the right shoulder surgery recommended by Dr. Hewitt is causally related to his September 18, 2020 industrial injury. Claimant's credibility is undermined by inconsistencies in his reports regarding the mechanism of injury and the onset and location of his symptoms.

Claimant reported to Dr. Smithart that the vehicle in which he was riding was going 5-10 miles per hour when it struck the dock and that he did not initially experience any pain. He then reported to Dr. Kawasaki the same speed, but that he experienced pain in his neck and low back during the collision. Dr. Kawasaki noted there was no headrest on Claimant's seat. Claimant later reported to Dr. Hewitt that the vehicle was going 20 miles per hour and that he experienced an immediate onset of neck and right shoulder pain. He later reported to Dr. Striplin that the vehicle was going 20-25 miles per hour, he struck the headrest, and experienced no immediate symptoms. Claimant testified at hearing that the vehicle was going at high speed and that he hit the headrest during the collision. Based

on the description of the accident, in which the driver was backing up into a dock to park, the ALJ is not persuaded it was likely the driver was going 20-25 miles per hour. Dr. Striplin credibly opined that it is not medically probable the mechanism of injury, striking the dock at 5-10 miles per hour, caused Claimant's right shoulder pathology and need for treatment.

Despite early medical records being devoid of any mention of right-sided complaints or findings, Claimant purports that he initially reported right shoulder and right-sided issues and that, since the beginning of his treatment, the treatment was focused on his right side. Claimant's contention is incredible based on a comprehensive review of the medical records. At Dr. Smithart's initial evaluation on September 21, 2020, she specifically made a distinction between Claimant's pre-existing right shoulder pain from a prior injury, and "new" left-sided pain from the September 18, 2020 incident. Additionally, the medical record from this evaluation does not document any examination of the right side. Claimant attended follow-up evaluations in October 2020 and November 2020, which also contain no reference to right-sided complaints or examinations of the right side. Dr. Kawasaki's December 22, 2020 medical note further contradicts Claimant's contention by stating that Claimant's pain initially was more on the left side but is currently bilateral. Dr. Smithart's January 8, 2021 note also undermines Claimant's argument in specifying that, on that particular day, Claimant's pain was primarily in the right shoulder although "typically center and both shoulders." While typographical errors in medical records are certainly possible, here, the ALJ is not persuaded that multiple providers at different over multiple visits failed to accurately document Claimant's reported symptoms and failed to examine the specific body parts about which Claimant allegedly complained.

Dr. Striplin credibly testified at hearing testified at hearing that Claimant's shoulder, had it been injured in the work incident, would have exhibited symptoms much sooner than three months after the date of injury. Dr. Striplin also credibly testified that the mechanism described by Claimant would not be anticipated to, and did not, cause a Claimant's shoulder injury. Based on the totality of the evidence, the preponderant evidence does not demonstrate the surgery is causally related to the September 18, 2020 work injury.

ORDER

It is therefore ordered that:

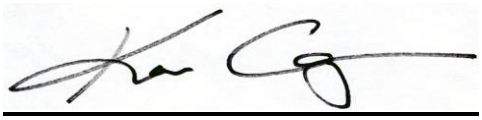
1. Claimant failed to prove by a preponderance of the evidence the right shoulder surgery recommended by Dr. Hewitt is causally related to his September 18, 2020 industrial injury. Claimant's claim is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their General Admission of Liability (GAL) acknowledging that Claimant suffered an industrial injury during the course and scope of her employment with Employer on December 3, 2019.

FINDINGS OF FACT

1. Claimant is a 42-year-old female who began working for Employer on October 14, 2019 in the position of General Labor/Hand Pack. The hand packing job involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks together with both hands, straightens them, then pivots to place the cheese in a box. Each handful weighs anywhere from two to five pounds. Once the box is filled with 15-pounds of cheese, it is placed onto a roller to move to the next conveyor. The workers wear freezer gloves as well as one or two pairs of thick yellow gloves to help protect them from the cold product. The working environment is room temperature.

2. Claimant worked four days each week for 10 hours each day. She began her shift at 8:30 p.m. and worked until 6:00 a.m. Claimant received two 15-minute breaks and a 30-minute lunch period.

3. Employer's Processing Supervisor VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line box more cheese than those at the end of the line. In reviewing a photo of the hand packing line as one of the Exhibits, Ms. VF[Redacted] noted that individuals in stations 9-12 of the line had no cheese sticks to pack. She generally remarked that there are normally periods of time when workers near the end of line have no cheese to pack. Ms. VF[Redacted] also commented that employees rotate positions every hour on the line. Finally, she explained that employees are instructed to scoop the cheese with tucked elbows in armfuls of approximately two to five pounds.

4. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations every hour. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Instead, workers rotate approximately five to seven stations down the line. For example, if a worker started at station eight and proceeded five stations down the line, she would rotate to station 1. The worker would then rotate the next hour to station 6. Similarly, if a worker rotated seven stations hourly and began at station 1, she would move to station eight. Ms. VF[Redacted] remarked that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. So to alleviate that pressure, we rotate them." She summarized that rotating stations gives

employees on the line a “period of time where they can sit at the end of the line and, kind of, get a breather.”

5. Ms. VF[Redacted] explained that hand packing is not performed on a daily basis, and employees engage in a variety of related jobs on off-days. On certain days, workers will “pick cheese.” The process involves identifying defective cheese sticks moving down a conveyor belt. If a defective cheese stick is found, the employee picks it up and drops it into a nearby tub.

6. The “bag tuck” position is another job on non-hand-pack days. The duties involve flipping over each side of the plastic bag in a box of cheese. The worker then folds the bag over the cheese and closes the flaps of the box.

7. Another job is “bag spotting.” The employee observes the boxes proceeding down the conveyor belt to make sure the plastic bags inside the boxes are in the proper positions. They then straighten the bags when necessary.

8. Employees also perform cleaning tasks. The worker uses a grabber to pick up cheese that has fallen on the floor and drops it into a tub. On some days there is nothing to clean and on other days employees may have to pick up fallen cheese for about 20 minutes out of an hour.

9. During Claimant’s first several weeks working for Employer she received training. Specifically, from October 14-26, 2019 Claimant engaged in computer-based education. For the next couple of weeks, Claimant shadowed other employees and began learning her various duties.

10. On November 18, 2019 Claimant began working in the hand packing position without shadowing a fellow employee. Hand packing was not performed again until November 25, 2019, when Claimant worked a 10.25-hour shift. Claimant did not return to hand-packing until December 2, 2019, when she worked a 12-hour shift. On the morning of December 3, 2019 Claimant reported to Ms. VF[Redacted] that she felt an aching and throbbing pain in her index finger. Ms. VF[Redacted] removed Claimant from the rotation and limited her to picking cheese.

11. On December 3, 2019 Claimant visited Brush Family Medicine and saw Ryan Reiss, NP for an evaluation. Claimant told NP Reiss that her job was to constantly dip her hands into cheese, squeeze it together, and fold it over in a mixing motion. She complained of severe right wrist pain when moving her right thumb. Claimant felt that the pain had been building over the previous three to four weeks. Physical examination revealed pain to palpation of the right wrist at the base of the thumb. NP Reiss assessed Claimant with right wrist pain that was likely related to de Quervain’s tenosynovitis. Claimant received a thumb spica splint and was restricted to limited lifting and use of the right hand. She subsequently attended six visits of physical therapy.

12. Claimant was placed on light duty from December 3, 2019 until February 11, 2020. On February 13, 2020 she performed the cheese picking job. On February 18,

2020 Claimant worked as break relief with no hand packing. She then worked 4.5 hours on February 19, 2020 in an unknown capacity.

13. On February 18, 2020 Respondents filed a General Admission of Liability (GAL). Respondents acknowledged that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits as a result of her December 3, 2019 industrial injury.

14. Claimant returned to the hand packing line on February 20-21, 2020. She did not work on February 22, 2020 and no hand packing was performed on February 23, 2020. On February 24, 2020 Claimant covered breaks on the hand packing line and worked for a maximum of five hours. Claimant again performed hand packing on February 25, 2020. On February 26, 2020 Claimant's work duties included bag spotting, picking cheese and other non-hand packing tasks.

15. On February 27, 2020 Claimant returned to NP Reiss for an evaluation. He noted that Claimant had returned to full duty with no lingering complaints. Claimant reported that on her second day back to work, she experienced bruising on the palm of her hand. NP Reiss noted that the pain over the base of the thumb had resolved and Claimant now reported pain radiating down into all four fingers. He placed Claimant on restrictions of limited use of the right hand up to five pounds.

16. Claimant never returned to work for Employer after February 26, 2020. She subsequently applied for social security disability benefits.

17. On March 16, 2020 NP Reiss remarked that Claimant's pain was in a different location than the previous two visits. Instead of pain over the base of her right thumb or in the palm of her hand, she now reported pain in the right wrist. NP Reiss documented that Claimant's wrist pain occurred after working in her garage at home. He referred Claimant to Gregory Reichhardt, M.D. for further evaluation and a possible impairment rating.

18. Claimant first visited Dr. Reichhardt for an evaluation on April 21, 2020. She informed him that her job involved grabbing a five to six-pound bundle of cheese and placing it in a box. She explained that her right wrist, thumb and distal forearm had all turned purple. Dr. Reichhardt assessed possible carpal tunnel syndrome and de Quervain's tenosynovitis. He could not rule out Chronic Regional Pain Syndrome (CRPS). Dr. Reichhardt recommended an EMG nerve conduction study.

19. On August 18, 2020 Claimant continued to report pain to Dr. Reichhardt over the volar aspect of her right wrist. Dr. Reichhardt saw no evidence of allodynia, hyperpathia, vasomotor changes, skin, hair, or nail trophic changes, and no sudomotor changes. After reviewing an August 13, 2020 right wrist MRI, Dr. Reichhardt assessed a ganglion cyst.

20. On October 21, 2020 Dr. Reichhardt recommended a pain psychology evaluation due to Claimant's reported significant anxiety. He assessed Claimant with

delayed recovery. At a November 3, 2020 examination Claimant demonstrated allodynia over the ulnar aspect of the right hand.

21. On February 9, 2021 Claimant visited George Schakaraschwili, M.D. for a CRPS evaluation. After QSART and thermogram testing, Dr. Schakaraschwili determined the findings were consistent with CRPS.

22. On March 30, 2021 Joseph B. Blythe, MA, CRC, performed a Job Demands Analysis (JDA) for the position of General Labor/Hand Pack at Employer's facility. He noted that Claimant's job duties while performing hand packing involved gathering cheese sticks bilaterally from a conveyor line and placing them into a shipping box until it weighed approximately 15 pounds. Once the correct weight was attained, the employee pushed the shipping box across rollers to a conveyer. The worker then transferred shipping boxes from the line to a packing table and repeated the process. The work cycle of filling a box of cheese and starting a new one measured between 28 and 41 seconds.

23. Mr. Blythe remarked that Claimant had been diagnosed with de Quervain's tenosynovitis. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Mr. Blythe did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors. However, there were no others present.

24. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand pack process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant spent four hours of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

25. On June 7, 2021 Carlos Cebrian, M.D. conducted an independent medical examination of Claimant. After reviewing Claimant's medical records, performing a physical examination and considering Mr. Blythe's JDA, Dr. Cebrian conducted a causation analysis pursuant to the *Guidelines*. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated Primary Risk Factors. He initially noted that Claimant had been diagnosed with de Quervain's tenosynovitis.

26. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for

Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The category requires four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees. Other risk factors in the category are six hours of elbow flexion > 90 degrees or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Dr. Cebrian concluded Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the *Guidelines*.

27. Because there were no Primary Risk Factors, Dr. Cebrian reviewed the Secondary Risk Factors delineated in the *Guidelines*. Notably, any Secondary Risk Factor must be physiologically related to the diagnosis. In performing the JDA, Mr. Blythe determined that Claimant had a Secondary Risk Factor for exposure to handling frozen foods that were 10 degrees for four hours. Because of the presence of the Secondary Risk Factor, Dr. Cebrian considered the Diagnosis-Based Risk Factor Table for Claimant's specific diagnosis of de Quervain's tenosynovitis. Dr. Cebrian concluded there was no correlation between the handling of frozen foods and the development of de Quervain's tenosynovitis. Claimant thus did not suffer a cumulative trauma condition as a result of her work activities for Employer. Dr. Cebrian summarized that Claimant's "right upper extremity complaints were never causally related to her work [for Employer]. No treatment should have occurred under the 12/3/2019 claim."

28. On December 26, 2021 Vocational Evaluator Daniel Best authored a JDA for Claimant's position as General Labor/Packager at Employer's facility. He explained that Claimant's job duties involved standing at a conveyor and repeatedly grasping from two to three pounds of frozen mozzarella cheese sticks weighing two ounces each into a plastic lined shipping box. Once the box weighed approximately 15 pounds, the worker pushed it down a roller to another conveyor belt exiting the packaging area. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. A task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds. Mr. Best emphasized that each bilateral task cycle for Claimant's job duties requires reaching, twisting the hands to manipulate/grip/grasp/lift/move and transfer each handful of frozen cheese sticks.

29. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, Mr. Best explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. However, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also met the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the

Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more, such as handling frozen foods that are 10 degrees.

30. On May 27, 2022 Mr. Blythe performed a second JDA to evaluate the other duties Claimant performed after learning that the actual hand-packing job was only one of several tasks. He specifically considered Claimant's duties as Bag Tuck Helper, Bag Spotter, Picker and Cleaner. Mr. Blythe did not find any Primary or Secondary Risk Factors in the preceding job duties.

31. Mr. Blythe testified consistently with his JDA that Claimant did not exhibit any Primary Risk Factors pursuant to the *Guidelines* for the development of a cumulative trauma condition. The only Secondary Risk Factor involved the handling of frozen foods. He explained that his job is to ascertain the number of hours per day that risk factors exist in a job. Mr. Blythe remarked that the threshold for awkward wrist posture is four hours or more per day. He commented "that's extremely difficult to do, based on my, you know, thousands of observations of work sites because, essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold. Notably, although Mr. Blythe noted ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level because the workers were not in a static position. Furthermore, Mr. Blythe disagreed with Mr. Best's determination regarding the Primary Risk Factors of awkward posture and repetition/duration. He explained that Mr. Best did not visit Claimant's jobsite and was unable to time or count her activities. Moreover, Mr. Best did not specifically identify the Primary Risk Factors that were present within each category. He specifically did not mention whether awkward posture while performing the hand packing position involved flexion, extension or ulnar deviation.

32. Mr. Best also testified consistently with his JDA that Claimant satisfied the Primary Risk Factors of awkward posture and repetition/duration for the development of a cumulative trauma condition. Claimant also met the threshold for two Secondary Risk Factors. Mr. Best detailed that the activity of moving from a neutral position of the wrist to a scooping position constitutes a 90-degree supination. Furthermore, the grasping motion in placing the hands down to pick up a bundle of cheese involves an ulnar deviation. He remarked that in every picture in Mr. Blythe's report the employees are either engaging in ulnar deviation with their hands and wrists and/or elbow flexion at 90 degrees or more. Mr. Best emphasized that employees filled a box every 30 to 45 seconds. A task cycle occurs about every nine seconds during each shift. Therefore, the awkward posture of four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation of greater than 20 degrees met the minimum threshold to constitute a Primary Risk Factor under the *Guidelines*.

33. Mr. Best disagreed with Mr. Blythe's analysis. He explained that, according to OSHA, a repetitive task is one that is performed in the same way for a prolonged period. Mr. Best remarked that the hand packer position should be considered not just as filling a box with cheese every 28 to 41 seconds, but as grabbing handfuls of cheese every nine seconds to place them in a box. He specified that individuals are basically performing the same activity every minute until there is a break period. "So, it's a very highly repetitive job, and that's why they rotate those positions."

34. Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He reiterated that Claimant suffered from de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks while working for Employer. He commented that Claimant only worked as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering the JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. He compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

35. Dr. Cebrian explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, there is no mention of a requisite time period for the development of certain cumulative trauma conditions. Instead, "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." In specifically addressing Claimant's diagnosis, Dr. Cebrian noted that whether "she worked 20 years doing this job, she didn't rise to the level of having any kind of primary risk factor or a secondary risk factor that correlated with the diagnosis-based risk factor table that would come up with a cumulative trauma condition." He maintained that physicians exercise discretion and utilize clinical experience in determining whether an individual has suffered a cumulative trauma condition based on work exposure.

36. On August 25, 2022 the parties conducted the post-hearing evidentiary deposition of Dr. Reichhardt. He diagnosed Claimant with de Quervain's tenosynovitis and explained that the causes of the condition are typically activities that "involve gripping, grasping, repetitive movement of the thumb, the digits of the hand, the wrist, pronation and supination, repetitive wrist flexion, awkward postures with the wrist." In considering the causes of Claimant's condition, Dr. Reichhardt reviewed the JDA's prepared by Mr. Blythe and Mr. Best. However, after rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt detailed that the cycle time involved grabbing one bundle of cheese, not filling a box with cheese.

37. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma

condition. Dr. Reichhardt remarked that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS. However, Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing its evidence-based criteria probably did not involve subjects who had only been on the job for a few days. He also noted that individuals typically suffer a gradual onset of pain during the development of de Quervain's tenosynovitis.

38. Respondents have demonstrated that it is more likely than not that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019. A review of Claimant's job duties as a hand packer reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. The hand packing position involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks with both hands, straightens them, and pivots to place the sticks in a box.

39. Ms. VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line pack more cheese than those at the end of the line. Ms. VF[Redacted] remarked that there are normally periods of time when workers near the end of line have no cheese to pack. She also commented that employees rotate positions on the line every hour. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Ms. VF[Redacted] explained that workers rotate approximately five to seven stations down the line. She commented that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. Finally, Ms. VF[Redacted] remarked that hand packing is not performed on a daily basis and employees engage in a variety of related jobs on off-days.

40. Relying on the *Guidelines,* Mr. Blythe conducted a JDA and performed time studies of the hand packer position. He did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors, However, there were no others present. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the minimum threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant engaged in excess of four hours per day of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

41. Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He diagnosed Claimant with de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks. He commented that Claimant was only working as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering Mr. Blythe's JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

42. In contrast, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also had the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. He explained that a task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting, and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds.

43. After rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt explained that the cycle time involved grabbing a bundle of cheese and placing it in a box, not filling a box with cheese. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. Dr. Reichhardt concluded that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS.

44. Despite the JDA of Mr. Best and the medical opinion of Dr. Reichhardt, the record reflects that Respondents have demonstrated that Claimant did not likely suffer a cumulative trauma condition while working for Employer. Initially, Dr. Reichhardt's opinion was predicated on Mr. Best's determination that a task cycle lasted nine seconds. Mr. Best calculated the task cycle by using a rate of five handfuls every 45 seconds to fill a 15-pound box with cheese sticks. However, Mr. Blythe credibly commented that Mr. Best

did not visit Claimant's jobsite and was unable to time or count the activities of a worker on the hand packing line. He remarked that the threshold for awkward wrist posture of four hours or more per day is difficult to achieve because "essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold."

45. Although Mr. Blythe noticed ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level delineated in the *Guidelines* because the workers were not in a static position. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he calculated she spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe's time measurements are consistent with the *Guidelines*. The *Guidelines* specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive time are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

46. Mr. Best's analysis also failed to consider that workers on the cheese packing line rotate hourly to reduce the strain on employees at the beginning of the line. Ms. VF[Redacted] credibly remarked that the individuals at the front of the line pack more cheese than those at the end of the line. She detailed the reasons and process for rotating packing stations. Ms. VF[Redacted] noted that employees do not rotate stations sequentially because they will not have adequate time to rest. She explained that workers rotate approximately five to seven stations down the line. In contrast, Mr. Best simply relied on Claimant repeatedly picking up 2.5 pound handfuls of cheese every nine seconds throughout her shift. Although the preceding assumption may apply to workers at the front of the line, Employer purposely limited the occupational exposure of employees by rotating them down the line so there were fewer cheese sticks to grab.

47. The record reveals that Claimant was only on the hand packing line for three prior to her report of symptoms on December 3, 2019. Dr. Reichhardt commented that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. However, Dr. Cebrian persuasively explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, he noted "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." Dr. Cebrian maintained that physicians exercise discretion by using clinical experience to consider whether an individual has suffered a cumulative trauma condition based on work exposure. Furthermore. Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing evidence-based criteria probably did not involve subjects who had only been on the job for a few days.

48. Based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive

activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Respondents have thus demonstrated that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. Generally, a claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.,* 989 P.2d 251, 252 (Colo. App. 1999). However, §8-43-201, C.R.S. provides that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." On February 18, 2020 Respondents filed a GAL acknowledging that Claimant was entitled to receive medical benefits and TTD benefits as a result of her December 3, 2019 industrial injury. Because Respondents seek to withdraw their GAL, they bear the burden of proof by a preponderance of the evidence.

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing at least two pounds. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, pp. 24-26.

8. Rule 17, Exhibit 5 instructs physicians about using risk factors for assessing causation of a cumulative trauma condition. After determining a diagnosis and defining the job duties of the worker, physicians should compare the worker's duties with the Primary Risk Factor Definition Table. The *Guidelines* specify that "[h]ours are calculated

by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive times are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

9. As found, Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019. A review of Claimant's job duties as a hand packer reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. The hand packing position involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks with both hands, straightens them, and pivots to place the sticks in a box.

10. As found, Ms. VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line pack more cheese than those at the end of the line. Ms. VF[Redacted] remarked that there are normally periods of time when workers near the end of line have no cheese to pack. She also commented that employees rotate positions on the line every hour. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Ms. VF[Redacted] explained that workers rotate approximately five to seven stations down the line. She commented that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. Finally, Ms. VF[Redacted] remarked that hand packing is not performed on a daily basis and employees engage in a variety of related jobs on off-days.

11. As found, relying on the *Guidelines,* Mr. Blythe conducted a JDA and performed time studies of the hand packer position. He did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors, However, there were no others present. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the minimum threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant engaged in excess of four hours per day of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

12. As found, Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He

diagnosed Claimant with de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks. He commented that Claimant was only working as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering Mr. Blythe's JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

13. As found, in contrast, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also had the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. He explained that a task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting, and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds.

14. As found, after rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt explained that the cycle time involved grabbing a bundle of cheese and placing it in a box, not filling a box with cheese. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. Dr. Reichhardt concluded that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS.

15. As found, despite the JDA of Mr. Best and the medical opinion of Dr. Reichhardt, the record reflects that Respondents have demonstrated that Claimant did not likely suffer a cumulative trauma condition while working for Employer. Initially, Dr. Reichhardt's opinion was predicated on Mr. Best's JDA that a task cycle lasted nine seconds. Mr. Best calculated the task cycle by using a rate of five handfuls every 45 seconds to fill a 15-pound box with cheese sticks. However, Mr. Blythe credibly commented that Mr. Best did not visit Claimant's jobsite and was unable to time or count

the activities of a worker on the hand packing line. He remarked that the threshold for awkward wrist posture of four hours or more per day is difficult to achieve because "essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold."

16. As found, although Mr. Blythe noticed ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level delineated in the *Guidelines* because the workers were not in a static position. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he calculated she spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe's time measurements are consistent with the *Guidelines*. The *Guidelines* specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive time are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

17. As found, Mr. Best's analysis also failed to consider that workers on the cheese packing line rotate hourly to reduce the strain on the employees at the beginning of the line. Ms. VF[Redacted] credibly remarked that the individuals at the front of the line pack more cheese than those at the end of the line. She detailed the reasons and process for rotating packing stations. Ms. VF[Redacted] noted that employees do not rotate stations sequentially because they will not have adequate time to rest. She explained that workers rotate approximately five to seven stations down the line. In contrast, Mr. Best simply relied on Claimant repeatedly picking up 2.5 pound handfuls of cheese every nine seconds throughout her shift. Although the preceding assumption may apply to workers at the front of the line, Employer purposely limited the occupational exposure of employees by rotating them down the line so there were fewer cheese sticks to grab.

18. As found, the record reveals that Claimant was only on the hand packing line for three prior to her report of symptoms on December 3, 2019. Dr. Reichhardt commented that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. However, Dr. Cebrian persuasively explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, he noted "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." Dr. Cebrian maintained that physicians exercise discretion by using clinical experience to consider whether an individual has suffered a cumulative trauma condition based on work exposure. Furthermore. Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing evidence-based criteria probably did not involve subjects who had only been on the job for a few days.

19. As found, based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive

activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Respondents have thus demonstrated that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Respondents may withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: October 27, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that his right knee condition has worsened and if so, whether this worsening is causally related to his admitted December 6, 2016 industrial injury.

PRELIMINARY DISCUSSION

At the outset of hearing, the ALJ discussed with the parties the issues they intended to litigate. Claimant's Counsel represented that he had discussed with Respondents' Counsel a willingness to narrow the issues to medical benefits, specifically Claimant's entitlement to PRP injections recommended by Dr. Simpson and "worsening" of Claimant's right knee condition. Respondents' Counsel acknowledged that she had spoken to Claimant's attorney and was in agreement that "worsening" had been endorsed on Claimant's Application for Hearing but the issue of medical benefits had not. Claimant then advised the ALJ that he would proceed forward solely on the issue of "worsening". The ALJ advised Claimant's counsel that based upon his Application for Hearing, medical benefits had not been endorsed and that Respondents' counsel was not agreeing to litigate the issue of Claimant's entitlement to additional medical benefits. Accordingly, the ALJ advised the Claimant to limit his presentation of evidence to the alleged worsening of condition. The ALJ also granted Claimant leave to submit photographs of his alleged disfigurement to the ALJ rather than attempt a video viewing of the same.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's December 6, 2016 Industrial Injury, his Medical Treatment and Maximum Medical Improvement

1. Claimant suffered an admitted injury to his right leg/knee on December 6, 2016, while employed as a rail marshal. According to the medical record, Claimant was turning on loose gravel when he fell injuring his right knee. As he was unable to put weight on his right leg, Claimant was taken to EmergiCare for medical treatment. X-rays were obtained and showed mild bony spurring with no apparent fracture and quadriceps tendon enthesopathy. An MRI demonstrated a distal quadriceps rupture with 5.8 cm retraction. (Resp. Ex. L, p. 185; Resp. Ex. N, p. 202).

2. Claimant was referred to Dr. Michael Simpson who determined Claimant would need surgery to repair his ruptured quadriceps tendon. Claimant underwent surgery with Dr. Simpson on December 10, 2016, during which his quadriceps tendon was repaired and excision of exostosis of the proximal superior patella was performed.

(Resp. Ex. L, p. 185). Claimant subsequently underwent a manipulation of the knee under anesthesia along with a second arthroscopic surgery consisting of a lysis of adhesions and debridement, i.e. meniscal trimming on April 4, 2017, in an effort to improve his right knee range of motion. *Id.* at p. 186.

3. Claimant was placed at maximum medical improvement (MMI) on August 28, 2017 by his authorized treating provider (ATP), Dr. Douglas Bradley. (Resp. Ex. L. p. 187; Resp. Ex. N, p. 205). In an impairment rating report dated September 17, 2017, Dr. Bradley assigned 10% lower extremity impairment for the right knee, which converts to 4% whole person impairment. (Resp. Ex. N, p. 203-204). Claimant was released to full duties. *Id*. at p. 203. Dr. Bradley did not recommend specific maintenance care other than to indicate that Claimant was to perform his "home exercises and stretch daily". *Id.*

4. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bradley's September 17, 2017 impairment rating opinions on November 15, 2017. (Resp. Ex. E, p. 51).

5. Claimant objected to Respondents' November 15, 2017 FAL and requested a Division Independent Medical Examination (DIME). The DIME was performed by Dr. Wallace Larson on November 7, 2019. During the DIME, Dr. Larson confirmed that Claimant had suffered a ruptured quadriceps tendon. (Resp. Ex. K, p. 179). He also noted that Claimant had calcific tendinitis of the quadriceps. *Id.* He agreed with Dr. Bradley's MMI date and performed right knee range of motion measurements. *Id*. at p. 178. Following his physical examination, Dr. Larson opined that Claimant had sustained 11% lower extremity impairment, which converts to 4% whole person impairment. *Id.* at p. 179. Finally, Dr. Larson noted that "[n]o work restrictions [were] needed" and Claimant had no need for maintenance treatment. *Id.*

6. Respondents filed an Amended FAL on December 11, 2019, admitting to Dr. Larson's opinions concerning impairment and maintenance treatment as outlined in his November 7, 2019 DIME report. (Resp. Ex. F, p. 64).

7. Dr. Miguel Castrejon completed an independent medical examination (IME) of the Claimant on July 24, 2020. Dr. Castrejon obtained a history and completed a physical examination as part of the IME appointment. At his IME, Claimant reported "intermittent to occasional constant dull pain to the anterior aspect of the right knee and distal thigh that worsens with walking for more than 1-2 hours. (Resp. Ex. L, p. 184). He also reported swelling, perceived instability, occasional limping and difficulty ascending/descending stairs. *Id.* at p. 184. While Claimant reported that his knee condition had improved, it had begun to worsen by the time of the IME. *Id.*

8. Dr. Castrejon documented an alteration in Claimant's gait, trace effusion in the right knee, a slight decrease in baseline range of motion and strength along with "medial joint line tenderness and painful but negative McMurry" testing. (Resp. Ex. L, p. 189). Although Dr. Castrejon opined that Claimant was appropriately placed at MMI on August 28, 2017, he reported that Claimant had "recently experienced a worsening of his condition that was suspect for internal derangement". *Id.* Dr. Castrejon raised concern

surrounding the meniscal trimming that was required at the time of the manipulation and questioned whether Claimant sustained meniscal injury at the time of Claimant's slip and fall on December 6, 2016. While Claimant's exam was not suspect for quadriceps re-tear, Dr. Castrejon noted this could not be entirely ruled out. He recommended a right knee MRI to evaluate the integrity of the quadriceps repair as well as the meniscus. *Id.*

9. According to the medical record, Claimant's case was reopened on October 8, 2020. (Resp. Ex. G, p. 111). Claimant then returned to Dr. Simpson for "increasing right knee pain" on December 1, 2020. (Resp. Ex. Q, p. 221). Dr. Simpson documented that Claimant had done well following his quadriceps tendon repair surgery until around 4 months prior to his December 1, 2020 appointment, when he started to experience "increasing pain, achiness, and stiffness in his knee". *Id.* Examination of the right knee revealed some "obvious quadriceps atrophy" when compared to the left knee. Id. at p. 222. Nonetheless, Claimant demonstrated "full" extension and flexion of the right knee. Claimant also demonstrated "some patellofemoral crepitation" and "tenderness at the superior pole of the patella in the distal insertion of the quadriceps tendon". *Id.* Dr. Simpson expressed a "little" concern about Claimant's increasing symptoms noting that "[h]e may be developing some increasing quadriceps tendinosis", which could place him at risk of a repeat rupture. *Id.* Accordingly, Dr. Simpson recommended a repeat MRI, which he noted had been denied previously. *Id.* at p. 221-222.

10. Claimant underwent an MRI of the right knee on or about December 10, 2020 and this imaging was reviewed by Dr. Simpson during a follow-up appointment with Claimant on December 15, 2020. (Resp. Ex. O, p. 209; Resp. Ex. R, p. 225). Dr. Simpson noted that the MRI demonstrated:

> "[S]ignificant patellofemoral arthritis in his knee. They called this chrondromalacia, but I have reviewed his MRI and this is actually more progressive osteoarthritis of the patellofemoral joint. He has thickening of the distal pole of the quadriceps tendon with a recurrent spur at the distal insertion of the quadriceps tendon. Patellar tendon is also thickened.

Id. Dr. Simpson assessed Claimant with arthritis and quadriceps tendinitis of the right knee, noting further that Claimant had undergone a right quadriceps tendon repair. *Id.*

11. Regarding the cause of Claimant's arthritis, Dr. Simpson opined as follows: "I think given his altered patellofemoral mechanics from repair of his quadriceps tendon, the subsequent quadriceps weakness and chronic atrophy, as well as his job demands, he has developed progressive osteoarthritis in the patellofemoral joint". (Resp. Ex. R, p. 226). Accordingly, Dr. Simpson noted: "I think treatment of [Claimant's] knee osteoarthritis . . . should be covered under his workers' compensation claim". *Id.* Because Claimant had a history of "mild" hypertension, Dr. Simpson concluded that a corticosteroid injection and anti-inflammatory medications were contraindicated as treatment options for Claimant. Instead, Dr. Simpson recommended a series of PRP injections and increasing activities as tolerated. *Id.*

12. Claimant presented to Concentra for an unscheduled appointment on December 15, 2020, following his appointment with Dr. Simpson. (Resp. Ex. O, p. 209). Claimant was treated on an emergent basis for "chronic right knee pain". *Id.* Following a physical examination, Dr. Bradley noted, "MMI date unknown at this time because pain and therapy needed". *Id*. at p. 212. Dr. Bradley anticipated that Claimant would reach MMI by February 21, 2021. Id. at p. 208. (See also, Resp. Ex. P, p. 218).

13. Claimant returned to Dr. Simpson on June 1, 2021. (Resp. Ex. S, p. 229). During this appointment, Claimant continued to "struggle with pain and stiffness in his knee". *Id.* Claimant rated his pain at a 5/10, which represents an increase from the 3/10 pain he reported approximately 6 months earlier on December 15, 2020. Dr. Simson noted that the recommended PRP injections had been denied and that Claimant was treated with physical therapy instead. *Id.* Dr. Simpson opined that "based on recent studies", PRP injections would be the most effective treatment option for Claimant's condition but because "work comp is not willing to do any additional consideration, (for PRP injections) then I think effectively, I have nothing else to offer him". Consequently, Dr. Simpson released Claimant from his care. *Id*. at p. 230. Dr. Simpson opined further that Claimant could consider visco-supplementation under his private insurance. *Id.*

14. Dr. Bradley placed Claimant at MMI on June 14, 2021 without permanent medical impairment, noting that he was able to return to full duty work. (Resp. Ex. U, p. 240-242). During this appointment, Claimant reported 4/10 right knee pain while sitting. *Id.* at p. 238.

15. Respondents filed an Amended FAL on September 29, consistent with the opinions of Dr. Bradley regarding MMI and impairment as outlined in his June 14, 2021 medical report. (Resp. Ex. G). The September 29, 2021 FAL noted that the 11% permanent partial disability (PPD) award of $6,748.00 had previously been paid consistent with the November 7, 2019 DIME report of Dr. Larson. Because Dr. Bradley had opined that Claimant had reached MMI without impairment, Respondents noted that the prior PPD award of $6,748.00 was considered an overpayment. *Id.* at p. 88.

16. Respondents filed another Amended Final Admission of Liability on November 3, 2021 removing the asserted overpayment reflected in the September 29, 2021 FAL. (See Resp. Ex. H).

17. Claimant objected to the November 3, 2021 FAL and requested a DIME. Claimant's second DIME was completed by Dr. Nicholas Kurz, D.O. on April 11, 2022. (Resp. Ex. M). Dr. Kurz documented that at the time of the DIME, Claimant had not been treated with any injections, orthopedic evaluations or treatment through his primary care provider (PCP) for approximately one year. *Id.* at p. 193.

18. Dr. Kurz noted that while Claimant denied "new" injuries since December 6, 2016, he was "5 years older, and 22 pounds heavier with a BMI of 35.1". (Resp. Ex. M, p. 195). He opined further, that Claimant was "known to have right knee arthritic ongoing issues and complaints predating his DOI including visco-supplementation injections, indicating likely end-stage arthritic issues". Although he opined that Claimant had pre-

existing osteoarthritis in the right knee, the medical records review section of Dr. Kurz' DIME report is devoid of any specific records he reviewed to support this conclusion. (See Resp. Ex. M). Moreover, Dr. Kurz did not comment on Claimant's pain levels throughout his treatment. Nor did Dr. Kurz document Claimant's pain level at the time of the DIME appointment.

19. Dr. Kurz indicated that Claimant was appropriately placed at MMI on August 28, 2017. (Resp. Ex. M, p. 197). He also upheld the previous impairment of 11% lower extremity impairment for reduced range of motion. *Id.* at p. 198. Finally, Dr. Kurz opined that Claimant had no need for maintenance medical treatment. *Id*. at p. 199. In support of his opinion regarding maintenance care and the cause of Claimant's worsening symptoms, Dr. Kurz noted that at the time of his December 6, 2016 injury, "[Claimant] was 51 years old with documented bilateral knee osteoarthritis, left greater than right, including the large spur that broke off resulting in as quadriceps rupture, which was healed and treated properly per the division guidelines". (Resp. Ex. M, p. 198). He went on to note:

> Now years later, [Claimant] is a bit older and heavier and experiencing progressive bilateral lower extremity arthritis symptoms, which are not causally or temporally related to the mechanism of his original injury, which at the time was likely more related to his arthritis than a true work related mechanism, however it has been found compensable, treated and an impairment rating was completed.

Id. at p. 198.

20. Respondents filed an Amended Final Admission of Liability on May 23, 2022 based on Dr. Kurz's DIME report. (Resp. Ex. J). The May 23, 2022 FAL denied liability for maintenance care after MMI. *Id*. at p. 158. Claimant then filed an Application for Hearing on June 16, 2022 endorsing the issues of disfigurement, permanent partial disability benefits, worsening, and maximum medical improvement. (Resp. Ex. A). The Application for Hearing contains no endorsement for medical benefits as an issue for hearing nor is "Petition to Reopen Claim" endorsed on Claimant's application. *Id.* at p. 2.

Claimant's Hearing Testimony

21. Claimant testified that the surgery performed by Dr. Simpson did not resolve all the issues/pain in his right knee. He added that he underwent a synvisc injection with Dr. Simpson sometime in 2021, which helped relieve his symptoms for approximately 6 months before it wore off and his symptoms worsened. He described a steady deterioration and an increase in his pain/symptoms following this 6-month period. According to Claimant, this progressive worsening began before his DIME with Dr. Kurz and has continued since. Indeed, Claimant described the current condition of his knee as painful, tight, unstable and popping. Despite his claims of worsening pain/symptoms, Claimant has continued to work in an unrestricted full duty capacity since he was released to work by Dr. Bradley on June 14, 2021. (Resp. Ex. U, p. 240, 242).

22. During cross-examination, Claimant admitted to prior service connected left knee problems, which he testified required injection therapy through the VA medical system. He also admitted that because of his left knee pain/dysfunction he was overcompensating with his right leg and knee. Consequently, he developed right knee pain and underwent one or two steroid injections directed to the right knee.

The Testimony of Dr. Kurz

23. Dr. Kurz testified as a board certified Family Medicine specialist who has been practicing Occupational Medicine throughout his career. He is Level II Accredited.

24. Dr. Kurz agreed with Dr. Simpson that Claimant suffers from osteoarthritis and chondromalacia. He also testified that these conditions are progressive in nature and will not improve with time. While he agreed that Claimant had osteoarthritis, Dr. Kurz testified that a recent statement by the American Academy of Orthopedic surgeons concluded that PRP and visco-supplementation injections are not beneficial in treating arthritis. Consequently, he testified that workers' compensation insurers have stopped covering the cost of such injections.

25. Dr. Kurz testified that Claimant had treatment for pain associated with end stage arthritis as evidenced by his prior visco-supplementation injections. While the ALJ is persuaded that Dr. Simpson administered a synvisc injection to Claimant's right knee sometime in 2021, several years after the admitted industrial injury in this case, the record is devoid of any evidence/indication that he had any visco-supplementation injections to the right knee prior to his December 6, 2016 industrial injury. Rather, the evidence presented supports a conclusion that Claimant underwent a pre-injury steroid injection directed to the right knee for pain he was experiencing from overuse based upon the disability he was experiencing in the left knee at the time.

26. According to Dr. Kurz, Claimant's current pain and right knee symptoms are related to the natural progression of his pre-existing non-work related osteoarthritis. Dr. Kurz testified that this expected progression combined with aging, weight gain and deconditioning explains Claimant's persistent and worsening symptoms. In support of his opinion, Dr. Kurz testified that while the original MRI only assessed the condition of the distal quadriceps tendon rather than the knee, a subsequent December 10, 2020 MRI of the right knee did not establish an actual injury to knee, but rather the presence of osteoarthritis. He also testified that a quadriceps tendon rupture is not likely to accelerate the rate of degeneration in the knee. Accordingly, Dr. Kurz maintained his opinion that Claimant's right knee arthritis was not related to Claimant's December 6, 2016 injury. In fact, Dr. Kurz opined that Claimant's pre-existing non-work related osteoarthritis probably caused Claimant's quadriceps tendon to calcify and ultimately rupture on December 6, 2016.

Claimant's Disfigurement

27. Claimant is seeking a disfigurement award for surgical scarring associated with his right distal quadriceps tendon rupture repair surgery. As noted, Claimant attended the hearing via teleconference. Consequently, the ALJ granted Claimant's unopposed request for the ALJ to evaluate his disfigurement by photograph(s) submitted to the OAC with his post-hearing position statement.

28. Claimant submitted seven (7) photographs depicting the nature and extent of the disfigurement he claims is related to his December 6, 2016 industrial injury. The photographs are labeled collectively as "Claimant's Exhibit A" and admitted into evidence.

29. Based upon the photographic evidence, the ALJ finds that Claimant has a visible disfigurement to the body consisting of an approximately 5 ¾ inch long by ⅜ inch wide surgical scar located on the anterior (front) portion of the right knee. This scar traverses the length of the patella, is lightly pigmented and rough in appearance, when compared to the surrounding skin.

30. Although referenced by Dr. Simpson in his December 1, 2020 medical report, the ALJ is unable to perceive any atrophy, i.e. loss of muscle bulk in the right quadriceps muscle compared to the left thigh as the photographs fail to provide a side-by-side comparison of the upper legs.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Claim Closure and Claimant's Alleged Worsening

C. A request for continuing medical treatment must be presented at the time of MMI, *Hanna v. Print Expediters Inc.*, 77 P. 3d 863 (Colo.App., 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo.App. 1994). Indeed, C.R.S. § 8-43-203(2)(b)(II) provides that a case will be "automatically closed as to the issues admitted in the [FAL] if the claimant does not, within thirty days after the date of the [FAL], contest the [FAL] in writing and request a hearing on *any disputed issues that are ripe for hearing*." . . . (emphasis added). *Olivas-Soto v. Indust. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). "Once issues are closed, they may only be reopened on the grounds stated in C.R.S. § 8-43-303. C.R.S. § 8-43-203(2) (d). Among those grounds is a change in the claimant's condition. C.R.S. Section 8-43-303(1); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo.App. 2004); *See also, Milco Construction v. Cowan*, 860 P. 2d 539 (Colo.App. 1992) (a claim may reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Industrial Claim Appeals Office*, 833 P. 2d 780 (Colo.App. 1991).

D. Based upon the evidence presented, the ALJ is persuaded that Claimant objected to and filed an Application for Hearing contesting Respondents' May 23, 2022 FAL. Nonetheless, Claimant did not include an objection to Respondents denial of liability for future, i.e. maintenance treatment benefits in his Application for Hearing. Indeed, Claimant failed to endorse any issue surrounding Claimant's entitlement to additional medical benefits, which issues the ALJ concludes were ripe for hearing, whether such benefits were curative or maintenance in nature. Rather, Claimant simply endorsed MMI, PPD, disfigurement and worsening and narrowed the issues for hearing to a worsening of condition at the outset of the September 15, 2022 proceeding. Accordingly, the evidence presented persuades the ALJ that the issue of medical benefits, including post-MMI treatment is closed because it was not endorsed within thirty days of the FAL as required by § 8-43-203(2)(b)(II). Absent such an endorsement or an agreement to try the issue, which is not the case here, Claimant's entitlement to additional medical benefits is closed and cannot be litigated. *See, Olivas-Soto v. Indust. Claim Appeals Office*, *supra*.

E. As noted, Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). In seeking to reopen a claim, the Claimant shoulders the burden of proving his/her condition has changed and that he/she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo.App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or, as presented here, to a change in a Claimant's physical condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo.App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, October 25, 2006).

F. The question of whether a claimant has proven a change in condition of the original physical or mental condition, which can be causally connected to the original compensable injury, is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits relating to the original injury are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo.App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted). Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office, supra; Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo.App. 1988).

G. In this case, the medical record supports a finding/conclusion that Claimant's recommended need for PRP injections was foreseeable treatment that could support an award of maintenance treatment at the time he was placed at MMI. Claimant had the opportunity to challenge the denial of maintenance treatment but failed to do so before the claim closed. The fact that Claimant may now need additional treatment, further medical evaluation and/or testing alone is insufficient to support a reopening of the claim. *Bowles v. Energy Air Systems, Inc*., W.C. No. 4-400-573 (ICAO, December 26, 2003), citing *Anderson v. Ready Mix Concrete*, W.C. No. 3-948-266, (ICAO, June 19, 1992), *aff'd, Anderson v. Ready Mix Concrete* (Colo.App. No. 92CA1060, March 25, 1993) (not selected for publication). Rather, the relevant questions to be answered are whether Claimant established that he suffered a post MMI change in his physical condition and whether that change is causally related to his admitted December 6, 2016 industrial injury. While the ALJ is convinced that Claimant's condition has changed and his persistent symptoms are probably emanating from his work related injury/condition (per the causality statement of Dr. Simpson), the evidence presented supports a conclusion that Claimant failed to endorse medical benefits or petition to reopen the as an issue for hearing. As noted above, a reopening is not warranted if once reopened, no additional benefits under the claim may be awarded. *Richards v. Industrial Claim Appeals Office, supra.* Because Claimant failed to endorse/preserve medical benefits in connection with his request to reopen and because the need for future medical benefits was foreseeable and ripe at the time of MMI, there are no medical benefits that can be awarded if the claim is reopened based upon a change of condition. Simply put, the ALJ concludes that there is no issue endorsed upon which additional benefits can be awarded if the claim is reopened based upon a change of condition. Accordingly, the ALJ concludes that any request to reopen the claim for additional medical benefits must be denied and dismissed.

Disfigurement

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found at Finding of Fact, ¶ 29 above, Claimant has suffered a "disfigurement", i.e. an approximately 5 ¾ inch long by ⅜ inch wide lightly pigmented and rough appearing surgical scar located on the anterior

(front) portion of the right knee, which the ALJ concludes constitutes an observable alteration in the natural appearance of the skin covering the right knee. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits pursuant to C.R.S. § 8-42-108 (1).

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is denied and dismissed.

2. Insurer shall pay Claimant $1,500.00 for his visible disfigurement.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: October 28, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of December 7, 2021 through December 12, 2021 and from March 29, 2022 through April 1, 2022 and from May 17, 2022 through ongoing?

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability ("TPD") benefits for the period of December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022?

- Whether Claimant has proven by a preponderance of the evidence that the medical treatment he received from Dr. Budiman with Grand Valley Primary Care was authorized medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

- Whether Respondents have proven by a preponderance of the evidence that Claimant committed a willful act that led to his termination of employment with Employer?

- If Respondents have proven Claimant committed a willful act that led to his termination of employment, whether Claimant has proven by a preponderance of the evidence that he subsequently sustained a worsening of his condition when he underwent surgery for his work condition which would result in Claimant being entitled to TTD benefits pursuant to *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004).

- What is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of his employment on December 6, 2021 while pulling off a forklift tire. Claimant testified that while removing the forklift tire, his left shoulder popped and he immediately felt a sharp pain. Claimant testified he reported his injury to Ms. L[Redacted] at the "North Avenue store" on the date of injury, but was not given a list of designated providers at that time.

2. Claimant testified he sought medical treatment with Grand Valley Primary Care on December 7, 2021. According to the medical records from Grand Valley Primary Care, Claimant was evaluated by Dr. Budiman, who diagnosed Claimant with impingement syndrome of the left shoulder. Claimant testified at hearing that Dr.

Budiman was his primary care physician ("PCP"). The medical records document that Claimant reported to Dr. Budiman that he had left shoulder pain when he felt a pop in his shoulder last night and immediately felt severe pain in his left shoulder. Dr. Budiman noted that Claimant reported chronic right shoulder pain which was not as severe as the left shoulder pain. Dr. Budiman provided Claimant with injections into his bilateral shoulders and took Claimant off of work until December 13, 2021 after which time Claimant was released to return to work with restrictions of no lifting over 30 pounds for two weeks.

3. Claimant testified he was later referred to Work Partners by Employer. Claimant sought treatment with Work Partners on December 21, 2021 at which time Claimant was examined by Dr. Fay. Dr. Fay noted a history of right shoulder treatment and diagnosed Claimant with pain in the left shoulder and rotator cuff strain. Dr. Fay provided Claimant with work restrictions for his left upper extremity including no lifting over 10 pounds and no lifting overhead or away from his body.

4. Respondents completed a first report of injury on December 22, 2021 indicating that Claimant had reported the injury to Employer on December 6, 2021.

5. Claimant's work restrictions were decreased to five pounds on January 12, 2022. On January 26, 2022, Claimant's work restrictions were again modified to restrict Claimant from commercial driving.

6. Claimant underwent a magnetic resonance image ("MRI") on January 31, 2022. The MRI showed a partial-thickness tear of the supraspinatus tendon, superior labral tear, infraspinatus tendinopathy, and possible tear of the humeral attachment of the glenohumeral ligament.

7. Claimant was referred to Dr. Scheffel for orthopedic consultation and was evaluated on February 17, 2022. Claimant reported to Dr. Scheffel that he injured his left shoulder when he was working on a forklift tire on December 6, 2021 and felt a pop and a sharp pain in his shoulder. Dr. Scheffel reviewed the MRI scan and recommended that Claimant undergo surgical intervention in the form of left shoulder arthroscopic rotator cuff repair and biceps tenodesis. Dr. Scheffel noted that he would be unable to perform the surgery as Dr. Scheffel would be out of work for an extended period of time, but recommended that Claimant be referred to another shoulder specialist to perform the surgery, as Dr. Scheffel opined Claimant cannot wait several months to have the procedure performed.

8. Claimant returned to Work Partners on February 23, 2022 and was evaluated by physicians' assistant ("PA") Meyer. PA Meyer reported Dr. Scheffel's recommended left shoulder arthroscopy rotator cuff repair and biceps tenodesis and noted that Dr. Scheffel was unable to perform the surgery, so Claimant was referred to other local surgeons. PA Meyer recommended Dr. Vance as the new orthopedic surgeon.

9. Claimant filed a Workers' Claim for Compensation on March 1, 2022. Claimant had an appointment with Work Partners on March 14, 2022 that was canceled due the fact that Respondents had denied Claimant's workers' compensation claim. Claimant returned to his PCP on March 16, 2022 and was provided with work restrictions that included no lifting heavier than five pounds in the left shoulder and no lifting greater than 20 pounds with the right shoulder.

10. Claimant again returned to his PCP on April 1, 2022 and was released to return to work as of April 4, 2022. There is no mention of restrictions in the release to return to work. The ALJ notes, however, that this was during a period of time when Claimant was not working and Respondents had not admitted liability for Claimant's injury. Claimant was off of work and not receiving workers' compensation benefits. The ALJ does not interpret the April 1, 2022 report that released Claimant to return to work without mention of any restrictions as a bona fide medical authorization to return to work without restrictions.

11. Respondents filed a general admission of liability ("GAL") for Claimant's work injury on May 4, 2022 admitting for medical benefits only. The GAL admitted for an average weekly wage ("AWW") of $1.00.

12. Claimant testified at hearing that the store manager, Mr. S[Redacted], told him that the store was going to make it hard for Claimant if he retained at attorney for his work injury. Mr. S[Redacted] testified he did not recall making that statement to Claimant.

13. Claimant testified that when he returned to work with his restrictions, he continued to work his job, but was not working the overtime hours he was working prior to his injury. Claimant testified Employer was not providing him with work that was within his restrictions. Mr. S[Redacted] testified that Employer offered Claimant work within his work restrictions. Mr. S[Redacted] testified he observed Claimant performing work outside of his work restrictions and when he saw Claimant performing work outside of his restrictions, he told Claimant not to exceed his work restrictions.

14. Mr. S[Redacted] testified that if Employer was unable to accommodate Claimant's restrictions, they would not have him work. Mr. S[Redacted] further testified that Employer would have been able to accommodate the work restriction provided after Claimant's surgery of no lifting great than paper weight.

15. DD[Redacted] runs wholesale operation for Employer. Mr. DD[Redacted] testified that Claimant would sometimes ask to run Mr. DD[Redacted]'s routes but that he did not ever direct Claimant to do so. Mr. DD[Redacted] testified that he is not a manager for Employer.

16. WK[Redacted] is a service manager for Employer. Mr. WK[Redacted] testified that he was in a management position for Employer in 2021, but was not a direct supervisor of Claimant. Mr. WK[Redacted] testified he requested Claimant perform certain tasks for him that Mr. WK[Redacted] believed were within Claimant's work restrictions. Mr. WK[Redacted] testified he never asked Claimant to perform work outside of his work

restrictions. Mr. WK[Redacted] testified he never witnessed Claimant show his genitalia to other employees.

17. Claimant testified that post injury there were times that he missed work for various reasons, including dental appointments and if Claimant's use of Ibuprofen caused stomach issues. Claimant testified his use of ibuprofen was increased post-injury due to his shoulder pain. Claimant testified he missed work between March 29 and April 1, 2022 due to stomach issues related to his use of ibuprofen. Claimant testified that on the occasions he needed to leave work early, he would ask permission from Employer prior to leaving work early.

18.Mr. S[Redacted] testified that Claimant returned to work at the same rate of pay and hours following his work injury, though business was slower in the wintertime. Mr. S[Redacted] testified Claimant was offered overtime after his work injury. Mr. S[Redacted] testified Claimant was offered light duty work that included delivering tires or driving. Mr. S[Redacted] testified Claimant applied for a position in sales after his work injury but was not offered that position because they were working through some issues with regard to Claimant's communication with teammates.

19.Claimant was terminated from his position with Employer on May 17, 2022. Mr. S[Redacted] testified Claimant was terminated for sexual harassment. Mr. S[Redacted] testified he found out on May 16, 2022 that Claimant was showing his genitalia to other employees and terminated Claimant for violating Employer's sexual harassment policy. Mr. S[Redacted] testified Employer had a no tolerance policy with regard to sexual harassment.

20.Claimant testified at hearing that he had exposed himself to co-workers at work several times in the previous five years as a joke. Claimant testified that the culture for Employer included horseplay and testified he had been "mooned" by a co-employee in the past. Claimant testified that at work co-employees would joke with each other and throw tools towards co-workers' crotches, or light fire crackers in the shop area. Claimant also testified that his co-workers would have "uncomfortable touch Tuesday." With regard to Mr. S[Redacted], Claimant testified he was aware that Mr. S[Redacted] was "not a hugger" and at the Christmas party in 2021 he approached Mr. S[Redacted] to give him a hug. Claimant testified that Mr. S[Redacted] responded by swatting him in the testicles with his hand.

21.Mr. S[Redacted] testified on cross-examination that he did hit Claimant in the testicles at the 2021 Christmas party and did so because he was protecting himself from getting a hug. Mr. S[Redacted] confirmed in his testimony that he is not a hugger. Mr. S[Redacted] testified that his action of striking Claimant in the testicles could be a violation of Employer's sexual harassment policy.

22. Respondents put into evidence written statements from three co-workers of Claimant, CR[Redacted], and JP[Redacted], who indicated in their written statements that Claimant had exposed himself to them. The statements from Mr.

CR[Redacted] and Mr. E[Redacted] did not indicate when Claimant had exposed himself. Respondents provided a letter from "J[Redacted]" that indicated Claimant approached him and asked him if he wanted to see or touch his "balls". The letter from "J[Redacted]" is likewise not dated and does not reference when the alleged comments were made by Claimant.

23. Claimant testified at hearing that he showed Mr. E[Redacted] his genitalia. Claimant testified he did not recall if he showed his genitalia to Mr. CR[Redacted]. Claimant denied asking "J[Redacted]" if he wanted to see his genitalia.

24. Mr. CR[Redacted] testified at hearing in this matter. Mr. CR[Redacted] testified that in the Summer of 2021, Claimant asked Mr. CR[Redacted] if Mr. CR[Redacted] wanted to see his belt buckle. Mr. CR[Redacted] testified Claimant then exposed himself to Mr. CR[Redacted]. Mr. CR[Redacted] testified he did not report this to any supervisor until May 2022. Neither Mr. E[Redacted] nor "J[Redacted]" testified at hearing in this matter.

25. Mr. S[Redacted] testified he did not believe there was a culture of sexual harassment at the workplace. Mr. S[Redacted] testified that he only became aware of Claimant exposing himself the day before he decided to terminate Claimant's employment with Employer. Mr. S[Redacted] testified that he was unaware of employees "mooning" each other while at work.

26. Claimant testified that he did not expose himself to other employees following his work injury. Claimant testified that his conduct prior to his work injury was performed in jest and was in relation to other work place behavior such as throwing tools at co-employees' crotches and "uncomfortable touch Tuesday".

27. Claimant remained on work restrictions following his initial visit with Dr. Budiman. Claimant was off of work pursuant to these work restrictions from December 7, 2021 (a Tuesday) through December 12, 2021 (a Sunday).

28. Claimant subsequently underwent surgery under the auspices of Dr. Vance. Dr. Vance performed a diagnostic arthroscopy, subacromial decompression, and distal clavicle excision on June 16, 2022. Claimant returned to Dr. Brown at Work Partners on June 30, 2022, following his surgery and reported his pain was 8 out of 10, which was an increase from 5 out of 10 prior to his surgery. Dr. Brown provided Claimant with increased restrictions that included no lifting, carrying, pushing, or pulling above paperweight with his left upper extremity.

29. Claimant returned to Dr. Brown on July 14, 2022. According to the WC164 form completed by Dr. Brown, Claimant's work restrictions continued to be no lifting, carrying, pushing or pulling above paperweight with the left upper extremity.

30. Claimant testified at hearing that after being terminated and undergoing surgery, he has not returned to work. Claimant testified that he has looked for work, but has not been able to find work within his restrictions.

31. Mr. S[Redacted] testified that Employer had administrative work that was within Claimant's work restrictions that Claimant could have performed for Employer following his surgery.

32. Dr. Brown testified by deposition in this matter. Dr. Brown opined that he believed the tearing of the posterior labrum constituted an aggravation of Claimant's preexisting shoulder issues. Dr. Brown testified Claimant's pain and lack of functionality of the shoulder led to Claimant's surgery. Dr. Brown testified that when he first saw Claimant on June 30, 2022, Claimant's pain had been aggravated by the surgical procedure with Dr. Vance. Dr. Brown testified that the physical examination of Claimant on that initial visit on June 30, 2022 was limited due to Claimant having just undergone shoulder surgery.

33. Dr. Brown testified that the physical examination on July 14, 2022 was again limited due the fact that Claimant remained in a lot of pain post-surgery and continued to wear a sling. Dr. Brown testified that Claimant was attempting to wean himself off of needing to use the sling, but this led to increased pain and Claimant again began to use the sling. Dr. Brown testified that Claimant's pain levels were higher than hoped for due to the fact that he was not tolerating use of the meloxicam, which caused Claimant an upset stomach. Dr. Brown further testified that Claimant's use of Cyclobenzaprine produced drowsiness.

34. Dr. Brown testified that as of the date of his deposition, Claimant had not been released by Dr. Vance or himself to do any increased activity beyond lifting at a paperweight level. Dr. Brown testified that he did not expect there to be a significant change in Claimant's work restrictions at his next scheduled evaluation.

35. Claimant testified he continues to experience pain and restricted range of motion, weakness, and lack of sleep as a result of his work injury. Claimant presented the testimony of Ms. I[Redacted] who lives with Claimant. Ms. I[Redacted] testified that Mr. [Claimant] continues to be limited around the house due to pain. Ms. I[Redacted] testified that the work injury has resulted in Claimant being unable to sleep as he would toss and turn at night following his injury.

36. Both parties argued in their position statement that in the twelve (12) weeks prior to Claimant's injury, Claimant earned $12,511.85 in wages from Employer. The ALJ therefore finds that Claimant's proper AWW is $1,042.65. Claimant's cost on continuing his health insurance ("COBRA") benefits effective June 1, 2022 was $188.61, increasing Claimant's AWW to $1,231.65.

37. Claimant argued at hearing that Claimant received a raise from Employer effective April 3, 2022 that increased his hourly rate from $20.70 to $21.48, an increase of 3.77%, which should be taken into account when calculating Claimant's AWW post April 3, 2022. The ALJ does not find that Claimant's post injury raise should be included in the AWW calculation under the facts of this case.

38. The mere fact that Claimant received a raise post-injury does not require that the AWW be increased for Claimant's claim based on the post-injury raise. The ALJ recognizes that an injured workers' post injury earnings may be used to calculate the Claimant's AWW, but declines the invitation to use the ALJ's discretion to raise the AWW based on post-injury earnings based on the facts presented in this case.

39. The facts in this case establish that following Claimant's work injury, he reported the injury to Employer and then sought medical treatment with his personal physician. Claimant's testimony that he reported the injury to Ms. L[Redacted] on the date of the injury was not rebutted by any credible evidence at hearing, and is supported by the Employer's First Report of Injury which indicates that the Employer was notified of the injury on December 6, 2021. Additionally, Claimant's testimony that he was not provided with a list of medical providers by Employer after reporting his injury to Employer on December 6, 2021 was not rebutted at hearing and is found to be credible.

40. Employer argues that they should not be responsible for the cost of Claimant's medical treatment with Dr. Budiman, despite the fact that there is no credible evidence that Employer properly referred Claimant to a medical provider in compliance with Section 8-43-404(5), C.R.S. Where the Employer fails to comply with Section 8-43-404(5), the choice of medical provider authorized to treat Claimant for his injury reverts to the injured worker. In this case, Employer failed to comply with Section 8-43-404(5), C.R.S. until Mr. S[Redacted] referred Claimant to Work Partners on or about December 20, 2021.

41. Based on the evidence presented in this case, the ALJ finds that Claimant's treatment with Dr. Budiman was authorized medical treatment necessary to cure and relieve the Claimant from the effects of the work injury. Respondents are therefore liable for the cost of the medical treatment provided by Dr. Budiman pursuant to the Colorado Medical Fee Schedule.

42. The ALJ further finds that Claimant's return to Grand Valley Primary Care in March and April 2022 was a result of his appointment with Work Partners being cancelled. Therefore, Claimant's treatment in March and April 2022 with Grand Valley Primary Care is likewise found to be authorized medical care related to Claimant's compensable work injury.

43. Claimant was taken off of work by Dr. Budiman from December 7, 2021 through December 12, 2021. Respondents argue that they are not responsible for TTD benefits during this period of time, even though Claimant was missing work as a result of his work injury. The ALJ is not persuaded.

44. Claimant was off of work pursuant to work restrictions from Dr. Budiman from December 7, 2021 through December 12, 2021. In order to prove entitlement to TTD benefits, an injured worker must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. In this case, Claimant's shoulder injury

resulted in a disability as evidenced by Dr. Budiman taking Claimant off of work for the period of December 7, 2021 through December 12, 2021. As found, that disability was related to Claimant's work injury.

45. After Claimant was evaluated by Dr. Fay at Work Partners, Claimant was provided with work restrictions that prohibited Claimant from performing his usual employment. The wage records entered into evidence establish that Claimant's earning after returning to work on December 13, 2021 were lower that his pre-injury earnings. Claimant testified at hearing that following his work injury, he was not provided with the same overtime hours he was prior to his work injury.

46. Mr. S[Redacted] testified at hearing that Claimant's lack of overtime hours after he returned to work was the result of a slow down in work that occurs after holidays. However, the wage records entered into evidence in this case demonstrate that Claimant was working less overtime hours after the work injury through the Spring than Claimant was working prior to his work injury. Therefore, the ALJ finds that Claimant has established that he is entitled to an award of TPD benefits for the period of December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022.

47. With regard to Claimant's missed time from work between March 28, 2022 and April 2, 2022, Claimant testified at hearing that he was having issues with regard to his stomach that was caused by his increased use of ibuprofen as a result of his work injury. Claimant's testimony in this regard is found to be credible and persuasive. This testimony was supported by the deposition testimony of Dr. Brown who referenced Claimant having reported having issues with regard to his medications following his work injury. The ALJ therefore finds that Claimant's missed time from work for the period of March 28, 2022 through April 2, 2022 is a result of Claimant's work injury and Claimant is entitled to an award of TTD benefits for this period of time.

48. Respondents argue that Claimant is not entitled to TTD benefits beginning May 17, 2022 because Claimant was responsible for his termination of employment. The ALJ is not persuaded that Respondents have established that Claimant was responsible for his termination of employment in this case.

49. In this case, Mr. S[Redacted] testified that Claimant was terminated from his Employment with Employer for violating the company policy with regard to sexual harassment. Mr. S[Redacted] testified that Employer has a zero tolerance policy with regard to sexual harassment. The incident in this case that was testified to by Mr. CR[Redacted] occurred in the Summer of 2021 according to Mr. CR[Redacted]'s testimony. Moreover, Mr. CR[Redacted] did not report the incident to Employer until May 2022. The written statement from Mr. E[Redacted] was corroborated by Claimant's testimony in this case. However, Claimant testified this occurred well before his work injury and was in relation to the nature of the employment. The ALJ therefore finds that Claimant would not reasonably be aware that such an action could lead to his termination of employment.

50. The other reported instances of sexual harassment in the written statements of "J[Redacted]" the co-employees is not found credible as it represents an out of court written statement that is not dated and not corroborated by other credible evidence at hearing.

51. Mr. S[Redacted]'s testimony that Employer has a zero tolerance policy with regard to sexual harassment is found to be not credible in light of the testimony regarding his striking Claimant in the genitals at the Christmas party in 2021.

52. Claimant's testimony with regard to the atmosphere at work among the employees is found to be credible. Claimant's testimony that employees would have "uncomfortable touch Tuesday" and would throw tools at the crotch of other employees is found to be credible. The ALJ does not condone the actions of Claimant in this case, but finds that the actions in this case were remote in time in relation to the work injury and represented actions by Claimant that he believed to be in the joking context of the employment situation with Employer.

53. Based on the foregoing, the ALJ finds that Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that Claimant reasonably should have known would lead to his termination of employment with Employer.

54. Based on the finding that Claimant was not responsible for his termination of employment, the ALJ need not make a finding as to whether Claimant has proven that it is more likely than not that he sustained a worsening of his condition after his termination of employment, which would result in a new award of TTD benefits after the worsening.

55. The ALJ therefore finds Claimant is entitled to TTD benefits beginning May 17, 2022 through May 31, 2022 at an AWW of $1,042.65 and from June 1, 2022 through ongoing at a rate of $1,231.26.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. To prove entitlement to temporary total disability ("TTD") benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

4. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits commencing December 7, 2021 through December 12, 2021 and March 29, 2022 through April 1, 2022 and May 17, 2022 through ongoing. As found, Claimant was taken off of work by Dr. Budiman on December 7, 2021 and Claimant's loss of wages during this period of time is found to be related to his December 6, 2021 work injury. As found, Claimant's testimony that he missed work from March 29, 2022 through April 1, 2022 due to stomach issues related to his use of ibuprofen to treat his shoulder injury is found to be credible. Therefore, Claimant is entitled to an award of TTD benefits for this period of time. As found, Claimant was off of work with restrictions related to his work injury starting May 17, 2022 and is entitled to an award of TTD benefits beginning May 17, 2022.

5. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

6. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TPD benefits beginning December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022. As found, Claimant was under work restrictions for most of these periods of time (with the exception of the vague work release from Grand Valley Primary Care on April 1, 2022 that was found to not represent a bona fide release to return to work without restrictions) and was earning less wages than prior to his work injury. Therefore, Claimant is entitled to an award of TPD benefits during these periods of time.

7. Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he or she precipitated the employment termination by a volitional act that he or she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment. As found, Claimant's actions in exposing himself to new employees was consistent with the general nature of the employment setting in which Claimant worked. As found, this employment setting included co-employees mooning each other and employees tossing tools towards the crotch of other employees and actions such as "uncomfortable touch Tuesdays". Additionally, Mr. S[Redacted]'s testimony that Employer had a "no tolerance" policy for sexual harassment is found by the ALJ to be not credible based on Mr. S[Redacted]'s own actions in slapping Claimant in the testicles in an effort to avoid being hugged at the 2021 Christmas party.

9. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The parties agreed in their position statements that Claimant's pre-injury AWW was $1,042.65. The ALJ therefore finds that the proper AWW is $1,042.65.

10. Claimant argued in his position statement that the AWW should be increased by 3.77% based on Claimant's post injury raises. As found, the ALJ is not persuaded that Claimant's AWW should be increased based on Claimant's post-injury raises. Notably, Section 8-40-201(19)(a), provides in pertinent part:

> "Wages" shall be construed to mean the money rate at which the services rendered are recompensed *under the contract of hire in force at the time of the injury*, either express or implied. (emphasis added)

11. The ALJ therefore determines that Claimant's AWW for purposes of this injury is properly calculated at $1,042.65 based on Claimant's earnings in the twelve (12) weeks prior to his industrial injury..

12. The parties further agree that Section 8-40-201(19)(b) provides that the AWW should be increased based on the employee's contribution for any COBRA benefits. The parties agree that the COBRA contribution for Claimant was $188.61 and became effective as of June 1, 2022. Therefore, Claimant's AWW increased to $1,231.26 effective June 1, 2022 to account for the COBRA contribution.

13. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

14. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

15. As found, Claimant reported his injury to Employer but was not initially provided with a list of physicians authorized to treat Claimant for his injury. The ALJ therefore finds that the treatment provided by Dr. Budiman and Grand Valley Primary Care is authorized medical treatment that was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury based on Employer's failure to refer Claimant to a treating physician after Claimant reported his injury.

16. As found, Claimant's return to Grand Valley Primary Care in March and April, 2022 after Claimant's March 14, 2022 medical appointment with Work Partners is likewise found to be authorized as Claimant's treatment with Grand Valley Primary Care was the result of his medical care with Work Partners being cancelled after he filed a Workers' Claim for Compensation.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits based on an AWW of $1,042.65 for the period of December 7, 2021 through December 12, 2021 and March 29, 2022 through April 1, 2022 from May 17, 2022 through May 31, 2022.

2. Respondents shall pay Claimant TTD benefits beginning June 1, 2022 at an AWW of $1,231.26 based on the increased AWW due to Claimant being eligible for COBRA coverage.

3. Respondents shall pay for Claimant's medical treatment with Grand Valley Primary Care that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury including the medical treatment with Dr. Budiman on December 7, 2021, March 16, 2022 and April 1, 2022.

4. Respondents shall pay statutory interest on all benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

DATED: October 28, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a low back injury in the course and scope of her employment on February 16, 2022.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she established a refusal to treat for non-medical reasons and the right to select a physician passed to Claimant who selected Karin Gallup, N.P. at La Casa of Denver Health.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 2, 2022 on the issues of compensability, medical benefits, AWW and TTD benefits from February 21, 2022 ongoing.

Respondents filed a Response to Claimant's May 2, 2022 Application for Hearing on June 14, 2022. No additional issues were listed.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, then the average weekly wage was $800.00 based on $20.00 per hour, 40 hours a week. The temporary total disability benefits (TTD) rate would be $533.33.

The parties further stipulated that, if the claim was deemed compensable, then Claimant would be entitled to TTD from February 21, 2022 until terminated by law. The parties agreed that, if TTD was paid, Respondents were entitled to an offset for short-term disability benefits beginning February 21, 2022 through August 19, 2022 in the amount of $250.00 a week, which would result in a payment of TTD of $283.33 per week while the offset lasted.

The parties also agreed that Concentra was an authorized treating provider.

The stipulations of the parties are accepted by this ALJ and shall become part of the order in this matter.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 45 years old at the time of the hearing. Claimant was a machine operator for Employer since approximately August of 2021. She began her work through a temporary agency then was hired by Employer permanently in January 2022. She would fill the machine casings with molding powder. After the material was "cooked" she would take them out of the casings and trim the remnants of plastic parts with a tool that had a wood handle and a metal blade of approximately three to four inches long and about two inches wide. The blade was provided by her employer. She would generally start her work at 3:00 p.m. and work to 11:00 p.m.

2. Claimant had a slip and fall injury while at work for a prior employer, a hospital, where she performed housekeeping duties. She injured her low back, but not in the same way as in this case. It was higher up on her spine. She was prescribed a steroid that help her problem really well. The injury resolved and she was released from care.

3. On December 2, 2019 Claimant was seen at Denver Health for a UTI and complained of back pain. The provider suspected muscle strain but made no recommendations nor provided treatment.

4. In December 2020 she had a slip and fall on snow and injured her left foot. The fracture was reduced in the emergency department and she wore a cast for several weeks. She was again evaluated on December 17, 2020 for ankle pain but x-rays could not visualize any abnormality regarding the left ankle due to the cast obscuring details. There was no mention of a low back problem during this visit. Further, of note, there have been several left foot incidents as far back as September 12, 2017, including an old left fifth metatarsal fracture of unknown age.

5. Claimant was assessed by telehealth on January 8, 2021 due to complaints of lower back problems. However, those complaints clearly resolved by the next visit as there was no mention in the February 1 or February 2, 2021 follow ups and evaluations.

6. On September 17, 2021 Claimant injured her left knee injury, which occurred while working for the temporary agency, who had placed Claimant at Employer's business to perform work as a machine operator. She last treated for that claim on March 9, 2022 for the last time in follow up of a third viscosupplementation injection. Claimant has not sought any further care for that left knee injury.

7. While working for Employer, Claimant would take her breaks in her car because she would frequently be making personal phone calls on one of her 15-minute breaks and she did not like to do that in the breakroom. The employees were allowed to take their breaks anywhere on the Employer's premises. Claimant's car was required to be parked in the Employer's parking lot, which was enclosed by a fence.

8. On February 16, 2022, while working for Employer, Claimant was taking her break and she slipped on the snow, without warning. She landed hard on her buttocks. She had been going to her car when the fall happened. She has had pain in her lumbar region and her buttocks since that time and the pain seemed to be deep in the bone at the base of her spine or buttocks, causing pain to radiate to her low back and cause muscle spasms. She stated that she sat in her car a while on her break. She had her tool in her back pocket, which she generally takes out when she sits in her car. After her

break, she got out of her car to return to work, forgetting her blade. When she realized she left her blade in her car, she returned to get it to continue working.

9. Claimant testified she told the man, who was training her on the machine she was working at, about her fall while on break on February 16, 2022. She laughed it off but her pain slowly increased during her shift her. She mentioned her fall again, letting him know her back pain was getting worse, but he did not seem to care about the incident

10. As the days went on the pain in her buttocks and low back started to really get worse. Claimant called the HR Department to advise the HR representative about the injury and request medical attention. Claimant did not hear back from the HR representative on where Employer wanted her to go for care so she determined to go to an urgent care facility for treatment as her low back pain continued to worsen.

11. On February 22, 2022 Claimant presented at Federico F. Pena Family Health Center – Urgent Care at Denver Health for an evaluation of her low back pain, where she was treated by Amy N. Quinones, N.P. Nurse Quinones treated Claimant for "acute back pain" and took Claimant off of work from February 22, 2022 to February 24, 2022.

12. When Claimant took the note from Nurse Quinones to Employer, she was advised she could not return to work until she was fully recovered. Her Employer did not contact her after this conversation to follow up or provide her with a designated provider list.

13. On March 4, 2022 Claimant returned to Denver Health where she was evaluated by Alicen M. Nelson, M.D., whose assessment was that of "bilateral low back pain without sciatica occurring after a fall three weeks ago."

14. At the March 4, 2022 visit, Claimant had two trigger point injections in the low back area. The working diagnosis was that of chronic bilateral low back pain without sciatica.

15. On March 9, 2022 Employer filed a Workers Compensation "First Report of Injury or Illness" (FROI) stating that Claimant had injured herself on February 16, 2022, that the time of the injury occurred at approximately 6:00 p.m., and that Employer was notified on February 16, 2022 of the injury. The report documented that Claimant had "slipped on the snow, fell on her bottom, hurting her back." The report was filed by the HR manager and indicated that Claimant had reported the injury to another Employer representative (PC) on February 16, 2022.[1]

16. On March 11, 2022 Claimant had her first visit with authorized treating physician ("ATP") Theodore Villavicencio, M.D. at the Concentra Medical Centers in Lakewood where ATP Villavicencio took a history of injury as follows:

> Reason for Visit
> Chief Complaint: The patient presents today with new injury, slip and fall on 02/16/2022 injured back, reports that she has pain in back and night pain. Self reported.

[1] This ALJ infers that the trainer advised the HR representative despite Claimant's impression that he did not seem to care about the fall.

At that visit, Dr. Villavicencio assessed that Claimant had a lumbar contusion and a strain of the lumbar region. He started her on a muscle relaxer, and provided her work restrictions of lifting 10 lbs. and pushing/pulling up to 20 lbs. with no forward bending, noting that she should be working only sedentary office type work. He gave the opinion that Claimant's objective findings were "consistent with history and/or work-related mechanism of injury/illness." In fact, all the Work Status reports from March 11, 2022 through April 19, 2022 all show the same causation analysis. Dr. Villavicencio also indicated that MMI was unknown.

17. On March 16, 2022 Claimant started physical therapy at the Concentra offices in Lakewood with Christi Galindo, P.T. This was the first of six visits programed. She documented Claimant's back pain was 3/10 but could rise to about a 7. The impairments identified during the examination prevented Claimant from performing her standard activities of daily living and/or work activities. Ms. Galindo noted abnormal range of motion, pain, abnormal muscle performance and gait. She proceeded with therapeutic exercises, neuromuscular reeducation, manual therapy and therapeutic activities. The treatment was provided by Austin Lyons SPT under Ms. Galindo's supervision.

18. Respondents filed a Notice of Contest on March 18, 2022, stating that the injury or illness was not work related.

19. On March 25, 2022 Claimant returned to Concentra and this time was evaluated by ATP Autumn Schwed, D.O. who noted that Claimant indicated that physical therapy "is not helping, but got cupping which has helped" and that Claimant was 25% of the way to meeting the physical requirements of her job. Dr. Schwed referred Claimant to Dr. Samuel Chan, a physiatrist, for an evaluation.

20. Dr. Schwed referred Claimant for an MRI and noted that the indications were for back pain and sacrococcygeal disorder. It was performed on April 1, 2022. It was read by Dr. Scot E. Campbell as showing a disc bulge at the L3-4 level with left paracentral small extrusion, mild facet arthropathy, mild left subarticular recess stenosis, and mild right neural foraminal stenosis. He noted a central disc protrusion at L4-5 with mild facet arthropathy, mild right subarticular recess stenosis and mild right neural foraminal stenosis. He also noted a right paracentral protrusion at the LS-S1 level with mild facet arthropathy. Dr. Campbell concluded that Claimant had degenerative disc disease and facet arthropathy without high-grade stenosis or nerve root impingement.

21. Claimant was evaluated by Dr. Samuel Chan on April 12, 2022.[2] Claimant described pain in the low back spine as well as radiation into the groin but not the lower extremities. On exam, he noted that Claimant's pain was centered around the PSIS and the sacral sulci. Claimant was also positive for Patrick's, Gaenslen's, FABER's, and Yeoman's[3] testing. Dr. Chan concluded that Claimant's exam was most consistent with sacroiliac joint dysfunction and recommended sacroiliac joint injections should her symptoms persist. He also diagnosed lumbar contusion and strain of the lumbar region.

[2] Pages are missing from this report.

[3] Medical tests used to detect musculoskeletal abnormalities and inflammation of the lumbar vertebrae, but more commonly the sacroiliac joint.

He indicated Claimant was to return in four weeks. He also noted that objective findings were consistent with the work-related mechanism of injury.

22. On April 19, 2022 Claimant returned to Concentra where she was evaluated this time by Chelsea Rasis, PA-C. ATP Rasis noted that the muscle relaxer (flexeril) helped at night with the low back pain and that cupping therapy was also providing temporary relief, stating that Claimant had more sessions scheduled. ATP Rasis documented that Dr. Chan had offered Claimant cortisone injections and that Claimant was looking into the side effects. She ordered six visits of chiropractic care and six acupuncture sessions. She continued the prior sedentary restrictions.

23. Claimant's last visit with Concentra was on May 13, 2022, when Claimant was released from care by ATP Rasis to have her care and "work restrictions to be managed" by her primary care provider (PCP).

24. Claimant testified that Ms. Rasis advised Claimant to go to her PCP for further care as the claim had been denied by the Insurer. She did not allow Claimant to return to Concentra for further care. She further advised Claimant that her PCP would have to provide any further medical care, such as the injections, work restrictions and that she was being released to her PCP's care.

25. Claimant started physical therapy on June 9, 2022 at Select Physical Therapy pursuant to Karim Gallup's referral. Jon Baird, PT noted that Claimant had a slip and fall in February 2022 and landed on her "butt." He documented that Claimant had had lumbar back pain, left greater than right, ever since then. Mr. Baird noted that Claimant ambulated slowly with a stiff spine pattern, a slight flexed trunk and stands with an increased lumbar lordosis. He provided exercise education and training, as well as manual intervention modalities. He recommended ongoing therapy for a period of 3 months.

26. Claimant's return visit to Denver Health, documented in the evidence presented, was for June 23, 2022, following Concentra's refusal to continue to treat Claimant at Concentra Medical Centers. She was evaluated by Morris M. Askenazi, M.D. who indicated that Claimant continued to have significant pain and limitations and would be unable to work at that time. He ordered continued physical therapy for the following two months. He stated Claimant should be on work restrictions of no lifting more than 5 pounds overhead, no repetitive bending, limited reaching/stretching, and anticipated the limitations to continue for the following two months.

27. Following Concentra's refusal to treat, Claimant's counsel wrote to Respondents indicating that if Claimant could not get follow-up care at Concentra, Claimant was requesting to change physician to Karin Gallup, N.P. at La Casa--Denver Health, based upon that refusal to treat.

28. Claimant credibly testified that she had had previous episodes of back pain, which typically resolved quickly. As found, immediately prior to February 16, 2022 Claimant had no ongoing medical care for back pain and was symptom free.

29. As found, there was a medical record from Denver Health which references back pain on January 8, 2021 and resulted from the fall where Claimant injured her left ankle. At the follow-up visit on February 1, 2021, however, there was no reference to

back pain, but rather only to the old metatarsal fracture of Claimant's left foot. Claimant testified that she had no problems with her low back immediately prior to the work injury. Claimant is found credible and persuasive.

30. Claimant is found to be credible and persuasive. As found Claimant was injured in the course and scope of her employment when she slipped and fell in Employer's parking lot while on her break. This is specifically not considered a deviation as Claimant was allowed to take her breaks on any area of Employer's premises and the parking lot was within Employer's premises.

31. As found, Claimant injured her low back, coccygeal area as well as her SI joint, causing a need for medical care and disability.

32. From the documents in evidence, Claimant's last appointment at Denver Health was on July 19, 2022. She was advised that they anticipated proceeding with steroid injections into her lumbar spine. She was advised that she needed to await the scheduling of the injections but had not received a call back with the scheduled appointment to date. As found, Claimant continues to require medical attention.

33. Further, as found, Concentra refused to continue seeing her and Respondents have not provided a new designated provider willing to provide care for the work related injuries. Claimant has shown that the right to select a medical provider passed to Claimant, that Claimant selected Nurse Gallup at Denver Health and that the Denver Heath system, including Nurse Gallup are authorized treating providers.

34. Claimant has remained under temporary work restrictions which the employer could not accommodate, but have paid Claimant, as noted by the stipulation of the parties, Employer funded short-term disability benefits from February 21, 2022 through August 19, 2022. Claimant continued to be off work in accordance with documentation from the medical providers at Denver Health.

35. Any evidence or testimony not consistent with the above findings is specifically found not relevant, or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as

not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Sec. 8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question

of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008); *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008).

The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

Claimant's was credible and persuasive in her description of her injuries, symptoms and pain complaints cause by the February 16, 2022 slip and fall at work. The arguments made by Respondents regarding Claimant's veracity are not persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable low back injury during the course and scope of her employment with Employer on February 16, 2022 when she fell in the designated parking lot for employees and landed on her bottom. This is supported by the opinions of Nurse Quinones, Dr. Chan, Dr. Villavicencio and Dr. Schwed and the Work Status Reports covering March 11 through April 12, 2022 indicating that Claimant's objective findings were consistent with a history of work-related mechanisms of injury. It is even supported by the Employer's First Report of Injury of injury filed by Employer's HR representative on March 9, 2022.

Moreover, although the records reflect that Claimant suffered at times from back symptoms prior to February 16, 2022, those incidents did not cause the need for significant medical care and Claimant credibly testified that they were short lived symptoms that did not require the care that has been consistent since Claimant's injury of February 16, 2022. Accordingly, Claimant's work injuries were proximately cause by

the February 16, 2022 accident and aggravated, accelerated or combined with any pre-existing conditions to produce the need for medical treatment. Thus, Claimant suffered a compensable lumbar injury during the course and scope of her employment with Employer on February 16, 2022.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. Sec. 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the

respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonably necessary and causally related medical benefits for her work related injuries cause by the fall of February 16, 2022, including for her low back, SI joint and sacrococcygeal injuries. Respondents noted that they had notice of the injury on February 16, 2022. However, there is no record that Respondents gave Claimant a designated provider list within the allowed seven days.[4] Claimant went to the Denver Health Medical Center (DHMC) --Urgent care and was evaluated by Nurse Quinones for acute low back pain on February 22, 2022[5], and Claimant provided the note to Employer. Claimant then followed up with DHMC on March 4, 2022 and was treated with injections by Dr. Nelson. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care. Claimant was not provided an appointment with Concentra until March 11, 2022.[6] Claimant eventually saw Dr. Villavicencio on March 11, 2022 at Concentra and he found that Claimant's mechanism of injury was work related and that she required medical care.

Claimant argued at hearing that Concentra's refusal to treat was for non-medical reasons, and thus the right to select a physician passed to Claimant. Claimant selected La Casa which operates under the auspices of Denver Health. Respondents argued at hearing and in their position statement that because the Claimant was under a denial of care there was no obligation to treat and that the designated provider remained designated, and thus they did not waive the right to select the medical provider. Sec. 8-43-404(5), C.R.S. implicitly contemplates that the Respondents will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ*. Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260. Here, it is specifically found that Ms. Rasis, as a Concentra representative, refused to treat Claimant. Claimant is credible and persuasive in her testimony that Ms. Rasis advised Claimant her claim was being denied and that Concentra would no longer treat her for her injuries. As found, Ms. Rasis in effect, advised Claimant to pursue care with her primary care provider (PCP).[7] Claimant's counsel sent a letter to Respondents that specifically notified

[4] Seven days from February 16, 2022 was February 24, 2022.

[5] The February 22, 2022 visit would normally be considered only an emergency visit.

[6] In fact, this ALJ considers that Respondents lost the right to designate a provider at all since Claimant was not sent to a provider until well after the date of injury and later than the seven day period required by statute. Claimant's choice of DHMC for the initial urgent care visit and all the follow up medical care at DHMC, indicated that DHMC should be an authorized treating provider.

[7] This, in effect, was a referral to her PCP.

Respondents of Concentra's refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified her PCP to be the providers at Denver Health Medical Center and specifically Nurse Gallup. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Nurse Gallup of DHMC, who is now Claimant's treating provider.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that she sustained compensable work related injuries to her low back, coccyx and SI joint within the course and scope of her employment on February 16, 2022.

2. The Stipulations of the parties are approved and become part of this order.

3. Claimant's average weekly wage is $800.00.

4. Respondents shall pay temporary total disability benefits at the rate of $533.33 beginning February 21, 2022 until terminated by law.

5. Pursuant to the parties' stipulation, Respondents may take an offset due to payment of short-term disability benefits in the amount of $250.00 per week from February 21, 2022 to August 19, 2022.

6. Respondents shall pay interest at the statutory rate of eight percent (8%) on all benefits that were not paid when due.

7. Claimant is entitled to medical benefits that are reasonably necessary and related to the February 16, 2022 injuries to her low back, coccyx and SI joint. As stipulated by the parties, Concentra is an authorized treating provider. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care.

8. Claimant has shown by a preponderance of the evidence that selection of provider passed to Claimant due to a refusal to treat for non-medical reasons and that La Casa--DHMC and Nurse Gallup are now authorized treating providers.

9. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 31st day of October 31, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL HISTORY

A hearing took place on August 17, 2022. The parties were provided through September 21, 2022 to submit post hearing positions statements, briefs or proposed orders. The proposed Findings of Fact, Conclusions of Law and Order were timely filed. This ALJ issued Findings of Fact, Conclusions of Law and Order (FFCL) on September 22, 2022[1] with instructions to the parties to provide supplemental wage information, if the parties were unable to reach an agreement with regard to the issue of average weekly wage as the information provided during trial was insufficient to make a determination. The FFCL was an order on both the October 23, 2020 claim, WC 5-153-595-002 and the September 1, 2021 claim, WC 5-184-071-002.

On October 14, 2022 Respondents filed a Petition to Review the FFCL on multiple issues including objecting to a finding of this ALJ "that Claimant proved by a preponderance of the evidence that she sustained an occupational disease or injury in the form of carpal tunnel syndrome during the course and scope of her employment."

The parties communicated that they were unable to reach an agreement regarding average weekly wage and provided the records on October 26, 2022, now labelled as Respondents' Exhibit L, which were admitted into the record. This Findings of Fact, Conclusions of Law and Order is only to address the issue of average weekly wage and the calculation of benefits due and owing pursuant to the September 22, 2022 FFCL, regarding the September 1, 2021 claim, WC 5-184-071-002. All other issues before this ALJ were addressed in the prior FFCL issued by this ALJ on September 22, 2022.

ISSUE

I. Whether Claimant has proven by a preponderance of the evidence the amount of Claimant's average weekly wage (AWW) applicable to the compensable September 1, 2021 claim, W.C. No 5-184-071-002.

II. Calculation of Temporary Partial and Temporary Total disability benefits based AWW and prior award dated September 22, 2022.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a mechanical service technician for Employer since sometime in 2018 or 2019 and was 54 years old at the time of the hearing.

[1] Served on September 26, 2022.

2. On September 1, 2021, Claimant was working on the roof of a building, replacing a fan motor of a condenser. He climbed up to the roof by ladder. A portion of the roof was pitched (slanted slope) and then the condenser was on a flat part of the roof further up. When he was standing on the pitched portion of the roof with his left foot, in the process of stepping onto the flat portion of the roof with his right foot, Claimant twisted his left knee and felt a pop. At that point, his left knee twisted while his left foot was planted on the 8 or 9 pitched roof, which was approximately a 36 to 38 degree pitch, causing a popping in his left knee. He was carrying a condenser part and his tools at the time. Claimant stated that all his weight was on the left leg because he had lifted his right foot to step from the pitched area to the flat roof area.

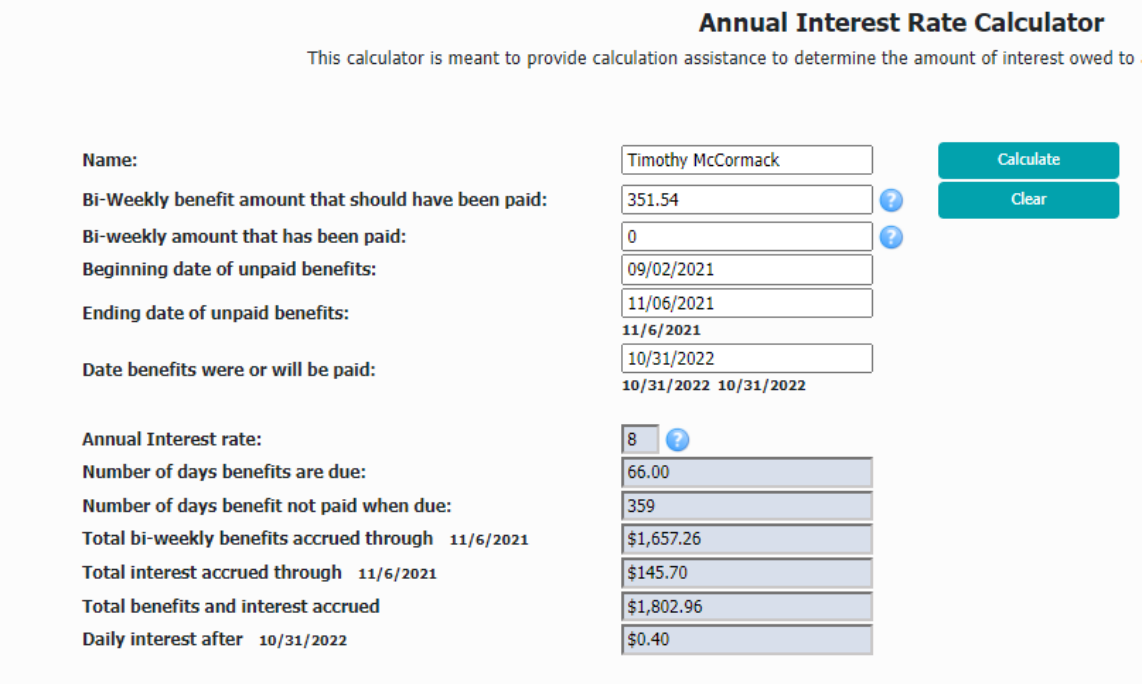
3. Claimant stated that something snapped in his knee. Claimant did not feel immediate pain but by approximately 30 minutes later, the pain in his knee started to intensify on top of the knee as well as inside and on the outer portion of his knee. Initially he thought he might have pulled a muscle. Since he was on the last job of the day, Claimant went home, thinking he would sleep on it and see how he was feeling in the morning. But his knee continued to hurt and swelled up, with a horseshoe swollen area above the knee cap. He reported the injury the following day and was sent for a drug test that day at Concentra. This claim was found compensable in the Findings of Fact, Conclusions of Law and Order dated September 22, 2022. See prior order.

4. The wage records, Respondents' Exhibit L, show Claimant received a pay increase for pay period ending May 22, 2021 which includes wages beginning as of May 9, 2021. When considering wages earned from May 9, 2021 through August 28, 2021, the last complete pay period prior to the September 1, 2021 date of injury, Claimant earned a total of $13,844.78. As found, the total wages divided by the 16 week period renders an average weekly wage of $865.30.[2] This provides a temporary Total Disability rate of $576.87. This ALJ finds that this is the Claimant's fair approximation of his average weekly wage.

5. The September 22, 2022 FFCL ordered Respondents to pay either temporary partial or temporary total disability benefits beginning September 2, 2021, as Claimant had shown by a preponderance of the evidence that he was entitled to wage loss benefits related to the September 1, 2021 work related injuries. This ALJ is now able to calculate the benefits owed as the parties communicated that they could not reach an agreement.

6. Based on the wage records from pay period ending September 4, 2021 through pay period ending November 6, 2021 (10 weeks or 70 days), Claimant earned an average of $602.03. Claimant's AWW was $865.30. The difference is $263.27 per week for September 2, 2021 through November 7, 2021. Therefore, Claimant is owed a total of $1,657.26.70 in temporary partial disability benefits plus interests of $145.70, which is calculated as follows:

[2] The total wages of $13,844.78 divided by 112 days multiplied by 7 days a week and rounded to the closest decimal.



Annual Interest Rate Calculator

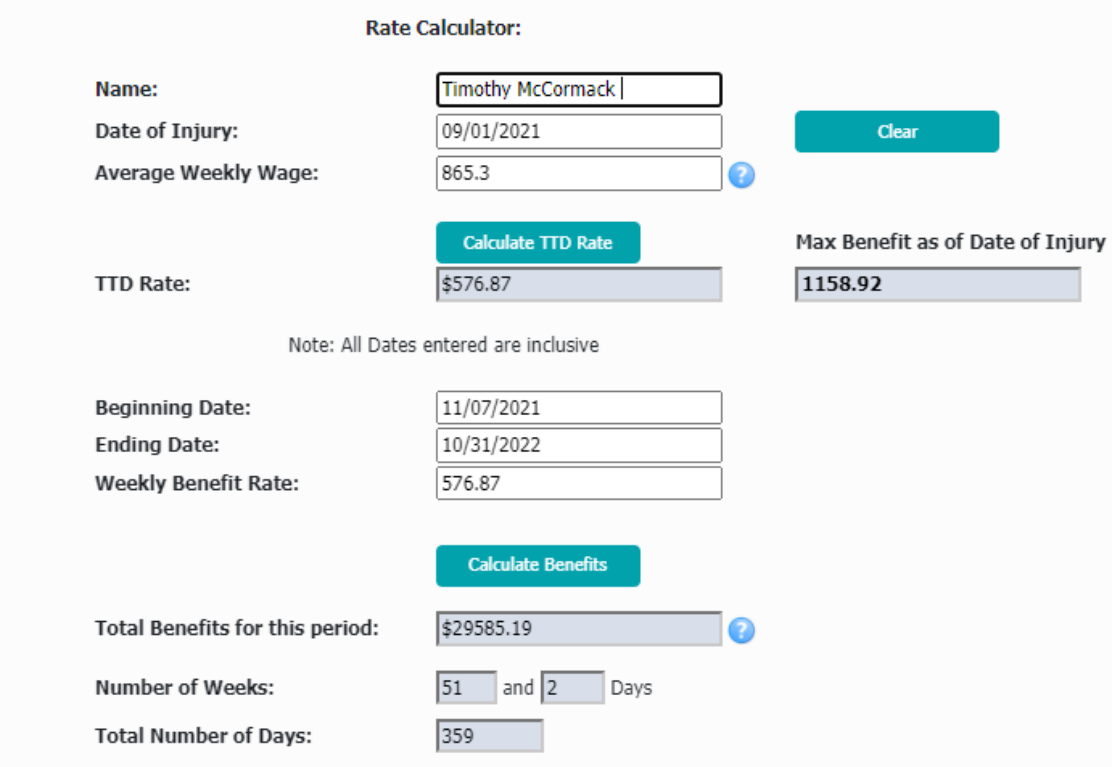
This calculator is meant to provide calculation assistance to determine the amount of interest owed to

Name:	Timothy McCormack
Bi-Weekly benefit amount that should have been paid:	351.54
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	09/02/2021
Ending date of unpaid benefits:	11/06/2021 11/6/2021
Date benefits were or will be paid:	10/31/2022 10/31/2022 10/31/2022
Annual Interest rate:	8
Number of days benefits are due:	66.00
Number of days benefit not paid when due:	359
Total bi-weekly benefits accrued through 11/6/2021	$1,657.26
Total interest accrued through 11/6/2021	$145.70
Total benefits and interest accrued	$1,802.96
Daily interest after 10/31/2022	$0.40

Calculate

Clear

7. Claimant is also owed temporary total disability benefits beginning the week of November 7, 2021 through the present and continuing until terminated by law. Neither party indicated that Claimant had been earning wages after November 7, 2021 and no further wage records were submitted after this date. For the period of November 7, 2021 through the date of this order, October 31, 2022 there was a period of 359 days, including the last day. TTD was calculated as follows:



Rate Calculator:

Name:	Timothy McCormack
Date of Injury:	09/01/2021
Average Weekly Wage:	865.3
TTD Rate:	$576.87
Max Benefit as of Date of Injury	1158.92

Clear

Calculate TTD Rate

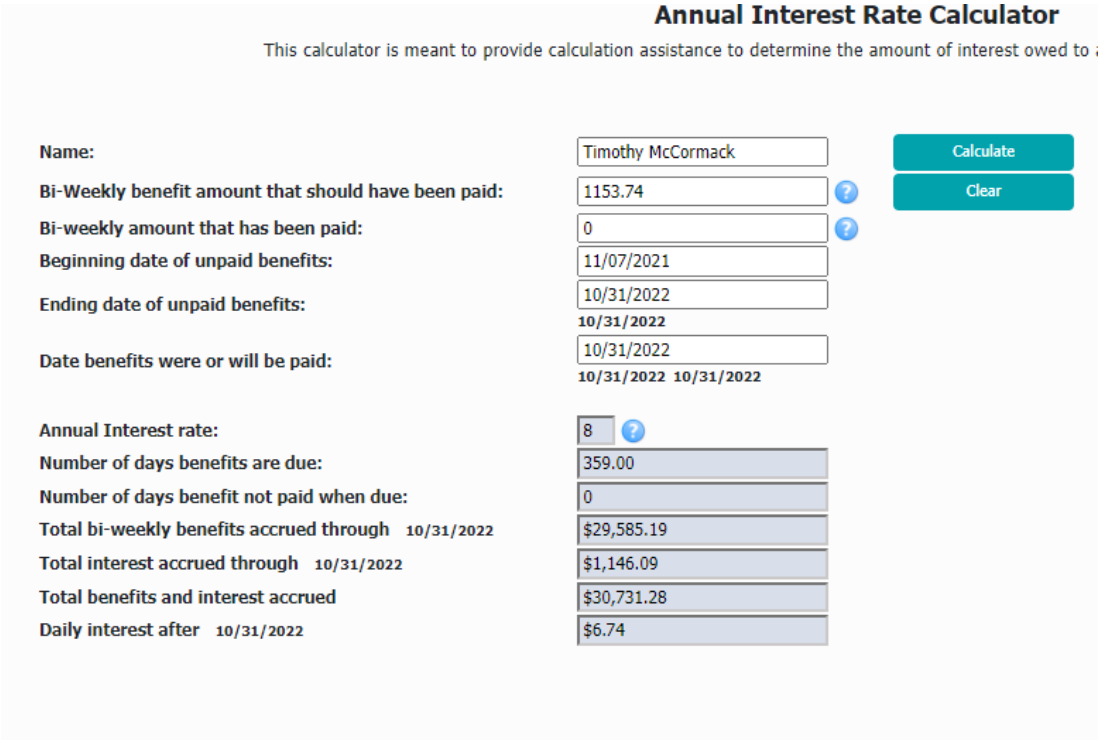
Note: All Dates entered are inclusive

Beginning Date:	11/07/2021
Ending Date:	10/31/2022
Weekly Benefit Rate:	576.87
Total Benefits for this period:	$29585.19
Number of Weeks:	51 and 2 Days
Total Number of Days:	359

Calculate Benefits

Claimant is owed TTD in the amount of $29,585.19.

8. Interests are due related to the benefits, which were not paid when due, in accordance with Sec. 8-43-410(2), C.R.S. Interests are calculated as follows:



Annual Interest Rate Calculator

This calculator is meant to provide calculation assistance to determine the amount of interest owed to

Name:	Timothy McCormack
Bi-Weekly benefit amount that should have been paid:	1153.74
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	11/07/2021
Ending date of unpaid benefits:	10/31/2022 (10/31/2022)
Date benefits were or will be paid:	10/31/2022 (10/31/2022 10/31/2022)
Annual Interest rate:	8
Number of days benefits are due:	359.00
Number of days benefit not paid when due:	0
Total bi-weekly benefits accrued through 10/31/2022	$29,585.19
Total interest accrued through 10/31/2022	$1,146.09
Total benefits and interest accrued	$30,731.28
Daily interest after 10/31/2022	$6.74

Calculate

Clear

When adding the $1,146.09 in interest due for TTD for pay period of November 7, 2022 through October 31, 2022 and the interest due for TPD for pay period from September 2, 2021 through November 6 2021 for the amount of $145.70, the total interest due for both periods is $1,291.79

CONCLUSIONS OF LAW

Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's

actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). As found, the Claimant's fair approximation of actual wage loss and diminished earning capacity caused by the September 1, 2021 industrial injury is an average weekly wage of $865.30. This renders a temporary total disability rate of $576.87.

Temporary Disability Benefits

The September 22, 2022 FFCL ordered Respondents to pay either temporary partial or temporary total disability benefits beginning September 2, 2021, as Claimant had shown by a preponderance of the evidence that he was entitled to wage loss benefits related to the September 1, 2021 work related injuries. This ALJ was able to calculate the benefits owed as the parties communicated that they could not reach an agreement and provided this ALJ with records going back to April 2021 until Claimant lost his employment.

The parties submitted the wage records on October 26, 2022, which were admitted as Respondents' Exhibit L. Based on the wage records from pay period ending September 4, 2021 through pay period ending November 6, 2021 (10 weeks or 70 days), Claimant earned an average of $602.03. Claimant's AWW was $865.30. The difference is $263.27 per week for September 2, 2021 through November 7, 2021. Therefore, Claimant is owed a total of $1,657.26 in temporary partial disability benefits plus interests of $145.70.

Claimant is also owed temporary total disability benefits beginning the week of November 7, 2021 through the present and continuing until terminated by law. Neither party indicated that Claimant had been earning wages after November 7, 2021 and no further wage records were submitted after this date. For the period of November 7, 2021 through the date of this order, October 31, 2022 there is a period of 359 days, this day included. Claimant is owed TTD in the amount of $29,585.19.

Interest is due related to the benefits, which were not paid when due, in accordance with Sec. 8-43-410(2), C.R.S. in the total amount of $1,291.79.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant proved by a preponderance of the evidence that the Claimant's average weekly wage is $867.30. Temporary Total disability benefits shall be paid at the rate of $576.87.

2. Pursuant to the September 22, 2022 Findings of Fact, Conclusions of Law and Order, Claimant was awarded temporary disability benefits beginning September 2, 2021.

3. Respondents shall pay Temporary Partial Disability from September 2, 2021 through November 6, 2021 in the amount of $1,657.26.

4. Respondents shall pay Temporary Total Disability Benefits from November 7, 2021 through the present and continuing until terminated by law. Benefits are calculated from November 7, 2021 through October 31, 2022 in the amount of $29,585.19. Subsequent to this date, TTD shall continue at the rate of $576.87 per week.

5. Interests owed from September 2, 2021 through October 31, 2022 is $1,291.79. Entitlement to interest shall continue until payments are made in accordance with this order.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 31st day of October, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-124-222-001

ISSUES

1. Whether Claimant has established by clear and convincing evidence that the DIME physician incorrectly placed Claimant at maximum medical improvement (MMI) as of June 22, 2021.

2. If Claimant overcomes the DIME physician's MMI determination, whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits.

3. If Claimant is at MMI, whether Claimant established by a preponderance of the evidence that DIME physician's permanent partial impairment ratings were incorrect.

4. Whether Claimant has established by a preponderance of the evidence that her left upper extremity scheduled impairment rating should be converted to a whole person impairment.

FINDINGS OF FACT

1. Claimant was employed by Employer as a custodian. On November 19, 2019, Claimant sustained admitted injuries when she fell a sidewalk striking her forehead on the cement, landed on her left side. On November 21, 2019, two days after Claimant's November 18, 2019 injury, Claimant was seen at UC Health by Kelby Bethards, M.D., for evaluation of headaches, left shoulder pain, right knee abrasion, and a loose tooth. (Ex. G)

2. On November 29, 2019, Claimant began treatment at UCH Health Greeley workers' compensation clinic. Initially, she saw Micheal Deitz, PA-C, physician assistant for authorized treating physician (ATP) Oscar Sanders, M.D. Mr. Deitz diagnosed Claimant with a left shoulder strain with the possibility of left rotator cuff injury, fall with facial contusion with no loss of consciousness, and a loose tooth. LOC.

3. Over the next 19 months, Claimant saw Dr. Sanders or associated providers at UCH approximately twenty times between November 29, 2019 and June 22, 2021. During this time, Dr. Sanders referred Claimant for evaluations with multiple specialists. These included referrals to Christopher Kirkpatrick, M.D., for an ophthalmologic evaluation; Gregory Reichhardt, M.D., for electrodiagnostic testing and trigger point injections; orthopedic referrals to Joshua Snyder, M.D., and Dr. Heaston for evaluation of Claimant's left shoulder; neurology referral to Benjamin Miceli, PA-C, for evaluation of Claimant's head injury and headaches; and a

psychological referral to Majia Bruzas, Ph.D., for psychological evaluation and treatment.

4. In January 2020, Dr. Sanders diagnosed Claimant with a probable concussion with minimal post concussive symptoms, head pain, headaches, and left shoulder pain. On January 29, 2020, Dr. Sanders noted Claimant's left neck and upper extremity symptoms were unresponsive to conservative care, and ordered MRIs of Claimant's left shoulder, left elbow and cervical spine. Dr. Sanders also referred Claimant for an ophthalmologic evaluation with Dr. Kirkpatrick which was normal. (Ex. I, Ex. 12, p. 136).

5. The MRIs were performed on February 10, 2020. Claimant's left shoulder MRI showed low grade rotator cuff tearing and tendinopathy without a full thickness or high-grade tear. The cervical and elbow MRIs were normal. (Ex. J & 16).

6. On February 17, 2020, Dr. Sanders reviewed Claimant's MRIs and indicated Claimant's rotator cuff tendinopathy was likely pre-existing and not caused by her work injury, although it was possibly exacerbated. He concluded Claimant's symptoms were clinically most consistent with subacromial impingement. He referred Claimant to Dr. Snyder for evaluation and possible steroid injections, and to the UCH Neurology Clinic for evaluation for her headaches. Dr. Sanders considered neuropsychological testing, but declined to do so because Claimant's only post-concussive symptoms at that time were headaches. He also indicated he would continue to monitor Claimant for post-concussive symptoms. On March 2, 2021, Dr. Sanders indicated he would consider referring Claimant for a neuropsychological evaluation shoulder cognitive and memory issues persist. (Ex. 12)

7. On March 2, 2020, Claimant saw Benjamin Miceli, PA-C, at the UCH Neurology Clinic. He diagnosed Claimant with headaches as late effect of brain injury, hypersomnia, and cognitive dysfunction. He noted Claimant's cognitive dysfunction was reported to pre-date her November 19, 2019 injury, but was exacerbated with her head injury. He prescribed Amitriptyline for her headaches, and indicated that a neuropsychological evaluation was to be determined, because of no known Spanish language testing in the region. (Ex. K).

8. On May 13, 2020, PA Miceli noted that Claimant's headaches and cognitive issues were resolving, and he anticipated weaning Claimant off Amitriptyline. PA Miceli again indicated a neuropsychological evaluation was "TBD," because of no known Spanish language testing in the region. (Ex. K).

9. Claimant saw Dr. Snyder on March 5, 2020. Based on his examination and review of Claimant's MRI, he diagnosed Claimant with a partial thickness bursal-sided rotator cuff tear on the left. Claimant continued to experience pain despite physical therapy. Dr. Snyder performed a cortisone injection in Claimant's left shoulder and recommended she restart physical therapy. (Ex. 14) Claimant returned to Dr.

Snyder on May 1, 2020, reporting three weeks resolution of her shoulder pain before the pain returned. (Ex. H) In later follow ups on June 8, 2020 and August 10, 2020, Dr. Snyder indicated he did not see any indications for surgery, additional injections, or activity restrictions, and noted he believed Claimant's discomfort was myofascial in nature. (Ex. H).

10. In October 2020, Dr. Sanders referred Claimant for a second opinion regarding her shoulder to a Dr. Heaston. (No records from Dr. Heaston were offered or admitted into evidence). Dr. Heaston ordered a follow-up left shoulder MRI, which showed similar findings to the February 2010 MRI. Dr. Heaston performed a second left shoulder injection which provide relief, but did not recommend surgery. (Ex. 12 & O).

11. On October 20, 2020, Claimant began seeing psychologist Dr. Bruzas, on referral from Dr. Sanders. Dr. Bruzas diagnosed Claimant with pain disorder, adjustment disorder with mixed anxiety, and depressed mood. Claimant reported memory and concentration issues. Dr. Bruzas indicated she was aware of a Spanish-speaking neuropsychologist in Denver (Jose Lafosse, Ph.D.), who could see Claimant if her memory and concentration issues persisted. (Ex. 15).

12. At her visit with Dr. Sanders on November 25, 2020, Claimant was referred to Dr. Lafosse for a neuropsychological evaluation, and the referral is reflected on the WC 164 form associated with the visit. (Ex. 12). At visits on December 16, 2020 and December 28, 2020, Dr. Sanders counseled Claimant on the importance of completing the neuropsychological evaluation with Dr. Lafosse. The WC 164 form associated with the December 28, 2020 visit also reflects the referral to Dr. Lafosse. (Ex. 12).

13. Claimant continued to see Dr. Bruzas from October 20, 2020 through August 26, 2021. At the December 9, 2020 visit, Dr. Bruzas indicated Claimant was scheduled for neuropsychological testing with Dr. Lafosse. However, at Claimant's January 27, 2021 visit, Claimant indicated she had not received information on testing with Dr. Lafosse. After January 27, 2021, neuropsychological testing was not referenced in Dr. Bruzas' records. Claimant's last documented visit with Dr. Bruzas on August 26, 2021, was noted as the second of four maintenance visits. No credible evidence was presented that Claimant returned to Dr. Bruzas after August 26, 2021 to complete additional visits. (Ex. 15).

14. For reasons that are not apparent from the record, Claimant did not complete a neuropsychological evaluation with Dr. Lafosse or any other provider.

15. On February 10, 2021, Dr. Sanders completed a questionnaire submitted by Respondents' counsel regarding Claimant's status. He indicated Claimant was not at MMI, and that Claimant required further medical treatment, specifically an EMG and ophthalmology follow up examination. He also indicated once Claimant reached MMI, she would require maintenance care including coverage for

Cymbalta for headache treatment. Dr. Sanders did not reference a neuropsychological examination at that time. (Ex. 12).

16. On February 26, 2021, Dr. Sanders requested that Dr. Bruzas evaluate Claimant for a mental[1] impairment rating, indicating Claimant had TBI and adjustment disorder with depression. (Ex. 12).

17. On March 19, 2021, John Raschbacher, M.D., conducted an independent medical examination (IME) at Respondents' request. In his report (dated April 5, 2021), Dr. Raschbacher conflated a different April 18, 2019 injury[2] with Claimant's November 19, 2019 injury, and opined that Claimant reached MMI on April 1, 2020 for the November 19, 2019 injury. (April 1, 2020 was the date of MMI for Claimant's unrelated April 2019 injury to her right shoulder). Because many of Dr. Raschbacher's opinions are based on his conflation of Claimant's two injuries, the opinions expressed in his April 5, 2021 report are not persuasive or credible. Notwithstanding, based on his examination and measurements taken of Claimant's left shoulder, Dr. Raschbacher assigned Claimant an 11% left upper extremity permanent impairment rating. (Ex. N).

18. On April 19, 2021, Dr. Raschbacher issued a second report based on a "re-evaluation of previously reviewed records." In that report, Dr. Raschbacher opined that Claimant reached MMI for her November 19, 2019 injury on March 21, 2020. He further opined that Claimant did not have a ratable condition related to her November 19, 2019 injury, and Claimant required no further medical treatment. He offered no cogent explanation for reversing his prior 11% rating for Claimant's left upper extremity. (Ex. N). Dr. Raschbacher's opinions are not persuasive.

19. On June 22, 2021, Dr. Snyder placed Claimant at MMI, and provided a permanent impairment rating. The admitted records demonstrate that Dr. Sanders assigned a 6% impairment for Claimant's left upper extremity, which corresponds to a 4% whole person impairment. (Ex. 12, p. 4, and Ex. I, p. 247). Dr. Snyder also assigned a 6% mental impairment (Ex. I, p. 248-249; Ex. 12, p. 5-6). In the mental impairment rating worksheet, Dr. Sanders stated Claimant's "Total Whole Person Physical Impairment" was 9%. (Ex. I, p. 249), and assigned Claimant a 14% whole person impairment (combining mental and physical impairments). Dr. Sanders did

[1] Claimant's providers variously use the terms "psychiatric impairment," "psychological impairment" and "mental impairment" in reference to the assignment of a "mental impairment" rating permitted under § 8-41-301 (2)(a), C.R.S. Thus, for the sake of clarity, the ALJ has substituted the term "mental impairment," for "psychiatric" or "psychological" where appropriate.

[2] Claimant had a different work-related injury on April 18, 2019 when she fell sustaining injuries to her back, right shoulder, and back of her head. Claimant ultimately underwent surgery on her right shoulder, and returned to work approximately six weeks after the surgery. Over the course of the next year, Claimant received treatment for her right shoulder, until being placed at maximum medical improvement (MMI), on April 1, 2020. The injuries Claimant sustained on November 19, 2019 are separate and distinct from the injuries sustained on April 18, 2019 and are not the subject of the current dispute.

not indicate which body part or parts comprised the 9% whole person physical impairment rating, or why the "physical" impairment listed was greater than the 4% left upper extremity rating he assigned the same day. (See id.)

20. In a letter to Respondents' counsel dated June 29, 2021, Dr. Sanders opined that Claimant's had a 14% whole person impairment, and would require medical maintenance care consisting of coverage for Amitriptyline (for headaches) and psychotherapy for one year. He recommended no other medical maintenance care, and did not recommend a neuropsychological evaluation. (Ex. I).

21. On July 2, 2021, Respondents filed a Final Admission of Liability, admitting for a 6% left upper extremity impairment rating and for 12 weeks of benefits for her permanent mental impairment. (Ex. 8). Claimant timely requested a DIME and objected to the FAL. (Ex. 6 & 7).

22. On January 25, 2022, Claimant underwent a Division Independent Medical Examination (DIME) with Jade Dillon, M.D. Based on her examination and review of records, Dr. Dillon diagnosed Claimant with a partial thickness rotator cuff tear of the left shoulder, closed head injury with mild traumatic brain injury, and adjustment disorder with mixed anxiety and depressed mood. Dr. Dillon opined that each of these diagnoses are causally related to Claimant's November 19, 2019 work injury and were "ratable conditions." She placed Claimant at MMI, effective June 22, 2021 (the MMI date assigned by Dr. Sanders). She assigned Claimant a 12% left upper extremity impairment rating (which corresponds to a 7% whole person impairment), and a 2% mental impairment rating. Combined, the two impairment ratings correspond to a 9% whole person impairment. Dr. Dillon indicated apportionment was not applicable and that Claimant had no other ratable conditions. Specifically, she stated "With respect to the anatomical regions specified on the application for DIME, there is no other impairment related to the occupational injury in question." When discussing the rationale for her decision, Dr. Dillon indicated that Claimant's "degradation of memory and concentration" was addressed under the category of "thinking, concentration, and judgment," which, the ALJ notes, are components of the mental impairment rating. (Ex. O, p. 337). Dr. Dillon assigned a 10-pound left-hand lifting restriction, and no reaching or working overhead. Finally, Dr. Dillon opined that no specific maintenance care was required. (Ex. O).

23. On February 25, 2022, the Division confirmed the completion of Dr. Dillon's DIME report. (Ex. C).

24. On March 8, 2022, Respondents filed a Final Admission of Liability, admitting for a 12% scheduled left upper extremity impairment, and 2% mental impairment. (Ex. D).

25. On April 6, 2022, Claimant filed an objection to the FAL, and an Application for Hearing. (Ex. 4).

26. Dr. Raschbacher testified by deposition and was admitted as an expert in occupational medicine. He testified that he performed a second examination of Claimant on July 29, 2022, and reviewed Dr. Dillon's DIME report. Dr. Raschbacher agreed with Dr. Dillon's impairment rating for Claimant's left shoulder, and opined that she followed appropriate and correct methodologies in assigning Claimant's left upper extremity impairment rating, and opined that it should not be converted to a whole person impairment. He testified that the situs of Claimant's left upper extremity impairment is the left shoulder joint. Dr. Raschbacher also testified that he did not see any error in Dr. Dillon's determination of mental impairment.

27. Claimant testified that following her November 19, 2019 injury, she experienced headaches, left shoulder pain, and pain in her eye and tooth. Claimant returned to work the day of her injury, and went to work the following day but was sent home. Claimant has not worked since November 20, 2019. Claimant testified at hearing that she continues to experience memory issues, and problems with mental function, specifically, that she needs more time to think and forgets where she is going at times. She testified her left shoulder continues to hurt with movement. Claimant could not recall why she had not seen a specialist, from which the ALJ infers Claimant meant a neuropsychologist. She testified that Dr. Sanders released her from treatment, and that the last physician she recalled seeing for her injuries was the DIME physician, Dr. Dillon.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on MMI and Impairment

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Serv.,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

MMI

Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant reached MMI on June 22, 2021 was incorrect. As found, Dr. Sanders and Dr. Dillon assigned an MMI date of June 22, 2021. Given Dr. Sanders' extensive involvement in Claimant's case, including numerous examinations and visits over a period of approximately 19 months, the ALJ finds his date of MMI to be reasonable and appropriate. Dr. Dillon's adoption of Dr. Sanders' MMI date is also reasonable and appropriate under the circumstances. No physician has opined that Claimant was not at MMI as of June 22, 2021.

Claimant asserts Claimant's reports of headaches and cognitive issues, and the lack of a neuropsychological evaluation render a finding of MMI incorrect. The record indicates Dr. Sanders initially referred Claimant for a neuropsychological evaluation with Dr. Lafosse in December 2020. For reasons not apparent in the record, Claimant did not complete that evaluation. As the referring physician, the ALJ infers that Dr. Sanders was aware Claimant had not completed the evaluation when he placed Claimant at MMI, and when he recommended medical maintenance care, which did not include a neuropsychological evaluation. Although Claimant testified to ongoing memory and cognitive issues, the existence of these symptoms does not constitute clear and convincing evidence that the assignment of MMI by the DIME physician was incorrect. The evidence does not establish that Dr. Dillon's MMI opinion is highly probably incorrect.

Impairment

Claimant has failed to establish by clear and convincing evidence that the permanent impairment ratings assigned by the DIME physician are incorrect. Claimant's primary contention is that Dr. Dillon failed to assign Claimant a permanent impairment rating for a closed head injury. As found, Claimant's primary symptoms from her closed head injury, and for which a neuropsychological examination was recommended, were

memory and concentration. In the DIME report, Dr. Dillon indicated these issues were addressed under the category of "Thinking, Concentration, and Judgment" which are components of Claimant's mental impairment rating. Claimant presented no credible evidence indicating that Dr. Dillon's rating of these conditions as components of Claimant's mental impairment rating was incorrect or improper, or that Dr. Dillon failed to follow appropriate standards and guidelines when assigning permanent impairment ratings.

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). TTD benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Once a Claimant reaches MMI, entitlement to TTD benefits terminates.

Because Claimant has failed to establish that the DIME physician's MMI rating was incorrect, Claimant reached MMI on June 22, 2021. Accordingly, Claimant is not entitled to further TTD benefits after June 22, 2021. Claimant's request for TTD benefits is denied.

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S.

The schedule includes the loss of the "arm at the shoulder." *See* § 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO June 11, 1998). Because § 8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). For a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *In re Claim of Barnes,* 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that her scheduled impairment rating for her left upper extremity should be converted to a whole person impairment. As found, Claimant reached MMI for the November 19, 2019 left shoulder injury on June 22, 2021. The DIME physician determined Claimant sustained a left partial thickness rotator cuff tear as a result of her November 19, 2019 injury. Dr. Dillon also determined Claimant had limitations in range of motion and required work restrictions limiting her ability to lift and use her left arm overhead. These limitations are not determinative of the "situs of functional impairment," but are, instead, manifestations of functional impairment. *See Garcia v. Terumo BCT*, W.C. No. 5-094-514-002 (ICAO, July 14, 2021).

Claimant's November 19, 2019, injury resulted in damage to the structures of the left shoulder, which are not surgical in nature. The ALJ credits Dr. Raschbacher's opinion that the situs of Claimant's impairment is her left shoulder. The ALJ concludes the Claimant's inability to fully use her left arm overhead and loss of range of motion are manifestations of an impairment of Claimant's left shoulder, beyond the arm. In other words, Claimant's shoulder does not function correctly. Accordingly, Claimant's left upper extremity impairment rating is converted from an 12% scheduled rating to a 7% whole person impairment.

ORDER

It is therefore ordered that:

1. Claimant reached maximum medical improvement on June 22, 2021.

2. Claimant's 12% scheduled left upper extremity rating is converted to a 7% whole person impairment.

3. Claimant failed to overcome the DIME's opinion regarding permanent impairment. Claimant sustained a 7% whole person impairment for her left upper extremity and a 2% mental impairment.

4. Claimant's request for temporary total disability benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The issues set for determination included:

- Is Claimant entitled to reopen his claim?
- If the claim is reopened, is Claimant entitled to conversion of scheduled medical impairment to whole-person rating?
- Is Claimant entitled to additional permanent partial disability (PPD) benefits?

PROCEDURAL SUMMARY

The undersigned issued a Summary Order on May 11, 2020. Respondent filed a timely Request for Specific Findings of Fact and Conclusions of Law and Order ("FFCL&O") on May 20, 2020. Claimant filed amended proposed Findings of Fact and Conclusions of Law, which was received on May 22, 2020. The FFCLO was issued on June 23, 2020.

Respondent filed a timely Petition to Review. The Industrial Claims Appeals Office ("ICAO") affirmed the decision and Respondent appealed to the Court of Appeals.

On December 2, 2021, the Court of Appeals remanded this case to the Industrial Claims Appeals Office for additional findings to determine whether Claimant had established a basis for reopening the award. The ICAO remanded this matter to the Director or the ALJ on January 21, 2022.

On February 4, 2022, Claimant's counsel sent a letter to all parties requesting that the Director determine whether reopening in this case was appropriate as "Claimant [has] no additional evidence to present". [1]

No response was received from Respondent and in a March 3, 2022 Order, the Director stated Claimant noted in his letter that Respondents would not agree with his request. The Director also found that "while this letter is not structured as a Motion, it does appear to be a request to reconsider the Director's January 31, 2022 Order".

Claimant's Motion to Reconsider the Order referring this matter to the OAC was denied. The Director also noted that the referral to the OAC for a factual determination

[1] The letter was not filed at the Office of Administrative Courts. The information concerning the letter was taken from Director Tauriello's March 3, 2022 Order, which was lodged with the Court on September 16, 2022.

regarding the issues of closure and reopening remained in effect.

A merits hearing was held on April 11, 2022.

FINDINGS OF FACT

1. Claimant was employed by Employer as a Deputy Sheriff, a position he has held for thirteen years.

2. Claimant's medical history was significant in that he had complaints involving his neck, upper back, and left trapezius. On August 12, 2015, Claimant saw his chiropractor at Kaiser Permanente. Claimant complained of left neck and left arm numbness and pain.[2] These were his first complaints of left arm and neck numbness and pain. There was no evidence Claimant suffered a traumatic injury to his left shoulder or had work restrictions before January 2017.

3. On January 31, 2017, Claimant was injured in a courtroom altercation with an individual who was in custody. Claimant testified he jammed his left arm, including the elbow and shoulder.

4. Claimant received medical treatment for his left shoulder, including a course of conservative treatment. After conservative treatment failed to resolve Claimant's symptoms, he underwent a left shoulder MRI which showed a posterior labral tear without evidence of a rotator cuff tear.

5. An arthroscopic labral repair, subacromial decompression (bursectomy, resection of CA ligament with resection of 7mm anterior acromial spur) and superior labral debridement performed by Michael Hewitt, M.D. The post-operative diagnoses were: left shoulder posterior-inferior labral tear (3 o'clock to 6 o'clock); superior labral fraying (type I SLAP lesion); subacromial impingement.

6. Following surgery, Claimant had complaints of myofascial irritation involving the trapezius and levator scapulae. Claimant underwent trigger point injections administered by John Aschberger, M.D. with good results. The ALJ noted these complaints were beyond the shoulder joint.

7. Claimant was placed at maximum medical improvement on January 15, 2018 by Stephen Danahey, M.D. Dr. Danahey assigned Claimant a 6% scheduled impairment rating for the left upper extremity.

8. On May 31, 2018, Claimant underwent a Division of Worker's Compensation ("DOWC") Independent Medical Examination, which was performed by John Hughes, M.D. At the time, Claimant reported symptoms of a stretch in his left posterior trapezius, with right lateral flexion and rotation of the cervical spine. Dr. Hughes noted the right shoulder ranges of motion (ROM) were full and smooth. The left shoulder

[2] Exhibit N, p. 49.

motion was restricted with flexion and extension measured at 119° and 31°, respectively. Abduction and adduction were measured at 126° and 14°, with external and internal rotation measured at 78° and 41°.

9. Dr. Hughes' assessment was: work-related fall with left shoulder sprain/strain leading to development of a labral tear and glenohumeral instability; left shoulder arthritis post arthroscopic labral repair, subacromial decompression and debridement performed by Dr. Hewitt on April 25, 2017; cervicothoracic myofascial pain syndrome, with current findings similar to what was noted in the past.

10. Dr. Hughes agreed with the date of MMI and based upon the ROM findings, assigned an 11% scheduled impairment to the shoulder. He noted crepitation and assigned a 10% severity grade for crepitation, which yielded a 16% upper extremity rating that converted to a 10% whole person medical impairment. Dr. Hughes noted Claimant had asymmetric restriction in right lateral flexion and rotation of the cervical spine, which may have been due to myofacial hypertonicity of the left posterior trapezius stemming from Claimant's surgery. The ALJ concluded this was evidence of functional impairment beyond the shoulder.

11. Respondent filed a final Admission of Liability ("FAL") on June 22, 2018, based upon Dr. Hughes' rating. admitting for, among other benefits, permanent partial disability ("PPD") benefits based on a 16% scheduled impairment. Respondent paid PPD based upon the 16% scheduled impairment rating.

12. On June 29, 2018, Claimant filed a timely objection to the FAL, including an Application for a Hearing ("AFH"). This AFH sought additional PPD benefits, based upon conversion to the whole person impairment rating. Respondent was served a copy of the AFH.

13, The ALJ concluded Respondent had notice that the issue of PPD benefits was contested by Claimant by virtue of the filing of this AFH. No hearing was set on this AFH.

14. Claimant filed a second AFH on October 12, 2018. An Unopposed Motion to Set Hearing Outside of 120-Days was granted on November 8, 2018. The case was not set for hearing on this AFH. Respondent was served a copy of the second AFH.

15. The ALJ concluded Respondent had notice that the issue of PPD benefits was contested by Claimant by virtue of the filing of this AFH.

16. On June 14, 2019, Respondent filed a Motion to Close the case, citing no activity in the case. Respondent alleged Claimant had not taken any action in furtherance of prosecution of the claim since producing Answers to Interrogatories on December 3, 2018.

17. On July 1, 2019, the Director of the Division of Worker's Compensation (Paul Tauriello) issued an Order to Show Cause ("OSC"), which set a 30-day deadline for Claimant to respond or else the claim would be closed by operation of law. The Director had authority under § 8-43-218 (1), C.R.S. (2018) to issue such an Order.

18. The deadline for the response was July 31, 2019. Claimant received the Order to Show cause, but did not file a timely response to the Director's July 1, 2019 Order.

19. On August 30, 2019, Claimant filed a third AFH on the issues of PPD benefits and whole-person conversion.

20. The ALJ found Respondent had notice of that Claimant was seeking conversion of the medical impairment rating by virtue of the three AFH-s filed.

21. On September 9, 2019, Claimant filed a Motion for Reconsideration to Set Aside Order to Show Cause and to Permit Setting of the August 30, 2019 Application of Hearing. This Motion requested that the Director set aside his July 1, 2019 Order that closed Claimant's claim for failure to prosecute. As part of the Motion, Claimant's counsel affirmed that he did not have a copy of the July 1, 2019 Order in his file.

22. Claimant's counsel then filed a Supplemental Request for Reconsideration on September 17, 2019, acknowledging that both Claimant and Claimant's counsel's office received copies of the June 14, 2019 Motion to Close and the July 1, 2019 Order; however, Claimant's counsel alleged that his legal assistant never advised Claimant's counsel of the Motion or the Order. Claimant's counsel stated similar acts of omission/malfeasance were done by this legal assistant.[3] The ALJ inferred that the was the reason that no response was filed to the OSC.

23. On September 19, 2019, Respondent filed a Response to Claimant's Motion for Reconsideration. Claimant's counsel filed a Reply Brief on September 25, 2019. That same day, the parties attended a Prehearing conference on Respondent's Motion to Strike Claimant's AFH for Ripeness. In an October 2, 2019 Order, Prehearing ALJ Martinez Tenreiro found and ordered the following:

> Respondents have shown good cause to strike the Application for Hearing in this matter as the issues are closed pursuant to the July 1, 2019 order. Should the Director reverse the prior order, Claimant may refile for hearing on the issue of conversion other issues listed on the prior Applications for Hearing.

24. On October 7, 2019, Director Tauriello issued an Extension of Time to Show Cause. The Director found, in relevant part:

[3] Exhibit F, pp.15-16. Claimant's Supplemental Request for Reconsideration was a verified pleading, signed before a notary public

> "On September 11, 2019, Claimant's counsel requested that the Order to Show Cause be set aside. Originally, Counsel stated the motion and order were not in his file and he, therefore, had failed to timely respond. However, he has since learned that his former legal assistant was aware of and received a copy of the motion and order and failed to inform Claimant's counsel. . . . The Claimant has represented that there is a need for an extension of time to show cause why this claim should not be closed".

25. The Order provided that Claimant's claim may be closed unless, within 120 days of the Order, the parties either set and attended a hearing before an Office of Administrative Courts ALJ on any outstanding issues, obtained a further extension of time, or filed a stipulation.

26. The ALJ concluded that Claimant's counsel did not respond to the Motion to Close was because of an error or mistake.

27. The ALJ concluded that sufficient facts were shown to establish the claim should be reopened based upon error or mistake.

28. The parties went to hearing on January 22, 2020 on the issue whether the Director had authority to issue the October 7, 2019 or whether reopening was required.

29. Pursuant to the Court of Appeals decision, the Director did not have authority to issue an Order extending time for the Response to the Order to Show Cause. The case was closed upon the expiration of the July 31, 2019 deadline to respond to the OSC.

30. Claimant filed an AFH on October 11, 2019, requesting conversion to the whole person medical impairment rating. In its Response, Respondent endorsed the issue of appealing the Director's October 7, 2019 Order, seeking review of the Director's Order for an abuse of discretion. This hearing followed.

31. Claimant testified he experienced pain in the shoulder, as well as between his shoulder and neck. This has caused ongoing functional problems with his left shoulder that impacted sleeping, lifting with his left arm, carrying objects on his left shoulder and dressing. The ALJ found Claimant to be a credible witness.

32. Ronald Swarsen, M.D. testified as an expert witness. He has practiced in the area of Occupational Medicine since 1984 and since 1997 has been Level II accredited pursuant to the WCRP. Dr. Swarsen reviewed Claimant's medical records, but did not examine him. Dr. Swarsen opined Claimant's injury included part of the scapula, which was proximal to the shoulder. The surgery Claimant underwent also involved structures above the glenohumeral joint, including superior aspects of the superior labrum and these anatomic structures were outside of the shoulder. Dr. Swarsen stated Claimant's deltoid and trapezius muscles were impacted by the surgery. Dr.

Swarsen demonstrated on an anatomical drawing how these structures were affected, as well as noting that the shoulder was separate from the arm.[4]

33. Dr. Swarsen opined Claimant sustained a functional loss above the shoulder. The ALJ credited Dr. Swarsen's opinion and concluded Claimant sustained a functional impairment beyond the shoulder.

34. Respondent did not present evidence which contradicted Dr. Swarsen's conclusions.

35. Claimant met his burden of proof to establish he was entitled to conversion of the extremity rating to a whole person rating.

36. Claimant is entitled to additional PPD benefits based upon the whole person rating issued by Dr. Hughes.

37. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Reopening

[4] Exhibit 13.

As set forth in both of Procedural History and Findings of Fact sections, *supra*, this case had an extensive procedural history. The Director initially issued an Order to Show Cause and set a deadline of July 31, 2019 for Claimant's Response, which was not met. (Findings of Fact 16-18). As determined in Findings of Fact 19-22, Claimant then filed an AFH and a Motion for Reconsideration; to which Respondent objected. Respondent also filed Motion to Strike the AFH. The Director then extended the time for the Response to the OSC. (Finding of Fact 23-24). A hearing on the merits was conducted and Respondent appealed the Findings of Fact, Conclusions of Law and Order. The Industrial Claim Appeals Office affirmed the FFCL&O and Respondent appealed the Final Order to the Colorado Court of Appeals.

The Court of Appeals concluded the instance case was governed by the reopening statute, as it involved an award of PPD benefits in the FAL and then held that the case was closed by the terms of the original Order to Show Cause that was issued upon the filing of the Motion to Close. Judge Gomez, who noted there was tension between the statutory authority of the Director to manage claims and the statute governing reopening, wrote for the Court of Appeals:

> "We conclude that the language in the reopening statute is broad enough to encompass claimant's award, which granted benefits pursuant to the FAL and which became final when the claim was closed for failure to prosecute. Indeed, in a similar case, a division of this court held that a claimant's receipt of temporary disability benefits based on the employer's FAL constituted an "award" subject to the reopening statute, even though the claim had been closed for failure to prosecute when the claimant failed to attend a hearing he had requested. *Burke*, 905 P.2d at 2. Thus, when the claimant later sought additional benefits due to the worsening of his condition, the division held that the award could be reopened if he satisfied the criteria in the reopening statute. *Id.*
>
> Likewise, here, claimant received PPD benefits based on the [Employer]'s FAL. That receipt of benefits constituted an "award," which became final when the claim was closed for failure to prosecute and timely respond to the Director's show cause order. And once the award had been closed, claimant could pursue further benefits only if he satisfied the criteria in the reopening statute." *City and County of Denver v. ICAO*, 2021 COA 146, p. 12 (Colo. App. 2021).

Accordingly, the Court held the reopening statute applied in this case and Claimant was required to make a factual showing that reopening was warranted.

> "So, too, does the reopening statute constrain the Director's ability to issue procedural orders that have the effect of reopening a closed award. Accordingly, the Director couldn't belatedly extend the show cause deadline, reopen the award, and grant additional benefits unless claimant satisfied the criteria in the reopening statute." *City and County of Denver v. ICAO*, 2021 COA 146, p. 15 (Colo. App. 2021).

The Court of Appeals also considered the application of *Klosterman v. Indus. Comm'n of Colorado*, *673 P.2d* (Colo. App.), which Respondent argued was similar to the facts here.

In *Klosterman v. Indus. Comm'n of Colorado*, *supra*, 694 P.2d at 873, Claimant alleged she suffered an injury and informed her employer. The employer, who was uninsured, hired defense counsel upon learning of a workers' compensation claim. The defense counsel never filed an entry of appearance and the employer changed addresses without filing a notice of change of address with the DOWC. The employer contested liability, arguing that he was a partner, but not an active participant. The defense attorney determined that the claim should be filed against the corporation and said he would advise Claimant's attorney. He did not enter an appearance in the case and took no further action. Claimant then filed an AFH to pursue indemnity benefits. Neither the employer nor the defense counsel received notice nor appeared for the hearing. Claimant prevailed and was awarded benefits.

Employer filed his petition to reopen in March 1983, alleging error or mistake. At hearing, the officer found that "the error or mistake in this case is . . . [the employer's] neglect" because the employer had not followed up with his attorney. The hearing officer determined the failure by the employer to apprise the DOWC of its address and the failure to appear at the hearing was attributable to his own neglect. The hearing officer rejected the employer's request to reopen the claim. The ruling was upheld by the Industrial Commission.

The employer appealed, arguing that his neglect was excusable and that excusable neglect fell within the definition of "error or mistake". The Court of Appeals rejected the argument and Judge Berman concluded: "It is apparent here that the Commission did not consider Klosterman's inaction after he obtained counsel, including his failure to apprise the Division of a change of address, or at any time of an address for the registered agent of the corporate entity, to be the type of mistake which would entitle him to a reopening". This was not an abuse of discretion and the decision was affirmed. *Klosterman v. Indus. Comm'n of Colorado*, *supra*, 694 P.2d at 876.

In *City and County of Denver v. ICAO*, the Court of Appeals considered the question of whether the terms "error" or "mistake" encompassed excusable neglect and noted the division that decided Klosterman relied on the fact that, irrespective of whether Klosterman's conduct might be considered excusable neglect, the Industrial Commission had determined that it wasn't an error or mistake that warranted reopening The Court of Appeals stated:

> "We are not prepared to conclude, as a matter of law, that the facts of this case cannot support a finding of error or mistake. The City hasn't offered a definition of "error" or explained why the Director couldn't conclude that reopening was warranted on that basis. It's also not entirely clear that "mistake" has the same meaning in the reopening statute as in Rule 60(b)(1). After all, Rule 60(b)(1)

includes the terms “inadvertence,” “surprise,” and “excusable neglect” along with “mistake” as bases for ordering relief from a judgment, thus suggesting that, in that context, each term means something different”. *City and County of Denver v. ICAO*, 2021 COA 146, pp. 21-22 (Colo. App. 2021).

The Court went on to conclude that it was unable to determine whether Claimant satisfied the grounds for reopening on the grounds of error or mistake and the case was remanded for additional factual findings.

Thus, issue presented in case is governed by § 8-43-303, C.R.S. and the ALJ or Director has broad discretion to determine whether Claimant met [their] burden of proof. *Id.* The question framed in the case at bar is whether there was a sufficient showing to support reopening under these facts.

The reopening statute provides in pertinent part:

> **“Reopening.** (1) At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment involving the circumstances described in section 8-42-113.5, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all rights to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. In cases involving the circumstances described in section 8-42-113.5, recovery of overpayments shall be ordered in accordance with said section. If an award is reopened on grounds of **an error, a mistake, or a change in condition**, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. Reopening does not affect the earlier award as to money already paid except in cases of fraud. Any order entered under this subsection (1) is subject to review in the same manner as other orders”. [Emphasis added.]

Claimant argued that reopening was warranted, specifically that the facts supported a finding of excusable neglect under C.R.C.P. Rule 60(b). This was based upon the beneficent purpose of the Workers’ Compensation Act (“Act”). Claimant asserted that the provisions of the Act was to be construed liberally to effectuate its remedial and beneficent purposes. *See ICAO v. Ray,* 145 P.3d 661 (Colo. 2006); *University of Denver v. Industrial Commission*, 335 P.2d 292 (Colo. 1959). This rule of liberal construction provides that an injured worker receives the benefit of doubt on close questions of law, i.e., issues which can be interpreted either way. See *Mountain City Meat v. Oqueda*, 919 P.2d 246 (Colo. 1996); *UAL v. ICAO*, 993 P.2d 1152 (Colo. 2002).

Claimant also asserted that doctrine of excusable neglect was addressed by the Supreme Court in *Buckmiller v. Safeway Stores, Inc.,* 727 P.2d 1112 (Colo. 1986) and applied in this context. The Court specified criteria to be considered when rleif was granted under C.R.C.P. 60(b), which included The trial court should base its decision on

the following three criteria: (1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether release from the challenged order would be consistent with consideration of equity. More particularly, Claimant alleged that the criteria set forth in *Buckmiller v. Safeway Stores, Inc.*, *supra,* were met and showing of excusable neglect was made. The ALJ noted that none of the appellate decisions which followed *Buckmiller* have adopted "excusable neglect" as a basis for reopening in a workers' compensation case.

Claimant asserted that the ALJ had authority to reinstate the Director'sFinally, Claimant also averred that since the claim should be reopened, he sustained a functional impairment beyond the shoulder and was entitled to additional PPD benefits.

Respondent asserted that Claimant failed to make a showing that the claim should be reopened, pursuant to 8-43–303, C.R.S. and there were no facts which supported a finding of "fraud, an error, a mistake or change of condition" which justified reopening under these circumstances. Respondent argued that the mistake or error presented in the instant case was not the type of mistake that would justify re-opening. Specifically, Respondent argued that the closure was not based upon a mistake or error. Respondent contended that, in fact, the mistake or error was wholly extraneous to the factual and legal basis for closure. Respondent analogized this to the situation where Claimant failed to object to a FAL or Respondent failed to file a timely Petition to Review after a scheduled impairment rating was converted to a whole person rating. Respondent also contended that in this case, Claimant had taken no action to prosecute the claim in the six months before the Director issued the Order, which closed the Claim. On this point, Respondent asserted the concept of error or mistake for reopening was distinguished from what might be considered error or mistake in "common parlance".

Respondent also argued that excusable neglect was not a basis for reopening and that the standard differed than under C.R.C.P. 60(b). Respondent reviewed the statutory history of both the reopening statute and C.R.C.P. 60(b) and asserted "mistake" was not intended to have a broader meaning in the reopening statute than what it had in C.R.C.P. 60(b). Respondent posited that the Colorado Legislature must have deliberately omitted "inadvertence," "surprise," and "excusable neglect" as bases for reopening when the reopening statute was enacted.

Respondent pointed as support for this argument the fact that the reopening statute was originally enacted in 1919 under Chapter 210, § 110, of the Session Laws of Colorado. (S.B. 19-59.) It was codified as § 4484, Compiled Laws of Colo. (1921). It included "error," "mistake," and "change in conditions" as the three bases for reopening an award. At the same time, a separate statute, § 81 of the Compiled Laws of Colorado, provided that a party could be relieved of a judgment where it arose from "mistake," "inadvertence," "surprise," or "excusable neglect" in civil cases. This was the predecessor of C.R.C.P. 60(b). Respondent argued both statutes provided means to set aside a final judgment or award but established somewhat different standards for workers' compensation than what was established for civil matters. The General Assembly is

presumed to have been aware of § 81 at the time they enacted § 4484, and their decision to use a different standard should be assumed to be deliberate.

The ALJ considered the arguments of the parties and the Court of Appeals decision in this case and concluded that "excusable neglect", as that phrase has been construed in cases in which a party sought relief under C.R.C.P. 60(b) did not apply at the case at bar. However, after considering the totality of the evidence, the ALJ determined that Claimant made a showing for relief by demonstrating that the failure to respond to the OSC was based on error or mistake. (Findings of Fact 22, 27). Accordingly, Claimant was entitled to reopen the claim. The rationale for this decision was threefold; first under these circumstances the ALJ determined the failure to respond to the OSC was the result of an error or mistake. As Respondent correctly noted in its post-April 2022 hearing brief, error and neglect are not defined in the Act. The ALJ turned to the plain meaning of words error and mistake:

> Definition of error-
>
> "Error (noun):
>
> 1a**:** an act or condition of ignorant or imprudent deviation from a code of behavior; b**:** an act involving an unintentional deviation from truth or accuracy; c**:** an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done, an *error* in judgment."[5]
>
> Definition of mistake-
>
> "Mistake (noun):
>
> 1: a wrong judgment;
> 2: a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention".[6]

The definition of mistake is apposite here, as the evidence pointed to a wrong judgment or action; i.e. Claimant's failure to respond to the OSC. The ALJ concluded this occurred because of error or mistake. (Finding of Fact 22). The error or mistake directly led to no response and the claim was closed. The ALJ specifically considered Respondent's argument that Claimant's error or mistake was "wholly extraneous" to the legal and factual basis for the closure itself and therefore could not be a rational basis for reopening. No appellate court has taken such a circumscribed view of what constitutes error or mistake and the ALJ concluded that a sufficient showing for reopening was made when the plain meaning of those terms was considered.

In the context of workers' compensation cases where reopening was sought, "mistake" has been interpreted to include mistake of fact or mistake of law. Examples of

[5] Merriam-Webster Dictionary, Sixteenth Edition.

[6] Id.

mistakes of fact supporting reopening include cases where there were instances of misdiagnosis or a more detailed diagnosis which were discovered only after the claim had closed. *See, e.g., Berg v. Indus. Claim Appeals Office of State of Colorado*, 128 P.3d 270, 273 (Colo. App. 2005) [misdiagnosis discovered during post-MMI surgery was legally sufficient mistake for purposes of reopening] and *Standard Metals Corp. v. Gallegos*, 781 P.2d 142, 146 (Colo.App.1989) [misdiagnosis discovered later only after advancement in medical technology was legally sufficient mistake for purposes of reopening].

An award may also be reopened based on mistake of law where the Order closing the claim was inconsistent with subsequent judicial interpretation. *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177, 1180-81 (Colo.App.1996). In its opinion in the case at bench, the Court of Appeals noted the *Berg* and *Renz* decisions didn't "state that the term 'mistake' is limited to those particular circumstances, nor do they elucidate what might constitute an 'error' justifying reopening". *City and County of Denver v. ICAO*, 2021 COA 146, p. 18 (Colo. App. 2021).

Accordingly, the ALJ considered the plain meaning of error or mistake as used in the statute, as well as reviewing the factual underpinnings of this case, (including the fact that Claimant had diligently prosecuted the case up to the point the Motion to Close was filed) and found that the failure to respond was the result of an error or mistake.

Second, the Court of Appeals decision in this case expressly noted that it could not conclude as a matter of law that the facts cannot support a finding of error and or mistake. Respondent characterized this as dicta, however, the view expressed by the Court indicates that other reopening for error or mistake is not limited to misdiagnosis cases or those where the law changed. The ALJ considered the extensive procedural history of the case before the Motion to Close was filed, as well as the circumstances which led to the failure to respond and concluded the basis was an error or mistake.

Third and finally, the ALJ concluded that there were equitable considerations in determining whether this claim should be reopened. Chief among these was the fact that Respondent had notice of the dispute concerning benefits by virtue of the prior AFH-s which were filed by Claimant. As found, the AFHs were filed in a timely fashion and Respondent was on notice that the issue of PPD was disputed and Claimant requesting a conversion of the shoulder impairment rating. (Findings of Fact 12-15). In addition, a trial on the merits is generally favored over default, which in this case the OSC operated as when it closed the PPD issue. These considerations weighed in favor of reopening this claim under these circumstances.

Conversion to A Whole Person Impairment Rating

Having concluded that the case should be reopened, the next issue to be determined was Claimant's request for PPD benefits based upon the whole person

impairment rating. If Claimant sustains an injury not found on the schedule, § 8-42-107(1)(b), C.R.S., provides Claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes, the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

The ALJ was persuaded Claimant met his burden of proof and established by a preponderance of the evidence he was entitled to PPD benefits based upon a whole person medical impairment rating. (Finding of Fact 35-36). The ALJ's conclusion was based upon the medical evidence in the form of treatment records which provided objective evidence that anatomical structures beyond the shoulder joint were involved. (Finding of Fact 6). Dr. Hughes' opinions within the DIME report also supported this conclusion. (Findings of Fact 9-10). In addition, Dr. Swarsen's expert testimony was persuasive on this subject, as well. (Findings of Fact 32-33). Claimant's testimony regarding the injury to his shoulder and its sequelae provided additional factual support for the ALJ's determination that he was entitled to a whole person rating. (Finding of Fact 31). The ALJ also found that Respondent presented no evidence to contravene the finding that structures beyond the shoulder joint were implicated. (Finding of Fact 34).

Based upon the totality of evidence presented at hearing, the ALJ determined Claimant showed he sustained functional impairment beyond the shoulder and was entitled to PPD benefits based upon a 10% whole person rating.

ORDER

It is therefore ordered:

1. Claimant's claim is reopened.

2. Respondents shall pay PPD benefits based upon Dr. Hughes 10% whole person rating. [$939.85 X .10 X 1.26 (Age factor-47 years of age) x 400 weeks= $47,368.44].

3. Respondent is entitled to a credit for PPD benefits previously paid.

4. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondents have proven by a preponderance of the evidence that the doctrines of estoppel and latches apply to the claim.

II. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on June 18, 2019.

IF THE CLAIM IS COMPENSABLE, THEN:

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to authorized, reasonably necessary and related medical benefits.

IV. Whether Claimant has proven by a preponderance of the evidence he is entitled to temporary partial disability benefits.

STIPULATIONS OF THE PARTIES

The parties stipulated that the issues of temporary total disability (TTD) benefits was withdrawn at the beginning of the hearing. In light of the stipulation, Respondents withdrew the issue of termination. Claimant agreed at the close of the evidence that the issue of temporary partial disability (TPD) was also withdrawn.

The parties further stipulated that, if the claim was found compensable, that Claimant's average weekly wage was $1,018.00, and that medical providers from Colorado Plains Medical Group and associated providers, Colorado Plains Medical Center, Colorado Rehabilitation and Occupational Medicine, Dr. Laurence Lesnak, as well as Morgan County Chiropractic, P.C., and Orthopedic and Spine Center of the Rockies were authorized treating providers.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a 44 year old cow hand at a dairy owned by Employer on June 18, 2019. His job included cleaning corrals, moving the cows from each corral and when necessary into the bottle neck in order to control the cow while performing the insemination, inseminating the cows, laying down bedding in the corrals and all other dairy jobs of a laborer.

2. Claimant stated that on June 18, 2019 he was corralling a cow into the chute in order to inject the cow (artificial insemination). At one point, two cows went towards him, one of the cows turned around pushing Claimant, and Claimant ended up against

the corral fence rails. Claimant stated, that when this happened he extended his left hand against the cow so he would not be shoved and his right side made contact with the rails of the fence. He alleged he injured his left arm, left rib, and shoulder and his right side, including his shoulder, arm and hand, and back.

3. Claimant was sent the next day to Colorado Plains Medical Group, where he was evaluated on June 19, 2019 by Tiffany Jorgensen, FNP. Nurse Jorgensen took a history as follows:

> 41-year-old male here with concerns of lower back pain, left forearm pain, left rib pain and lower shoulder pain in regards to being shooved [sic.] by a cow States that he was at work on 06/18/2019 when they were placing cows in a Corral in 1 cow with coming up fast and patient reports that he went to put his arms across to self to protect self and went to turn when the cow pushed him coming in contact with the cow on his rights side as he was turning to avoid the cow States that this happened about 8 00 a m In the morning States since then has had left forearm pain along with left shoulder pain left rib pain and left back pain

Claimant's physical exam was essentially normal other than the complaints of tenderness and complaints of pain with movement. She ordered x-rays of the lumbar spine, the left forearm, shoulder and ribs as well as the left ankle. Nurse Jorgensen also provided restrictions of no lifting more than 20 lbs. and no repetitive lifting, carrying, pushing, pulling, reaching overhead or reaching away from the body and prescribed a muscle relaxant. X-rays were all noted as normal findings.

4. Employer filed a First Report of Injury (FROI) on June 21, 2019 noting that they had notice of the claim on June 18, 2019, and stated that Claimant was moving cows and was pushed into the railings and had a contusion of the left hip.

5. In a follow up on July 8, 2019 Marshal Unrein, PA-C noted that Claimant did not have any obvious deformity or abnormality of the left shoulder but had mild point tenderness over the posterior aspect of the shoulder, a slightly decreased range of motion and strength of his left shoulder with resistance to flexion and abduction, and slightly decreased motion in the left arm compared to the right. He also found point tenderness over the right SI joint area, and an audible pop to the right hip area with flexion. He diagnosed strain of lumbar region, strain of left shoulder, and contusion of rib on left side. He continued muscle relaxant medications, provided restrictions of 10 lbs. and Claimant was to avoid repetitive bending of the lumbar spine.

6. By July 23, 2019 Claimant noted that he had improvement since the last visit but continued to have some low back pain with most of the pain over the right SI joint area. With regard to the left shoulder, he had some difficulty with range of motion but good strength. Mr. Unrein remarked that claimant had not started with physical therapy but was willing to for his low back symptoms. He documented that Claimant's left shoulder strain was essentially resolved and was asymptomatic regarding the rib contusion.

7. On August 22, 2019 Claimant reported he had seen good improvement over the past 2 weeks in regards to his low back pain. He reported decreasing pain in his low back. He also had decreasing pain down his right leg. He still had pain in his hips once in a while but was much better. He had been going to physical therapy 2 times a week.

Claimant reported he was pleased with progress and Mr. Unrein was hopeful that things would get better over the next 4-8 weeks. He continued taking ibuprofen, using ice and heat as well as following restrictions. On exam, Mr. Unrein found nothing remarkable but recommended continued physical therapy. After this visit Claimant continued to report improvements with physical therapy.

8. By September 27, 2019 Claimant started having worsening lumbar spine symptoms with left lower extremity radiation. Mr. Unrein recommended an MRI and prescribed continued physical therapy.

9. Claimant was unable to obtain an MRI due to his pacemaker and radiology recommended a CT scan of the lumbar spine with myelogram. Claimant continued to report radiating pain in the bilateral lower extremities, greater on the left than the right on October 24, 2019.

10. Claimant was evaluated by Nurse Jorgensen on November 1, 2019. She remarked that Claimant had another fall on dry alfalfa on October 30, 2019, injuring his bilateral arms and aggravating his low back pain. Claimant reported no numbness or tingling; just a slight hot-feeling, and thigh pain. Claimant stated he felt like his leg wanted to go out from under him. Claimant report his back was doing well, but since the fall had worsened. Ms. Jorgensen noted that Mr. Unrein had also referred Claimant to a neurosurgeon for an evaluation. She discontinued physical therapy until the neurosurgeon provided his opinion.

11. On November 6, 2019 Claimant's CT myelogram of the lumbar spine revealed only mild discogenic and facet related degenerative changes greatest at the L4-5 level without significant spinal canal or foraminal stenosis, as read by Dr. Eric Nyberg.

12. On November 12, 2019 X-rays of the ribs showed no evidence of fracture, displacement, or other acute deformity, uniform mineralization of the skeletal structures and no focal soft tissue deformity. X-rays of the left wrist and ankle were also negative.

13. Claimant reported that he had a slip and fall on ice on November 21, 2019, which aggravated his low back symptoms and was seen in the urgent care office, who took X–rays on November 21, 2019.[1] Mr. Unrein changed the referral from a neurosurgeon to a physiatrist for evaluation in light of the essentially normal CT and continuing complaints of Claimant's low back pain.

14. Claimant was evaluated by Dr. Lawrence Lesnak on December 13, 2019. Claimant, or rather his wife, provided a history of a slip and fall injury on ice on or about October 30, 2019, while at work, injuring his left side and causing low back and leg pain. He noted that he was seen at Colorado Plains clinic that day.[2] He stated that Claimant reported he had had multiple prior low back injuries, mostly at work. However, he was unable to provide Dr. Lesnak with any information regarding these multiple prior low back injuries. He stated that he had undergone significant treatments over the years as well but, again, could not state what or where.

[1] This ALJ infers that the date was a typographical error as x-rays were taken on November 12, 2019 so it is presumed that the fall happened on November 12, not November 21, 2019.
[2] Claimant was seen on November 1, 2019 with increased back pain.

15. Claimant complained to Dr. Lesnak of left greater than right low back pain, left buttock pain and less frequently left posterior leg pain extending into the left posterior heel. Dr. Lesnak made comment that Claimant was a very poor historian (multiple times throughout his report). He noted that Claimant appeared to have a flattened affect, and reported moderate to high level of somatic pain complaints, indicative of psychosocial facts affecting Claimant's symptoms, his recovery as well as his perceived function. He noted that Claimant exhibited multiple pain behaviors during his evaluation. He documented that gentle brushing of the skin overlying his left greater than right low back/superior buttock region reproduced at least a moderate amount of pain. However, there were no distinct trigger points or muscle spasms that were palpated throughout the patient's lumbar paraspinal musculature or gluteal musculature bilaterally. He recommended Claimant have an EMG test to determine whether radicular nerve injury was present.

16. Dr. Lesnak noted that the psychosocial evaluation was assessed utilizing the Distress and Risk Assessment Method (DRAM) evaluation which analyzed the Modified Zung Depression Index and the Modified Somatic Pain Questionnaire. The patient scored numerical values that placed him in the "at risk" category for psychosocial dysfunction. Dr. Lesnak further noted that Claimant reported a high level of depressive symptoms, as well as a moderate to high level of somatic pain complaints during the DRAM testing. A moderate to high level of reported somatic pain complaints suggested the presence of an underlying symptom somatic disorder/somatoform disorder and stated that patients who have these types of diagnoses frequently embellish/exaggerate their symptoms, thus causing their reported subjective complaints to be unreliable at best. Therefore, he cautioned evaluating/treating healthcare providers to rely primarily, if not solely, on reproducible objective findings in order to provide accurate medical diagnoses and especially accurate medical treatment recommendations.

17. On December 19, 2019 Claimant reported to Mr. Unrein that he continued to have low back pain with radiating pain down the left leg greater on the back than anteriorly and was scheduled for a lower extremity EMG for January 17, 2020.

18. Respondents filed a Notice of Contest on January 15, 2020 stating that the injury or illness was not work related and that they required a medical history and release returned by Claimant.

19. Claimant underwent EMG testing on January 17, 2020 which showed no electrodiagnostic evidence of left lumbar or sacral radiculopathies, plexopathies or peripheral nerve entrapments or neuropathies involving Claimant's left lower extremity or lumbar spine. He stated that given Claimant's significant past medical history, as well as his residual pain behaviors and nonphysiologic findings, Claimant did not appear to be a good candidate for any type of interventional treatments such as a trial of lower lumbar facet joint injections. However, he did recommend a brief trial of manipulative treatments, either osteopathic or chiropractic care.

20. Mr. Unrein noted that he had received the physiatrist's recommendation that Claimant be referred to a chiropractor, which he did on January 22, 2020.

21. On February 24, 2020 Mr. Unrein documented that Claimant had seen the chiropractor for six sessions without improvement and that Claimant continued with low

back pain that radiated down his left leg to his left heel areas. He stated that the symptoms wax and wane. Claimant was to finish two additional visits and then be seen by the physiatrist again.

22. Claimant returned to Dr. Lesnak on March 23, 2020 who noted he found Claimant to be at MMI without permanent impairment based on negative diagnostic workup and subjective complaints, and discharged him from care. Dr. Lesnak did not make any further recommendations for Claimant's non-objective somatic complaints.

23. On March 30, 2020 Claimant was placed at maximum medical improvement by Mr. Unrein as Claimant had exhausted all conservative care without resolution of his symptoms and diagnostic test failed to reveal any need for injections or surgical treatment. Mr. Unrein noted that Claimant had no permanent restrictions and could return to regular work. The M164 also indicated Claimant had no permanent impairment.

24. Claimant's counsel entered his appearance on July 9, 2020.

25. On July 29, 2020 a Workers' Claim for Compensation (WCC) was filed on Claimant's behalf noting he was injured on June 18, 2019, sustaining strain injuries to his upper back, low back, waist, and spine, while working for Employer.[3]

26. On February 1, 2021 Claimant presented to the emergency department at Colorado Plains with increased symptoms without any known mechanism of injury. Claimant reported it had started the day before attending the ED.[4] Claimant reported that he had pain that radiated to the right foot, left foot, right leg, and left leg. He had numbness, tingling, urinary retention, weakness, and was unable to have a bowel movement. He was examined, and he did have decreased sensation to light touch in the bilateral feet. He was complaining of weakness in his legs, although he was standing and walking around without difficulty. Following some discussion of whether he needed an MRI emergently and the facts that he was neurologically intact and was walking around, Dr. Matthew Garman determined proper course was to give him some medications and discharged him home.

27. Claimant filed an Application for Hearing on January 12, 2022 and, following an Unopposed Motion to Withdraw the Application for Hearing and an order dated June 7, 2022 allowing for the withdrawal without prejudice, filed a second Application for Hearing on July 8, 2022.

28. Claimant was seen by Dr. Alisson Fall at Respondent's request for an independent medical evaluation on April 6, 2022. She took a history which was consistent with Claimant's testimony and performed a record review. She examined Claimant, reporting Claimant had diffuse tenderness to palpation of the lumbar spine, self-limited range of motion secondary to complaints of pain, no radicular symptoms, negative straight leg raise and difficulty sitting up due to body habitus. She also found give-way weakness of the lower extremities but otherwise a negative testing. She assessed that Claimant was post left arm, ribcage, and hip contusion on June 18, 2019 which resolved. She also

[3] There was no mention of Claimant's left upper extremity or hip.
[4] Presumably meaning January 31, 2010.

noted the subsequent fall leading to low back pain and a reported fall on January 31, 2021 leading to acute back pain and leg symptoms.

29. Claimant's Supervisor with Employer testified that Claimant had quit his job in July, 2020, that he had simply stopped working. He also stated that Claimant was paid out his vacation time instead of Claimant taking any vacation time.

30. This ALJ reviewed the video footage found at Exhibit S. This ALJ concurs with Dr. Fall that, on the surveillance, Claimant could be seen easily bending to the ground to pick up a small item, getting in and out of a vehicle, and working under a Jeep including what appears to be changing a tire and even getting underneath, with prolonged squatting and awkward positions without hesitation or signs of discomfort. He was also ambulating fluidly without antalgic gait.

31. As found, Claimant admitted to having multiple subsequent falls to Dr. Lesnak when he saw him on December 13, 2019. He reported to Dr. Lesnak that he was injured on October 30, 2019. Claimant reported he had had multiple prior low back injuries, mostly at work, in the past. However, he was unable to provide Dr. Lesnak with any information regarding these multiple prior work-related low back injuries. This is borne out by the evaluation at the ED on November 1, 2019 that stated Claimant had an aggravation of his lumbar spine condition. Following this evaluation, Claimant continued to complain of worsening symptoms. However, Dr. Lesnak noted that Claimant appeared to have a flattened affect, and reported moderate to high level of somatic pain complaints, indicative of psychosocial facts affecting Claimant's symptoms, his recovery as well as his perceived function. He noted that Claimant exhibited multiple pain behaviors during his evaluation.

32. As found, the video surveillance shows that, while Claimant complained to providers and testified that he continued to have pain symptoms, he clearly is shown without visible or notable limitations while changing a tire in awkward positioning while squatted for a lengthy period of time. This ALJ was not convinced that there was an injury causing incident that occurred on June 18, 2019, as Claimant admitted to Dr. Lesnak that he had had multiple falls and multiple injuries to his low back with unknown dates of injury. While there are no records of those injuries before June 2019, Claimant's testimony was not persuasive. Further, even if there was an incident that cause some complaints on June 18, 2019 the records of August 22, 2019 persuasively indicated that Claimant's complaints were essentially resolved. Lastly, Respondents have shown that Claimant had multiple intervening events that likely caused aggravations of his lumbar spine condition, which are not related to the incident of June 18, 2019 but likely related to intervening events occurring on October 30, 2019, November 12, 2019 and January 31, 2020 or at other times of uncertain dates. Drs. Fall and Lesnak are found persuasive in this matter. Claimant has failed to show he has any injuries related to the June 18, 2019 events.

33. Testimony and evidence inconsistent with the above findings is not relevant, credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives

of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Doctrines of Latches and Estoppel

Respondents counsel argued that the claim was barred under the doctrine of latches and estoppel as supported *by Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014). That case deals with a promissory note and the promise to pay said note, when the statute of limitations would have barred the recovery action because the party made a payment after the statute of limitation had run, the underlying court determined that the statutory period began anew under the partial payment doctrine. The trial court reversed itself and made a determination that the laches defense applied and recovery was not permitted. The Court of Appeals reversed stating that laches was unavailable due to the separation of powers doctrine. The Supreme Court reversed the CA decision and remanded. They cited *Lombard v. Colorado Outdoor Educ. Ctr, Inc.,* 187 P.3d 565, 570 (Colo.2008) citing that "Where the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly's authority to modify or abrogate common law, but only recognize such changes when they are clearly expressed." *Hickerson v. Vessels*, 316 P.3d 620 at 623 (Colo. 2014). Further stating that "Unless a conflict with the statute exists, the pre-existing common law continues to apply." See *Smith v. Exec. Custom Homes*, 230 P.3d 1186, 1192 (Colo.2010).

The statute of limitation under the Act states as follows:

> … the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby,…"

The statute of limitations as denoted in the Act, very clearly expresses the parameters for the filing of a claim. There is no doubt in the mind of this ALJ that the statute of limitations in the Act is clear, concise and states the parties' rights with regard to the filing or pursuing of a claim.

The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another. *City of Thornton v. Bijou Irrigation. Co.,* 926 P.2d 1, 73 (Colo.1996) (internal quotations omitted). Laches requires "such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery*." Loveland Camp No. 83 v. Woodmen Bldg.,* 108 Colo. 297,116 P.2d 195, 199; *Keller Cattle Co. v. Allison*, 55 P.3d 257, 260 (Colo.App.2002) ("The doctrine of laches permits a court to deny a party equitable relief."); *Hickerson v. Vessels, supra* at 623.

The Supreme court analyzed that "Since the early days of statehood, we have recognized that laches is available as a defense in some circumstances to shorten the period for filing a claim, even though the claim has been timely filed within a legislatively prescribed statute of limitations period." *Great W. Mining Co. v. Woodmas of Alston Mining Co*., 14 Colo. 90, 23 P. 908, 911 (1890); *Hickerson v. Vessels*, *supra* at 624. They further stated that it is particularly "true where witnesses have died or their memories become dim or time and long acquiescence have obscured the nature and character of the [claim] or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance." *O'Byrne v. Scofield*, 120 Colo. 572, 212 P.2d 867, 871 (1949). *Hickerson v. Vessels*, *supra* at 625.

What was not mentioned in case law, is that the Act clearly states the limitations for the filing of a claim. Nor is there mention of the Division's Rules of Procedure which provide another avenue for relief to Respondents, other than the statute of limitations or common law doctrines. Pursuant to D.O.W.C. Rule 7-1(C), Respondents may file a motion to close the claim for failure to prosecute at any time "when there is no activity in furtherance of prosecution has occurred in a claim for a period of at least six months."

In this matter, Respondents have failed to show that there was any significant prejudice to Respondents for Claimant's failure to proceed to hearing prior to the original Application for hearing dated January 12, 2022. Employer filed a First Report of Injury on June 21, 2019 and knew or should have known that Claimant had a right to file a Workers' Claim for Compensation within two years of the date of the alleged injury pursuant to statute.

An unknown individual,[5] filed a Workers' Claim for Compensation on July 29, 2020 on Claimant's behalf. Claimant filed an Application for Hearing on January 12, 2022 and, following an Unopposed Motion to Withdraw the Application for Hearing and an order dated June 7, 2022 allowing for the AFH withdrawal without prejudice, filed a second Application for Hearing on July 8, 2022. Respondents had the ability to find resolution of the claim. Respondents had to very reasonable steps to take. The first by filing a Motion to Close at any time six months after the date of the filing of the WCC. The second by filing an application for hearing to litigate the issue of laches or estoppel.

Further, Respondents had notice that Claimant had an attorney working on the case as of July 2020 when he entered his appearance. There was no credible indication that Respondents were prejudiced by the delay in Claimant's filing the AFH a year or so later. Respondents demonstrated no prejudice to Respondents when they did not oppose the withdrawal of the first AFH without prejudice. Neither did Respondents show they had relied on the fact that no AFH was filed before January 2022 by any particular actions taken by Respondents. No persuasive evidence was presented at hearing that "witnesses had died or their memories become dim or time and long acquiescence have obscured the nature and character of the [claim] or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance." In fact, providers noted particular findings in the medical records. And Claimant's supervisor did not exhibit any lack of knowledge of the events which had occurred over three years prior

[5] This ALJ infers it was an individual at Claimant's counsel's office that filed the WCC on Claimant's behalf.

to the hearing before this ALJ. Here, the argument of latches simply does not apply. Respondents have failed to show that the doctrine of latches applies in this matter as no prejudice is found.

With regard to Respondents' argument that the doctrine of estoppel applies, equitable estoppel exists where the following criteria are met: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely upon the other party's conduct. See *Johnson v. Industrial Commission*, 761 P.2d 1140, 1146 (Colo. 1988); *In re Claim of Hernandez*, WC No. 4-850-627-03, I.C.A.O. (September 20, 2013).

Respondents failed to show that Claimant's conduct was such that it incited Respondents to act in a certain manner. Claimant did not in any way show that they intended to relinquish the right to proceed to hearing on the issue of compensability. Claimant hired counsel and counsel filed an entry of appearance with opposing counsel and the court. This ALJ presumes that Claimant's counsel was gathering the facts and evidence necessary to proceed with the claim and any records obtained by Claimant's counsel should have been exchanged with Respondents pursuant to the rules. There is a lack of persuasive evidence that Claimant was doing nothing or that Claimant had all of the relevant and necessary facts at his disposal before filing the AFH. Respondents have failed to show that the doctrine of estoppel applies in this matter.

C. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999*); Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result*. City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. E.g., *Montgomery v. HSS, Inc.,* W.C. No. 4-989-682-01 (August 17, 2016).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the

injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). The questions of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury or a worsened condition are ones of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant failed to prove that it is more likely than not that he suffered a compensable injury to his lumbar spine on June 18, 2019. As an initial matter, it is not readily apparent how the accident described in testimony and medical records would have been sufficient to cause a lumbar spine injury. Furthermore, all diagnostic testing, including the CT scan, the EMG and nerve conduction study, the x-rays, the DRAM psychosocial evaluation as well as multiple examinations by multiple providers, including Mr. Unrein, Dr. Lesnak and Dr. Fall, failed to show any acute pathology of a lumbar spine injury. In fact the CT scan only revealed mild degenerative pathology at the L4-L5 level. Further, by Claimant's own admission, Claimant told Dr. Lesnak that he had had multiple falls that aggravated his lumbar spine condition, including one on October 30, 2019. The records of Nurse Jorgensen on November 1, 2019, Mr. Unrein on November 21, 2019 and Dr. Garman on February 1, 2021 identified a fall in the hay, a unknown mechanism as well as a slip and fall on ice. This ALJ concludes that it was more likely than not that Claimant had multiple incidents, including but not limited to dates on October 30, 2019, November 12, 2019 and and another on January 31, 2020. This ALJ specifically concludes that these were aggravations of the underlying degenerative process, which are considered intervening events, and not any injury caused on June 18, 2019. Claimant has failed to show that he had a compensable work related injury to the low back on June 18, 2019.

All other issues are moot in light of this finding and will not be addressed.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits is *denied* and *dismissed*.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 2nd day of November, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered an allergic reaction to the COVID-19 vaccine causing a need for medical care and thus a compensable injury.

II. If Claimant established that she suffered a compensable allergic reaction to the COVID-19 vaccine, whether she also established, by a preponderance of the evidence, that her emergency room visit on October 14, 2021 was reasonable, necessary, and related to that reaction such that Respondent must pay for the visit.

Because the ALJ concludes that Claimant failed to establish that she suffered a compensable injury, this order does not address issue II outlined above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a former correctional worker who contracted Covid-19 on September 25, 2021. She was taken off work as a consequence. She described the symptoms associated with her Covid infection as mild and lasting for approximately three (3) days. According to Claimant, her Covid symptoms consisted primarily of fevers and sinus congestion.

2. Upon recovery from her Covid infection, Claimant returned to full duty work in her usual capacity as a correctional officer on the graveyard shift on October 6, 2021. She testified that she resumed her duties completing rounds, counts and escorting inmates without difficulty. In conjunction with her duties, Claimant testified that she could be on her feet for six of her 8 hour shift.

3. On October 13, 2021, Claimant received a first dose of the Pfizer Covid-19 vaccine. She testified that she did not want to be vaccinated because she had underlying medical conditions[1] and was concerned about any associated interaction risks between the vaccine and her pre-existing conditions. She also felt that because she had recently recovered from a bout of Covid, that she had some natural immunity from the virus. However, the injection was mandatory and because she had already passed the compulsory date to be vaccinated, Claimant testified she was afraid that she would lose her job if she did not comply with Employer's directive to get vaccinated. Thus, Claimant presented for her required first dose of the vaccine as scheduled.

[1] Claimant has diabetes and thalassemia, an inherited blood disorder that is occasionally confused with cancer.

4. Following an injection to the left shoulder, Claimant waited 15 minutes without issue then drove home to rest before reporting for her work shift that evening. Claimant testified that while she was laying down she developed difficulty swallowing. According to Claimant, she got up and immediately noticed right sided facial swelling severe enough to prevent her from opening her right eye completely. After speaking with the pharmacist in the clinic where she received her vaccination, Claimant elected to proceed to the emergency room (ER) at Parkview hospital.

5. Claimant presented to the ER at 7:50 p.m. (1950) complaining of an "allergic reaction". (Resp. Ex. B, p. 8). She reported that she had received an injection of the Pfizer Covid-19 vaccine in her left arm and approximately 30 minutes later "noted an onset of [a] sore throat and swelling of her throat". *Id.* She also reported an onset of right sided facial swelling approximately one-hour post injection. *Id.* While in the ER, Claimant denied dysphagia (difficulty or discomfort swallowing), tongue swelling, stridor, nausea, vomiting, diarrhea, wheezing, difficulty breathing, rash, chest pain, palpitations or edema among other symptoms. However, she complained of a sore throat, nasal congestion, a mild dry cough and "lots" of left sided abdominal pain. *Id*. at p. 8-9.

6. Physical examination revealed a well-developed, well-nourished 21 year old female in no acute distress who was nontoxic in appearance. Her face was symmetrical on examination. (Resp. Ex. B, p. 9). There was no lip or tongue swelling noted; however, examination of the throat (oropharynx) was significant for "erythema and bilateral tonsillar swelling with exudates or tonsillar stones present in the left tonsil. *Id.* Claimant's lungs were clear to auscultation and she demonstrated no respiratory distress. Furthermore, she had a regular heart rate and rhythm with a pulse ox saturation of reading of 95%. *Id.* at p. 9-10.

7. Lab testing revealed a positive monoscreen and an elevated blood sugar (glucose) reading of 313. (Resp. Ex. B, p. 13). There was no "evidence of life-threatening allergic reaction". *Id*. at p. 14. Claimant was diagnosed with infectious mononucleosis as the most likely "etiology" for her symptoms. *Id.* Indeed, the ER doctor noted that this was "causing a degree of splenomegaly, leading to [Claimant's] onset of left-sided abdominal pain and tenderness to the left upper quadrant on exam". *Id*. at p. 14-15. Claimant was treated for her hyperglycemia and given IV Benadryl, Famotidine and Dexamethasone as a precaution to address any "possible allergic reaction" and to treat her pharyngitis. *Id*. Following her medical workup, Claimant was advised that her "symptoms [were] likely unrelated to Covid vaccine" and discharged home. *Id*. at p. 16. Based upon the evidence presented, specifically the objective findings on examination, the ALJ is convinced that Claimant's report of severe facial swelling was overstated. Moreover, the October 13, 2021 ER report supports a finding that Claimant's throat swelling and alleged difficulty swallowing were probably emanating from tonsillar swelling caused by her mononucleosis rather than an allergic reaction to her vaccine injection.

8. Claimant returned to the ER approximately 24 hours later. Indeed, she presented to the ER at Parkview on October 14, 2021 at 10:31 p.m. (22:31). (Resp. Ex.

B, p. 2). Upon presentation, Claimant's symptoms had evolved to include sharp chest pain radiating to the back. *Id.* Although she told the ER staff on October 13, 2021 that she had "difficulty swallowing/breathing", she denied any swelling of the throat or mouth during her October 14, 2021 ER visit. Rather, she reported that she woke on the morning of October 14, 2021 with "left-sided chest wall pain that went through to her back". *Id.* Even though the doctor had advised Claimant that her symptoms on October 13, 2021 were likely unrelated to her Covid-19 vaccine, Claimant's reported primary complaint was "allergic reaction". *Id.* In fact, Claimant persisted in reporting that she "might be having an allergic reaction" and that she was seen in the ER the day prior "for the same", despite being advised the day before that her "symptoms were likely unrelated to her Covid vaccine injection. *Id.* at p. 4.

9. During her October 14, 2021 ER encounter, Claimant denied any shortness of breath, her lungs were clear, she had a normal heart rate and rhythm and a pulse ox reading of 97-98%. (Resp. Ex. B, p. 3-4). Claimant's physical examination was noted to be completely normal except for pain with palpation of her left pectoralis muscle area. *Id.* at p. 3. The ER physician was unable to "appreciate any significant swelling at the injection site in her left deltoid region" and "[did] not appreciate any axillary or supraclavicular adenopathy" leading Claimant's provider to conclude that she was having "typical post vaccine muscle discomfort and malaise". *Id*. at p. 5. Nonetheless, a chest x-ray and an EKG were obtained. The x-ray demonstrated "no acute findings" and the EKG revealed a "[s]inus rhythm rate in the 70s, normal axis, normal conduction and no ST or T wave abnormality". *Id.* at p. 4. Claimant was diagnosed with "[a]cute muscle pain after Covid injection", which was felt to be a "normal reaction to the Covid vaccine" *Id*. Claimant was provided with a Toradol injection for her muscle pain and discharged home with instruction to take Motrin or Aleve as necessary. *Id.* p. 6.

10. On October 15, 2021, Claimant presented to UC Health for her third emergency visit in three days. There is no indication that the physician who evaluated Claimant during this encounter had access to the prior ER records from October 13 and 14th, 2021. Upon presentation, Claimant told the intake technician, Erik Waalkes that "[She] got the Covid shot and . . . has a rash that has developed on the back of her scalp". (Clmt's Ex. 6, p. 97). Claimant told the evaluating physician, Ian Tullberg that she "had [a] Pfizer Covid shot Wednesday and had a reaction". *Id*. at p. 95. Indeed, she told him that following her injection her "face and neck were swollen" and that she went to the ER for this and that she returned to the ER the next day for chest pain.

11. As noted, the content of Dr. Tullberg's record leads the ALJ to find that the he did not corroborate Claimant's allegations of having facial and throat swelling consistent with an allergic reaction by reviewing the ER records from October 13 and 14th. If he had, he would have noted that the ER records from October 13 and 14th are devoid of any objective indication that Claimant had swelling of her face, lips or tongue consistent with an allergic reaction. Furthermore, he would have discovered that Claimant had been diagnosed with infectious mononucleosis and that her oropharynx swelling was likely caused by tonsillar inflammation. Finally, he would have noted that two other ER

physicians opined that the most likely etiology for Claimant's symptoms was her mononucleosis and an expected response to the Covid vaccine injection.

12. Despite reporting no issues with her breathing while in the ER on October 13 and 14th and none being found on exam or through pulse ox monitoring, Dr. Tullberg reported, "[Claimant] states that she **still** has difficulty breathing." *Id.* at p. 95 (emphasis added). Regardless, Claimant's primary complaint while in the ER on October 15, 2021, was the presence of a "[d]iffuse pink blanching, macular rash on her back, otherwise her physical examination was completely normal. (Clmt's Ex. 6, p. 95-96). Following an inspection of her rash, Dr. Tullberg documented that Claimant's "symptoms" were consistent with allergic reaction, but he noted a differential diagnosis list that included but was not limited to "infection" and/or "contact dermatitis". *Id.* at p. 94. Claimant was sent home with a prescription for prednisone.

13. On October 20, 2021, Claimant presented to Family Care Specialists for a post ER appointment. (Resp. Ex. D, p. 2). She was evaluated by Physician Assistant (PA) Micaela Gale during this encounter. In contrast to Dr. Tullberg, PA Gale appears to have had access to and reviewed Claimant's prior ER records. Indeed, she repeatedly referred to specific diagnoses and quoted the records from October 13 and 14th as part of her medical report. *Id.* She noted Claimant's chest muscle pain had resolved, that she and Claimant discussed Claimant's prior ER course in full, and that mononucleosis and a normal post vaccine response were the likely cause of her complaints rather than an allergic reaction to the vaccine injection. *Id.* at p. 3. PA Gale completed FMLA paperwork for work missed "**due to mono**." *Id.* (emphasis added). Moreover, she advised Claimant that she could discontinue the Famotidine and Benadryl for purposes of possible allergic reaction. Finally, she did not include among her assessments a diagnosis of allergic reaction. *Id.*

14. On October 22, 2021, Claimant posted the following message to her social media page:

> Just got a call from my new doc that they received the er visit transcripts and found out that they edited the reason I was in there as having "mono" and I had never had an allergic reaction at all and that the ivs I was hooked up with was to lower my blood sugar when the discharge papers they gave me say something completely different. This vaccine is being covered up by the government and so are the allergic reactions I don't even know how legal it was of them to edit my diagnosis after the fact that has to be illegal". (Resp. Ex. F, p. 5).

15. The evidence presented persuades the ALJ that Claimant's allegation that her medical records were "edited" is unfounded. She did not provide the discharge papers that she claims were inconsistent and provide "something different" than what was documented in the medical records from her ER visits. Furthermore, she acknowledged during cross-examination that at the time she was discharged from the ER on October

13, 2021, she understood that she had symptoms associated with mono rather than any indication that she suffered an allergic reaction to the Pfizer vaccine. She also testified that the discussions she had with the ER physician gave her the impression that her symptoms were not related to the Covid vaccine. Finally, Claimant testified that she posted the October 22, 2021 Facebook statement out of emotional distress leading her to retract her accusation that her ER records were edited.

16. Claimant presented to the Walmart clinic on October 25, 2021, her fourth different provider for this condition within 12 days. (Resp. Ex. C, p. 7). Claimant was evaluated by PA Melanie McCoy for the purpose of addressing her "concerns and ongoing side-effects" from her Covid-19 vaccine. *Id*. Claimant advised PA McCoy that she went to the "ER for a **severe allergic reaction** that included many symptoms: SOB, body aches, HA, rash, and diffuse swelling." *Id.* (emphasis added). Claimant's physical examination was completely normal despite claims of shooting pains in her chest, shortness of breath, migraines, and muscle spasms. *Id.* During this appointment, Claimant also told PA McCoy, despite knowing it was untrue and without any basis in fact, that the ER doctor "changed the documentation to state that it was not an allergic reaction", which led to a dispute that caused her to change her PCP. Finally, Claimant advised PA McCoy that she worked for the DOC and that she was "being required to get her second vaccine next week" before adding that she continued to have "shooting chest pains on both side (sic) with muscle spasms in her neck and back along with shortness of breath (SOB) and migraine headaches. *Id.*

17. Based upon the content of the October 25, 2021 report of PA McCoy, the ALJ finds that Claimant was probably seeking an exemption from the clinic on October 25th to getting the second required Covid injection. Indeed, PA McCoy documented that she explained to Claimant that the clinic did not give vaccine exemptions (supporting a reasonable inference that Claimant asked for one); noting further that she would need to "follow up with her PCP for further evaluation and treatment". (Resp. Ex. C, p. 7). It is also reasonable to infer, based upon the totality of the evidence presented, that Claimant advised PA McCoy that her medical records had been edited in an effort to impress upon her that, contrary to the medical records, she and an allergic reaction to the first injection so as to improve her chances of securing an exemption from getting the second shot.

18. On October 28, 2021, Claimant sought a second opinion from the providers at Walmart. (Resp. Ex. C, p. 5). Although the medical record indicates that Claimant was seen at Family Care Specialists on October 27, 2021, for continued episodes of diffuse chest pain radiating into her back, it is not clear from the October 28, 2021 report why Claimant was seeking a second opinion. Nonetheless, she was evaluated by Nurse Practitioner (NP) Kathy Boyd. Again, Claimant reported, that she had suffered an "allergic reaction" with face and throat swelling and trouble breathing. *Id*. She complained of ongoing headaches and nausea and continued to propagate the narrative that her ER records had been edited by reporting that "[h]er mother was getting an attorney because they (ER) changed her medical records". *Id.* Claimant also made it clear that she did not want to take the second Covid injection but knew that failing to do so could mean losing her job. Claimant would go on to testify at hearing that she rejected the second injection

and was subsequently terminated from her employment after she exhausted her leave. The physical examination from this date of visit was normal. *Id*.

19. Claimant was seen by an unknown medical provider on November 9, 2021.[2] During this visit, Claimant reported shin pain and left leg swelling, migraine headaches and blurry vision. (Resp. Ex. A, p. 4). Claimant reported that she had recently returned to work and was walking "all" day. She was diagnosed with shin splints. *Id.* Claimant also reported that she had been under a lot of stress and had been in the hospital due to an "anaphylactic reaction" to her Covid vaccination. *Id.*

20. Claimant testified that having to submit to the injection or lose her employment was "quite stressful" for her. She acknowledged that she can get stress related rashes. Indeed, in a social media post from October 9, 2020, Claimant stated that she was "allergic" to stress and posted a picture of her arm with a rash that she claimed was stress hives "[a]fter everything [she] went through last month and all the stress [she] was put under". (Resp. Ex. F p. 6).

21. Claimant underwent an initial workers' compensation medical evaluation on November 16, 2021, with Dr. Lisa Baron. (Clmt's Ex. 4, p. 42). Once again, the history obtained reflects that Claimant told Dr. Baron that one hour after her vaccine, her throat and face started to swell and she went to the ER for treatment. The record from this date of visit also reflects Claimant's continued baseless reporting that her ER records were "altered to remove the allergic reaction diagnosis and leave only a mono diagnosis". *Id.* During this appointment, Claimant reported suffering from "intermittent chest pain (CP), palpitations [and] jerking muscles". *Id*. at p. 45. Despite her claim of shortness of breath, Claimant's oxygen saturation was 99%. *Id.* at p. 44. While Dr. Baron conducted a review of systems, the record from this date of visit is devoid of any indication that she completed a directed physical examination, yet she included "adverse effect of vaccine" among her assessments for Claimant's symptoms. *Id*. at p. 45. Concerning Claimant's palpitations, Dr. Baron noted that Claimant had a scheduled appointment with cardiology.

22. Claimant saw cardiologist, Dr. Alexander Simon Ross on November 22, 2021. (Clmt's Ex. 6, p. 104). During this appointment, Claimant reported having random sharp chest pains, palpitations, an elevated resting heart rate, and dyspnea at low workloads since her Covid-19 vaccination, which she "reported" caused an "anaphylactic reaction". *Id.* Claimant's physical examination was again normal. She also had a normal 12 lead EKG, a normal heart rate, and 1+ non-pitting edema in the left leg. *Id*. at p. 104-109. Dr. Ross recommended a 3 day zio patch (Holter) monitor, a metabolic panel and a Doppler study to exclude DVT, given her complaints of lower extremity swelling. *Id*. at p. 104. Dr. Ross stated, "Assuming these tests are unremarkable, I would presume this to be autonomic dysfunction. If that is the case, it should improve with conservative therapies including aggressive hydration and slowly increasing aerobic exercise." *Id.*

23. During cross-examination Claimant denied telling Dr. Ross that she had an anaphylactic response to the vaccine. Instead, she testified that she told Dr. Ross that

[2] See the Respondent requested medical records review report of Dr. Mogyoros. (Resp. Ex. A, p. 4).

she had an allergic reaction. During re-direct, Claimant admitted to knowing that an anaphylactic reaction meant a "severe, life-threatening reaction to an allergen". She again denied ever using the phrase anaphylactic reaction to any medical doctor and instead used only the terms "allergies" and "allergic reaction" when discussing her condition with her providers. She then testified that if any doctor wrote down "anaphylactic reaction" in the medical reports, that was their choice of words, not hers. The ALJ is not persuaded. Review of the content of Dr. Ross' medical records supports a finding that he attributed the terms "anaphylactic reaction" and "anaphylaxis" to verbal reports Claimant made to him about her condition after her October 13, 2021 injection. (See Clmt's Ex. 6, pp. 104-105). The ALJ credits the medical records of Dr. Ross to find that Claimant probably reported that she experienced an "anaphylactic reaction" to the Pfizer vaccine and was treated in the ER for "anaphylaxis" for several hours after her injection.

24. Claimant returned to Dr. Baron on December 13, 2021. (Clmt's Ex. 4, p. 58). During this encounter, Claimant reported continued "episodes of left sided chest pain, palpitations, shin-splint type lower leg pain, [and] lower leg swelling". *Id.* Claimant also reported seeing the cardiologist "who ordered a Holter monitor that she [was] to receive in the mail". Because Claimant had not received the Holter monitor, she indicated she would call her doctor's office to see if she could pick it up or have one re-mailed. *Id.*

25. Claimant attended a follow-up appointment at Concentra Medical Centers on January 17, 2022 where she was evaluated by NP Jennifer Livingstone. (Clmt's Ex. 4, p. 67). During this appointment, Claimant reported that she was able to complete her Holter monitor testing and send the monitor back for interpretation of the results. No results were available as of this appointment. Claimant reported continued frequent palpitations throughout the day and less frequent and random chest pain. She reported that her lowers legs felt swollen, but no appreciable swelling was noted on examination. She also expressed a desire to try Omega 3 and CoQ10 for her ongoing palpitations. Despite Claimant's report of having completed her Holter monitoring, she did not submit the results of such testing as evidence of her alleged arrhythmias.

26. Respondents sought an opinion from Dr. Daniel Mogyoros, a fellowship trained, Board Certified expert in the specialty of infectious diseases, regarding the likelihood that Claimant's vaccination caused her to experience an allergic reaction requiring medical treatment. Dr. Mogyoros completed a medical records review and issued a causality opinion on August 25, 2022. (Resp. Ex. A).

27. In analyzing causality, Dr. Mogyoros noted that Claimant had two "clusters" of symptoms, with one set occurring immediately after the vaccination and one occurring at least a couple of weeks after the injection. Moreover, he noted that these symptom clusters occurred in close temporal relation to three specific events, specifically a pre-vaccine Covid infection occurring around September 25, 2021, a mononucleosis infection and the administration of the Covid-19 vaccine on October 13, 2021. (Resp. Ex. A, p. 7). Thus, he opined that it was necessary to determine which symptoms Claimant began reporting after the administration of her vaccine correlate with which of the above noted events. *Id.*

28. In concluding that Claimant did not suffer an "allergic reaction" to her Pfizer Covid-19 vaccination injection, Dr. Mogyoros noted that the vaccine has multiple known "normal" side effects which do not constitute evidence of an allergic reaction. (Resp. Ex. A, p. 7). These include local reactions at the injection site, including pain, swelling, tenderness, warmth, and redness. *Id.* Additional normal systemic reactions include, headache, fatigue, chills, fever, joint pain, muscle aches and nausea. *Id.* Women were more likely to report adverse events than men by an odds ratio of 1.89%. *Id*. at p. 8.

29. Dr. Mogyoros noted that at the time of her initial ER visit on October 13, 2021, Claimant was diagnosed with infectious mononucleosis (mono), which is caused by infection from the Epstein-Barr Virus (EBV). (Resp. Ex. A, p. 8). Symptoms associated with mono include headache, fatigue, sore throat, abdominal pain, nausea, rash, fever, enlarged lymph nodes and enlarged liver and/or spleen. *Id.* Additional diagnostic findings consistent with mono include elevated liver function tests and white blood cell counts. *Id.*

30. As noted throughout the medical record, Claimant reported symptoms consistent with a normal response to the Covid vaccine, namely pain and tenderness with palpation to the left chest, body aches, malaise, headaches and chills following her injection on October 13, 2021. According to Dr. Mogyoros, these known normal vaccine reactions resolved in Claimant within days of her vaccine. (Resp. Ex. A. p. 8). Claimant also reported symptoms consistent with primary EBV infection causing mono while in the ER on October 13, 2021. These symptoms included a sensation of swelling in the throat, difficulty swallowing, a sore throat, nasal congestion, a mild dry cough and "lots" of left sided abdominal pain. As found above, physical examination of the oropharynx on October 13, 2021, was noteworthy for erythema and bilateral tonsillar swelling with exudates or tonsillar stones present in the left tonsil. Moreover, Claimant had a slightly elevated white blood cell count and an elevated liver enzyme consistent with an EBV infection. Accordingly, Claimant was tested for mono and her Monoscreen was later found to be positive. Based upon Claimant's reported symptoms, her ER findings and her medical progress, Dr. Mogyoros opined that all of Claimant's "symptoms in the first week (following her October 13, 2021, injection) can be explained by either normal vaccine adverse effects (not allergic reaction) or primary EBV infection". *Id*. at p.8.

31. Dr. Mogyoros defined "anaphylactic reaction" in accordance with the World Health Organization as a "[S]evere life-threatening systemic hyper sensitivity reaction characterized by rapid onset of potentially life-threatening airway, breathing, or circulatory problems, usually but not always associated with skin and mucosal changes". (Resp. Ex. A, p. 8). In order to qualify as an anaphylactic reaction, there must be an acute onset (minutes to hours) of illness with involvement of the skin, mucosal tissue or both. *Id*. This includes the generalized presence of hive, puritus or flushing and/or swelling of the lips-tongue or uvula. *Id.* Moreover, there must be accompanying respiratory compromise, including dyspnea, wheezing, bronchospasm, stridor reduced peak expiratory flow or hypoxemia or reduced blood pressure or associated symptoms of end organ dysfunction. Following review of the medical records, Dr. Mogyoros found no evidence to support a finding that Claimant met any of the criteria for anaphylaxis as she claimed. (Resp. Ex.

A, p. 9). The only evidence that Dr. Mogyoros found that could be compatible with a delayed allergic reaction was the presence of a rash, which he noted could be from her mono. *Id.* Noting that elevated eosinophil counts often accompany allergic reactions and these were normal for Claimant on both October 13 and October 20, 20121, Dr. Mogyoros concluded that there was "very little data in the medical record to support the notion that [Claimant] had an allergic reaction to the Covid vaccine" despite the presence of a rash. *Id.*

32. Based upon the evidence presented, the ALJ credits the opinion of Dr. Mogyoros to find that Claimant's rash, as described in the ER report from October 15, 2021, was probably caused by her mononucleosis or something other than an allergic response to her Covid-19 vaccination. Simply put, the ALJ is not convinced that the presence of a diffuse rash localized to Claimant's back provides sufficient evidence to support a finding/conclusion that she had an allergic reaction to her Covid-19 vaccination, especially in light of her mono diagnosis and her self-reported reactions to stress.

33. Dr. Mogyoros also addressed the cause of the new cluster of symptoms Claimant developed around October 27, 2021, which Dr. Baron referenced in her November 16, 2021 report. These symptoms include Claimant's diffuse chest pain, cardiac palpitations, leg swelling, jaw pain and uncontrolled muscle jerking. According to Dr. Mogyoros, these "symptoms are not described as adverse effects of the Pfizer vaccine", and the timing for their development was "much later than the expected timeframe for vaccine induced adverse events" i.e., side effects/symptoms). (Resp. Ex. A, p. 9). Dr. Mogyoros attributed these symptoms to Claimant's development of "long Covid" following her September 25, 2021 Covid infection. Long Covid can cause symptoms consistent with a condition known as autonomic dysfunction. According to Dr. Mogyoros, a reported manifestation of autonomic dysfunction includes a condition known as Postural Orthostatic Tachycardia Syndrome (POTS), which causes cardiac symptoms, including heart palpitations, chest pain, shortness of breath, and decreased exercise tolerance. It can also cause non-cardiac symptoms such as "mental clouding, headaches, lightheadedness, fatigue, muscle weakness, gastrointestinal symptoms, sleep disturbances, and chronic pain (including temporomandibular joint disorder). . ." *Id*. at p. 10. Dr. Mogyoros noted that while it is known that this syndrome is caused by acute Covid infection, it has also been reported "following infections with EBV, influenza, and Borrelia burgdoferi (Lyme disease)". *Id.* Based upon Claimant's clinical picture, Dr. Mogyoros agreed with Dr. Ross that Claimant likely had autonomic dysfunction but he disagreed that this was caused by an allergic reaction to the Covid-19 vaccine but rather by her initial September 25, 2021 Covid infection causing Long Covid or her subsequent EBV infection causing mono. *Id.* at pp. 10-11. He reiterated that there were no clinic "signs or symptoms" consistent with anaphylaxis and little information to suggest that she had an allergic reaction to the vaccine. Consequently, he opined that "other diagnoses predicated on the idea that [Claimant] had an anaphylactic reaction (to the vaccine), [were] incorrect". Id. at p. 9.

34. Dr. Mogyoros testified as an expert in infectious disease. He noted that vaccine reactions are part of his practice and that he was familiar with the Pfizer Covid-

19 vaccine and its expected side-effects. He noted that anaphylactic reactions rise very quickly, i.e. within minutes to hours and perhaps up to one day following exposure to an allergen and are dramatic in their presentation.

35. Dr. Mogyoros testified that Claimant did not give accurate information about her history to her providers on October 13, 2021. At no point during any of Claimant's treatment was facial swelling, throat or airway swelling, breathing difficulty, or a rapid heart rate found on examination. He also testified that Claimant was not having an allergic reaction upon presentation to the ER on October 13, 2021. Rather, he testified that Claimant presentation to and treatment in the ER on this date was related to her EBV infection and that she was given steroids, not for an allergic reaction but rather pharyngitis (sore throat). He reiterated his opinion that Claimant's muscle pain was an expected reaction to the vaccine injection and that her treatment, including a Toradol injection was palliative in nature. He opined that while Claimant's prior Covid infection may have resulted in "more pronounced" chest pain upon vaccination, that pain was no more dangerous and no longer lasting than someone who had not had Covid previously, and this response did not constitute an allergic reaction.

36. Regarding Claimant's October 15 back rash, Dr. Mogyoros testified that an allergic vaccine reaction is typically "diffuse" and "reacting throughout the body." As a result, he opined Claimant's rash was not typical of an allergic reaction and that with a vaccine reaction he would "expect a very different looking rash than what's described." He also said he would expect to see a vaccine rash sooner than the third day after the vaccine. He repeated his belief that Claimant's EBV infection, i.e. her mononucleosis or another cause was an equally (50/50) likely explanation of her rash. Supporting Dr. Mogyoros' opinions concerning Claimant's rash are the studies he cited to in his report. First, an analysis of the vaccine found that only around 2% of individuals developed a rash after their first injection (See Resp. Ex. A p. 6-7; Clmt's Ex. 7 p. 125), and that these reactions usually occurred within a day of the vaccination and only lasted 1-2 days. *Id.* In comparison, the mononucleosis study cited by Dr. Mogyoros demonstrated that rashes were present in 19% of positive patients – a rate nearly 10 times higher than that of the vaccine.

37. During his testimony, Dr. Mogyoros explained the lack of a causal connection between the myriad of symptoms Claimant reported and her Covid-19 vaccination. He testified that headaches in response to the vaccine typically appear within 24 hours, and are not the late onset, week in week out, migraines Claimant described. Therefore he concluded that Claimant's migraine headaches were not related to her injection. He added that leg/shin pain was more probably than not related to Claimant's return to work, deconditioning from her mono or a case of Long Covid rather than her October 13, 2021 injection. As explained in his medical records review report, Dr. Mogyoros reiterated his opinion that Claimant's jaw pain, muscle jerking, palpitations and alleged chest pain and fast heart rate were not related to her vaccine injection.

38. Dr. Mogyoros addressed Claimant's suggestion that because she had a "mild" case of Covid-19 preceding her vaccine she could not get a case of Long Covid.

He testified that Claimant's unsubstantiated argument that a mild case of Covid could not cause a case of Long Covid was incorrect. He explained that those who are fully vaccinated, unlike Claimant, are less likely to get Long Covid and while there have not been definitive studies, up to 25% of people infected with the delta variant, which Claimant presumably had due to the timing of her infection, suffer from Long Covid. Finally, he testified that it was typical for patients with Long Covid to get better and then for symptoms to reappear 4-6 week later, much as it did for Claimant.

39. Ultimately, Dr. Mogyoros testified that Claimant did not need any care related to her October 13, 2021 vaccine nor did she require any work restrictions in the first 72 hours after taking the vaccine. Further, he opined that the care she received during this time, i.e. Famotidine and Dexamethasone, Toradol, prednisone, Benadryl and IV fluids) did not change her outcome, and that without this care, she would have enjoyed the same outcome. Claimant did not present expert testimony or any medical opinion or theory explaining how her mixed bag of late onset symptoms is related to her injection. Rather, she seemingly relies on her claim that correlation is causation based on the timing of her symptoms in relationship to taking the vaccine.

40. The ALJ finds the opinions/conclusions of Dr. Mogyoros to be supported by the medical records and the materials cited. As noted, the ALJ credits the opinions of Dr. Mogyoros to find that the myriad of symptoms reported by Claimant following her October 13, 2021 injection are either expected responses to the injection and do not constitute an "injury" or are related to her mononucleosis diagnosis or a case of Long Covid. Based upon the evidence presented, the ALJ is not convinced that Claimant experienced an allergic reaction to her Covid-19 vaccination. Because Claimant failed to establish a causal connection between her symptoms and need for treatment and her October 13, 2021 injection, her claim for benefits must be denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that she is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor

of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Mogyoros are supported by the medical record and the available medical literature. He had the opportunity to draw conclusions after reviewing the entire medical record in this case; whereas, the evidence presented supports a finding that Dr. Ross and Dr. Baron did not. Rather, they seemingly accepted Claimant's statements that she had an allergic reaction and/or anaphylaxis in response to her October 13, 2021 injection at face value. Accordingly, the ALJ concludes that Dr. Mogyoros' opinions are credible and more convincing than those of Drs. Ross or Baron. While the ALJ is convinced that Claimant was experiencing symptoms on October 13, 2021, following her injection and after, the evidence presented persuades the ALJ that her symptoms and need for treatment were/are not related to an alleged allergic response to her Covid-19 vaccination.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I) (b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

F. The "arising out of" element is narrower and requires Claimant to show a causal connection between her employment and the injury such that the injury has its origins in her work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and Claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

G. In this case, Claimant contends that she suffered an allergic reaction to the Covid-19 vaccination resulting in the need for emergency treatment on October 13, 14 and 15, 2021. Because she was healthy and allegedly asymptomatic prior to taking the Pfizer Covid-19 vaccination and she developed varied symptoms after her injection, Claimant contends that it is logical to conclude that there was "some kind" of injury due to the vaccine. Accordingly, Claimant urges the ALJ to conclude that she has established the requisite causal connection between her vaccination and the treatment in the ER and find the claim compensable. The ALJ is not persuaded.

H. When viewed in its totality, the ALJ concludes that the evidence presented supports Dr. Mogyoros' expert medical opinion that Claimant experienced a typical response to her Covid-19 vaccination, i.e. muscle pain and malaise. The ALJ is convinced that this response was not allergic in nature and did not cause Claimant's need for treatment. Rather, the ALJ concludes that Claimant's need for treatment is likely causally related to an EBV infection, i.e. mononucleosis causing symptoms, which Claimant and some of her providers have mistaken for an allergic response. Moreover, the ALJ is persuaded that Claimants continued symptoms, including her cardiac palpitations, chest pain, perceived shortness of breath, persistent headaches, fatigue,

and muscle jerking are more probably than not related to a case of Long Covid which Dr. Ross noted would improve with conservative therapies including aggressive hydration and slowly increasing aerobic exercise.

I. While it is possible that some of Claimant's more troublesome symptoms, e.g. her rash may be related to an allergic response to her Covid-19 vaccination, the ALJ credits the opinions and testimony of Dr. Mogyoros to find and conclude that Claimant's overall clinical picture and the more likely causes of her symptoms, including her rash, render it medically improbable. A coincidental correlation between a claimant's work and his/her symptoms does not mean there is a causal connection between his alleged injury and his work. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), To the contrary, as noted by the Panel in *Scully* "correlation is not causation". In crediting the opinion of Dr. Mogyoros, the ALJ concludes that objective medical evidence is important to making an allergic reaction diagnosis. In this case there is a paucity of objective findings, outside of a diffuse rash, to suggest that Claimant had such a reaction. Indeed, Claimant appeared in no acute distress and was non-toxic upon presentation to the ER shortly after her injection. Her face was symmetrical and she had no lip or tongue swelling consistent with an allergic response. Moreover, she consistently had pulse ox readings greater than 90% and there was no wheezing, bronchospasm or stridor to suggest that she was suffering from anaphylaxis. Accordingly, the ALJ concludes that Claimant's subjective perception that she was having an allergic reaction to her vaccine, which was carried through in documentation in her subsequent appointments, was/is probably incorrect and fails to establish the necessary causal connection to establish that she suffered a compensable injury. Her reporting of symptoms consistent with an allergic response is even more questionable/unreliable when one considers the presence of a patent motivation to report such symptoms as support to secure an exemption from having to submit to the second injection.

J. In this case, the ALJ agrees with Respondents that the provision of medical care based on a claimant's report of symptoms does not establish an injury but rather, demonstrates only that Claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made (in this case to Dr. Baron) so that the Respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id*. Merely because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co*., Inc., W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off*., 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Because the objective medical evidence strongly supports a finding/conclusion that Claimant did not suffer an allergic

reaction to her vaccine injection she has failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions. Consequently, her claim must be denied and dismissed and her remaining claim for medical benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 3, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-198-798-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits.

2. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Employer is a temporary labor staffing company. Claimant has been employed by Employer since 2018, performing primarily day-laborer work at a variety of locations. Employer's employees, including Claimant, are not obligated to work a set number of day, and instead request work from Employer on days of the employees' choosing. Employees are not guaranteed the ability to work on any given day or shift, nor are they guaranteed any hours, shifts, or rate of pay. The minimum pay Employer pays employees is one dollar per hour over minimum wage.

2. On January 1, 2022, Claimant sustained injuries to his hands arising out of the course of his employment with Employer. Specifically, Claimant sustained frostbite to his fingers while shoveling snow.

3. The following day, Claimant was seen at the Denver Health Emergency Department with finger swelling and pain, and diagnosed frostbite. Claimant was discharged with care instructions and no work restrictions. (Ex. F).

4. Claimant returned to work for a shift on or about January 3, 2022, and worked a position indoors. Claimant also worked a shift on January 10, 2022.

5. On January 9, 2022, Claimant was seen at the Longmont United emergency department due to increasing pain and tingling in both hands as a result of frostbite. Claimant was diagnosed with frostbite of fingers of both hands and discharged without work restrictions. (Ex. G).

6. On January 17, 2022, Claimant called Employer's office looking for work and spoke to "Nelson." Nelson told Claimant that due to the fact that he was still injured, he needed to see one of Employer's doctors and return with a doctor's note clearing him to work. Nelson instructed Claimant to go to a designated clinic, and return with a doctor's note before he could return to work. (Ex. J).

7. On January 19, 2022, Claimant was seen at Denver Health' Occupational Health, and reported continued pain and numbness in the fingers of both hands. Examination of Claimant's hands showed hardened skin and black discoloration of the right thumb tip, and the tips of his third through fifth fingers, with swelling, decreased sensation, and

decreased range of movement. On the left side, Claimant had discoloration of the left third finger, and hardened skin on the thumb and fifth finger with decreased sensation. He was diagnosed with frostbite with tissue necrosis of the right hand. Claimant was assigned work restrictions to include no use of the right hand, no use of power tools, no climbing, no push/pull of more than two pounds with the left hand, no work in cold environments, and indoor work only. (Ex. H).

8. Claimant's work restrictions remained in place until he was discharged at maximum medical improvement (MMI) on April 14, 2022 by authorized treating physician Douglas Scott, M.D. At discharge, Claimant was authorized to return to work at full duty. (Ex. H).

9. Given Employer's January 17, 2022 directive to Claimant that he could not work until being cleared by a physician, the ALJ finds Claimant became entitled to temporary disability benefits on that date, continuing until April 14, 2022.

10. Claimant returned to work for Employer on April 22, 2022, and worked approximately 46 days between April 22, 2022 and August 5, 2022, earning gross wages of $5,719.29.

11. Claimant's pre-injury employment records admitted into evidence cover the period from April 21, 2020 through December 31, 2021. The records demonstrate Claimant did not work a set schedule, and his hours, days and weeks worked were inconsistent and varied. During some periods, Claimant worked a full-time schedule (*i.e.*, 5 days per week). During other periods, Claimant worked one to four days, and other times Claimant did not work for Employer for several consecutive weeks. During 2021, Claimant worked all or part of 39 weeks, and did not work at all for Employer for 13 weeks interspersed throughout the year. Claimant worked the first 13 weeks of 2021, but after the week of March 27, 2022, Claimant did not work more than eight consecutive weeks, and did not work more than 4 days in any week. Based on Claimant's work history, the ALJ finds it more likely than not that had Claimant not been injured, he would likely would have worked 75% of the weeks between January 17, 2022 and April 14, 2022, consistent with his work history.

12. The ALJ finds it reasonable to base Claimant's average weekly wage at the time of injury on his wages earned during the entire calendar year 2021. During 2021, Claimant earned $14,778.97 in gross wages working for Employer. Claimant's AWW during 2021 was $284.21 ($14,778.97 ÷ 52 weeks = $284.21). This figure accounts for the intermittent nature of Claimant's employment, including the likelihood that Claimant would not have worked every week during the period of his disability.

13. Claimant is entitled to temporary total disability benefits for the period of January 12, 2022 until April 14, 2022.

CONCLUSIONS OF LAW
Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

TEMPORARY DISABILTY BENEFITS

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability

may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits. The evidence demonstrates Claimant was medically incapacitated due to his work-related injury, and sustained a loss of earning capacity for more than three work shifts. The primary dispute in this matter is the period of time for which Claimant is entitled to temporary disability benefits. As found, on January 17, 2022, Employer instructed Claimant that he could not return to work until a physician medically cleared him. No credible evidence was presented that Claimant was unable to work prior to that date, as Claimant worked two shifts after his injury. The ALJ finds Claimant's entitlement to temporary disability benefits began on January 17, 2022, and continued until Claimant was placed at MMI and work restrictions were removed on April 14, 2022. Accordingly, the ALJ determines that Claimant is entitled to temporary total disability benefits from January 17, 2022 until April 14, 2022.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is

vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's AWW at the time of injury was $284.21. Due to the nature of Claimant's employment with Employer, including the variations in hourly wage, hours, days, and weeks worked, the ALJ concludes a fair approximation of Claimant's AWW is the total wages Claimant earned from Employer in 2021 divided by 52 weeks, (*i.e.*, $14,778.97 ÷ 52 weeks = $284.21). This accounts for the intermittent nature of Claimant's work shifts, variations in hours, and the likelihood that Claimant would not have worked every week between January 17, 2022 and April 14, 2022.

The ALJ notes that using 39 weeks *(i.e.*, the number of weeks Claimant worked in 2021) as the denominator for Claimant's AWW would not be a fair approximation of Claimant's AWW. Based on his work history, Claimant worked 75% of the weeks during 2021 (*i.e.*, 39/52 = 75%). The ALJ finds it more likely than not Claimant would have worked a similar pattern during the period of his disability, had he not been injured. Basing Claimant's AWW on the entire 52-weeks of 2021 incorporates and accounts for the 25% of the time Claimant would not likely have worked during his period of disability by including the weeks he earned no wages in his AWW. A calculation based on 39 weeks fails to account for the 25% of the weeks Claimant did not work, and results in artificially inflated AWW and TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage at the time of his January 1, 2022 work-related injury was $284.21.

2. Respondents shall pay Claimant temporary total disability benefits from January 17, 2022 to April 14, 2022 based on an average weekly wage of $284.21.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 7, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the platelet rich plasma (PRP) injection recommended by Dr. Tomas Pevny is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 21, 2021 work injury.

FINDINGS OF FACT

1. The claimant suffered an admitted injury to his right knee on April 21, 2021. The claimant initially underwent conservative treatment for his injury. On August 20, 2021, Dr. Tomas Pevney performed a right knee arthroscopy with partial medial meniscectomy.

2. The claimant testified that initially following the surgery he had relief of his right knee symptoms. However, approximately one month later, the pain returned.

3. On January 6, 2022, the claimant was seen by Dr. Pevny and reported persistent medial sided pain in his right knee. The claimant also reported pain with extension, when walking down stairs, and with driving. Dr. Penvy recommended magnetic resonance imaging (MRI) of the claimant's right knee.

4. On February 7, 2022, an MRI of the claimant's right knee was performed. The MRI showed, *inter alia,* a new area of mild subchondral marrow edema; an adjacent grade two chondral defect; post-surgical changes from the prior medial meniscal repair; a small region of fluid intensity signal along the undersurface of the medial meniscus at the posterior horn body, (which suggested a small recurrent undersurface tear).

5. On February 10, 2022, the claimant was seen by Dr. Pevny. At that time, the claimant reported intermittent pain on the medial aspect of his right knee. The claimant also reported tightness and pain with extension. Dr. Pevny recommended a platelet rich plasma (PRP) injection.

6. At the request of the respondents, on February 22, 2022, Dr. William Ciccone authored a report following his review of the claimant's medical records. In his report, Dr. Ciccone noted that PRP injections are generally not recommended in workers' compensation cases, with the occasional exception of treating osteoarthritis. Dr. Ciccone noted that the pain in the claimant's right knee is due to spontaneous osteonecrosis, which is not work related. Therefore, it was Dr. Ciccone's opinion that the recommended PRP injection is not appropriate treatment for the claimant. Based upon

Dr. Ciccone's report, the respondents denied authorization for the recommended PRP injection.

7. On March 10, 2022, the claimant was seen by Dr. Pevny. On that date, Dr. Pevny opined that the recent MRI showed a stress reaction of the medial femoral condyle. Dr. Pevny noted that if the claimant did not improve, he would be a candidate for a right knee arthroscopy and a possible PRP injection. On that same date, Dr. Pevny recommended and administered a corticosteroid injection.

8. On April 7, 2022, the claimant returned to Dr. Pevny and reported initial relief from the recent cortisone injection, but his pain returned after approximately three weeks. The claimant described his pain as being on the medial and posterior aspect of his knee and that the knee felt better overall since the injection. Dr. Pevny noted that although the claimant was not approved for the PRP injection, he continued to opine that it would be the best next step for the claimant. Dr. Pevny further noted that the claimant was not a surgical candidate at that time and referred the claimant to Dr. Mark Purnell for a second opinion.

9. On April 13, 2022, the claimant was seen by Dr. Purnell. The claimant reported to Dr. Purnell that after his August 2021 surgery, symptoms of locking and catching resolved, but he had persistent medial pain. The claimant also reported recurrent pain with prolonged ambulation, kneeling, and squatting. Dr. Purnell opined that the clamant has a recurrent tear of the undersurface of the posterior horn of the medial meniscus. Dr. Purnell opined that best option for the claimant would be to undergo a repeat arthroscopy and debridement of the recurrent tear.

10. Dr. Pevny examined the claimant again on April 18, 2022. Dr. Pevny assessed a recurrent tear of right knee medical meniscus and opined that a meniscectomy and arthroscopic revision meniscectomy[1] would be indicated. Dr. Purnell again stated that an intra-articular PRP injection would also be helpful to the claimant.

11. The ALJ credits the medical records and the opinions of Dr. Pevny over the conflicting opinions of Dr. Ciccone. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the recommended PRP injection is reasonable, necessary, and related to the admitted work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

[1] While it would appear that the claimant may benefit from an additional knee surgery as noted by Ors. Pevny and Purnell, that specific medical treatment is not currently before this ALJ.

considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the PRP injection recommended by Dr. Pevny is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 21, 2021 work injury. As found, the medical records and the opinions of Dr. Pevny are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the platelet rich plasma (PRP) injection recommended by Dr. Tomas Pevny, pursuant to the Colorado Medical Fee Schedule.

Dated November 9th, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: {1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-119-993-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her 11% scheduled impairment rating should be converted to a 7% whole person impairment rating.

II. Whether Claimant established that she is entitled to a disfigurement award, and if so, how much.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On July 1, 2019, Claimant suffered an injury to her right shoulder-rotator cuff-while lifting about 23 pounds of lances above shoulder height at work. (Ex. X, p. 12.)
2. On July 3, 2019, Claimant went to emergency department at Banner Health. At this appointment, she complained of right shoulder and arm pain as well as numbness in her arm going down to her 4th and 5th fingers.
3. On July 10, 2019, Claimant was seen at Workwell by Amber Payne, PAC, for continued right shoulder pain and numbness and tingling down her right arm.
4. On July 18, 2019, Claimant returned to Workwell where she also complained of some popping around her bicep tendon and sharp pain with reaching.
5. On July 18, 2019, Claimant started physical therapy and continued, without improvement, until August 22, 2019.
6. Because of ongoing shoulder pain, Claimant underwent an MRI on August 28, 2019. The MRI revealed, among other things, a full-thickness rotator cuff tear. The MRI showed the following:
    - moderate right supraspinatus tendinosis with a high grade articular surface tear of the tendon at the insertion measuring 7 mm AT diameter;
    - moderate infraspinatus tendinosis with a mild interstitial tear within the tendon 2 cm proximal to the insertion;
    - mild biceps tendinosis;
    - mild subacromial/subdeltoid bursitis;
    - lateral acromial downsloping and subacromial spurs which could predispose to subacromial impingement.

7. Based on the MRI findings, Claimant was referred to David Beard, M.D., an orthopedic surgeon. (Ex. K, p. 47.)
8. On September 10, 2019, Claimant saw Dr. Beard for an evaluation of her shoulder. At this appointment, Dr. Beard recommended surgery to fix Claimant's right shoulder full-thickness rotator cuff tear.
9. On October 21, 2019, Claimant underwent a right shoulder arthroscopy with arthroscopic acromioplasty and right shoulder mini open rotator cuff repair. (Ex. 5.)
10. After undergoing surgery, Claimant underwent physical therapy.
11. By November 15, 2019, Claimant was doing well and performing light duty, but was still using an immobilizer for her right arm. (Ex. K, p. 48.)
12. On December 4, 2019, Claimant had a follow up appointment with Dr. Beard. At this appointment, he discontinued her immobilizer and cautioned her about doing anything that might put her at risk for reinjuring her shoulder. (Ex. K, p. 48.)
13. Claimant continued with physical therapy through December 2019.
14. On December 31, 2019, Claimant complained of increased shoulder pain in the morning-after sleeping. Therefore, she was prescribed Lidoderm patches.
15. On January 2, 2020, Claimant returned to Dr. Beard. At this appointment, Dr. Beard noted that her range of motion was not where it should be. Therefore, he recommended additional physical therapy to reduce Claimant's shoulder symptoms and increase her range of motion. (Ex. K, p. 48.)
16. On January 14, 2020, Claimant was seen by Dr. Downs. Because of ongoing shoulder pain, he prescribed massage therapy. (Ex. 48, p. 49.)
17. On January 31, 2020, Claimant returned to Dr. Downs and reported slight improvement. (Ex. 48, p. 49.)
18. On May 15, 2020, Claimant followed up with Dr. Beard. At this point, it had been about 7 months since her shoulder surgery to repair her torn rotator cuff. Claimant still had limited range of motion of her shoulder and discomfort. At first, Dr. Beard considered manipulation under anesthesia, but based on her improvement, he did not recommend it. Nevertheless, his assessment at that time included postoperative adhesive capsulitis. (Ex. A, p. 4.)
19. On May 22, 2020, Claimant went to physical therapy. At this appointment, Claimant stated that her shoulder felt almost normal at work, except for some random bone pain. The physical therapist concluded that despite her improvement, Claimant still had limitations with her right shoulder range of motion, limitations in strength, and ongoing pain. The physical therapist noted that Claimant's functional goals included using her right arm to put her dishes away and reaching up overhead with her right arm since Claimant still needed help at work with overhead tasks. (Ex. B, pp. 6-8.)
20. On May 28, 2020, Claimant returned for additional physical therapy. At this appointment, it is noted that Claimant stated that she felt good and did not have any pain, but still did not feel like she had fully recovered since she rated her improvement at 80-85%. But, at this appointment, it was noted that Claimant had achieved 90% of her goals, which

included putting dishes away with her right arm and reaching overhead. (Ex. D, pp. 16, 17.)

21. On May 28, 2020, Claimant was evaluated by Dr. Luke, via a telemedicine appointment. At this appointment, her primary problem was sharp and throbbing pain located in her shoulder, which she rated at 2/10. Despite being a telemedicine visit it is noted that on physical examination, she had tenderness at the posterior deltoid, bicipital notch, and the AC joint. It was also noted that Claimant had normal range of motion, but there is no indication he actually measured her range of motion since this was a telemedicine visit. In the end, he recommended that Claimant return to regular duty-without restrictions and indicated that he would consider whether Claimant was at MMI in three weeks. (Ex. B, pp. 12-14.)

22. On June 15, 2020, Claimant returned to physical therapy. At this appointment, it is noted that Claimant "has no pain," but then indicates Claimant "did have some bone pain this weekend, but nothing more than usual."

23. On June 17, 2020, Claimant returned to Dr. Luke, via a telemedicine appointment, and was placed at MMI. At this appointment, Claimant still had "the same discomfort in flexion, abduction, and IR [internal rotation]." Claimant's pain continued to be in her right shoulder, and she rated her pain at this visit at 4/10. But, despite ongoing symptoms, Dr. Luke placed Claimant at MMI without any restrictions, and told her to finish her remaining physical therapy sessions. (Ex. F, p. 80.)

24. On June 19, 2020, Claimant underwent additional physical therapy. At this appointment, Claimant noted that her shoulder "is doing good" but with occasional pain at work. The remaining goals for therapy consisted of improving Claimant's right shoulder ROM and strength. (Ex. G, pp. 26, 27.)

25. On July 7, 2020, Claimant returned to physical therapy and stated that she felt her shoulder was about 85% better. At this appointment, Claimant had some random bone pain, but "no pain with a specific movement or activity," but she still had limited range of motion and was tight with shoulder flexion and external rotation. (Ex. H, p. 29.)

26. On July 14, 2020, Claimant saw Dr. Watson. At this appointment, her primary problem still consisted of aching, sharp, and throbbing pain in her right shoulder, which she rated at 3/10. Claimant also completed a questionnaire that had a pain diagram. Claimant noted that her right shoulder hurt, but she did not complete the pain diagram. On physical examination, Claimant had full range of motion of her cervical spine and did not have any neck pain that day. Dr. Watson performed an impairment rating and provided Claimant an 8% scheduled impairment rating, which converts to a 5% whole person impairment rating. (Ex. J, pp. 35-39.)

27. On December 23, 2020, Claimant underwent a Division Independent Medical Examination (DIME) with Bradley Abrahamson, M.D. In his report, Dr. Abrahamson noted that Claimant stated that she has occasional sharp pains across her right collar bone and tightness in her right trapezius that is causing migraines. Claimant stated that these migraines start in the shoulder and continue up into the right side of her neck and forward into her head, settling behind her eyes. Claimant stated that these migraines started around August 2020. Claimant also stated that she started to develop tingling down her

entire right arm to her fingers when lifting overhead and that these symptoms started around July 2020. Claimant also stated that she did not think she got much out of physical therapy. She complained that she often had different therapists and there was a lack of continuity. Claimant also stated that her sleep is still affected by her shoulder pain and it causes her to wake up a couple of times a night. Claimant also stated that her shoulder injury precludes her from making quilts, blankets, and comforters and also precludes her from picking up her grandson. Lastly, she stated that after working a 12-hour shift at work, she cannot do household chores due to shoulder discomfort. (Ex. K.)

28. Dr. Abramson performed a physical examination and measured Claimant's right shoulder range of motion and found decreased range of motion. He also concluded that Claimant developed a brachial plexopathy possibly due to tightness in the pectoralis minor post-operatively. He also concluded that Claimant' elbow disability is a side effect of the treatment for her work injury. (Ex. K.)

29. During the IME Claimant stated that she felt she could regain more shoulder function with better physical therapy. As a result, Dr. Abrahamson concluded that Claimant was not at MMI and recommended additional physical therapy in the form of:

> 1-on-1 PT with a DPT well-versed in movement-based therapy such as what would be seen in a gym-like setting. I estimate that she will need a course of focused PT twice a week until she reaches her plateau in therapy, at which time she could be at MMI.

(Ex. K.)

30. On February 24, 2021, Claimant returned to Dr. Luke. Based on his physical examination, he found the following: Tenderness at the posterior deltoid, bicipital notch, AC joint, medial scapular border, anterior deltoid, supraspinatus, and bicipital groove. He also noted that her range of motion was limited and that there was weakness with external rotation, flexion, and internal rotation. (Ex. K, pp. 58, 59.)

31. Based on Dr. Abrahamson's DIME, Claimant underwent eight additional physical therapy sessions from March 4, 2021, through April 5, 2021. Treatment focused on Claimant's chief complaints about her shoulder that consisted of:

- Awakening due to pain.
- Difficulty dressing.
- Loss of function.
- Loss of motion–pain.
- Loss of motion–stiffness.
- Swelling.
- Weakness.

(Ex. M, pp.61-63.)

32. After her additional physical therapy sessions, Claimant's shoulder pain ranged from 1/10 to 4/10. As for her functional status before and after her second round of physical therapy

Claimant's activities of daily living, dressing her upper body, recreational sports, sleeping, and work activities were limited by 50%, but after the new round of physical therapy each increased to 70% of normal. That said, even after undergoing additional physical therapy, Claimant still had functional impairment of her shoulder that consisted of weakness, loss of range of motion, and pain. (Ex. M, pp. 61-63).

33. On January 12, 2022, Claimant returned to Dr. Abrahamson for her follow up DIME. At this appointment, Claimant continued to have 3-5/10 pain around the anterior portion of her right shoulder when she wakes up each morning. Claimant also had an increase in symptoms during increased computer use. Dr. Abrahamson performed range of motion measurements of Claimant's shoulder and provided Claimant an 11% scheduled impairment rating which converts to an 7% whole person impairment rating.

34. On March 7, 2022, Respondents filed a Final Admission of Liability and admitted for an 11% scheduled impairment rating.

35. Claimant testified at hearing. Claimant testified that she continues to have pain across her collar bone, pain around her shoulder blade, and pain that goes into her neck and results in headaches. Claimant also testified that she continues to have tightness in her right trapezius. The ALJ finds Claimant's testimony to be credible and persuasive regarding her ongoing symptoms.

36. Based on Claimant's testimony, and the medical records submitted at hearing, it is found that Claimant's right shoulder injury, a torn rotator cuff, and subsequent surgery, has resulted in permanent sharp pain across her collarbone, tightness in her right trapezius and pectoralis, as well as pain around her shoulder blade, and pain into her neck and head. The injury to her shoulder-rotator cuff-has also caused a decrease in Claimant's range of motion of her arm due to the functional impairment of her shoulder. Moreover, the pain and limited range of motion limits and interferes with many of Claimant's activities of daily living, such as getting dressed, sleeping, and reaching overhead. These symptoms are manifestations of functional and medical impairment of Claimant's right shoulder injury and involve physiological structures that are beyond the proximal termination of the arm at the shoulder and extend into her shoulder, torso and neck. As a result, Claimant has functional and medical impairment that extends beyond the proximal termination of the arm at the shoulder and extends into the shoulder, neck, and torso. Consequently, Claimant has functional and medical impairment that is not on the schedule of listed impairments.

37. As a result of her work injury and subsequent shoulder surgery, Claimant has a visible disfigurement to the body that is normally exposed to public view consisting of surgical scars on her right shoulder. One scar is approximately 3 inches long and about 1/8th of an inch wide. Claimant also has an arthroscopic surgical scar that is approximately ¼ of an inch long and approximately 1/16th of an inch wide. The color of each scar is different from the surrounding skin.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of Claimant nor in favor of the rights of Respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that her 11% scheduled impairment rating should be converted to a 7% whole person impairment rating.

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in § 8-42-107(2), C.R.S. when a Claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether Claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether Claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of Claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Based on Respondents' filing their final admission for an 11% scheduled impairment rating, there is no dispute about the extent of Claimant's impairment. The dispute is whether the 11% impairment rating should be converted to a 7% whole person impairment rating.

The ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her right upper extremity rating should be converted to a whole

person impairment. Section 8-42-107(2)(a), C.R.S., provides that a loss of use of the "arm at the shoulder" is a scheduled impairment, but does not include the shoulder itself. In other words, section 8-42-107(2)(a) defines the anatomical extent of the arm. If an impairment extends beyond the proximal termination of the arm at the shoulder, Claimant is entitled to whole person impairment.

In this case, Claimant's medical records and her testimony establishes that due to her shoulder injury-rotator cuff injury-Claimant has the following symptoms and limitations that demonstrate the manifestations of Claimant's functional and medical impairment of her shoulder, portions of her torso, and neck. These symptoms and limitations include:

- Shoulder pain.
- Pain across her collarbone.
- Tightness in her right pectoralis.
- Tightness in her right trapezius.
- Tenderness of her right scapula.
- Pain into her neck.
- Trouble using her shoulder to move her arm, which has caused a decrease in her range of motion.
- Trouble getting dressed.
- Intermittent sleeping problems due to shoulder pain and discomfort.

Claimant's symptoms and limitations demonstrate the manifestations of Claimant's functional and medical impairment of her shoulder, portions of her torso, and neck. As a result, the ALJ finds and concludes that the situs of these functional and medical impairments extend beyond the arm at the shoulder, and extend into the shoulder, collar bone, trapezius, pectoralis, neck, and scapular areas. Thus, the ALJ finds and concludes that Claimant has impairment that is not on the schedule of listed impairments.

Accordingly, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her scheduled right upper extremity permanent impairment rating should be converted from an 11% extremity rating to a 7% whole person impairment.

II. Whether Claimant established that she is entitled to a disfigurement award, and if so, how much.

As found, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. As found, Claimant has a visible disfigurement to the body that is normally exposed to public view consisting of surgical scars on her right shoulder. One scar is approximately 3 inches long and about 1/8th of an inch wide. Claimant also has an arthroscopic surgical scar that is approximately ¼ of an inch long and approximately 1/16th of an inch wide. The color of each scar is different from the surrounding skin.

As a result, the ALJ finds and concludes that Claimant is entitled to $1,200.00 in disfigurement benefits.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's 11% scheduled impairment rating is converted to a 7% whole person impairment rating.
2. Claimant is entitled to $1,200.00 in disfigurement benefits.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 9, 2022

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on June 7, 2022 listing issues of compensability, reasonably necessary medical benefits that are authorized, average weekly wage.

Respondents filed a Response to the Application for Hearing on June 8, 2022 listing as issues that the injury/illness did not occur in the course and scope of, or arise out of work, and that Claimant had a pre-existing condition. Further, Respondents alleged that there was an efficient intervening event. Issues listed but no longer being pursued by Respondents were apportionment, if applicable; responsibility for termination, if applicable; unrelated/unauthorized treatment; all applicable offsets including but not limited to SSDI, unemployment; STD/LTD, §8-42-112, and §8-42-112.5.

During the hearing Claimant sought to introduce a medical report provided by Claimant's ATP, which had not been previously exchanged in accordance with W.C.R.P. Rule 5-4(A)(5) nor pursuant to W.C.R.P. Rule 9-1(E). Claimant argued that Claimant's counsel was unaware that Claimant had such document in her possession, only received the medical record on the date of hearing and that it was relevant to the issues set for hearing. Respondents objected to the tendered exhibit as Respondents was unaware of the exhibit. After consideration of the parties' arguments, this ALJ sustained Respondents' objection and held that the sanction for failure to comply with the provisions of the rules was to not admit the medical record into evidence.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment on October 26, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY,

II. Whether Claimant has proven that she is entitled to reasonably necessary medical benefits related to the October 26, 2021 incident.

III. If medical benefits are reasonably necessary, whether Claimant has proven that the treatment she obtained was authorized within the chain of referral and/or by a provider on a designated provider list.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits as a consequence of the injuries sustained.

V. Whether Respondents have proven by a preponderance of the evidence that there was an efficient intervening event.

STIPULATIONS OF THE PARTIES

The parties agreed that, should compensability be awarded and if Claimant is entitled to temporary partial disability benefits, the parties would calculate the amounts due and owing or litigate the issue at a further time. The Stipulation of the parties is approved and is part of the order, if applicable.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a 42 year old employee, working for Employer as a stocker for approximately 19 years. Claimant worked from approximately 4 a.m. to 12:30 p.m. The job required Claimant to stock various products and merchandize, including boxed products, to the show room throughout the store and unloading them to the appropriate display or shelving units on the sales floor. Claimant would utilize a jack which was loaded in the warehouse area and transported to the floor.

2. On October 26, 2021 Claimant was assigned to the furniture department. Claimant and her two co-workers went to the warehouse area and took a pallet of furniture with the pallet jack, taking it to the area where they needed to restock the floor. One of the co-workers was Claimant's sister. At approximately 4:10 a.m. the co-workers teamed up to lift a box containing a desk (unassembled) from the pallet. When the product shifted in the box, it caused Claimant to have to support a large portion of the weight of the desk. Claimant twisted and felt a strain in her low back. The boxed desk weighed approximately 80 lbs. She felt a pulling sensation in her low back. She told her coworkers right away and she rested for a few minutes then returned to work, despite the pain.

3. Claimant went home after a full day of work and took some Tylenol for the pain. She discussed the low back pain with her daughter but did not disclose the injury to Employer that day.

4. On October 27, 2021 she returned to work. During the 6:00 a.m. break, Claimant informed her supervisor about the injury she sustained, as the symptoms did not go away. She let him know she had been injured the prior day and was continuing to have pain in her low back. He did not send her to a doctor, but advised her that it would probably go away and to take it easy in the meantime.

5. Claimant had hoped that she would feel better with activities of daily living and work and did not demand medical evaluation at that time. As she continued to work, her back pain continued to worsen. Claimant told her supervisor that she continued have pain and had to take over the counter medications. Her supervisor did not provide her with any instructions. She reported the injury to her store manager a few days later, after he had returned from time away from work. The store manager advised Claimant that her symptoms would likely resolve in a few days. The manager instructed Claimant to take more OTC meds and continue working. Claimant felt ignored and sought medical attention on her own from her primary care provider (PCP). She contacted her physician,

scheduling an appointment, though she was not able to obtain any immediate appointments.

6. Claimant was first evaluated on November 9, 2021 by Dr. Joseph A. Murphy at the GME Bruner Family Medicine clinic for acute left-sided low back pain without sciatica, and IT band syndrome on the right. He noted that the IT band problem was atraumatic and started approximately three days before. He took a history that the lumbar spine problem was chronic with an acute flair several weeks before as Claimant had a physical job and later in his report stated it was three to four weeks prior, without numbness or tingling and no weakness.[1] On physical exam he found no edema, full strength, and normal range of motion, though tenderness to palpation on the left SI joint.

7. Claimant stated that she was scheduled for a follow up appointment at the Bruner clinic and provided with work restrictions. She stated that, following the November 9, 2021 appointment, Claimant took the work restrictions provided by Dr. Murphy, to her supervisor, who ignored the restrictions. When she could no longer stand the low back pain, she went to the HR department to advise them that she thought there was something seriously wrong with her. That is when she was sent to Concentra. She was seen at Concentra some days later.

8. Claimant first saw Dr. Autumn Schwed at Concentra Medical Center on December 1, 2021. Dr. Schwed noted that Claimant presented with the chief complaint of low back pain which started October 26, 2021 while at work. She was lifting a piece of furniture onto a shelf with a co-worker when it slipped back down and she caught it. She had pain in her left lower back, radiating into her thighs and described an aching sensation. She saw her PCP and was taking Diclofenac. Some days she felt better, some days worse and noted no prior occurrences. On physical exam, Dr. Schwed noted only the reported back pain. Dr. Schwed diagnosed a lumbar strain and started Claimant on medications[2], recommended physical therapy, provided light duty work restrictions, and set a follow up in one week.

9. Claimant followed up at the Bruner clinic with Brandon M**.** Teska, D.O., Ph.D., on December 3, 2021 for the acute left-sided low back pain, which he noted was likely secondary to her work injury. He particularly noted that Claimant presented "with a long history[3] of acute back pain. She was injured at work while moving a large item approximately 5 weeks ago." Dr. Teska noted that she was better since the injury and had no further injuries, however she discontinued the medicine that was prescribed at her last visit (diclofenac) as it had not been working. She still had occasional episodes of acute to severe pain with movements. She noted that flexing or extending her back were particularly painful. On exam she was tender to palpation in the bilateral SI joints, PSIS[4]

[1] Dr. Murphy made mention that Claimant worked cleaning houses. Claimant emphatically denied she had worked in housekeeping and denied she had a second job during the hearing and this ALJ found Claimant credible.

[2] Lidocaine patches, methocarbamol, and prednisone.

[3] This ALJ infers that the long history refers to the long account by Claimant not to the length of time Claimant has had acute back pain.

[4] This ALJ infers that the PSIS is the posterior superior iliac spine, immediately below the hip crest.

and lumbar paraspinals from L3-L5, as well as tender with extension, flexion and rotation with a positive straight leg test. Otherwise, her exam was within normal limits.[5]

10. Claimant was seen by Dr. Schwed on December 8, 2022. She presented for re-evaluation of low back pain and reported some worsening low back pain with radiating pain into her thighs, noting that the pain in the low back was greater on the left side, and worse with twisting and extension. She described it as cramping. The M-164 states that Claimant was able to return to modified activities, which included maximum 10 lbs. lifting, pushing/pulling up to 10 lbs., no forward bending and no squatting. She was to continue her therapy and rehabilitation as well as medications as prescribed. Dr. Schwed noted that the objective findings were consistent with the work related mechanisms of injury for October 26, 2021.

11. Dr. Schwed noted that Claimant presented for re-evaluation of low back pain on December 14, 2021. She noted that Claimant had been doing well with the work restrictions overall, but one supervisor forced her to work outside her restrictions, which caused increased pain in both sides of her lower back. Claimant reported difficulty sleeping due to pain, stated PT was helpful, especially with use of the TENS unit. Claimant had no numbness, weakness, or paresthesias on exam, but found that there was tenderness present in the left paraspinal and right paraspinal. Dr. Schwed provided the same work restrictions but noted that "If unable to accommodate those restrictions, patient must be sent home from work."

12. On December 16, 2021 Claimant was seen at Saint Joseph Hospital Emergency (Good Samaritan Medical Center) for acute low back pain. She provided a history that the original injury occurred at work on October 26, 2021 while carrying furniture. She reported intermittent paresthesias in the bilateral lower extremities, no weakness, incontinence, or other issues. Claimant reported she continued to work a very physical job and had periods where she was incapacitated by her pain. On exam PA Christopher North found paraspinous spasm with diffuse tenderness in a band-like region across the sacrum, no midline tenderness, decreased rotation, negative straight leg raise bilaterally, sensation was intact to light touch to the bilateral lower extremities with deep tendon reflexes symmetrical; good range of motion and no concerning findings. PA North ordered a CT of the lumbar spine and reviewed the results with Claimant. These notes were cosigned by Dr. Ryan Patterson.

13. Eric Wannamaker, M.D. Neuroradiologist of Diversified Radiology of Colorado, PC, noted that the CT of the lumbar spine from December 16, 2021 showed a disc bulge at the L3-L4 level, and a broad based disc bulge at the L4-L5 level with mild to moderate spinal canal stenosis with the thecal sac measuring 8.2 mm, and moderate left facet arthropathy resulting in mild to moderate neuroforaminal stenosis with possible contact extending into the exiting L4 nerve root. At the L5-S1 level it showed a shallow disc bulge, severe right sided facet arthropathy with moderate canal stenosis and a facet osteophyte contacting the right L5 nerve root. He recommended an MRI to more accurately assess the degenerative spinal canal and stenosis.

[5] The report does not mention Claimant's visit to Concentra. This ALJ does not give this any significant or relevant meaning as medical reports frequently do not report everything that is conveyed during an appointment.

14. Claimant was seen multiple times by Dr. Schwed including January 4, 2022, January 11, 2022, March 1, 2022, March 22, 2022, all of which read substantially the same.

15. On January 11, 2022 Samuel Y. Chan, M.D., a physiatrist, initially evaluated Claimant.[6] He noted a history consistent with Claimant's testimony. Dr. Chan documented the following:

> Despite 2-1/2 months of diagnostic and therapeutic intervention including physical therapy program, chiropractic care, the patient finds that the pain complaint continues to be rather significant, and examinations today shows that there is some listing noted in the lumbar spine area to left side. The concern is whether if there are any type of discogenic issues that might account for the patient's ongoing symptoms. Therefore, I am in agreement with Dr. Schwed that further imaging studies would be indicated at this juncture. By the patient's report , an MRI has been scheduled for the upcoming week. Thus, I would like to follow up with the patient after this is completed in order to review the MRI findings. Depending on the MRI findings, further treatment modalities and plan may then be developed. Meanwhile, for pain management, the patient is to continue with the use of anti-inflammatory medications that has been provided by Dr. Schwed's office. The addition of lidocaine patches may be of benefit as well, and hopefully, this will continue to maintain the patient's ongoing functional level and she is to continue with gentle core stabilization exercise program and thus she will follow through in current work status as per Dr. Schwed's office.

16. Claimant filed a Workers' Claim for Compensation on January 10, 2022. Claimant was stocking unassembled furniture boxes and when she was lifting a box with coworkers, the weight shifted to her and she injured her low back. She noted that she was first treated at SCL Health and then was transferred to Concentra.

17. The first notes showing Claimant was attended by Dr. Theodore Villavicencio were from January 11, 2022 at Concentra. Dr. Villavicencio assessed a lumbar strain and stated Claimant would see a specialist that day. He noted that objective findings were consistent with the mechanism of work related injury and ordered an MRI. He stated Claimant should return to modified work activities which included that Claimant must be sitting 50% of the time, and if restrictions could not be accommodated, then she should be sent home from work.

18. Claimant was seen by Dr. Teska on January 11, 2022 for a follow-up on her Graves disease due to her hyperthyroidism, which was being followed by an endocrinologist. Dr. Teska also noted Claimant had a probable impingement syndrome, of two to three weeks, on the left shoulder. On exam he documented that Claimant was tender palpation on the lateral aspect of the deltoid down into the mid upper arm, with a positive Neer's and Hawkins. He stated that Claimant was being treated with NSAID's, but he recommended steroid injections and physical therapy. He also listed an iron deficiency.

19. Claimant was evaluated by Dr. Chan on February 1, 2022. He took a history that three coworkers were moving a piece of furniture to place it on a shelf above shoulder height when it started to slip, and she tried to save it from falling. She pulled all the weight of the furniture herself, straining herself and had been dealing with pain complaints in the lumbar areas ever since. He noted Claimant continued to be symptomatic following

[6] Pages 22-25 of Claimant's Exhibit 8.

physical therapy and massage therapy. Claimant also was reporting radiating bilateral lower extremity complaints, numbness and burning sensation. Dr. Chan made the following findings:

> Lumbar Spine: Axial loading, trunk rotation, minimal skinfold did not exacerbate her tenderness. There is no tenderness to palpate about PSIS and sacral sulcus. Bilateral SI joints engaged symmetrically with lumbar forward flexion. Straight leg raising is somewhat positive in the seated and supine position at about 70 degrees. Patrick, Gaenslen, FABER's, Yeoman's are grossly positive bilaterally.
>
> Neurologic: Manual muscle testings are 5/5 throughout. Sensory is grossly intact to light touch and pinprick. Deep tendon reflexes 1+ throughout and downgoing toes bilaterally.
>
> DIAGNOSES:
>
> 1. Lumbosacral spine.
>
> a. Rule out discogenic disease.
>
> b. Essentially normal neurologic examination.
>
> c. Rule out bilateral sacroiliac joint dysfunction.
>
> d. There is no clinical evidence of facetogenic complaints.

Dr. Chan recommended the MRI as well and noted that, if the MRI findings were unrevealing, he would consider some SI joint injections, but that Claimant should continue with core stabilization exercises, isometric strengthening, range of motion exercises and refilled her lidocaine patches.

20. PA Chelsea Rasis attended Claimant at Concentra on February 15, 2022. He noted on exam that Claimant had abnormal range of motion of the lumbar spine as well as the thoracic spine but otherwise not remarkable. He documented that Claimant was not doing well, with pain worse with prolonged walking, better with sitting down, that she was going to PT, the MRI was still pending and that she saw Dr. Chan that day, who was recommending lumbar injections, pending authorization.

21. Dr. Chan reevaluated Claimant again on February 15, 2022 and, upon further examination, concluded Claimant did have bilateral sacroiliac joint disfunction but was not able to rule out discogenic issues as the MRI has not taken place yet. He recommended proceeding with SI joint injections. Dr. Chan also stated that objective findings were consistent with the history and/or work related mechanism of injury.

22. Respondents filed a Notice of Contest on February 25, 2022 for further investigation.

23. Claimant followed up with Dr. Chan on March 15, 2022 following a March 3, 2021 SI joint injection and he noted that Claimant had significant diagnostic and therapeutic benefits from the procedure. He recommended that Claimant continue with an active exercise routine and suspected that the majority of Claimant complaints were related to the SI disfunction vs. the discogenic component. Even though Claimant continued to complain of pain at 5/10 to 6/10, the pain was no longer constant in the region, she was able to obtain much better sleep pattern at night and was able to lift much greater weight. Claimant continued to use Celebrex as well as lidocaine patches.

24. The MRI was completed on March 21, 2022 pursuant to Dr. Chan’s referral and was interpreted by Chelsea Jeranko, D.O. at Diversified Radiologist. The MRI

showed findings consistent with the prior CT scan with the exception that the MRI read showed disc height loss with disc space unroofing due to anterolisthesis and superimposed canal zone disc protrusion at the L4-5 level. It also showed bone marrow edema on the left at this level in addition to the moderate to advanced facet arthropathy and bilateral facet joint effusion. It also showed mild paraspinal muscle atrophy was chronic and symmetric at the L5-S1 level with advanced facet arthropathy with ligamentum flavum thickening and bony hypertrophy.

25. The March 23, 2022 medical records from Bruner noted a motor vehicle accident on March 13, 2022. Claimant was complaining of neck pain since the accident with residual neck and upper back pain. Dr. Teska also noted that Claimant had chronic low back pain which may have had a slight flair up (0.2).[7] Radiographs of the neck and ribs were negative. Claimant had no tenderness to palpation of the cervical spine in the midline but had tenderness in the paraspinals bilaterally, and full range of motion but pain at extremes of range of motion. There was no examination of the lumbar spine. Dr. Teska diagnosed acute neck and upper back pain with diagnosis codes for cervicalgia and dorsalgia respectively.

26. On April 5, 2022 Claimant followed up with Dr. Chan. Given the positive response to the SI joint injection as being both diagnostic and therapeutic, he recommended a follow up injection. On the same day he sent a request for prior authorization.

27. Claimant reported to Dr. Gina Phillips on April 8, 2022 that she had improvement of the neck pain, was being controlled with Naproxen and stopped meloxicam. She found mild loss of ROM of the neck, with improvement.

28. Dr. Chan reevaluated Claimant on May 3, 2022. Dr. Chan reported that Claimant had repeat SI joint injections on April 22nd. Claimant described that when she left the surgery center, the pain complaint was 1/10. She noted that the pain complaint was slightly returning but had moments when she was actually pain free. On exam he found that Claimant had a negative straight leg test but Patrick's, Gaenslen's, Faber's and Yeoman's were positive bilaterally.[8] He had the chance to review the MRI which showed anterolisthesis at the L4-5 level, with facet arthrosis and bilateral facet effusions.

29. On May 10, 2022 Nurse Practitioner Jennifer Brown of Bruner, noted that Claimant continued to have neck and muscle pain since the MVA on March 13, 2022, with negative x-rays from the ED. Claimant was to follow up with physical therapy and continue with Tylenol and naproxen. On exam nurse Brown notice that she was positive for neck pain with tenderness in the cervical spine musculature. She mentioned associated symptoms included leg pain but nothing further to elucidate on this issue.

30. Dr. William M. Barreto, on May 18, 2022 indicated that lidocaine ointment was authorized on March 22, 2022 and that he found it not medically necessary based on the records he was provided as well as based on the Medical Treatment Guidelines, Rule 17, Exhibit B. There was a very short list of records provided to Dr. Barreto.

[7] This ALJ infers that this 0.2 is referencing a pain scale of 0-10, with a two decimal points of one on the scale, ergo the reference to the "slight flair."
[8] Patrick's, Gaenslen's, Faber's and Yeoman's are all tests confirming the SI joint involvement.

31. Dr. Nicole Huntress of Concentra assessed Claimant on May 31, 2022 stating that Claimant was returning for checkup, noting no improvement since the last visit, still had pain, moderate aching of the bilateral and central low back, exacerbated by most activities. She noted that Claimant continued with injections with Dr. Chan and was expecting a third SI joint injection, and continued with massage therapy, which had been helpful.

32. On June 28, 2022 Claimant reported to Dr. Megan Keane of Bruner Family Medicine that she had improvement with injections into the SI joint but that the pain returned. She was investigating the possibility that Claimant may have a component of fibromyalgia.

33. Claimant returned to Dr. Chan on June 28, 2022 with a rather excellent short term diagnostic response to SI injections. In light of the continued spine pain he recommended an L5 medial branch block and sacral lateral branch blocks. He stated that if these were successful, Claimant could then proceed with lateral branch radiofrequency ablations. Claimant was reporting increased pain radiating down into her hamstrings and some ankle swelling. She continued to use ibuprofen and lidocaine patches. Dr. Chan noted frustration that Insurer continued to deny the recommended injections, in light of Claimant's continued pain complaints.

34. On July 5, 2022 Dr. Chan requested authorization to proceed with bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine. The parties did not provide any information on whether this was authorized or not.

35. Dr. Siva Ayyar, issued a denial report on July 20, 2022 of both the bilateral L5 medial branch block and the bilateral S1, S2 and S3 lateral branch block with lidocaine. This was based on the records Dr. Ayyar was provided, which were limited to one medical report.

36. John Burris, M.D. conducted an independent medical evaluation at Respondents request on July 19, 2022. The mechanism of injury described by Dr. Burris was consistent with Claimant's hearing testimony. He obtained a history of medical care and reviewed medical records going back to 2018. Dr. Burris' ultimate opinion was as follows:

> [Claimant]'s clinical course has not followed a typical physiologic pattern associated with an acute injury on 10/26/2021, given random waxing and waning, and expanding complaints, which have not correlated with the passage of time and appropriately directed treatment. It is noted that her subjective complaints acutely worsened after the intervening 3/15/2022 MVA reported by her PCP (not acknowledged by the WC providers).
>
> Her subjective complaints today are out of proportion to her examination which exhibits no objective findings, and she exhibits clear psychosomatic overlay. Overall, her presentation is nonphysiologic. All examinations have documented intact range of motion and normal neurologic function, and all diagnostic testing has been negative for acute abnormalities. Based on the totality of the information provided, the described 10/26/2021 workplace event represents an incident without injury or need for treatment. Thus, no treatment within the WC system is reasonable, necessary, or related. [Redacted Claimant's name]'s subjective complaints today, 9 months after the reported workplace event, cannot be causally related to the described workplace event.

37. The last Work Status Activity form completed by Dr. Villavicencio was dated July 27, 2022 and showed the same sedentary work restrictions as previous.

38. On August 9, 2022 Claimant was evaluated by Dr. Huntress, returning for follow-up from specialist, Dr. Chan. She ordered Claimant to continue with the specialist, stated that objective findings were consistent with the history and mechanism of the work related injury and ordered continued restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time.

39. Dr. Burris also testified at hearing. He was accepted as an expert in occupational medicine and as a Level II accredited physician. His testimony was consistent with his report. He testified that Claimant did not have any objective findings on exam and that the diagnostic evaluations were consistent with preexisting pathology and not consistent with the mechanism of injury after so many months after the incident. Dr. Burris opined that Claimant's symptoms following her injury were unrelated to the October 26, 2021 incident.

40. Wage records provided showed Claimant was earning $23.00 per hour at the time of her injury.[9] The wage records are hard to understand and neither party provided testimony or arguments on how to calculate the appropriate average weekly wage. It is clear that the pay period ending (PPE) dates show that Claimant was paid every two weeks. However, the pay period ending October 2, 2021, shows Claimant earning $611.66 but working 87.3 hours, which would provide a pay rate of $7.28 per hour, and $21.36 per hour for the PPE July 10, 2021. Therefore, this ALJ determined that Claimant's fair approximation of her average weekly wage should be calculated by Claimant's total number of hours worked. Taking PPE October 31, 2020 through PPE October 16, 2021, a period of 52 weeks, Claimant worked 1,881.66 regular hours and 79.02 overtime hours. Which, when multiplied by her rate of pay, provides an average weekly wage of $884.73.[10]

41. The record shows that Claimant clearly was at work within the course and scope of her employment when she lifted the boxed desk with her coworkers and strained her low back when she twisted after the weight shifted to her. Claimant has injuries to her lumbar spine and sequelae causing radicular symptoms into her bilateral lower extremities. Medical providers have documented the strain, and the CT and MRI findings showed Claimant has disc herniations more likely than not caused by or aggravated by the work place injury. Claimant testified that she did not have problems with her lumbar spine or lower extremities before the accident on October 26, 2021. Claimant was credible and persuasive. Further, Drs. Teska, Schwed, Villavicencio and other Concentra providers noted that Claimant's injuries were consistent with the mechanism of injury and this ALJ infers from these statements that they were causally related to the October 26, 2021 work injury. These providers were credible and persuasive, over the contrary opinionw of Dr. Burris. Claimant has shown that the proximate cause of Claimant's

[9] The last pay period ending before Claimant's date of injury was October 16, 2021, showing that Claimant earned $560.05, which divided by the 24.35 hours worked, provides a rate of $23.00 per hour.
[10] Total regular hours of 1881.69 divided by 52 is 36.19 regular hours a week, which multiplied by $23.00 per hour results in $832.37 per week. Total overtime hours of 79.02 divided by 52 is 1.52 hours, which multiplied by $34.5, the overtime per hour rate, results in $52.44 per week. [$832.29+$52.44=$884.73]

injuries was the accident of October 26, 2021. Claimant's injuries arose from the accident at work in the course and scope of her employment on October 26, 2021.

42. The Claimant reported her injury to her supervisor and the store manager and they failed to designate a medical provider. Claimant finally chose her personal care providers at GME Bruner Family Medicine including Dr. Murphy and Dr. Teska. When Claimant's supervisor failed to follow the restrictions provided by her PCP, Claimant went to the Human Resources office to report what was happening. The HR office sent Claimant to Concentra Medical Center within two days, where Claimant was seen by multiple providers beginning December 1, 2021. Claimant continued with care at Bruner for her lumbar spine injury, as well as with Concentra. Claimant demonstrated her acquiescence to the change of provider to Concentra by continuing to treat with Concentra. As found, Bruner was authorized until December 1, 2021, at which time her care was transferred to Concentra. Bruner is was the authorized provider from until the change occurred.

43. Claimant has shown that she requires ongoing medical care that is reasonably necessary and related to the October 26, 2021 work injury, including the injections and medications, such as the lidocaine ointment, recommended by Claimant's providers, including Dr. Chan. Claimant has shown that she is entitled to reasonably necessary medical benefits that are authorized, including GME Bruner Family Medicine, Concentra, and medical providers within the chain of referral, as well as the lidocaine ointment and the bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine recommended by Dr. Chan.

44. Claimant has been provided with restrictions from her first medical visit with Dr. Murphy at Bruner and her providers have continued to note restrictions through on August 9, 2022, when Dr. Huntress stated that Claimant continued with restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time. Claimant has shown that she is entitled to temporary disability benefits, if she has lost wages. The parties stipulated that they would calculate any outstanding temporary disability and that stipulation is approved.

45. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor

of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial*

Commission, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Drs. Teska, Schwed, Villavicencio and other Concentra providers are more persuasive than the contrary opinions of Dr. Burris. The record shows that Claimant clearly was at work, within the course and scope of her employment, when she lifted the boxed desk with her coworkers and strained her low back when the weight shifted to her. As found, Claimant injured to her lumbar spine and causing the sequelae of radicular symptoms into her bilateral lower extremities. Medical providers have documented the strain, and the CT and MRI findings show Claimant has disc herniations more likely than not caused by or aggravated by the work place injury. Claimant testified that she did not have problems with her lumbar spine or lower extremities before the accident on October 26, 2021. Claimant is credible and persuasive. Claimant has shown that the proximate cause of Claimant's injuries to her lumbar spine and bilateral lower extremities was the accident of October 26, 2021. Claimant's injuries arose from the accident at work in the course and scope of her employment on October 26, 2021.

C. Authorized, Reasonably Necessary Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable and necessary medical care related to the injuries or aggravations of the preexisting condition. As found, Claimant reported her injury to her supervisor and the store manager and they failed to designate a medical provider. Claimant finally chose her personal care providers at GME Bruner Family Medicine including Dr. Murphy and

Dr. Teska. When Claimant's employer failed to follow the restrictions provided by her PCP, Claimant went to the Human Resources office to report what was happening. The HR office sent Claimant to Concentra Medical Center where Claimant has seen multiple providers. Claimant continued with care at Bruner for some time as well as Concentra. Claimant has shown that she requires ongoing medical care, including the injections and medications, such as the lidocaine ointment, recommended by Claimant's providers, including Dr. Chan. Claimant has shown that she is entitled to reasonably necessary medical benefits that are authorized, including GME Bruner Family Medicine through December 1, 2021, Concentra, and medical providers within the chain of referral, as well as the lidocaine ointment and the bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine.

D. Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S. Claimant alleges impaired earning capacity from October 27, 2021 through the present.

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive temporary disability benefits. Claimant has been provided with restrictions from her first medical visit with Dr. Murphy at Bruner and restrictions have continued through at least August 9, by Dr. Huntress, who stated that Claimant continued with restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time. Claimant has shown that she is entitled to

temporary disability benefits, if she has lost wages. The parties stipulated that they would calculate any outstanding temporary disability and that stipulation is approved.

E. Average weekly wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from pay period ending October 31, 2020 through October 16, 2021, a period of 52 weeks. Based on the average hours worked of 1881.69 regular hours and 79.02 overtime hours for the 52 week period, earning $23.00 per hour, provides an average weekly wage of $884.73. As found, the fair approximation of Claimant's average weekly wage is $884.73 per week.

F. Intervening Event

All results flowing proximately and naturally from an industrial injury are compensable. *See, Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970)*. However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Post Printing & Publishing Co. v. Erickson, 94 Colo. 382, 30 P.2d 327 (1934)*. "If the need for treatment results from an intervening injury or disease unrelated to the industrial injury, then treatment of the subsequent condition is not compensable. This…is a question of fact for resolution by the ALJ." *See Merrill v. Pulte Mortgage Corp.*¸ W.C. No. 4-635-705-02 (ICAO May 10, 2013) (citing *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002).

Here, it is clear from the persuasive medical records, that Claimant was involved in a motor vehicle accident (MVA) in March 2022. However, as found, Claimant only had a very slight temporary flair of her work related condition as noted by Dr. Teska. The Bruner records indicate that Claimant injured her neck in the MVA and she treated for that at Bruner. Respondents failed to show that Claimant had an intervening event that broke the causal link between the October 26, 2021 work related injury to her lumbar back and lower extremities and her need for treatment for those injuries.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work related injury to her lumbar spine and lower extremities on October 26, 2021.

2. Respondents shall pay for the authorized care Claimant received at the Bruner clinic through December 1, 2021.

3. Respondents shall pay for the reasonably necessary and related medical care Claimant received from Concentra and the providers within the chain of referral.

4. The stipulation of the parties is approved and part of this order. Respondents shall pay temporary disability benefits from November 9, 2021 until terminated by law.

5. Claimant's average weekly wage is $884.73.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 15th day of November, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-120-768-004

ISSUES

1. Did Claimant prove by a preponderance of the evidence that his ongoing physical therapy appointments at Flicker Physical Therapy and ISU Physical Therapy are reasonable, necessary and related medical treatment for his October 17, 2019 work injury?

2. Did Claimant prove by a preponderance of the evidence that he is entitled to repayment for out-of-pocket expenses associated with the physical therapy he received at Flicker Physical Therapy and ISU Physical Therapy?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 24 year-old male who sustained a compensable work injury on October 17, 2019 while working for Employer in Wyoming. Claimant fell from a power line pole and sustained a compression fracture at L1 that progressed to a spinal cord infarction up to T6. Claimant has paraplegia at the T6 level and is confined to a wheelchair. Claimant has no sense of feeling in his lower extremities, but has full use of his upper extremities.

2. Prior to the accident, Claimant enjoyed outdoor activities including, camping, riding dirt bikes, and playing sports. Claimant testified that he is no longer able to engage in these hobbies due to his injury (Tr. 41:7-42:25).

3. Claimant underwent spine surgery at Wyoming Medical Center. He was subsequently transferred to Salt Lake City, Utah, where he participated in an in-patient rehabilitation program. Claimant then transitioned to an out-patient physical and occupational therapy program. In late December 2019, once he completed the program, Claimant was discharged and he returned to his parent's home in Blackfoot, Idaho.

4. On December 20, 2019, Gary Walker, M.D., a specialist in physical medicine and rehabilitation (PMR) and Claimant's authorized treating physician (ATP), evaluated Claimant. Dr. Walker noted that Claimant had been doing physical therapy daily. The recommendation from the University of Utah was for Claimant to continue with two hours a day with a combination of physical and occupational therapy. Dr. Walker noted Claimant had been working on strengthening, sitting and standing/balance in the frame. He noted Claimant's "biggest primary issue right now is outpatient physical therapy and occupational therapy," and he was trying to get approval for the therapy. (Ex. T pp. 203-206).

5. Claimant had a follow-up appointment with Dr. Walker on January 20, 2020. Dr. Walker noted Claimant was going to Idaho State University Physical Therapy (ISU), and working with Cindy Seiger, PT, on Tuesdays and Thursdays. Claimant was going to Flicker Physical Therapy (Flicker) on Mondays, Wednesdays, and Fridays, and working with Tim Flicker, PT. Claimant reported that he felt like he was getting a little bit stronger with the therapies. Dr. Walker ordered physical therapy five days a week, between the two locations, for an additional four weeks. (Ex. T pp. 207-208).

6. On February 20, 2020, Ms. Seiger wrote to Dr. Walker regarding Claimant's progress to date, and to request additional therapy through the end of October 2020. She explained "recovery of function 1-2 levels inferior to a complete SCI is possible for the first 6 months post injury and decreases from months 6 to 12." Ms. Seiger felt that Claimant's physical therapy frequency would decrease around the end of April 2020, and she encouraged community activity participation such as exercising at the gym. (Ex. 10 pp. 56-58). At Claimant's February 20, 2020 appointment, Ms. Seiger recommended Claimant exercise at the gym in his home town. She volunteered to go with Claimant to assist him in knowing what equipment to use. According to the medical records, Claimant was not interested, and wanted to continue with physical therapy. (Ex. GG p. 421).

7. At Claimant's February 25, 2020 appointment, Dr. Walker reviewed the progress notes from each of the physical therapists working with Claimant. According to the progress notes, Claimant showed subtle improvement. Further, each location and therapist was working on different modalities. Dr. Walker ordered additional physical therapy for Claimant for the next four weeks, and he requested progress notes and a Functional Independent Measure (FIM) score from the therapists. Dr. Walker and Claimant discussed a psychotherapy referral, and Claimant was receptive to the idea. (Ex. T pp.214-215).

8. Mr. Flicker prepared a progress note on March 9, 2020 after Claimant's 32nd visit. Mr. Flicker noted that Claimant had excellent upper body strength and range of motion, and he needed to work on his dynamic balance and transfers. Claimant's FIM score was 107. (Ex. HH p. 730).

9. On March 24, 2020, Dr. Walker rewrote prescriptions for physical therapy at Flicker and ISU. Claimant had met with psychologist, Donald Whitley, PHd, the previous day. Dr. Walker recommended that Claimant continue seeing Dr. Whitley and he wrote Claimant a prescription for weekly psychotherapy with Dr. Whitely for the next four to six weeks. (Ex. T p. 220).

10. Insurer denied authorization of additional physical therapy, and Dr. Walker appealed this decision on April 7, 2020. He explained that he reviewed the therapy notes and spoke with Mr. Flicker. Claimant had made very mild progress in physical therapy, but the goal was to get him more stable with balance and transfers to help him become more independent. Dr. Walker recommended four more weeks of physical therapy, three times a week. In light of the coronavirus pandemic, Dr. Walker recommended resuming physical therapy with Mr. Flicker in four to six weeks. Dr. Walker did not see a reason for Claimant to have telephysical therapy with ISU. (Ex. T p. 235).

11. Claimant continued to go to physical therapy at Flicker, three days a week for about an hour and a half to two hours each session. Dr. Walker continued to reorder physical therapy, and to appeal Insurer's decision to deny authorization. (Ex. T p. 242-243).

12. On June 29, 2020, Claimant saw Matthew Fackrell, D.O. for an evaluation. Dr. Fackrell is Claimant's family physician, and he cared for Claimant as he was growing up. The medical records note that Claimant was there "for a workman comp claim and is needing some referrals." Dr. Fackrell noted that Claimant was going to physical therapy and had been seeing Dr. Walker. He also noted that according to Claimant, Insurer had stopped paying for physical therapy, so Claimant was paying out-of-pocket for the therapy. Dr. Fackrell opined that physical therapy was medically necessary. (Ex. FF pp. 349-350).

13. Dr. Walker evaluated Claimant on July 2, 2020, via video. At the appointment, Claimant asked if his treatment could be transferred to Dr. Meyers, a physiatrist in Twin Falls, associated with St. Luke's Hospital. Dr. Walker said he would make a referral to change all care to Dr. Meyers, and no further follow up with him would be necessary. (Ex. T p. 254).

14. On July 24, 2020, Claimant's FIM score, per Mr. Flicker, was still 107. (Ex. HH p. 107)

15. On July 30, 2020, Dr. Walker provided an addendum to his July 2, 2020 medical record stating Claimant "is referred to Dr. Kevin Hill for long term physiatric/rehab. Dr. Matthew Fackrell." (Ex. 8 at 8-40). Claimant, however, had already seen Dr. Fackrell nearly a month prior to this addendum, and four days prior to July 2, 2020, when he asked that his care be transferred to Dr. Meyers.

16. Kevin Hill, M.D.[1] evaluated Claimant the morning of July 30, 2020. Dr. Hill noted in the medical record that Claimant had originally been referred to Dr. Walker, and he was not sure why Claimant did not want to continue treating with Dr. Walker. Dr. Hill suggested, however, that Claimant see a rehabilitation physician who was board certified in spinal cord injuries, as he was a generalist. Dr. Hill renewed Claimant's medications and wrote him several referrals. (Ex. Y and Ex. 17).

17. Insurer continued to deny any authorizations for physical therapy on the basis that the records showed "no significant long-term gains have been made." (Ex. Y p. 282).

18. On September 2, 2020, Claimant's FIM score, per Mr. Flicker, was still 107. (Ex. HH p. 906).

19. On October 26, 2020, Portneuf Medical Group notified Insurer that Dr. Hill was no longer in the group, and there was no other provider in the office to continue Claimant's care. (Ex. Y p. 284).

[1] Dr. Hill and Dr. Meyers were colleagues at Portneuf Medical Group, Neuroscience and Rehab Clinic/Physical Medicine and Rehabilitation.

20. Claimant was evaluated by Ahren O. Geilenfeldt, D.O.[2], on November 24, 2020. Dr. Geilenfeldt noted that Claimant was a year out from his injury and "recovery had slowed down." Claimant was doing physical therapy three times a week, but other than using a stander at home, Claimant did not have any other home exercise program (HEP). Dr. Geilenfeldt noted it was "reasonable to continue with therapy," but encouraged Claimant to work on establishing a regular HEP. Dr. Fackrell is listed in the medical record as Claimant's primary care physician. (Ex. T pp. 293-297).

21. After multiple cancellations, Claimant had a follow-up appointment with Dr. Geilenfeldt on February 16, 2021. Claimant was still going to physical therapy three times a week, and the therapy was prescribed by Dr. Fackrell. Claimant was not engaged in a HEP and he told Dr. Geilenfeldt he was not interested in doing one, but preferred to go to physical therapy for exercise. The medical record states that Claimant was "resistant to any short–term goal setting for physical activity which is concerning." In his plan, Dr. Geilenfeldt reported that he would defer management of ongoing therapy to the prescribing physician, Dr. Fackrell. (Ex. BB pp. 305-306).

22. Claimant testified that he does some at-home exercises. He uses his standing frame and an electric motor pedal system. When asked if he was following the recommendations of his providers with respect to at-home exercises, Claimant said "more or less, yes [but] they would encourage more." He also testified he gets depressed and secluded at home to a point he does not want to do anything. Going to physical therapy motivates Claimant. (Tr. 52:2-53:7).

23. Claimant is no longer seeing Dr. Whitley despite recommendations he do so. Claimant testified he gets more benefit out of going to physical therapy as opposed to a psychologist. (Tr. 56:4-57:23).

24. The ALJ finds that Claimant does some at-home exercises, but he is not participating in a formal HEP as recommended by his providers.

25. On March 3, 2021, Claimant had over 150 physical therapy visits with Mr. Flicker. Claimant's FIM score had not changed from what it was a year prior – it was still 107. (Ex. HH p. 1044).

26. On March 9, 2021, Dr. Fackrell wanted Claimant to continue physical therapy because it was a "medical necessity." Dr. Fackrell, did not elaborate but stated "as far as the paraplegia, spinal cord injury, and weakness that he has now, I do recommend continuing with both [in] physical therapy and a chiropractor." (Ex. FF pp. 361-362). Dr. Fackrell consistently recommended physical therapy for Claimant through March 2022, and referred to it as a medical necessity. (Ex 13, Ex. GG and Ex. HH).

27. On May 4, 2021, Claimant resumed physical therapy with ISU. (Ex. GG).

[2] In July 2020, Dr. Meyers recommended that Claimant schedule an appointment with Dr. Geilenfeldt. Claimant said he was going to think about it. Insurer had scheduled a new patient visit with D. Geilenfeldt on Claimant's behalf. (Ex. BB p. 291).

28. Claimant saw Clark Allen, M.D., a neurosurgeon, on August 30, 2021. Dr. Allen noted in the medical record that it was "obvious that [Claimant] is hopeful for return of function and is looking for improvement on the films as a sign of the possibility of function return." After reviewing the films and examining Claimant, Dr. Allen concluded Claimant was well decompressed and had a stable fusion. He told Claimant he did not see any options for intervention, and any change or improvements in his MRI scan really had no meaning for a return to function. Dr. Allen concluded that based on Claimant's clinical course and how far out he was from the injury, the return of any meaningful function was unlikely. (Ex. DD).

29. At Claimant's follow-up appointment with Dr. Geilenfeldt on September 7, 2021, Claimant reported Dr. Fackrell was still prescribing physical therapy four times a week. According to the medical record, Claimant told Dr. Geilenfeldt he was not doing a HEP, just physical therapy. Claimant was using his standing frame and electric motor pedal system. Dr. Geilenfeldt recommended that Claimant start a HEP. (Ex. BB pp. 317-318).

30. At Claimant's December 16, 2021 physical therapy visit at ISU, Claimant requested a letter of medical necessity for bilateral knee-ankle-foot orthoses (KAFOs). Ms. Seiger sent a letter to Claimant's doctor regarding the medical necessity for bilateral KAFOs. (Ex. 10 pp. 174-175).

31. Claimant stopped treating with Dr. Geilenfeldt because he wanted to establish care with a physiatrist closer to his home. Tyler Hedin, M.D., began treating Claimant on December 17, 2021. Dr. Hedin noted that Claimant continues to work with physical therapists at ISU and they are advocating for bilateral KAFOs to aid with functional tasks at home. Dr. Hedin believed "training with bilateral KAFOs to be reasonable given some mild motor return in the proximal hips according to PT." (Ex. EE. pp. 333-334).

32. On January 3, 2022, Dr. Hedin ordered custom fabricated bilateral KAFOs for Claimant. (Ex. EE p. 336).

33. Claimant had a follow-up appointment with Dr. Hedin on February 15, 2022. Dr. Hedin noted that Claimant had not yet received his KAFOs, but continued to work with his physical therapists at ISU and Flicker on transfers and gait. Dr. Hedin specifically noted that Claimant was to use the KAFOs in physical therapy to aid with standing. (Ex. EE p. 338).

34. Claimant testified that he goes to Flicker, two to three times per week, and to ISU about two times per week for physical therapy. Claimant pays out-of-pocket for the therapy because Insurer has denied authorization. (Tr. 43:23-21). Claimant testified that going to physical therapy helps him because it forces him to get out of the house. It gives him more of a social life, as well as improving his muscles, spinal cord, core muscles, hip flexors and balance. (Tr. 45:20-46:4).

35. Claimant has been diagnosed with depression, and he credibly testified that going to physical therapy has a positive effect on his depression. (Tr. 47:13-48:1).

36. Claimant credibly testified that physical therapy has also aided him in being able to get around generally. Therapy has helped strengthen his core and upper extremities, enabling him to get around the house, balance in his chair, transfer from his chair and balance in vehicles. Claimant testified he would be driving soon. (Tr. 48:2-19).

37. Due to the pandemic, Claimant did not attend physical therapy at ISU from March 24, 2020 to May 4, 2021. At the May 4, 2021 appointment, Ms. Seiger noted that Claimant's static balance, when compared to his previous course of treatment, demonstrated improved ability to maintain balance against resistance, suggesting recovery of some voluntary motor control of his trunk muscles. She also noted Claimant's goal to walk was unlikely without external devices or significant advances in medical treatment. The plan was for Claimant to attend therapy, one to two times a week, for 12 weeks. (Ex. GG pp. 495-496).

38. As of January 2022, Claimant has had over 90 physical therapy sessions at ISU. Claimant's ISU treatment records from May 4, 2021 to January 28, 2022, consistently state that Claimant is not interested in exercising at a gym. (Ex. GG).

39. Claimant consistently attended physical therapy at Flicker from December 30, 2019 to the time of hearing. As of March 2022, Claimant had attended over 287 sessions at Flicker. Throughout this time, Claimant's FIM remained at 107. (Ex. HH).

40. Rachel L. Basse, M.D. conducted an independent medical evaluation (IME) of Claimant on August 18, 2020, and issued a report on September 25, 2020. Dr. Basse is board certified in PMR as well as chronic pain, and is Level II accredited. With respect to Claimant's physical therapy, Dr. Basse noted that ISU seemed more familiar with spinal cord injury patients. At ISU, Claimant worked on core activation, hands and knees, very functionally based activities including balance, and mat activities. Flicker also worked on balance and strength, and they used a treadmill where Claimant was in a harness and cable suspension that held his weight. Dr. Basse opined that Claimant should have already transitioned to a HEP, and he did not require any further formal physical therapy sessions. Dr. Basse referenced Ms. Seiger's February 20, 2020 letter regarding the timeline for recovery of function with spinal cord injuries, and specifically that recovery of function is possible for the first six months post injury, but decreases six to 12 months out. (Ex. 10 pp.56-58). Dr. Basse noted that Claimant would require regular re-evaluations by a physical therapist with a specialty in spinal cord injuries to reassess Claimant's functional status. (Ex. O).

41. Dr. Basse issued a supplemental report the following year, on October 19, 2021, after reviewing extensive medical records. Dr. Basse explained that the medical records consistently noted that Claimant is resistant to any HEP, despite its benefit to his overall health and well-being. Dr. Basse referenced the opinion of Dr. Allen that the return of any function was unlikely. She opined that there was no documentation to demonstrate that the physical therapy Claimant had received resulted in any clear functional gains over the past year. In her opinion, Claimant should have transitioned to a HEP the year prior (2020). (Ex. O).

42. Dr. Basse testified at the hearing in accordance with her IME report and supplemental report. She credibly testified that Claimant's physical therapy records, as recent as January 2022, do not show any significant functional gains. Dr. Basse testified that for continued physical therapy to be deemed reasonably necessary, there needs to be documentation of functional gains, and that is not present here. (Tr. 103:1-104:4).

43. Dr. Basse was present throughout the hearing and listened to Claimant's testimony. When asked whether she had any concerns regarding Claimant's description of the role that physical therapy provides him, she responded: "[the] other concern I have is, back to your question to me about Mr. Worthington saying the physical therapy gets him out of the house; it forces him have a schedule; it gives him more of a social life. And that is just not really the role of a physical therapist. A physical therapist is a formal, trained health care provider. They are not there to be your friend. They are not there to be a personal trainer. And it is not how physical therapists are utilized." (Tr. 106:19-108:4). Dr. Basse further expressed concern that Claimant's use of ongoing regular physical therapy may be hindering his overall medical management and independence because some of his providers were not being completely forthright with respect to what was a reasonable and functional outcome, particularly regarding his gait. (Tr. 107:5-25).

44. Michael Miller, M.D., saw Claimant for a 24-month DIME on March 15, 2022. Dr. Miller opined that Claimant reached MMI on October 17, 2020, and gave him a 94% whole person impairment rating. Dr. Miller noted that Claimant's FIM score had been static at 107 since at least February 26, 2020, primarily due to the absence of home accommodations. He opined "functional gain is not dependent on changes in medical condition or additional rehabilitation, but rather is dependent on changes in [Claimant's] living environment." (Ex. N. pp. 100-101).

45. Dr. Miller noted that Claimant had been managed by four different physiatrists: Dr. Walker, Dr. Hill, Dr. Geilenfeldt, and most recently Dr. Hedin. He noted Claimant continues with physical therapy four times a week, and KAFOs had been ordered for Claimant, but were not available as of the time of the DIME. Claimant uses his standing frame for three to four hours a day, and his electric pedaling machine daily. Claimant's parents perform stretching exercises on his legs every evening. With respect to maintenance care, Dr. Miller opined that additional physical therapy would be upon the recommendation of Claimant's PMR specialist. Claimant's current PMR specialist is Dr. Hedin. (Ex. N).

46. Claimant's counsel deposed Dr. Miller on June 13, 2022. Dr. Miller was asked if he saw Claimant experiencing any functional gains based upon his review of the records. Dr. Miller testified that Claimant experienced functional gains early on, but at a certain point they seemed to plateau. (Dep. Tr. 12:23-13:4).

47. According to Dr. Miller, FIM is a measure that looks at 18 different items, including motor and cognitive subcategories, and rates each area of function on a seven point scale ranging from total assistance to total independence. (Miller Dep. Tr. 45:3-9). As of February 2, 2022, Claimant's FIM score was still 107, which is what is was approximately two years prior. (Ex. HH p, 1311).

48. Dr. Miller credibly testified that it "would be reasonable" for Claimant to have physical therapy specifically addressed to the KAFOs he is to receive. (Dep. Tr. 14:19-15:9). He opined, however, that Claimant going to physical therapy four to five times a week seemed excessive in the context of no demonstrable functional gains. (Dep. Tr. 48:1-9). Dr. Miller agreed with Dr. Basse that the physical therapy records from 2021 on do not document any clear functional gains for Claimant. (Dep. Tr. 35:10-15).

49. The ALJ finds the testimony of Dr. Basse and Dr. Miller to be credible and persuasive. The ALJ finds that Claimant has not demonstrated any clear functional gains from physical therapy from 2021 to present.

50. Debra Curfman is a complex claims representative for Insurer, and she has worked on Claimant's matter since the inception of his claim. Ms. Curfman credibly testified that Insurer authorized Claimant's physical therapy with ISU from January 9, 2020 through March 24, 2020. (Tr. 87:2-13). Ms. Curfman further testified that Insurer initially authorized and paid for Claimant's physical therapy at Flicker from December 19, 1999 through August 11, 2020, but after reviewing Dr. Basse's IME report and her recommendation for three more months of physical therapy, Insurer retroactively authorized physical therapy from August 11, 2010 through December 24, 2020. (Tr. 88:24-89:25).

51. Dr. Fackrell referred Claimant for physical therapy from July 24, 2020 to March 14, 2022. (Ex. FF, GG and HH). Dr. Fackrell is a family physician, and there is no evidence in the record that he has expertise in spinal cord injuries.

52. Ms. Curfman credibly testified that Dr. Fackrell, Claimant's family physician, is not an authorized treating physician in this case. (Tr. 88:5-14).

53. The ALJ finds that Dr. Fackrell is not Claimant's authorized treating physician.

54. Based on the totality of the evidence, the ALJ finds that Claimant's physical therapy with Flicker and ISU after December 24, 2020 was not reasonable, necessary or related to Claimant's admitted injury. The ALJ further finds that Claimant is not entitled to repayment of out-of-pocket expenses associated with physical therapy at Flicker and ISU.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. § 8-42-101, C.R.S.; *see Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S.

Since July 2020, Dr. Fackrell, Claimant's family physician, has referred Claimant to physical therapy at Flicker and ISU, and has said physical therapy is a medical necessity. As found, Dr. Fackrell is not Claimant's ATP in this case, and he does not have any specific expertise in spinal cord injuries. (Findings of Fact ¶¶ 51 and 53).

The ALJ finds the opinions and testimony of Drs. Basse and Miller are credible and persuasive. Dr. Basse credibly testified that the medical records do not show any evidence that Claimant has received any clear functional gains from physical therapy from 2021 to present. (Findings of Fact ¶ 42). Dr. Miller credibly testified that Claimant experienced functional gains early on, but at a certain point they plateaued. Dr. Miller noted that Claimant's FIM score has been has been static at 107 since February 26, 2020. (Findings of Fact ¶ 44). Since 2020, Claimant's PMR physicians and his physical therapists have encouraged him to utilize a HEP, but Claimant has repeatedly declined to engage in a formal HEP. Claimant uses his standing frame and electric motor pedal system at home regularly, but he prefers going to physical therapy as opposed to

engaging in a HEP. (Findings of Fact ¶ 22).

Claimant credibly testified that going to physical therapy helps with his depression, and it motivates him to get out of the house. (Findings of Fact ¶ 35). But as Dr. Basse credibly testified, this is not the role of physical therapy. (Findings of Fact ¶ 43).

As found, based on the totality of the evidence, Claimant failed to demonstrate by a preponderance of the evidence that physical therapy sessions with ISU from May 2021 through present, physical therapy sessions with Flicker from December 24, 2020 through present, and any ongoing formal physical therapy is reasonably necessary to cure and relieve Claimant from the effects of the October 17, 2019 work injury.[3] (Findings of Fact ¶ 54).

ORDER

It is therefore ordered that:

1. Claimant's request for retroactive authorization of physical therapy sessions with ISU from May 2021 through the present is denied and dismissed. Any request by Claimant for reimbursement of any out-of-pocket expenses associated with physical therapy at ISU during the time frame of May 2021 forward is likewise denied and dismissed.

2. Claimant's request for retroactive authorization of physical therapy sessions with Flicker Physical Therapy since December 24, 2020 through the present is denied and dismissed. Any request by Claimant for reimbursement of out-of-pocket expenses associated with physical therapy at Flicker Physical Therapy during this time frame is likewise denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

[3] Dr. Hedin, Claimant's ATP, who is also a PMR, found that Claimant will need physical therapy once he receives his KAFOs. Dr. Miller agreed that this limited type of physical therapy would be reasonable. The ALJ credits the opinion of Dr. Basse that Claimant will require regular physical therapy re-evaluations by a physical therapist with a specialty in spinal cord injuries to reassess Claimant's functional status.

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 15, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the Horizant medication recommended by authorized treating physician (ATP) Yusuke Wakeshima, M.D. is reasonable, necessary and causally related to Claimant's admitted November 29, 2017 work injury.

II. Whether Claimant proved by a preponderance of the evidence that the bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima are reasonable, necessary and causally related to Claimant's admitted November 29, 2017 work related injury.

III. Whether Claimant is entitled to an award of costs under Section 8-42-101(5), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer for approximately 9.5 years as a Principal Secretary.

2. Records from Claimant's primary care providers at Kaiser Permanente document Claimant's prior history of neck pain, left shoulder joint pain, and left hip joint pain in 2015. The records do not indicate Claimant was undergoing treatment to her left hip leading up to the work injury.

3. Claimant sustained an admitted industrial injury to her low back and right hip on November 29, 2017. Claimant tripped and fell forward onto her knees and hands, then rolled onto her back.

4. Claimant subsequently treated with authorized provider SCL Physicians and saw Elizabeth Harris, N.P. on December 1, 2017. Claimant reported bilateral knee and lower back pain. On examination, NP Harris noted tenderness to palpation to the right sacroiliac (SI) joint region. No left hip complaints or findings were documented. NP Harris assessed Claimant with acute right-sided low back pain, bilateral knee abrasions, and a left elbow abrasion. She referred Claimant for physical therapy.

5. Claimant presented to ATP Hiep Lelourdes Ritzer, M.D. on February 21, 2018. Claimant complained of low back, right hip and bilateral knee pain. The medical note contains no mention of left-sided complaints. On examination, Claimant was tender bilaterally over the SI joint. Dr. Ritzter referred Claimant to Samuel L. Chan, M.D. for evaluation.

6. Claimant subsequently underwent work-related SI injections, right hip intra-articular injections, and a right hip labral reconstruction in 2018.

7. On April 3, 2019 ATP Chan performed right L5 primary dorsal ramus percutaneous rhizotomy and right S1, S2 and S3 primary dorsal ramus percutaneous lateral branch radiofrequency rhizotomies for diagnosis of chronic low back pain and right sacroiliac joint dysfunction. Dr. Chan noted Claimant had a positive diagnostic and therapeutic response to SI injections in the past.

8. On April 8, 2019 Claimant presented to ATP Haley Burke, M.D. with complaints of ongoing discomfort mainly on the right side but also across the bilateral lumbosacral spine. Dr. Burke documented worsening symptoms and a new onset of numbness with history of diffuse right lower extremity pain, bilateral lumbosacral pain and bilateral lumbar pain affecting the right lower extremity after a recent SI joint radio frequency ablation performed within the last week. Dr. Burke remarked that Claimant's symptoms did not fit a dermatomal pattern and that Claimant did not have objective findings on exam. She nonetheless prescribed Claimant Gabapentin for post-procedure neuritis, which she stated is a commonly known occurrence after radiofrequency ablation (RFA). She cautioned Claimant regarding drowsiness and not to drive or pursue any potentially dangerous activities with the use of Gabapentin until Claimant knew how it affected her.

9. Claimant presented to ATP Yusuke Wakeshima, M.D. on April 16, 2019. She reported right greater than left low back pain and right lower extremity pain. Dr. Wakeshima noted that Dr. Chan performed a SI injection which reportedly only helped for a few days. He further noted that Claimant also underwent radiofrequency neurotomy by Dr. Chan on April 3, 2019, and that since then her SI pain profoundly worsened. Claimant reported that the Gabapentin medication was making her somewhat sedated but that she otherwise seemed to be tolerating her medication regimen. Dr. Wakeshima initially opined that Claimant's symptoms may be related to potential piriformis syndrome on the right after the SI joint radiofrequency neurotomy procedure. He continued Claimant on Gabapentin, increasing her dosage.

10. Dr. Wakeshima performed an EMG of Claimant's right lower extremity on May 6, 2019, which demonstrated peroneal motor neuropathy on the right distal to tibalis anterior. There was no evidence of lumbar radiculopathy or lumbosacral plexopathy on the right.

11. On August 27, 2019 Claimant reported to Dr. Wakeshima that she experienced no further improvements following her SI joint injections. Dr. Wakeshima concluded that Claimant's SI joint dysfunction is not her pain generator, as she did not demonstrate further benefit from the SI joint injections. Claimant reported that she experienced a big difference in her pain with the increase of Gabapentin, but also a significant increase in her sedation level. Claimant requested a change in her neuropathic medication to something that may not be as sedating. Dr. Wakeshima thus prescribed Claimant Horizant, noting, "We will therefore have patient undergo a trial of Horizant which is gabapentin enacarbil which is absorbed better than current gabapentin and also sustained release, and thus should cause less sedation, and achieve higher plasma levels than generic gabapentin." (Cl. Ex. 12, p. 76).

12. Claimant underwent a lumbar spine MRI on October 7, 2019. The radiologist's impression was:

> No significant change since 10/12/2018 in mild central canal stenosis at L4-L5, mostly due to bilateral facet and ligamentum flavum hypertrophic changes. Partial sacralization of left L5. Upper sacrum only incidentally imaged on sagittal sequences. Lower sacrum not included on this study. No MR evidence of right S1 nerve root impingement. Consider dedicated MRI of sacrum to evaluate lower sacral nerve roots.

(R. Ex. K, p. 90).

13. Claimant returned to Dr. Wakeshima on December 10, 2019 with complaints of continued right-sided low back pain and right posterior thigh and leg region pain symptoms. He continued Claimant on Horizant, which Claimant reported made her somewhat sedated. Claimant anticipated that she would begin to get used to the sedation.

14. On December 26, 2019 Claimant underwent a right hip arthroscopic labral repair versus reconstruction and femoral acetabular osteoplasty, performed by ATP Brian White, M.D.

15. On June 17, 2020 Claimant saw Dr. Ritzer with complaints of persistent chronic right hip and lower back pain with right leg numbness. She also reported persistent left hip pain.

16. On June 26, 2020 Dr. Wakeshima reviewed both the report and film from the October 7, 2019 lumbar MRI. He noted that the film demonstrated facet arthrosis not only at the L4-5 level, which was noted in the radiologist report, but also at level L5-S1, left greater than right, which was not mentioned in the radiology report. Dr. Wakeshima did not appreciate any L-5 foraminal stenosis or any nerve root impingement. Based on his review of the MRI film, Claimant's clinical presentation, and Claimant's lack of beneficial response from her previous SI joint injections, Dr. Wakeshima concluded that Claimant's pain generator was most likely bilateral L4-5 and L5-S1 facet arthropathy. He requested bilateral facet injections at L4-5 and L5-S1 to address Claimant's facetogenic low back pain.

17. At a follow-up evaluation on July 29, 2020 Dr. Wakeshima noted that the facet injections were on hold pending an Independent Medical Examination (IME) by Respondent. He explained,

> Patient clinical presentation still is most consistent with lumbar facet joint arthropathy. While she does demonstrate provocative sacral joint dysfunction, and tenderness over the sacroiliac joint region she has not demonstrated resolution of her pain symptoms after radiofrequency neurotomy of the sacroiliac joint. Her MRI studies did demonstrate facet arthrosis at the L4-5 and L5-S1 level.

(Cl. Ex. 16 at p. 98).

Dr. Wakeshima recommended additional chiropractic treatment and continued Claimant on Horizant.

18. Claimant underwent an MRI of her left hip on August 10, 2020 which revealed a nondisplaced linear contrast-filled tearing of the anterior left acetabular labrum with mild to moderate underlying anterior superior labral attenuation and fraying; high-grade attenuation and mild fraying of the superior posterior superior portions of the left labrum; and small areas of isolated high-grade chondral fissuring in the periphery of the superior left acetabulum without chondral delamination or subchondral edema.

19. On August 20, 2020 Carlos Cebrian, M.D. performed an IME at the request of Respondent. Dr. Cebrian concluded that Claimant did have left femoroacetabular impingement secondary to Cam type morphology with a labral tear, but that it was unrelated to Claimant November 29, 2017 work injury. He noted temporal delay in Claimant's development of left hip symptoms and disagreed that Claimant's gait abnormality aggravated or caused Claimant's pre-existing femoroacetabular impingement with labral pathology. Dr. Cebrian opined that Dr. Wakeshima's request for bilateral facet joint injections at L4-5 and L5-S1 should be denied as not reasonable, necessary or related. He explained that it was not probable Claimant would have a positive response to the facet injections. He noted that Claimant's initial lumbar spine findings after her injury were specific to the right SI joint and that she underwent SI joint injections with questionable responses with subsequent expansion of lumbar spine complaints. Dr. Cebrian opined that Claimant's examination was non-specific and not suggestive of facet-mediated pain. He further opined that Claimant reached maximum medical improvement (MMI) as of August 20, 2020 with a 12% whole person impairment. Dr. Cebrian concluded that Claimant did not require any medications as maintenance treatment, as the Horizant was being prescribed for non-claim related neuropathy.

20. On September 30, 2020 Dr. White noted that imaging showed left sided CAM and pincer-type femoroacetabular impingement with labral tear. He recommended that Claimant undergo a left hip arthroscopy with femoral and acetabular osteoplasty, and labral construction.

21. Dr. Wakeshima addressed his review of Dr. Cebrian's IME report in an October 6, 2020 medical note. He agreed with Dr. Cebrian that Claimant's peroneal neuropathy was not work-related. Regarding medication he stated,

> [h]owever her Horizant may be addressing a neuropathic component to her low back and right hip pain with subsequent surgeries not appreciated on electrodiagnostic study. We will try a weaning program on the Horizant at our next appointment to see if her pain about the hip or low back worsens with weaning down and off this medication.

(Cl. Ex. 17, p, 104).

Dr. Wakeshima noted that it was important Claimant be tapered off of the Horizant, instead of abruptly stopping it.

22. At a follow-up evaluation on October 26, 2020 Claimant reported to Dr. Wakeshima that Insurer did not authorize refills on Horizant per her last appointment. Claimant reported 4/10 pain level with pain in the low back radiating down right lower extremity, as well as hip pain. Dr. Wakeshima reiterated,

> …the Horizant was written more for addressing any neuropathic component to her low back and hip pain, rather than the peroneal neuropathy which was appreciated on her electrodiagnostic studies in the past, which appears to be the basis of Dr. Cebrian's denial of the Horizant (ie that the Horizant was to treat the peroneal neuropathy).

(Cl. Ex. 18, p. 110).

23. Dr. Wakeshima provided Claimant enough samples of Horizant to wean her off by the time of his next follow-up appointment. He explained,

> If she notices no change in her pain symptoms, this medication will then not be resumed. If, however, her low back pain, hip pain or radicular type symptoms reexacerbate being off the Horizant, then I would conclude that this medication is directly related to her work injury, and Dr. Cebrian was incorrect on his RIME in assuming that this was strictly for peroneal neuropathy, and should therefore be authorized for reinitiation and continuation. If she only notices worsening of her pain about her right lateral leg in the peroneal nerve distribution, then this will be related to peroneal neuropathy, and would need to be resumed and continued under her private health insurance.

(Id.).

24. On November 13, 2020 Claimant reported to Dr. Wakeshima that the weaning off Horizant was not well-tolerated, noting a profound increase in her overall pain. Dr. Wakeshima noted that Claimant had made a detailed pain log documenting her response to weaning off the medication from October 26 to November 9. He further noted that, during this timeframe, Claimant's pain increased not only in her back, but also in her bilateral lower extremities. By November 9, when off the Horizant, Claimant's pain increased from 4/10 at the beginning of the wean to 7/10. Dr. Wakeshima concluded that the tapering down and off of Horizant led to profound worsening of Claimant's pain in locations outside of the peroneal neuropathy region. He explained that this demonstrated that the medication was "helping more than just the peroneal neuropathy symptoms that was reported in her electrodiagnostic studies on the right lower extremity, that Dr. Cebrian incorrectly assumed that was the only reason why she was on the Horizant." (Cl. Ex. 19, p. 116). Dr. Wakeshima further explained that Horizant was to address Claimant's neuropathic pain as related to her work injury for her back and lower extremity and opined that it was medically appropriate and indicated to address Claimant's work-related neuropathic pain issues.

25. On November 23, 2020 Dr. Wakeshima prescribed Claimant Gabapentin instead of Horizant because Insurer had not yet authorized Horizant.

26. At a follow-up evaluation on December 10, 2020 Claimant reported to Dr. Wakeshima that the Horizant was finally authorized and had been helping with her pain symptoms. Claimant reported that she tried the generic Gabapentin and felt continuously sedated and tired and the Horizant was much better tolerated.

27. Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Richard M. Gordon, M.D. on February 17, 2021. Dr. Gordon diagnosed Claimant with work-related right hip pain, right sacroiliac joint dysfunction, multilevel lumbar spondylosis and low back pain. He opined that Claimant's left hip pain was unrelated to the November 29, 2017 work injury. Dr. Gordon concluded that Claimant reached MMI on September 1, 2020. He assigned an impairment rating for Claimant's low back and right hip. For maintenance care, Dr. Gordon recommended that Claimant continue Horizant 600 mg BID for right lower extremity neuropathic type pain which he "feels is due largely to the above documented right L5-S3 ablation procedure. Expected duration of medication is indefinite." (R. Ex. Q, p. 241). He opined that further physical therapy, chiropractic care, massage therapy, acupuncture or other type of passive modality would not benefit Claimant. Dr. Gordon did not specifically address Dr. Wakeshima's recommendation for bilateral facet injections.

28. Respondent filed a Final Admission of Liability (FAL) on March 30, 2021 admitting for post-MMI maintenance treatment pursuant to Dr. Gordon's DIME opinion.

29. Claimant subsequently sought treatment for her left hip with her primary care providers at Kaiser Permanente.

30. At an April 7, 2021 evaluation at Kaiser Permanente, Claimant reported that she had confirmed left labral tearing and that she had not been able to obtain treatment for her left hip through the worker's compensation claim. Claimant was referred to a hip specialist at Kaiser Permanente.

31. On May 12, 2021 Dr. Wakeshima noted Claimant experienced another delay in receiving her Horizant. Claimant reported increased neuropathic, low back, and hip region pain while off of the medication. Dr. Wakeshima noted that the DIME physician placed Claimant at MMI. He continued Claimant on Horizant, remarking that it helped with the neuropathic component of Claimant's pain symptoms.

32. Dr. Wakeshima attended a telephone conference with Claimant's counsel on December 14, 2021 and issued a note on the same date. He explained that Claimant's mechanism of injury could have put force on her the lumbar facets and in turn caused facetogenic low back pain. Dr. Wakeshima reiterated that the MRI films showed L4-5 and L5-S1 facet arthrosis. He suspected that Claimant's pain generator was most consistent with L4-5 and L5-S1 joint arthropathy pain, which he stated would be in a similar location as the SI joint, and, at times, could potentially mimic SI joint symptoms. He noted that it appeared that Dr. Gordon and Dr. Cebrian reviewed the MRI report, but not the actual

MRI film. Dr. Wakeshima explained that, on his last physical examination, Claimant demonstrated left greater than right lumbar region pain and tenderness with pain greatest with lumbar extension and lumbar rotation. Dr. Wakeshima continued to opine that Claimant's current back pain complaints are more consistent with facetogenic low back pain based on her most recent MRI films as well as her clinical presentation. He resubmitted his request for authorization of therapeutic bilateral L4-5 and L5-S1 facet joint injection to address facetogenic low back pain.

33. On January 10, 2022 Dr. Wakeshima explained that he wrote Claimant a prescription for Gabapentin to hold Claimant over until the Horizant was again authorized. He noted that Claimant had tried generic Gabapentin in the past, which was too sedating for Claimant compared to Horizant.

34. On January 21, 2022 Claimant reported to Dr. Wakeshima that she had been tolerating the Gabapentin without any adverse side effects, but that it had not been as effective as the Horizant in controlling her neuropathic pain symptoms. Dr. Wakeshima continued Claimant on Gabapentin as it was currently being authorized by Insurer. Dr. Wakeshima noted that the bilateral facet joint injections had been denied by Insurer. He disputed Dr. Cebrian's argument that it is common for pain in the hip secondary to femoroacetublar impingement to present with lumbar spine complaints, again stating that Claimant has radiologic findings of facet joint arthrosis as well as clinical findings suggestive of facetogenic low back pain in clinical examination.

35. On March 16, 2022 Claimant reported to Dr. Wakeshima that the Gabapentin was making her very sedated. She complained of 8/10 low back pain and right posterior lateral thigh and leg region pain. Dr. Wakeshima noted that he would refill Claimant's Gabapentin and switch to Horizant when authorized by Insurer. He noted that the Gabapentin was not as effective as Horizant for the Claimant, but was better than having no neuropathic pain medication at all. Dr. Wakeshima opined that Horizant use is related to Claimant's work injury and should be continued indefinitely under maintenance care.

36. Claimant returned to Dr. Wakeshima on April 18, 2022 reporting increased sedation issues with the Gabapentin compared to the Horizant. Claimant requested that Dr. Wakeshima resubmit his request for bilateral facet joint injections. Dr. Wakeshima informed Claimant that his request was denied and that she should discuss it with her attorney. Dr. Wakeshima again stated he would switch Claimant back to Horizant if authorized by Insurer.

37. On June 28, 2022 Claimant complained to Dr. Wakeshima of some knee swelling. Dr. Wakeshima informed Claimant that the fluid retention may be related to the Gabapentin and, if so, he would decrease the dosage.

38. On June 30, 2022 Claimant was evaluated at Kaiser Permanente and described that her left hip pain limited her ability to exercise. Claimant's primary care provider noted that Claimant had received an injection in her left hip in August 2021 and that Claimant was supposed to have had a three-month follow-up, which was recommended to have

occurred ten months prior. Claimant's Kaiser physician discussed the role of orthopedic follow-up and noted that Claimant had longstanding issues with hip pain.

39. Dr. Cebrian reviewed additional medical records and issued a second IME report dated January 13, 2022. He specifically addressed whether the prescription for Horizant and the request for bilateral facet injections at L4-5 and L5-S1 are medically reasonable, necessary and related. Dr. Cebrian opined that the recommended bilateral facet injections are not reasonably necessary or related. He again explained that Claimant's initial lumbar spine findings after the injury were specific to the right SI joint, she had a questionable response to the SI joint injections, there was subsequent expansion of lumbar spine complaints, and that examination was non-specific and not suggestive of facet-mediated pain. Dr. Cebrian noted that, on examination, Claimant had more prominent left-sided lumbar spine pain, which she did not have after her initial injury. Since the injury, Claimant has developed left-sided hip pain which he concluded is not causally related to the injury. He explained that it is common for pain in the hip secondary to femoral acetabular impingement (FAI) to present with lumbar spine complaints. Dr. Cebrian further noted that DIME physician Dr. Gordon did not recommend any facet injections. Dr. Cebrian continued to opine that Horizant should also be denied as there is not a claim-related neuropathic lesion. He noted that Horizant was being prescribed to Claimant in 2020 for non-claim related peroneal neuropathy, and that there have not been any new claim-related conditions which warrant its utilization under this claim.

40. Claimant testified at hearing that, while both the Gabapentin and the Horizant work for her symptoms, the Gabapentin makes her significantly more sedated and lethargic compared to the Horizant. Claimant wants to continue to take the Horizant as recommended by Dr. Wakeshima and Dr. Gordon. Claimant also wants to undergo the bilateral lumbar facet injections recommended by Dr. Wakeshima. Claimant testified that she has continuing left hip symptoms for which she has treated with her primary care providers. Claimant has not undergone left hip surgery.

41. Dr. Cebrian testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Cebrian testified consistent with his IME reports and continued to opine that the recommended bilateral lumbar facet joint injections and the Horizant medication are not reasonable, necessary and related to Claimant's November 29, 2017 work injury. Dr. Cebrian testified that it does not make sense to perform bilateral lumbar injections when Claimant's initial complaints were to the SI joint. He further stated that Claimant has significant left hip complaints and pathology. He explained that left hip FAI can present with low back pain, groin pain, and abdominal pain, and that Claimant's left hip condition would result in pain radiating form the left hip to the lumbar spine, further confusing Claimant's presentation. Dr. Cebrian testified that his examination of Claimant was not consistent with facet-mediated pain. He testified that the recommended injections would not improve Claimant's pain complaints, even if such complaints were due to facet-mediated pain, as Claimant's left hip would continue to cause Claimant pain.

42. Dr. Cebrian explained that Horizant is a slow-release form of Gabapentin used to address nerve pain. He opined that the recommendation for Horizant is not reasonable, necessary or related to Claimant's work injury. He explained that Claimant was on a low

dose of Gabapentin in September 2018 for nerve pain that did not help her symptoms. Dr. Cebrian testified that the neurotomy would not result in leg complaints, and that Claimant's symptoms instead correlate with the peroneal nerve issue that is unrelated to this claim. He stated that a May 2019 EMG demonstrated a peroneal nerve issue in the lower leg, not the back. Dr. Cebrian testified that Claimant's symptoms do not follow the correct nerve patterns. He further opined that Claimant's medical records did not adequately document any improved function with Horizant. Dr. Cebrian acknowledged that Gabapentin is usually more sedating than Horizant. Dr. Cebrian further testified that numerous medications Claimant takes outside of her worker's compensation claim, including Wellbutrin, Buspar, Effexor, Imitrex, Amitryptiline and Trazadone, can cause fatigue and drowsiness.

43. The ALJ finds the testimony of Claimant and opinions of Drs. Wakeshima, Burke and Gordon, as supported by the medical records, more credible and persuasive than the testimony and opinion of Dr. Cebrian.

44. Claimant proved it is more probably true than not the Horizant medication and bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima, are reasonable, necessary and causally related to Claimant's November 29, 2017 work related injury.

45. Claimant proved entitlement to reasonable costs incurred in pursuing the Horizant and bilateral L4-5 and L5-S1 facet joint injections recommended by ATP Wakeshima. Respondent contested the medical benefits by denying authorization of such medical maintenance treatment. As Claimant has not received the Horizant or bilateral facet joint injections, the treatment as of the date of hearing is unpaid.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once

a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

As found, Claimant proved it is more probably true than not that both the Horizant and the bilateral injections recommended by ATP Wakeshima are reasonably necessary and causally related to her industrial injury. Dr. Cebrian opined that Horizant is not reasonably necessary and causally related to Claimant's work injury because it is used to treat the symptoms of Claimant's peroneal injury, which is unrelated to the current claim. His opinion is credibly contradicted by ATPs Wakeshima and Burke, as well as DIME physician Gordon. The medical records document that Claimant reported increased low back and nerve pain after undergoing her work-related RFA procedure. Dr. Burke noted that experiencing neuritis after a RFA procedure is a common known occurrence, and prescribed Claimant Gabapentin to address the associated symptoms. Claimant was subsequently prescribed Horizant in lieu of Gabapentin to address those same symptoms. Dr. Gordon credibly opined that Horizant should be continued as maintenance medication for Claimant's right lower extremity neuropathic pain, which he felt was largely caused by the ablation procedure. Dr. Wakeshima specifically addressed Dr. Cebrian's IME report and credibly explained that the Horizant is being prescribed for Claimant work-related neuropathic pain. Dr. Wakeshima confirmed his conclusion by tapering Claimant off of Horizant, which ultimately resulted in a significant increase in Claimant's neuropathic pain.

Claimant consistently reported and credibly testified that, while effective for her pain at certain dosages, the Gabapentin has a significantly sedating effect. In comparison, the Horizant medication is as effective in treating her pain and has a less sedating effect on Claimant. Dr. Cebrian acknowledged that Gabapentin is usually more sedating than Horizant. While Dr. Cebrian noted that other medications Claimant is taking outside of the worker's compensation system can also have a sedative effect, there was no evidence that Claimant reported or experienced similar side effects from those medications when not taking the Gabapentin. Claimant demonstrated that she is able to identify the difference in the sedating effects of different medications, as she did with Gabapentin and Horizant. Dr. Wakeshima explained that he continues to prescribe Claimant Gabapentin for her work-related neuropathic pain specifically because Insurer ceased to authorize Horizant. As Horizant is used to address Claimant's work-related neuropathic condition and results in less severe side effects than Gabapentin, the preponderant evidence demonstrates that Horizant is reasonable, necessary and causally-related maintenance treatment.

The preponderant evidence also establishes that the bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima are reasonable, necessary and

causally-related maintenance treatment. Dr. Cebrian opined that the recommended injections are not reasonable, necessary or related due to Claimant's initial complaints regarding the SI joint, her current left hip complaints and pathology, and lack of exam findings. Dr. Wakeshima addressed these concerns, credibly disputing Dr. Cebrian's position. Claimant's initial complaints and treatment were focused on the SI joint and right hip. However, subsequent imaging revealed facet arthrosis at the L4-5 and L5-S1 levels, which was confirmed by Dr. Wakeshima's review of the MRI film. Contrary to Dr. Cebrian, who opined there were no findings of facet mediated pain on his examination, Dr. Wakeshima has credibly opined that, on his exam, Claimant had findings consistent with facet mediated pain. He credibly explained that L4-5 and L5-S1 joint arthropathy pain can potentially mimic SI joint symptoms, explaining why Claimant's initial complaints and treatment focused on the SI joint without much relief.

While, as stated by Dr. Cebrian, hip pain may present with lumbar spine complaints, the ALJ is persuaded by Dr. Wakeshima's credible opinion that the pain generator here is most likely bilateral L4-5 and L5-S1 facet arthropathy, for which there is objective evidence. Dr. Wakeshima has consistently recommended bilateral facet injections for therapeutic purposes as related to Claimant's work injury. Based on the totality of the evidence, bilateral L4-L5 and L5-S1 facet joint injections are reasonable, necessary and related treatment to relieve the effects of Claimant's work injury.

Costs Under Section 8-42-101(5), C.R.S.

Section 8-42-101(5), C.R.S. provides,

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

Respondent argues that Claimant failed to prove entitlement to reasonable costs under Section 8-42-101(5), C.R.S. because Claimant did not submit any bills or testimony into evidence to substantiate that Respondent received medical bills for the requested treatment and denied these bills, or that the bills were received and not paid by Respondent.

Respondent relies on *Regina Van Meter v. Dillion Companies, Inc.*, WC No. 4-781-504-01 (ICAO, Aug. 17, 2017). In *Van Meter*, the Panel affirmed an order that denied Claimant's request for costs under Section 8-42-101(5), C.R.S. At hearing, the Claimant submitted unpaid medical bills from her authorized provider related to maintenance medical treatment that she had obtained in the claim. The ALJ found that the treatment was reasonable and necessary, but denied the payment of incurred costs. The panel

agreed with the ALJ, finding that the bills submitted at hearing by the Claimant did not prove that the benefits were unpaid and contested. First, there was no evidence that the bills were received by Respondents and denied. Second, the bills were not overdue yet, meaning that they had not yet been unpaid.

The circumstances here are distinguishable from *Van Meter* and more similar to those in *William Fox v. The Kroger Company*, WC 4-144-756-002 (ICAO, July 19, 2021). In *Fox,* the ALJ concluded that a stimulator and psychological evaluation were reasonably necessary and related medical treatment. The ALJ further concluded that, pursuant to §8-42-101(5), C.R.S., the claimant was entitled to costs incurred in pursuing a psychiatric evaluation associated with evaluation of the appropriateness of a stimulator. On appeal to the Panel, the respondent argued that the ALJ erred in awarding costs under § 8-42-101(5), C.R.S., since there were no findings of fact that the psychological evaluation was "unpaid" at the time of the hearing. The respondent contended that the ALJ made no findings that a bill had been submitted to it by a provider for the psychological evaluation or that the respondent had failed to timely pay any bills related to the psychological evaluation.

The Panel disagreed, reasoning that the ALJ implicitly found that the psychiatric evaluation was both "unpaid" and "contested" by the respondent. The Panel reasoned,

> Based on the respondent's denial for authorization of the psychiatric examination, however, we conclude that the ALJ reasonably could infer that the respondent would not pay for such examination. That is, when a self-insured employer or insurer refuses to authorize maintenance medical treatment, then it also is stating that it is refusing to pay for such treatment, thereby resulting in any such treatment being "unpaid." The statute does not expressly require the claimant prove that bills are "unpaid," as is argued by the respondent. To require the claimant to show an "unpaid" bill, as the respondent is arguing here, would be to force him to undergo the contested treatment at his own expense with the potential of never recovering such payment. Thus, while the claimant here could have proved "unpaid" maintenance medical benefits by introducing "unpaid" bills for such treatment, nowhere in the plain language of § 8-42-101(5), C.R.S., is this expressly required. Further, while § 8-42-101(5), C.R.S., clearly places the burden on the claimant in this case to prove that the medical maintenance benefits are "unpaid," to limit him to only doing so by introducing "unpaid" bills would be to frustrate the efforts of injured workers in quickly resolving disputes over maintenance medical benefits, contrary to the clear intent of the statute.

(Id.).

The Panel in *Fox* distinguished *Van Meter*, noting that in *Van Meter*, while the claimant presented invoices showing outstanding amounts owed, the invoices showed a date of April 27, 2016. The Panel in *Van Meter* thus ruled that if these bills were not

received until April 27, 2016, then payment was not due until 30 days after receipt of the bill pursuant to WCRP 16-12 (A)(2) and (3), which was after the May 3, 2016, hearing in that case. The Panel in *Van Meter* further noted that while the respondent contested the claimant's entitlement to future Oxycodone prescriptions, there was no evidence in the record that the respondent contested prior prescriptions or failed to timely pay for Oxycodone, since payment for the only prescription in dispute was not due until after the date of the hearing. The Panel in *Fox* distinguished *Van Meter*, reasoning that in *Fox,* the claimant never underwent the requested psychiatric evaluation because respondent would not authorize it.

Here, Dr. Wakeshima, an ATP, recommended Horizant and bilateral facet injections as medical maintenance treatment. The record establishes, and Respondent does not dispute, that such treatment was denied by Respondent. Accordingly, the medical benefits have been contested. Claimant has not yet undergone the bilateral facet injections or received the Horizant prescription, meaning such unperformed treatment is unpaid. *See Fox*, *supra* (§8-42-101(5), C.R.S. could reasonably include in the category of an "unpaid" maintenance medical benefit a procedure that had not yet been performed and an ALJ under certain circumstances could reasonably could infer that since the respondent would not authorize the psychiatric evaluation, then it also would not pay for such a benefit).

This analysis is in line with the legislative intent of §8-42-101(5), C.R.S., as discussed by the Panel in *Fox*,

> Similarly, based on the plain and ordinary meaning of the statutory language contained in § 8-42-101(5), C.R.S., its intent is to address or include disputes surrounding a common type of maintenance medical benefit that occurs due to a contest. For example, a maintenance medical procedure that is requested but denied through a respondent's contest typically will remain unperformed until the contest is resolved. It also is typical that a medical treatment that remains unperformed will not be subject to being paid. However, the respondent's proposed reading of § 8-42-101(5), C.R.S., attempts to exclude all such medical benefit contests of this type on the basis that because the medical procedure was not yet performed and, therefore, not billed, then it is not covered by the statutory reference to "unpaid." In such a circumstance, the respondent could proceed to contest requests for maintenance medical authorization with little need to worry over the "reasonable costs" referenced in the statute. In this regard, the legislative intent of § 8-42-101(5), C.R.S., would not be achieved.

(Id.).

Here, the preponderant evidence establishes that Claimant is entitled to the reasonable costs incurred in pursuing the Horizant medication and L4-5 and L5-S1 bilateral facet injections that are unpaid and contested by Respondent.

ORDER

It is therefore ordered that:

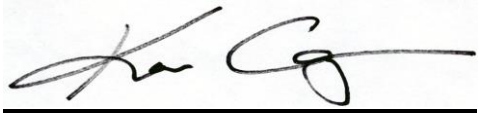
1. Respondents shall authorize and pay for the Horizant medication and bilateral L4-L5 and L5-S1 facet joint injections recommended by ATP Wakeshima.

2. Pursuant to §8-42-101(5), C.R.S., Claimant is entitled to reasonable costs incurred in pursuing the Horizant medication and L4-5 and L5-S1 bilateral facet injections. Claimant shall submit a bill of costs itemizing the incurred costs incurred within 30 days of the date of this order.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

- Whether Respondents proved by clear and convincing evidence that Dr. Bissell's impairment rating was incorrect with respect to non-scheduled impairment and by a preponderance of evidence with respect to scheduled impairment.

FINDINGS OF FACT

1. Claimant worked for Employer as a farm laborer/mill operator for Granada Feeders. The Employer operated a feedlot.

2. Claimant suffered an admitted injury to his left ankle on July 2, 2019 when he fell from a rotted building beam and fell 14 to 15 feet fracturing his left ankle. The Claimant also had low back pain immediately following the incident.

3. Claimant was taken by ambulance to Lamar emergency room where he had x-rays and scans showing a fracture of his ankle. He was then transferred to Parkview Hospital. He was diagnosed with a compression fracture of L-4 and a fracture of the talar head in his ankle.

4. He was seen by Dr. Moore, a podiatrist and put in a cast for three months. He then started physical therapy and utilized a walking cast.

5. Claimant came under the care of Dr. Hudson at High Plains Community Health Center. The initial records with Dr. Hudson are mostly illegible. However, in reviewing the later records from his office, they consistently document the compression fraction and the fracture in the ankle, which he treated with Diclofenac, 75 mg and physical therapy.

6. After conservative care failed, he ultimately underwent a subtalar joint arthrodesis on February 5, 2021, which was performed by Dr. Maurer.

7. On May 25, 2021, Dr. Mauer noted that Claimant had resumed physical therapy and he released him from care to follow up in one year, post-op. Claimant next saw Dr. Mauer on February 7, 2022. At that time, Claimant stated that he had improved 50% since the time of surgery. He experienced sudden sharp pains in his ankle had had swelling. At the time of the visit, he had pain of 2 out of 10.

8. With respect to Claimant's L4 compression fracture, he was seen by physician's assistant Andrew Glass at Parkview Neurological Services between September 11, 2019 and January 10, 2020. On January 10, 2020 it was noted that overall, the claimant was doing well. He did have a "small amount" of pain when leaning forward, otherwise he was largely asymptomatic. Mr. Glass did note that there was no radiating leg pain. He was discharged as of that date.

9. He was referred to Dr. Raschbacher for an IME on October 15, 2021 by Respondents. Dr. Raschbacher determined that Claimant was at MMI as of that date. He determined that his rating was 9% based on loss of range of motion impairment for the ankle. With respect to the lumbar range of motion, he determined that the measurements he took were non-physiologic and should not be including in the rating. He did assign a table 53 rating of 5% and he assumed a reasonable amount of loss of range of motion for the lumbar spine would be 1% for a total of 6% for the lumbar spine.

10. After review of Dr. Raschbacher's IME report, Dr. Hudson, in a questionnaire dated November 23, 2021, agreed with the MMI date that Dr. Raschbacher assigned. Since Dr. Hudson was not level II accredited, he was referred to Dr. Kurz for an impairment rating.

11. Dr. Kurz did a rating on December 30, 2021. He determined that his rating was 6% based on loss of range of motion impairment for the ankle. With respect to the lumbar range of motion, he determined since the Claimant had full range of motion in all directions, that he had no impairment for loss of range of motion. He did have a table 53, I. A. impairment based on the compression fracture in the category of 0% to 25% which equates to 5% whole person impairment. This part of the rating was based on the CT scan that was performed on July 2, 2019 that showed disc height loss of 20% to 30% of L4.

12. Dr. John Bissell performed a DIME on April 8, 2022. His ankle range of motion measurements were very different from Dr. Kurz. He noted that the Claimant was probably having a "bad day" on the date of the IME. He found that claimant had 17% for loss of range of motion. He also added on 5% lower extremity impairment for subtalar arthritis based on CDLE Impairment Rating Tips #11 for moderate subtalar arthritis. Combining the impairments he arrived at a 21% impairment rating for the lower extremity.

13. With respect to his back impairment, Dr. Bissell gave Claimant a 7% impairment for table 53 impairment instead of 5% for 0% – 25% compression fracture of L4. For this measurement, he references the CT scan for the abdomen and pelvis. However, in reviewing that CT scan, there is no specific reference to loss of disc height. (Claimant exhibit C, pp. 65 – 66). The accurate reference to the disc height is contained in the Lumbar CT scan. (Claimant's Exhibit 6, p. 61). The accurate reference in that report is 20% to 30% loss of height of L4. Instead of discussing this range, he utilized the higher end of the range, giving the Claimant a 7% impairment rating instead of a 5% impairment rating. He also gave him impairment for loss of range of motion of 14% for a total whole person rating of 20% for the lumbar spine. This is quite different than the normal range of motion measured by Dr. Kurz.

14. As testified by Dr. Raschbacher, Dr. Bissell did not explain why he accepted the very limited range of motion as compared to the range of motion as measured by Dr. Kurz. This was an error in the opinion of Dr. Raschbacher.

15. Similarly, there is a discrepancy between the range of motion measurements of the ankle taken by Dr. Bissell as compared to the measurements taken

by Dr. Hudson and Dr. Mauer, post-surgery. Dr. Hudson noted full range of motion of the ankle on February 23, 2022. (Respondents' Exhibit B, p. 59). Dr. Mauer also noted normal non-painful range of motion on February 7, 2022. (Respondents' Exhibit D, p. 119). Dr. Bissell instead found Claimant had 17% impairment due to abnormal motion of the hind food and an additional 5% for subtalar arthritis. (Respondents Exhibit A, p. 10). Dr. Bissell does not reconcile his findings with that of either Dr. Kurz or Dr. Raschbacher's range of motion findings. Nor does he explain why he applied the rating tip for arthritis impairment other than to note he was applying it to this rating. Without providing an explanation for inclusion of this additional impairment, the ALJ is unable to determine if it is appropriate. However, it light of the other deficiencies of Dr. Bissell's impairment determinations, the ALJ finds that Dr. Bissell's overall impairment determinations including the inclusion of arthritis pursuant to the rating tips are not credible.

CONCLUSIONS OF LAW

A. Burdens of Proof regarding impairment

Whether a Claimant's impairment represents a scheduled or whole person impairment is a threshold issue that must be addressed before one can determine the weight to be accorded to the DIME's rating. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance. The Claimant did not assert that the ankle injury was a non-scheduled impairment and therefore any challenge to Dr. Bissell's ankle impairment is subject to a preponderance burden of proof.

The Claimant's lumbar spine impairment clearly is not on the schedule and Respondent's burden of proof to overcome the DIME impairment for the spine is by clear and convincing evidence.

B. Respondent overcame the DIME's whole person impairment rating.

A DIME's determinations regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Respondents have met their burden to overcome DIME physician Dr. Bissell's opinions on Claimant's lumbar spine permanent impairment by clear and convincing evidence.

Respondents' evidence clearly establishes and proves that it is highly probable that Dr. Bissell erred in reaching his determination that the Claimant had a 20% whole person impairment rating. Dr. Bissell documented in his DIME report his review of the records for Dr. Hudson, Parkview Neurosurgical Services, Dr. Maurer, Dr. Raschbacher, and Dr. Kurz. Dr. Bissell acknowledges that his range of motion measurements are vastly different than those of Dr. Kurz. He also acknowledges that the range of motion measurements taken by Dr. Raschbacher were determined to be non-physiologic. He even acknowledges the opinion of Dr. Hudson that claimant is malingering. However, nowhere in his report does Dr. Bissell address or reconcile the differences in the findings of the authorized providers, who examined and treatment claimant on multiple occasions and following his healing progress from the date of injury through his placement at MMI, with the drastically different findings at the DIME appointment. Nor does Dr. Bissell provide any objective medical basis or reasoning to explain the dramatic difference, other than speculation that Claimant was having a "bad day" on the date of the Division IME and a "good day" when he was examined by Dr. Kurz. As testified to by Dr. Raschbacher, the loss of range of motion that he obtained as well as obtained by Dr. Bissell was non-physiologic. The ALJ find's Dr. Raschbacher's opinions to be credible and persuasive. Dr. Bissell's whole person impairment is clearly incorrect.

C. Respondents proved by a preponderance of evidence that the Claimant's scheduled impairment was accurately determined by Dr. Kurz.

As discussed above, Dr. Bissell's range of motion for the Claimant's ankle also differed greatly from Dr. Raschbacher's measurements, as well as Dr. Kurz'. There was no attempt to reconcile the differences in the discrepancies by Dr. Bissell. I conclude that the range of motion for the ankle was correctly determined by Dr. Kurz to be 6% of the lower extremity.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on Dr. Kurz' 5% whole person rating. Insurer shall also pay Claimant based on a scheduled rating of 6%. Insurer may take credit for any PPD benefits previously paid to Claimant on this claim.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to this order is the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to

OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 16, 2021

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

PROCEDURAL BACKGROUND

W.C. No. 5-153-633-003 involves an admitted injury claim for a date of injury of October 23, 2020 with the Employer. A Petition for Reopening was previously heard in this case by ALJ Lamphere on March 10, 2022. The Petition was denied by Order issued on April 13, 2022. (Respondent's Exhibit L). W.C. No. 5-202-731-001 involves a new claim for an injury to his right shoulder for a date of injury of April 7, 2022 when he turned his head to cover the speaker on his radio with his cheek and reached around his back to turn down the volume on the radio.The claims were consolidated for hearing in a prehearing order dated August 15, 2022.

ISSUES

- Did Claimant prove the claim 5-153-633 should be reopened based on a change of condition?
- In the alternative, did Claimant suffer a new compensable injury on April 7, 2022 in W.C. No. 5-202-731.
- Did Claimant prove entitlement to medical benefits including the surgery recommended by Dr. Weinstein?

FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer. Claimant sustained an admitted injury on October 23, 2020 to his right shoulder. This is the subject matter of W.C. No. 5-153-633. The claim was admitted and the Claimant underwent an arthroscopic subacromial decompression and right rotator cuff repair with Dr. David Weinstein on January 2, 2021. The claim was closed by final admission on September 28, 2021.

2. Claimant applied for a hearing to reopen this claim and the hearing was held on March 10, 2022. The reopening was denied by order of Judge Lamphere dated April 13, 2022. (Respondent's Exhibit L). The ALJ concluded there was insufficient objective evidence to substantiate that Claimant had experienced a worsening of condition. This was based on the medical records of Dr. Weinstein and Dr. Bradley that it was well established that Claimant had popping in the right shoulder at the time he was discharged from Dr. Weinstein's care on June 2, 2022.

3. At the time of the prior hearing with Judge Lamphere, Dr. Castrejon had prepared an IME report dated February 2, 2022, which was submitted by Claimant. The report was considered by the ALJ. In that report Dr. Castrejon noted in the physical examination portion that there was a painful pop appreciated with elevation of the shoulder and internal or external rotation. Dr. Castrejon concluded that the Claimant was

experiencing a significant worsening. However, as noted above, the Administrative Law Judge did not find this opinion to be persuasive.

4. Dr. Castrejon also opined that the Claimant should be limited to no use of the right upper limb. (Respondent's Exhibit 1, p. 7).

5. Subsequent to the hearing with Judge Lamphere, Claimant was again evaluated by Dr. Castrejon on August 29, 2022, via telemedicine. (Claimant's Exhibit 1). In this new report, Dr. Castrejon, contrary to his opinion regarding the Claimant's worsening in February, opines that "In fact, over time the claimant admitted the popping was becoming less of a problem." (Claimant's Exhibit 1, p. 7). In this report, Dr. Castrejon now focuses on the new incident on April 7, 2022 when the claimant slightly elevated then internally rotated his right shoulder in order to reach the volume button on his two way radio an reported having experienced a substantially more prominent "pop" to the superior and anterior aspect of his right shoulder that was accompanied by severe pain. After analyzing the mechanism of injury, Dr. Castrejon stated "This movement resulting in an aggravation to the rotator cuff mechanism of the right shoulder that has left claimant with pain that is contributing to severe loss of function to the right upper limb". (Id. p. 8).

6. The Claimant testified at hearing that on April 7, 2022 he was performing his usual job duties, checking on inmates during the night, when a call came over his radio. It was very loud, so he covered the speaker with his cheek and reached behind his back with his right hand to turn down the volume on his radio. At that time he felt an immediate onset of pain and heard a pop in his right shoulder. He also testified that although he was in pain, he had a duty to complete his job duties and did so before he reported to lunch. At that time, Officer Casillas saw the Claimant and escorted him to Captain Vogan's office to report the injury.

7. He was seen at the ER at Parkview Health System on April 7, 2022. He gave a history to the doctor that he had an "ongoing "pop" in his shoulder when he lifts and move in certain ways. Tonight he states he moved to talk into his radio microphone and felt a pop in his R shoulder that has radiated to base of neck and R shoulder that has radiated to base of neck an R shoulder with numbness in arm/hand. He states this has happened several times but seems more intense than in the past." (Respondent's Exhibit B, p. 10).

8. After x-rays were taken, Claimant was reassessed by Dr. Ostrand. He was improved. He had increased range of motion, was able to abduct and adduct his shoulder and stated that his paresthesias were essentially gone.

9. Claimant was next seen by at Concentra on April 8, 2022 by Physician's Assistant Daniel Czarniawski. He took a history that Claimant had a new work injury to his right shoulder. Mr. Czarniawski states: "Wearing a radio and he turned his head towards his shoulder, reached behind his back and felt a pop in his shoulder. Severe pain. Limited ROM. Went to ED and XR done. Requested records. Has been off work since." (Claimant Exhibit 3, p. 17).

10. Claimant was seen by Dr. Jon Erickson for an IME at the request of Respondent. (Respondent's Exhibit C). Claimant reported that on April 7, 2022 he was working the midnight shift and attempted to adjust the volume on his belt radio, which was clipped over his right rear pocket. Claimant reported he twisted with his right arm and felt a pop with the onset of severe pain. Claimant reported that this is a maneuver he does frequently. Dr. Erickson opined that the overall conclusion of the April 19, 2022 MRI, was there was no evidence of any acute trauma and the noted pathology was mild. Dr. Erickson opined that "reaching behind one's back is a motion that most individuals likely do several times each day, most often during bathing or dressing. This motion does not require any significant tensile loads on the tissues of the shoulder and should not, under normal circumstances, cause an injury." Dr. Erickson stated he reviewed three surveillance videos of the alleged event and saw no incident where Mr. Romero suffered an incapacitating injury. (Ex. C, p. 28).

11. I find that the opinions of Dr. Erickson regarding the incident of April 7, 2022 to be more persuasive than the opinions of Dr. Castrejon as to whether the Claimant sustained a new injury to his right shoulder on that date. Based on Dr. Erickson's opinions I find that the Claimant did not sustain a new work injury on April 7, 2022.

12. I further find that the Claimant did not sustain a worsening due to the natural progression of his admitted and closed work injury of October 23, 2020 (W.C. 5-153-633). While Claimant may have experienced a temporary flare-up of his symptoms due to the "pop" that occurred on April 7, 2022, I find that Claimant's current symptoms/condition and restrictions are consistent with and similar to his symptoms/condition and restrictions as they existed at the time of the prior March 10, 2022 hearing. Claimant's symptoms on February 1, 2022 were documented to include mild atrophy of the supraspinatus, severe disabling "pops" followed by pain for days, with pain extending to his right side of his neck and into the shoulder blade, pain of 6-7/10 despite no use of his limb, shoulder girdle muscle weakness, positive impingement and drop arm testing. These symptoms and Claimant's examination resulted in a concern for internal derangement (retear) in February 2022, and resulted in Claimant being provided work restrictions of no use of his right upper limb and the recommendation for additional evaluation and treatment by Dr. Weinstein, to include probable surgery. This evidence was presented at and Claimant's complaints adjudicated at the prior March 10, 2022 hearing. As such, I find that Claimant has failed to prove a worsening of his condition.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Renz v. Larimer County, 924 P.2d 1091 Colo.App. 1996).* The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate

consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Pre-existing disability from a prior industrial injury does not preclude recovery of workers' compensation benefits for a second compensable injury to the same body part. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986).

A claimant suffers a compensable injury if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove a compensable aggravation. A purely symptomatic aggravation is sufficient for an award of benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment or causes a disability, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). However, the mere fact that a claimant experiences symptoms during or after work activities does not necessarily establish a compensable injury. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Where, as here, the pre-existing condition results from a prior industrial injury, the ALJ must determine whether the recurrent pain is "a logical and recurrent consequence of the original injury," or a compensable "aggravation" giving rise to a new claim. *F.R. Orr Construction, supra,* at 968.

Based on the opinions of Dr. Erickson, whose opinions are credible, there has been no change in Claimant's condition since MMI or since the time of the hearing before Judge Lamphere, due to the natural progression of Claimant's injury. As such, the request to reopen that claim is denied. Similarly, the Claimant has failed to sustain his burden of proof that he sustained a compensable injury on April 7, 2022 arising out of and in the course and scope of his employment.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen W.C. No. 5-143-435 for medical benefits is denied and dismissed.

2. Claimant's claim in W.C. No. 5-164-953 for a February 17, 2021 injury is denied and dismissed.

3. Claimant's request for surgery with Dr. Weinstein is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 18, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant suffer a compensable injury arising out of employment on February 1, 2022?

- If the claim is compensable, was the treatment provided by Brendon Madrid, NP at Concentra on April 18, 2022 reasonably necessary and authorized?

FINDINGS OF FACT

1. Claimant worked as a parts sales manager at one of Employer's retail stores.

2. Claimant suffered multiple injuries in a fall at work on February 1, 2022. At the time of the accident, Claimant was unpacking inventory from a pallet of inventory items that had been delivered earlier that day.

3. The store receives weekly deliveries, typically consisting of 1-4 pallets of goods. Each delivery usually includes a mix of vehicle parts and other automotive-related items such as batteries, fluids, and cleaning supplies. Most items are packed inside a metal cage, but occasionally totes or boxes are stacked on top of the cage. Each cage and any associated items are wrapped with an industrial-strength plastic wrap and placed on a pallet.

4. Claimant is a veteran with a service-connected disability. She previously underwent a right leg above-the-knee amputation and now utilizes a prosthesis for ambulation. Claimant has had problems with the fit and function of the prosthesis and has been involved in a lengthy conflict with the Veterans Administration (VA) to have it corrected. A desire to obtain better treatment for the residual limb and prosthesis was a major factor in Claimant's decision to relocate to Colorado in 2021.

5. Employer provided job modifications to account for Claimant's physical limitations. The modifications were formalized on January 3, 2022 as follows: "no climbing ladders, needs to take a break when business allows, no lifting batteries." The store management informally provided similar accommodations before January 3, 2022.

6. There is no question Claimant fell at work on February 1, 2022 and suffered injuries. The dispute centers on whether the fall "arose out of" Claimant's employment.

7. The parties have substantially different theories about how the fall occurred. Claimant testified she was unpacking items from a pallet after a coworker had cut and removed the plastic wrap. Claimant reached for a box that was stacked atop the cage. When she tried to step forward on her right leg (the leg with the prosthesis), she "felt something pull" and fell. Claimant hit her head and briefly lost consciousness. She awoke

on the floor, surrounding by automotive parts. When she regained consciousness, her manager (Mr. B[Redacted]) was shaking her shoulder and asking if she was okay. Claimant tried to get up but "I felt my right leg get pulled again. And that's when I saw the plastic wrap, and I had to untangle my leg." Mr. B[Redacted] then helped Claimant get up and into a nearby chair. Claimant then noticed the foot on her prosthetic leg was angled inward.

8. Mr. B[Redacted] was working in an adjacent area of the store when Claimant fell. He heard "a big bang, like a bunch of totes hit the floor." Mr. B[Redacted] ran to the back of the store and saw Claimant "laying on the ground with a bunch of parts laying on the floor." An overturned chair was next to her. Claimant appeared unconscious. Mr. B[Redacted] quickly knelt down, shook Claimant's shoulder, and asked if she was okay. Claimant opened her eyes, and Mr. B[Redacted] helped her to the chair. Claimant mentioned her foot was twisted. Mr. B[Redacted] looked at Claimant's foot, which he had not noticed up to that point. Mr. B[Redacted] agreed it appeared twisted inward.

9. Mr. B[Redacted] testified he saw no plastic wrap on the floor or on Claimant's prosthesis after the accident.

10. Mr. B[Redacted] helped Claimant to her car so she could go to the VA clinic and have the prosthesis evaluated. He took photographs of Claimant's prosthesis, although they were not saved to his phone, for unknown reasons.

11. The store manager, JQ[Redacted], was on the road returning from another store at the time of the accident. Mr. B[Redacted] spoke with Mr. JQ[Redacted] about the accident after Claimant had left. Mr. JQ[Redacted] completed an Employer's First Report of Injury based on the information he received from Mr. B[Redacted]. The report described the accident as "The EE was in the back stock room pulling items off a pallet. [She] was found on the floor. [She] was unresponsive for approximately 20 seconds." Mr. JQ[Redacted] did not contact Claimant to discuss the accident.

12. Claimant was seen at the VA clinic in Pueblo the afternoon of February 1, 2022. He was referred to physical therapy and given temporary parts until the prosthesis could be fully repaired or replaced. In the meantime, the provider recommended Claimant limit any work duties involving standing and walking.

13. Claimant spoke to an adjuster with Insurer's TPA by telephone on February 2, 2022. The adjuster documented Claimant's description of the accident as: "Unloading the truck and the person prior who cut the wrap. He did not know wire[1] had wrapped around prosthetic. He fell with boxes and snapped knee joint and bruising of left hip." Claimant stated the VA was willing to treat his injuries, but the adjuster told Claimant "to hold at this time."

14. Claimant saw NP Brendon Madrid at Concentra on March 11, 2022. Based on documents completed at the initial appointment, the ALJ infers Concentra is a

[1] The term "wire" is probably a typographical error, as Claimant credibly testified he described plastic wrap rather than wire.

designated provider for Employer. When asked how the injury occurred, Claimant stated, "On 02/01/2022 was unloading a shipment when coworker took wrap off and then got caught up in [her] prosthesis [sic] leg. Fell with three boxes of auto parts and was knocked unconscious." Claimant reported ongoing injury-related symptoms including headaches, low back pain, and left wrist pain. Mr. Madrid took Claimant off work and made several referrals for evaluations and treatment.

15. Claimant saw Mr. Madrid again on April 18, 2022. Mr. Madrid maintained Claimant's work restrictions and scheduled a follow-up appointment after additional tests were completed.

16. Employer's store manager, JQ[Redacted], testified he observed Claimant fall on one prior occasion at work. Claimant actually started to fall but Mr. JQ[Redacted] caught her. Mr. JQ[Redacted] testified Claimant stated her prosthesis gave out. On rebuttal, Claimant testified her leg had become caught up on a floor mat, which caused the fall.

17. There was no persuasive evidence of another episode of Claimant's leg "giving out" or causing her to stumble or fall during her employment dating to May 6, 2021.

18. Employer's district manager, RC[Redacted], confirmed that Claimant's formal job duties include unpacking pallets of inventory. Because the only specific accommodations approved by HR were no lifting over 50 pounds and no ladders, Mr. RC[Redacted] "would expect [Claimant] to work truck other than 50 pounds and put things on ladders."

19. The persuasive evidence shows unloading pallets was a part of Claimant's job, notwithstanding the parties' disagreements about whether she "should" have been doing it or was "ordered" to do so.

20. Claimant proved the February 1, 2022 fall "arose out of" her employment. Claimant's description of the accident is generally credible. Specifically, the ALJ credits Claimant's testimony that a small piece of plastic wrap was on her prosthesis immediately after the accident. The credibility of Claimant's testimony is bolstered by her consistent description of being caught up in wrapping from the pallet of inventory, including to the adjuster the next day. Claimant's foot probably became tangled or she slipped on the plastic wrap, which caused her to fall. The ALJ by no means intends to suggest that Mr. B[Redacted]'s testimony was untruthful. Rather, the ALJ infers he simply did not notice the small piece of plastic wrap on Claimant's leg in the brief period while Claimant was lying on the floor and he was helping her up.

21. Respondents' argument that Claimant's fall was precipitated by a purely personal condition*, i.e.*, the defective prosthesis, is speculative and not probable based on the evidence presented.

22. Claimant proved the treatment provided by Brendon Madrid, NPC at Concentra was reasonably needed and authorized, including the April 18, 2022 appointment.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "course of employment" merely requires that an injury occur within the time and place limits of the employment and during an activity that had "some connection" with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The "arising out of" element is narrower, and requires a sufficient causal nexus between the injury and the job. An injury "arises out of" the employment when it originates in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is not essential that the claimant be performing an obligatory job function or an activity that provides a specific benefit to the employer at the time of the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Rather, the question is whether the activity "is sufficiently interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996).

The mere fact that a claimant suffers an injury at work does not automatically mean the injury "arose out of" their employment. *City of Brighton*, *supra*. When an injury is precipitated by a pre-existing, nonwork-related condition, the injury is only compensable if a "special hazard" of employment combines with the pre-existing condition to cause or increase the degree of injury. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Whether an injury arises out of and in the course of employment are questions of fact for the ALJ, based on the totality of circumstances. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

As found, Claimant proved the February 1, 2020 tissue accident "arose out of" her employment. Claimant's description of the accident is generally credible. Specifically, the ALJ credits Claimant's testimony that a small piece of plastic wrap was on her prosthesis immediately after the accident. The credibility of Claimant's testimony is bolstered by her consistent description of being caught up in wrapping from the load of inventory. Her foot probably became tangled or slipped on the plastic wrap, which caused her to fall. This is by no means intended to suggest that Mr. B[Redacted]'s testimony was untruthful. Rather, the ALJ infers he simply did not notice the small piece of plastic wrap on Claimant's leg in the brief period while Claimant was lying on the floor.

Respondents' theory that Claimant's fall was precipitated by a purely personal condition, *i.e.*, her prosthesis, is speculative and not probable based on the evidence presented. Accordingly, the "special hazard" rule is inapplicable.

B. Medical benefits

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of a compensable injury or occupational disease. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant proved the treatment received from Mr. Madrid at Concentra, including the April 18, 2022 office visit, was reasonably needed to cure and relieve the effects of the compensable injury. Mr. Madrid is also authorized, as Concentra is a designated provider for Employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits based for injuries sustained on February 1, 2022 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the April 18, 2022 office visit with Brendon Madrid, NP at Concentra.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 18, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period August 11, 2021 through March 15, 2022.

5. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 16, 2022 through May 4, 2022.

6. Whether Employer has demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

7. Whether Insurer is a proper party for Claimant's claim based upon the effective coverage date of the Workers' Compensation insurance policy with Employer.

8. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on August 10, 2021.

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Driver of medical marijuana. On July 27, 2021 Claimant suffered an infection in his right elbow and visited the emergency department. He underwent treatment for cellulitis, but was not diagnosed with any fracture. Claimant received an antibiotic in the form of cephalexin.

2. On August 10, 2021 Claimant planned to use a power washer to clean vans at Employer's warehouse in preparation for the following day's deliveries. Claimant remarked that he had to pull a cord to start the power washer. He commented that he has consistently had trouble starting the machine without assistance. Claimant pulled the cord

numerous times but could not start the equipment. On his final attempt he "gave a real big pull" and heard a loud pop in his right elbow.

3. Claimant mentioned the incident to a warehouse employee named Colin and went to the SCL Emergency Room for treatment. He was diagnosed with a closed fracture of the olecranon process of the right ulna. On August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021. He assigned restrictions of "no right arm work until cleared by ortho or work comp."

4. Claimant sent a text message to his manager JG[Redacted] stating that he had broken his elbow at work. He inquired whether Employer had Workers' Compensation insurance coverage. Mr. JG[Redacted] directed Claimant to contact Employer's Human Resources employee VD[Redacted] about the matter.

5. On August 11, 2021 Claimant reported his right elbow injury to Ms. VD[Redacted]. She directed him to Dee Jay Beach, D.O. at Colorado Occupational Medicine Physicians. Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. After a physical examination, Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He limited Claimant to modified duty work with no use of the right upper extremity. Dr. Beach recommended an MRI and referred Claimant to surgeon Lucas G. Schnell, D.O. for a consultation.

6. On August 11, 2021 Claimant also completed an Incident Report for Employer. He reported that he was pulling a cord to start a power washer in an attempt to clean his work van. As Claimant pulled the cord, he experienced a pop in his right elbow. The Incident Report specified that Claimant contacted Mr. JG[Redacted] and went to an emergency room for treatment.

7. On August 18, 2021 Claimant visited Dr. Schnell at the Center for Spine & Orthopedics. Dr. Schnell assigned restrictions of "desk work only." He ordered an MRI of Claimant's right elbow. On the following day, Dr. Beach concurred with the assigned work restrictions.

8. On August 21, 2021 Claimant underwent an MRI of his right elbow. The MRI revealed "complete to near complete detachment of the triceps tendon from its olecranon insertion with 4mm proximal retraction."

9. On August 23, 2021 Claimant visited Dr. Schnell for an examination. Dr. Schnell reviewed Claimant's MRI and conducted a physical examination. He diagnosed Claimant with a right complete distal triceps tendon insertion rupture. Dr. Schnell recommended surgery in the form of a left open distal triceps tendon repair. He prohibited Claimant from using his right arm until after surgical intervention.

10. On September 2, 2021 Dr. Beach noted that Dr. Schnell recommended surgical repair of Claimant's torn right triceps tendon. However, insurance had not authorized the surgery and was contesting the claim. Dr. Beach continued Claimant's

work restrictions of "computer/desk work only." He also directed Claimant to continue wearing a right arm sling.

11. On September 14, 2021 Insurer filed a Notice of Contest denying Claimant's Workers' Compensation claim. The denial was based on "pre-existing active condition same body part."

12. Claimant was unable to obtain coverage for the surgery recommended by Dr. Schnell. He thus procured Medicaid through the Colorado Department of Health Care Policy & Financing.

13. Subsequent to the Notice of Contest, Employer provided modified work for Claimant. However, Claimant explained that some of his duties exceeded the medical restrictions that essentially required desk work. Employer decreased Claimant's work hours.

14. On September 15, 2021 Dr. Beach advised Claimant to continue his current work restrictions. He noted there would be no follow-up appointments until Insurer approved the claim.

15. On November 2, 2021 Dr. Schnell performed an open distal triceps repair on Claimant's right upper extremity. Dr. Schnell noted that Claimant had suffered a work-related injury to his right elbow in August, 2021. An MRI had confirmed a small, full-thickness tear of the distal triceps.

16. On November 29, 2021 Claimant began receiving physical therapy through Select Physical Therapy for his right upper extremity. The notes reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow. He was assessed with a spontaneous rupture of other tendons of the right elbow. The record reveals that Claimant continued to undergo physical therapy through May 3, 2022. Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00.

17. On January 19, 2022 Dr. Schnell's assistant, Kandace Hudson, PA-C continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. On March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

18. On March 15, 2022 Employer terminated Claimant's employment. Employer explained that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

19. In response, Claimant explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked

that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant generally denied the truth of the allegations in Employer's Termination Letter and stated that he has not been pursued by any person from Coda with charges of sexual harassment.

20. Since his termination, Claimant has not sustained regular employment. He remarked that he is still limited by his right arm because it is less functional than it was before his work injury.

21. On May 4, 2022 Dr. Beach issued a closing report regarding Claimant's right elbow injury. Although he noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Dr. Beach also discharged Claimant from care and determined that he reached Maximum Medical Improvement (MMI) on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

22. Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his treatment. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totaled $6,725.83 as of August 16, 2022.

23. For the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an Average Weekly Wage (AWW) of $757.79.

24. For the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The period August 13, 2021 through March 11, 2022 totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Indemnity benefits of $5,216.38 at a TPD rate of 66.66% totals $3479.33.

25. Multiplying an AWW of $757.79 by the seven-week period from March 16, 2022 through May 4, 2022 yields a total of $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% equals $3538.12 for the period.

26. Workers' Compensation Program Manager for Insurer MC[Redacted] also testified at the hearing in this matter. He explained that the bulk of his job duties involve providing oversight of the Third-Party Administrators (TPA's) that handle Insurer's Workers' Compensation claims. Mr. MC[Redacted] remarked that Employer had a Workers' Compensation policy with Insurer for the period August 11, 2021 through August 11, 2022. However, no policy was in effect on Claimant's August 10, 2021 date of injury.

27. Based on a review of the policy number for the period August 11, 2021 through August 11, 2022, Mr. MC[Redacted] verified that Employer did not have a prior

Workers' Compensation insurance policy through Insurer. Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

28. Claimant has established that it is more probably true than not that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021. Claimant's testimony and the persuasive medical records reveal that Claimant injured his right elbow while working for Employer. Initially, Claimant credibly testified that on August 10, 2021 he was using a power washer to clean vans. He remarked that he had to pull a cord to start the power washer. After pulling the cord numerous times without starting the machine, he "gave a real big pull" and heard a loud pop in his right elbow.

29. On August 11, 2022 Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. On the same day, Claimant completed an Incident Report in which he stated that, while pulling a cord to start a power washer, he experienced a pop in his right elbow.

30. Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He recommended an MRI and referred Claimant to surgeon Dr. Schnell for further evaluation. Dr. Schnell diagnosed Claimant with a right complete distal triceps tendon insertion rupture and performed an open distal triceps repair on Claimant's right upper extremity. Subsequent notes from Select Physical Therapy reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow.

31. Based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right elbow injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right elbow injury at work on August 10, 2021.

32. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury. Claimant initially visited the SCL emergency room for medical treatment and was diagnosed with a closed fracture of the olecranon process of the right ulna. He subsequently obtained care through Dr. Beach and underwent right elbow surgery with Dr. Schnell. Because Claimant was unable to obtain coverage for the surgery

recommended by Dr. Schnell, he procured Medicaid through the Colorado Department of Health Care Policy & Financing. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. He subsequently received physical therapy from Select Physical Therapy for the period November 29, 2021 through May 3, 2022. Dr. Beach ultimately discharged Claimant from care and determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

33. Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his care. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totals $6,725.83 as of August 16, 2022. Moreover, Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00. The record reveals that all of Claimant's medical treatment for his right elbow injury was reasonable, necessary and related to the August 10, 2021 industrial incident. Employer is thus financially responsible for the payment of Claimant's medical expenses, including the outstanding lien from the Colorado Department of Health Care Policy & Financing and any balance due to Select Physical Therapy. Combining the outstanding lien and the Select physical therapy balance yields total medical payments due of $7,292.83.

34. Employer's wage records reflect that for the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an AWW of $757.79. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

35. Claimant has proven that it is more probably true than not that he is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The record reveals that Claimant was limited to modified duty after his August 10, 2021 work injury until his termination on March 15, 2022. Specifically, on August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021, but assigned restrictions of "no right arm work until cleared by ortho or work comp." On August 11, 2021 Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow and restricted him to modified duty work with no use of the right upper extremity. By September 2, 2021 Dr. Beach continued Claimant's work restrictions of "computer/desk work only." He also directed Claimant to continue to wear a right arm sling. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. By January 19, 2022 PA-C Hudson continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. Finally, on March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

36. For the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The record thus reveals that Claimant's work restrictions because of his right elbow injury decreased his ability to earn wages.

Claimant has established that his August 10, 2021 injury caused the disability and consequent partial wage loss. Accordingly, Claimant is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The period totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Claimant's indemnity benefits of $5,216.38 at a TPD rate of 66.66% total $3479.33.

37. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period March 16, 2022 through May 4, 2022. The record reveals that Claimant worked modified duty and earned reduced wages until he was terminated on March 15, 2021. Claimant explained that subsequent to the termination he has been unable to sustain regular employment. Notably, he is still limited by his right arm because it is less functional than it was before his August 10, 2021 work injury. The record thus reveals that Claimant's right elbow injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Although Dr. Beach issued a closing report on May 4, 2022 and noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Claimant's TTD benefits thus continued until Dr. Beach determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating. Claimant is entitled to TTD benefits for the period March 16, 2022 through May 4, 2022. The period totals 49 days or seven weeks. An AWW of $757.79 times seven weeks equals $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% total $3538.12.

38. Employer has failed to demonstrate it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Employer contends that Claimant is not entitled to receive TTD benefits because he was responsible for his March 15, 2022 termination from employment. Employer noted that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

39. in response to Employer's assertion, Claimant credibly explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant also stated that he has not been pursued by any person from Coda with charges of sexual harassment. Although Claimant acknowledged that he contacted a woman at Coda after business hours, the record reveals that he did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Employer has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period March 15, 2022 until he reached MMI on May 4, 2022.

40. Employer did not have an active Worker's Compensation insurance policy with Insurer effective on or prior to Claimant's August 10, 2021 date of injury. The Workers' Compensation policy obtained by Employer through Insurer became effective on August 11, 2021 or one day after Claimant's date of injury.

41. Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

42. The record reveals that Claimant's date of injury preceded the effective date of Employer's Workers' Compensation insurance coverage through Insurer. Claimant's August 10, 2021 injury is thus not subject to coverage under the policy. Insurer had no insurance relationship or contract with Employer that would properly warrant Insurer's inclusion in the present matter. As a result, Insurer is not a proper party to this claim and is dismissed with prejudice.

43. Employer was not insured on Claimant's August 10, 2021 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $3479.33 in TPD benefits and $3538.12 in TTD benefits. The total compensation awarded thus equals $7017.45. Twenty-five percent of $7017.45 is $1754.36. Accordingly, Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

44. This Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $7,292.83, indemnity benefits of $7,017.45, and penalties of $1,754.36, for total compensation of $16,064.64. Employer is thus required to pay the trustee of the Division a total amount of $16054.64. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has established by a preponderance of the evidence that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021. Claimant's testimony and the persuasive medical records reveal that Claimant injured his right elbow while working for Employer. Initially, Claimant credibly testified that on August 10, 2021 he was using a power washer to clean vans. He remarked that he had to pull a cord to start the power washer. After pulling the cord numerous times without starting the machine, he "gave a real big pull" and heard a loud pop in his right elbow.

8. As found, on August 11, 2022 Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. On the same day, Claimant completed an Incident Report in which he stated that, while pulling a cord to start a power washer, he experienced a pop in his right elbow.

9. As found, Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He recommended an MRI and referred Claimant to surgeon Dr. Schnell for further evaluation. Dr. Schnell diagnosed Claimant with a right complete distal triceps tendon insertion rupture and performed an open distal triceps repair on Claimant's right upper extremity. Subsequent notes from Select Physical Therapy reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow.

10. As found, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right elbow injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right elbow injury at work on August 10, 2021.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a

factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury. Claimant initially visited the SCL emergency room for medical treatment and was diagnosed with a closed fracture of the olecranon process of the right ulna. He subsequently obtained care through Dr. Beach and underwent right elbow surgery with Dr. Schnell. Because Claimant was unable to obtain coverage for the surgery recommended by Dr. Schnell, he procured Medicaid through the Colorado Department of Health Care Policy & Financing. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. He subsequently received physical therapy from Select Physical Therapy for the period November 29, 2021 through May 3, 2022. Dr. Beach ultimately discharged Claimant from care and determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

14. As found, Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his care. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totals $6,725.83 as of August 16, 2022. Moreover, Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00. The record reveals that all of Claimant's medical treatment for his right elbow injury was reasonable, necessary and related to the August 10, 2021 industrial incident. Employer is thus financially responsible for the payment of Claimant's medical expenses, including the outstanding lien from the Colorado Department of Health Care Policy & Financing and any balance due to Select Physical Therapy. Combining the outstanding lien and the Select physical therapy balance yields total medical payments due of $7,292.83.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the

injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82.

16. As found, Employer's wage records reflect that for the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an AWW of $757.79. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Partial Disability Benefits

17. Section 8-42-106(1), C.R.S. provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

18. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The record reveals that Claimant was limited to modified duty after his August 10, 2021 work injury until his termination on March 15, 2022. Specifically, on August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021, but assigned restrictions of "no right arm work until cleared by ortho or work comp." On August 11, 2021 Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow and restricted him to modified duty work with no use of the right upper extremity. By September 2, 2021 Dr. Beach continued Claimant's work restrictions of "computer/desk work only." He also directed Claimant to continue to wear a right arm

sling. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. By January 19, 2022 PA-C Hudson continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. Finally, on March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

19. As found, for the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The record thus reveals that Claimant's work restrictions because of his right elbow injury decreased his ability to earn wages. Claimant has established that his August 10, 2021 injury caused the disability and consequent partial wage loss. Accordingly, Claimant is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The period totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Claimant's indemnity benefits of $5,216.38 at a TPD rate of 66.66% total $3479.33.

Temporary Total Disability Benefits

20. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

21. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period March 16, 2022 through May 4, 2022. The record reveals that Claimant worked modified duty and earned reduced wages

until he was terminated on March 15, 2021. Claimant explained that subsequent to the termination he has been unable to sustain regular employment. Notably, he is still limited by his right arm because it is less functional than it was before his August 10, 2021 work injury. The record thus reveals that Claimant's right elbow injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Although Dr. Beach issued a closing report on May 4, 2022 and noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Claimant's TTD benefits thus continued until Dr. Beach determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating. Claimant is entitled to TTD benefits for the period March 16, 2022 through May 4, 2022. The period totals 49 days or seven weeks. An AWW of $757.79 times seven weeks equals $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% total $3538.12.

Responsible for Termination

22. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

23. As found, Employer has failed to demonstrate by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Employer contends that Claimant is not entitled to receive TTD benefits because he was responsible for his March 15, 2022 termination from employment. Employer noted that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

24. As found, in response to Employer's assertion, Claimant credibly explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant also stated that he has not been pursued by any person from Coda with charges of sexual harassment. Although Claimant acknowledged that he contacted a woman at Coda after business hours, the record reveals that he did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Employer has thus not proven by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits for the period March 15, 2022 until he reached MMI on May 4, 2022.

Insurance Coverage

25. Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. §8-44-101, C.R.S. As found, Employer did not have an active Worker's Compensation insurance policy with Insurer effective on or prior to Claimant's August 10, 2021 date of injury. The Workers' Compensation policy obtained by Employer through Insurer became effective on August 11, 2021 or one day after Claimant's date of injury.

26. As found, Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

27. As found, the record reveals that Claimant's date of injury preceded the effective date of Employer's Workers' Compensation insurance coverage through Insurer. Claimant's August 10, 2021 injury is thus not subject to coverage under the policy. Insurer had no insurance relationship or contract with Employer that would properly warrant Insurer's inclusion in the present matter. As a result, Insurer is not a proper party to this claim and is dismissed with prejudice.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

28. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective

July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant's August 10, 2021 injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

29. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

30. As found, Employer was not insured on Claimant's August 10, 2021 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $3479.33 in TPD benefits and $3538.12 in TTD benefits. The total compensation awarded thus equals $7017.45. Twenty-five percent of $7017.45 is $1754.36. Accordingly, Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

Payment to Trustee or Posting of Bond

31. Under §8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado."

32. As found, this Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $7,292.83, indemnity benefits of $7,017.45, and penalties of $1,754.36, for total compensation of $16,064.64. Employer is thus required to pay the trustee of the Division a total amount of $16054.64. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

1. Claimant suffered a compensable right elbow injury on August 10, 2021 during the course and scope of his employment with Employer.

2. Employer is financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his right elbow injury.

3. Claimant earned an AWW of $757.79.

4. Claimant shall receive TPD benefits for the period August 11, 2021 through March 15, 2022 in the amount of $3479.33.

5. Claimant shall receive TTD benefits for the period March 16, 2022 through May 4, 2022 in the amount of $3538.12.

6. Employer has failed to establish that Claimant was responsible for his termination from employment.

7. Insurer is not a proper party to the matter and is thus dismissed with prejudice.

8. Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

9. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $16054.64, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $16,054.64 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

12. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

13. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: November 18, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-867-720-002

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the medial branch blocks and the radiofrequency ablations (a/k/a rhizotomies) for his lumbar spine are reasonable, necessary, and related to his industrial injury.

II. Whether Claimant has proven by a preponderance of the evidence that the referrals for medical treatment for his posttraumatic nasal deformity, nasal obstruction, septal deviation, and breathing problems are reasonable, necessary, and related to his industrial injury.

III. Whether Claimant has proven by a preponderance of the evidence that the Botox injections to the TMJ area of his jaw are reasonable, necessary, and related to his industrial injury.

IV. Whether Claimant has established that he is entitled to his preferred nurse case manager.

STIPULATIONS

- Respondents agreed to authorize the right knee injections as recommended by Dr. Mason.[1]
- The parties stated at the beginning of the hearing that the feeding tube issue was not before the court. Therefore, the ALJ has not addressed that issue.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Claimant Assaulted and Sustained Numerous Injuries

1. On September 28, 2011, Claimant suffered a work-related accident in the form of an assault that resulted in numerous injuries. At the time of the assault, Claimant was providing security for Employer. On the night of the assault, there was a concern that one of the building alarms had not armed. As a result, Claimant went to investigate why the alarm was not arming. While investigating the problem, Claimant was attacked by an unknown person or persons and was severely beaten.

[1] Pursuant to Claimant's proposed order, the parties have reached an agreement regarding the knee injections.

2. Because of the assault, Claimant suffered fractures to multiple body parts, the most significant and severe injuries were to his face, nasal passages, jaw, and right knee. (Exhibit 2 #33). The fractures included the following:

    a. Right condylar fracture, right comminuted body mandibular fracture.

    b. Comminuted left angle fracture and left condylar fracture.

    c. Fracture of the right zygoma, LeFort fracture.

    d. Fracture of the left zygoma.

    e. Midline palatal fracture.

    f. Nasal septum fracture with deviation.

Ex. X, p. 18.

3. Due to his facial, nasal, and jaw injuries, Claimant has undergone multiple reconstructive surgeries to his jaw (including temporomandibular joint) (TMJ), mouth, face, and nasal area. (Ex. 4, p. 78 review of medical records Dr. Mason—outlining the multiple staged dental procedures that were being recommended)

4. Along with his facial, nasal, and jaw fractures, Claimant also suffered additional injuries, which included, but were not limited to, his hands, right knee, and back. He was diagnosed in the emergency room as suffering from:

    a. Right fifth metacarpophalangeal dislocation.

    b. Right fourth proximal PIP dislocation.

    c. Right patellar [kneecap] fracture.

    d. Left fifth metacarpal fracture.

    e. Bilateral lung contusion.

    f. Acute kidney injury.

    g. Abrasions to his back.

<u>Low Back / Medial Branch Blocks / Radiofrequency Ablations</u>

5. On September 28, 2011, while in the emergency room and being treated for multiple injuries, it was also noted that Claimant suffered trauma to his back which was evidenced by abrasions on his back. (Ex. 2, p. 2; Mason Dep. 23)

6. Due to his numerous injuries, which included a fractured kneecap, Claimant was not very mobile after the accident. (Mason Dep. 27)

7. As time went on, Claimant became more mobile. But due to his knee injury, Claimant was wearing a knee brace and using a cane, which caused him to walk with a limp. (Mason Dep. 27)

8. Once he became more mobile, his back injury started becoming more symptomatic.

9. Once Claimant began walking with a limp, the limping aggravated his lumbar facets and caused the facets, in his low back, to become more symptomatic and require medical treatment. (Mason Dep. 23, 27)

10. In January 2012, and due to ongoing back pain, Claimant was evaluated by Dr. Ladley O'Brien. Because of Claimant's ongoing back pain, Dr. O'Brien referred Claimant to a chiropractor. (Mason Dep. 9-10; Ex. 2, p. 35)

11. In February 2012, and due to continuing back pain, Dr. O'Brien ordered an MRI of Claimant's lumbar spine. The MRI showed some mild posterior disk bulging at L2-3, some mild disk bulging at L3-4, and disk protrusion toward the right with neuroforaminal narrowing at L4-5. (Mason Dep. 10; Ex. 4, p. 77)

12. In March 2012, it was noted that Claimant continued to walk with the assistance of a cane. (Ex. 4, p. 77)

13. Sometime in 2012, Dr. O'Brien referred Claimant to Dr. Kristen Mason and Claimant came under the care of Dr. Mason. (Ex. 2, p. 44)

14. In January 2013, Dr. Mason performed an initial evaluation. At this evaluation, Claimant complained of back pain as well as pain in his hip and knee. Claimant also marked those areas on his pain diagram. (Mason Dep. 9-10; Ex. 2, p. 35)

15. Dr. Mason ultimately diagnosed Claimant with facet arthropathy that had become symptomatic due to the assault and his altered gait. (Mason Dep. 27)

16. Due to his facet arthropathy, Dr. Mason referred Claimant for medial branch blocks.

17. In September 2014, Claimant underwent his first medial branch block, and then another one in December 2014, which reduced his back pain by 80%. The blocks were thus considered diagnostic. (Mason Dep. 25)

18. In January 2015, and due to the diagnostic response of the medial branch blocks, Claimant underwent a radiofrequency ablation. (Ex. 15, p. 555)

19. In April 2015, Dr. Mason noted Claimant's range of motion had improved since having the radiofrequency ablation. (Ex. 4, p. 209) Then, in May 2015, Dr. Mason noted that Claimant's lumbar back pain had decreased since having the radiofrequency ablation. (Ex. 4, p. 213) The benefits of the radiofrequency ablation lasted for approximately 15-18 months. Based on Claimant's response, Dr. Mason concluded he had excellent results from the procedure. (EX. 4, pp. 260, 267)

20. Sometime in 2015, Claimant stopped using a cane.

21. Around August 2016, the effects of the first radiofrequency ablation started to wear off. Therefore, Claimant underwent another radiofrequency ablation in August of 2016. (Ex. 4, p. 270) As before, the results of the radiofrequency ablation were good. (Ex. 4, p. 275) The benefits provided from this radiofrequency ablation lasted about 13 months. (Ex. 4, p. 284)

22. In October 2017, Claimant underwent another medial branch block and then another radiofrequency ablation in December 2017. (Ex. 5, p. 402). Like the prior radiofrequency ablations, the December 2017 procedure started wearing off about 15 months later, in Mach 2018.

23. In July 2019, Claimant underwent another medial branch block and then a radiofrequency ablation in September 2019. The results from the ablation were excellent. The ablation increased Claimant's lumbar range of motion and decreased his back pain. (Ex. 4, p. 331)

24. In June 2021, about 18 months after the last ablation, the effects from the procedure started to wear off. (Ex. 4, #358) In July and August 2021, Claimant underwent additional radiofrequency ablations. (Ex. 4, pp. 362, 364)

25. Around March or April 2022, Claimant thought that the last radiofrequency ablation was starting to wear off since he had increased back pain and decreased range of motion. (Ex. 4, pp. 378, 382) Due to his prior radiofrequency ablation wearing off, Dr. Mason referred Claimant back to Dr. Olsen for a repeat procedure.

26. On May 20, 2022, Respondents denied authorization for Dr. Olsen to see Claimant and repeat the radiofrequency ablation. (Ex. 4, p. 388)

27. Dr. Mason testified that the radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury. Dr. Mason testified that Claimant's facets in his low back were most likely injured during the assault and then aggravated by Claimant's altered gait. Dr. Mason also testified that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury because they have increased his range of motion-function- and decreased his pain.

28. The ALJ finds Dr. Mason's opinions about the need for the medial branch blocks and radiofrequency ablations to be credible and persuasive for many reasons. First, Dr. Mason's opinions are supported by the Claimant's statements to medical providers regarding his pain relief. For example, the decrease in pain and increased range of motion noted on examination supports a finding that the treatment is effective. Second, Dr. Mason's opinions are supported by the medical records. For example, Dr. Mason testified that Claimant has had good pain relief from the radiofrequency ablations, and the medical records support such a finding. Third, the Colorado Medical Treatment Guidelines support the use of radiofrequency ablations–but not exceeding twelve. To date, Claimant has only received about 5 radiofrequency ablations.

29. Dr. Fall also testified. Dr. Fall testified that she does not think Claimant's back injury relates to the assault or his altered gait. She also testified that even if his back condition were caused by his work injury, the radiofrequency ablations are still not reasonably necessary. Part of her opinion is based on her contention that Claimant did not have a diagnostic response to the medial branch blocks. But Dr. Mason credibly testified that Claimant did. The medical records also document that Claimant obtained substantial and sustained relief from the radiofrequency ablations. This relief included a decrease in back pain and an increase in his range of motion. Moreover, to the extent Claimant had sustained relief from the treatment, Dr. Fall wants to characterize the relief as a placebo effect, and not due to the treatment itself. Based on the medical records and opinions of Dr. Mason, such a rationale for the effectiveness of the past radiofrequency ablations seems to be an attempt to disregard evidence that goes against her ultimate conclusion. In other words, she seems to be

cherry-picking the data to support her opinion. As a result, the ALJ does not find the opinions of Dr. Fall to be persuasive.

30. The ALJ finds that Claimant suffered a back injury during the assault. The ALJ further finds that his back condition was aggravated by his altered gait that was caused by the work injury to his knee. The ALJ also finds that the initial back injury and aggravation have necessitated the need for medical treatment. Lastly, the ALJ finds that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work-related back injury.

Nasal Injury and Referral to a Specialist

31. When Claimant was assaulted, he suffered a nasal septum fracture with deviation that resulted in a nasal obstruction.

32. In May 2012, Claimant underwent a septoplasty to repair his posttraumatic nasal deformity, nasal obstruction, and septal deviation. (Ex. 4, p. 77)

33. In February 2013, Claimant presented to Dr. Alan Lipkin, an ENT, for his ongoing nasal obstruction problems that were present after his nasal septal reconstruction surgery. Dr. Lipkin recommended Claimant use nasal saline irrigation for the consequences of his work injury, which included Claimant's nasal obstruction. (Ex. 6, pp. 477-481)

34. In September 2013, Claimant presented to Dr. Jannuzzi. At this appointment, it was noted that there was obstruction involving Claimant's right sinus. But, at this appointment, it was not known whether the obstruction might be due to maxillary sinusitis or nasal intubation. (Ex. 3, p. 53)

35. As part of his treatment for his facial injuries, Claimant was prescribed a mouthguard. While using his mouthguard at night, Claimant noticed that he was having a lot of difficulty breathing through his nose.

36. In February 2022, Dr. Mason noted that Claimant was having problems breathing through his nose.

37. On April 15, 2022, Dr. Mason noted that Dr. Millam concluded that Claimant was suffering from some collapse of one of his nostrils. (Ex. 4, p. 382)

38. Other than the work-related assault, which caused a nasal septum fracture with deviation that resulted in nasal obstruction that required surgery, there is no credible evidence indicating Claimant has suffered any other nasal injuries since the assault.

39. Dr. Mason testified that she believes Claimant's current problem of breathing through his nose needs to be assessed by a specialist as part of his work injury because (1) Claimant had incurred significant trauma to his nose and face in the form of a nasal fracture, (2) he had reconstructive surgery, and (3) there does not seem to be a new and unique diagnosis.

40. The ALJ finds Dr. Mason's opinions about the need for a referral to a nasal specialist to be credible and persuasive. Her opinion is found credible and persuasive because it is consistent with, and supported by, Claimant's underlying medical records that demonstrate prior trauma to his nasal area, prior surgery to his nasal area, and a prior

collapse of his nasal area. The ALJ also finds her opinion credible because she is not saying that any nasal condition that he has will be work related, but that under the circumstances, it is reasonable to have Claimant assessed by an expert, or experts, as part of his workers' compensation claim. Had Claimant not suffered any trauma to his face or nasal area, then a referral to an expert would not be reasonably necessary to assess and treat Claimant from the effects of his work injury. But those are not the facts here.

41. Dr. Fall basically testified that because specific treatment has not been recommended for his nasal problems, there must not be a problem that requires treatment. But the issue is whether a referral and assessment by an expert, or experts, is reasonably necessary to assess Claimant's symptoms, determine whether they are work related, and then recommend treatment, if any. Therefore, Dr. Fall's contention that because no treatment or surgery has been recommended, without the assessment of an expert, puts the proverbial cart before the horse.

42. Dr. Fall also testified that due to the temporal relationship between Claimant's current breathing complaints and the initial assault, any condition is most likely not related. But Dr. Fall fails to acknowledge the limitations of her expertise. She is not an expert in nasal issues, but yet ventures out into that specialized area and renders an opinion that is beyond her expertise. It is as if she is missing the point as to what a qualified expert does. They apply their expertise to make an assessment that she cannot do, due to her lack of expertise in that field. As a result, the ALJ does not find her opinions about Claimant's lack of need for additional treatment in the form of an assessment, or assessments, to address his nasal complaints to be persuasive.

43. A referral to a nasal specialist has a reasonable prospect of defining the extent of Claimant's nasal condition that was caused by the assault and the extent of future treatment.

44. Based on the facts of this case, a referral to an expert, or experts, to assess Claimant's nasal and breathing complaints is reasonable and necessary medical treatment to treat Claimant from the effects of his work injury. Thus, the referral is reasonable and necessary medical treatment that is meant to cure and relieve Claimant from the effects of his work injury.

TMJ and Botox Injections

45. Because of the assault, Claimant sustained several facial injuries that included a broken jaw and injury to his TMJ. (Ex. 2, pp. 26, 40) At first, Claimant underwent various facial and jaw surgeries that resulted in his jaw being wired shut.

46. Then, on September 19, 2012, Claimant underwent surgery that was performed by Dr. Jannuzzi. The surgery included the removal of hardware as well as a left TMJ arthroplasty with an autogenous bone from his iliac crest, and exploration of his right parasymphysis fracture. (Ex. 3, p. 53)

47. On February 12, 2013, Claimant presented to Dr. Alan Lipkin and he found Claimant's TMJ deviated to the left and had limited mobility on the left. (Ex. 6, p. 479)

48. In March 2016, Claimant returned to Dr. Jannuzzi, the surgeon for the TMJ reconstruction surgery, to obtain an assessment for his ongoing left TMJ pain and facial pain. Dr. Jannuzzi concluded that from a surgical standpoint, Claimant was doing very well. But Dr. Jannuzzi explained to Claimant that the artificial TMJ will not function as a regular TMJ and that the difference in function will cause discomfort. The plan at that time included following Claimant as needed, as well as Claimant continuing with orthodontic care and dental care that included dental implants. (Ex. 3, pp. 58-60)

49. In June 2021, Claimant returned to Dr. Jannuzzi for a re-evaluation of his TMJ due to muscle spasm and pain regarding his TMJ. Then, Claimant's TMJ pain was 6/10 and he could not keep his mouth open wide enough to get his restorative dental work done. Therefore, to reduce Claimant's TMJ muscle spasm, increase his range of motion so he could open his mouth and continue with his dental treatment, and decrease his pain, Dr. Jannuzzi injected Botox into Claimant's superior masseter. (Ex. 3, pp. 62, 63)

50. In July 2021, Claimant returned to Dr. Mason. At this appointment, it was noted that the Botox was working significantly well and resulted in Claimant opening his mouth more and also improved his ability to bite and chew more efficiently. (Ex. 4, pp. 360, 362)

51. In December 2021, Claimant returned to Dr. Mason. At this appointment, it was noted that Dr. Waguespack, another dentist, was recommending repeating the Botox injections because he thought the recurring muscle spasm was causing Claimant's bite to not line up properly. Since it had been 6 months since his last Botox injection, and Botox injections typically last 90 days, Dr. Mason referred Claimant back to Dr. Jannuzzi for repeat Botox injections. (Ex. 4, p. 370)

52. At some point, the repeat Botox injections were denied. Then, in January 2022, Claimant returned to Dr. Mason. At this appointment, she concluded that the Botox injections were reasonably necessary to treat Claimant's jaw problems and she did not understand why the Botox injections were denied since Claimant needs the Botox to treat his TMJ. (Ex. 4, pp. 373, 376) Ultimately, in March 2022, the Botox injections were authorized, and Claimant had the injections. (Ex. 4, pp. 379, 386)

53. In April 2022, Dr. Mason stated that Claimant had been having the Botox injections about every 6-8 weeks, but they were no longer being authorized, despite the Botox injections helping "tremendously" with his left jaw and facial pain. (Ex. E, pp. 30, 31)

54. Claimant returned to Dr. Mason in May 2022. At this appointment it was noted that while the most recent Botox injections were not as helpful as the last ones, it did give Claimant about 75% pain relief but did not help entirely with his bite problems. (Ex. 4, p. 386)

55. Dr. Fall issued a report, dated April 28, 2022. In her report, she concluded that she did not find an indication for ongoing Botox injections. She did, however, indicate that "if there were an indication, clearly documented in the medical records and supported by evidence-based medicine, the Botox injections would be appropriate under maintenance care." (Ex. E, p. 42)

56. The ALJ finds that the medical records establish that the Botox injections reduce Claimant's TMJ/jaw pain and increase his range of motion. They also, to some extent, improve his bite. Therefore, the Botox injections relieved Claimant from the effects of his work injury.

57. Dr. Mason testified about the reasonableness and necessity of the Botox injections. She stated that Botox causes a temporary paralysis of the affected muscles, thereby reducing the spasm and pain. Thus, she concluded that the injections are reasonable and necessary because they reduced Claimant's spasm and associated pain coming from Claimant's TMJ and the muscles used for mastication. The ALJ finds Dr. Mason's opinions and conclusions to be credible and persuasive regarding the reasonableness and necessity of the Botox injections to treat Claimant from the effects of his work injury. Her opinion is found credible and persuasive because it is consistent with the underlying medical records, and Claimant's statements, that demonstrate Claimant gets pain relief and functional improvement from the Botox injections.

58. The ALJ does not find Dr. Fall's opinions about the Botox injections to be persuasive because the medical records document Claimant obtains consistent, albeit temporary, pain relief and increased jaw mobility from the Botox injections.

59. The ALJ finds that the Botox injections reduce Claimant's jaw pain and increase the function of his jaw by allowing him to open his mouth wider.

60. The ALJ finds that the Botox injections are reasonable and necessary medical treatment to cure and relieve Claimant from the effects of his work injury.

Claimant's Request for a Specific Medical Case Manager

61. Claimant has had a complicated course of medical treatment. There have been stops and starts with authorization issues of medical care throughout the claim. Early in the claim a medical case manager, Annette Carter, RN, was selected by the workers' compensation carrier and assigned to the claim. She assisted with the coordination and authorization of the complex medical authorizations, treatment, and payment issues that were needed to provide reasonable and necessary medical care as part of the claim. (Ex. 2, pp. 42, 44; Ex. 3, pp. 58, 61) (*See also* her written reports. Ex. 4)

62. From about 2012, through December 2021, Ms. Carter was the primary medical case manager for Claimant's care. As noted in the records, Ms. Carter started attending medical appointments with Claimant while he was treating at Denver Health in 2012. She also attended appointments with Claimant and Dr. Mason, over an approximate 8-year period. Besides attending appointments and managing care for Claimant with Dr. Mason, Ms. Carter also managed and coordinated care with Drs. O'Brien, Waguespack, Benson, Wells, Levine, Jannuzzi, and probably others.

63. Along with Ms. Carter being a medical case manager, Ms. Anita Solano, who is also an RN, also became a medical case manager and helped manage Claimant's care.

64. On January 13, 2022, Dr. Mason's office was advised that the longtime medical case manager, Ms. Carter, had been removed from Claimant's case by the workers' compensation adjuster. Dr. Mason requested the Insurer reconsider the decision. She

stated Claimant had an extremely complicated and prolonged course of care and was still not at MMI. She noted that there are several remaining items that need to be coordinated, such as the ENT evaluation and the finalization of his dental work. She also noted that her office was not equipped to assist him adequately with these needs. (Ex. 4, p. 375)

65. Dr. Mason stated that in November, she was projecting MMI in a three-month period, but was uncertain regarding MMI because of the authorization issues. She also said that Claimant would require nurse case management services from MMI through a structuring of maintenance care. Dr. Mason stated that Claimant had been through fluctuations in his depression and anxiety recently, and in the past had been severely depressed to the point of suicidality. She was concerned that his delicate emotional state would deteriorate substantially with the change and not to have the services of nurse case manager would delay MMI.

66. Dr. Mason, since the termination of the prior medical case managers, has advocated for the return and retention of the longtime nurse case managers (which were basically two people) because the long-term institutional knowledge of the claim, and the trust developed with Claimant over the period of the claim. According to Dr. Mason Claimant has trust and other issues, and Dr. Mason stated that their continuing involvement was necessary to assist her with obtaining referrals, authorization, and payment for the medical care that is necessary. (Mason Dep. p. 19)

67. The medical case managers over the period of the claim had developed a trusting relationship with Claimant. They helped coordinate Claimant's appointments, handled communication with the carrier and authorization issues for recommended medical care. The long-term and trusting relationship Claimant developed was with the two people that work for the same company. Because of the complexity of the claim, the time the claim had gone on and because of his emotional problems and psychologic state, which has always been somewhat fragile during the period of time Dr. Mason treated him, in Dr. Mason's opinion, required their specific continued involvement.

68. According to Dr. Mason, at a baseline, Claimant is not a very trusting person. Claimant has paranoia from time to time, most of it directed toward the insurance company. This is in addition to an ongoing concern that he still does not know who attacked him or why. So when Claimant does form therapeutic alliances, which he has with most of his providers, and develops a level of trust it is important to his recovery. Claimant had that trusting relationship with the prior nurse cases managers. She testified that he trusted them to act in his best interest. At this point in the claim, there is not any other nurse case manager that would be as beneficial for him because of that established relationship. (Mason Dep. 22)

69. Dr. Mason specifically conveyed that the identification of a different telephonic medical case manager who was an employee of the insurance company, which was suggested at one point, would just add a layer of complication and not be helpful. (Mason Dep. 20)

70. Dr. Mason testified that the case manager also helps her make sure that she has all the information from all the other providers, which does not always happen automatically. So it is a benefit to her to help provide medical care in a timely and

informed position. As a result, Dr. Mason believed that ongoing involvement of Case Med Solutions as nurse case manager are reasonable and necessary now. (Mason Dep. 20)

71. Dr. Mason testified that the services should be available to her and Claimant through MMI and after for a time period. She also concluded that after 11 years, the eventual end of active care will be difficult for Claimant psychologically. Claimant will have a lot of change imposed on him and the ongoing involvement will help ease that transition. She also stated that Claimant is someone who has had frequent suicidal ideations, severe depression, including mood swings, anger, and irritability. He does not have a good support system. As a result, she concluded that having somebody allied to assist with that transition to a less active phase of care would be beneficial and would probably save time, energy, and money that would be spent on other things if his depression and anxiety get any worse. (Mason Dep. 21; Mason Dep. Volume 2, 8)

72. The ALJ finds Dr. Mason's opinions regarding the need for a medical case manager to be credible and persuasive for many reasons. First, Claimant's injuries and need for treatment has been extensive. Second, Claimant's care is being provided by numerous providers and Claimant has established the need for someone to help manage his care with all of the providers involved. Third, the case managers involved in Claimant's case have helped Claimant obtain the treatment he needs for his work-related injuries.

73. The ALJ finds that the need for a specific medical case manager, Ms. Carter, or Ms. Solano, is reasonable and necessary for several reasons. First, because of the time spent managing Claimant's care, each nurse case manager has a significant amount of knowledge regarding Claimant's medical needs and the doctors involved. Second, Claimant has trust issues and is comfortable working with Ms. Carter or Ms. Solano. Third, Dr. Mason believes working with a new case manager would be difficult for Claimant psychologically.

74. The medical case managers here are providing administrative and communication functions designed to coordinate the medical treatment and insure proper care is being provided to Claimant.

75. Respondents have removed the prior medical case managers and replaced them by offering a new medical case manager. Respondents have therefore offered and provided medical case management, and continue to offer medical case management, by offering a medical case manager – of their choice – to help manage Claimant's care.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of Respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that the medial branch blocks and the radiofrequency ablations (a/k/a rhizotomies) for his lumbar spine are reasonable, necessary, and related to his industrial injury?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ finds and concludes that Claimant's lower back was injured during the assault, and that his back condition was aggravated and became more symptomatic, i.e., painful with limited range of motion, when he became more mobile and started walking with a limp shortly after the assault. The ALJ further finds and concludes that the back injury, and aggravation, necessitated the need for medical treatment, and Claimant has undergone various treatment for his back.

As also found, Claimant has undergone a number of medial branch blocks and radiofrequency ablations which have been beneficial. As found, the treatment has reduced Claimant's pain and increased his range of motion. But the benefit from each treatment has varied from approximately 12-18 months. Because the treatment is usually not permanent, the treatment must be repeated. In this case, Claimant has had about 5 radiofrequency ablations. As testified to by Dr. Mason, the Colorado Medical Treatment Guidelines suggest that radiofrequency ablations should be limited to 12 over a person's lifetime. At this time, Claimant has not had 12.

Dr. Mason credibly and persuasively testified that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury. Her opinion is supported by the underlying medical records, which document an injury to Claimant's back right after the assault, additional back pain due to his altered gait, combined with the relief each medial branch block and radiofrequency ablation has provided Claimant over the years.

The ALJ has also considered the opinions of Dr. Fall. Overall, the ALJ does not find Dr. Fall's opinions to be persuasive. Dr. Fall testified that she does not think Claimant's back injury relates to the assault or his altered gait. This is even though the emergency room records establish Claimant had abrasions on his back after the assault and was referred for chiropractic treatment after Claimant started walking and became more mobile after the assault. She also testified that even if his back condition were caused by his work injury, the radiofrequency ablations are still not reasonably necessary, in part, because she contends Claimant did not have a diagnostic response to the medial branch blocks. Her alternative theory is that any positive effect of the ablations is due to a placebo effect. As found above, the ALJ rejects such a conclusion and finds that portion of her opinion to be evidence of rejecting data that does not support her conclusions, i.e., cherry-picking. On the other hand, Dr. Mason credibly and persuasively testified that Claimant did have a diagnostic response to the medial branch blocks and the radio frequency ablations. The medical records also document that Claimant obtained substantial and sustained relief from the radiofrequency ablations. This relief included a decrease in back pain and an increase in his range of motion. As a result, the ALJ does not find the opinions of Dr. Fall to be persuasive.

Thus, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the medial branch blocks and radiofrequency ablations are reasonably necessary and related to treat Claimant from the effects of his work injury.

II. Whether Claimant has proven by a preponderance of the evidence that the referrals for medical treatment for his posttraumatic nasal deformity, nasal obstruction, septal deviation, and breathing problems are reasonable, necessary, and related to his industrial injury?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Moreover, the cases suggest that medical "treatment" encompasses both diagnostic and curative medical procedures. *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) ("The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury."); *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining Claimant's condition and suggesting further treatment).

Because of the assault, Claimant suffered significant facial trauma, which included a nasal septum fracture with deviation that resulted in a nasal obstruction.

As found, in May 2012, Claimant underwent a septoplasty to repair his posttraumatic nasal deformity, nasal obstruction, and septal deviation. In February 2013, Claimant presented to Dr. Alan Lipkin, an ENT, for his ongoing nasal obstruction problems that were present after his nasal septal reconstruction. At that time, Dr. Lipkin recommended Claimant use nasal saline irrigation for the consequences of his work injury, which included Claimant's nasal obstruction.

In September 2013, Claimant presented to Dr. Jannuzzi. At this appointment, it was noted that there was obstruction involving Claimant's right sinus. But, at this appointment, it was not known whether the obstruction was due to maxillary sinusitis or nasal intubation.

As part of his treatment for his facial injuries, Claimant was prescribed a mouthguard. While using his mouthguard at night, Claimant noticed that he was having a lot of difficulty breathing through his nose and brought it up with Dr. Mason in February 2022. Soon after, in April 2022, Dr. Mason noted that Dr. Millam concluded that Claimant was suffering from some collapse of one of his nostrils.

Other than the work-related assault, which resulted in a nasal septum fracture with deviation, and a nasal obstruction that required surgery, there is no credible evidence that Claimant has suffered any other nasal injuries since the assault.

Moreover, Dr. Mason testified that she believes Claimant's current problem of breathing through his nose and need for an assessment is because (1) Claimant incurred significant trauma to his nose and face in the form of a nasal fracture, (2) he had reconstructive surgery, and (3) there does not seem to be a new and unique diagnosis.

The ALJ finds Dr. Mason's opinions regarding causation of Claimant's nasal problems and need for a referral to a specialist to be credible and persuasive. Her opinion is found credible and persuasive because it is consistent with, and supported by, Claimant's underlying medical records that demonstrate prior trauma to his nasal area, prior surgery to his nasal area, and a prior collapse of his nasal area.

The ALJ has considered Dr. Fall's opinion. Her opinion is basically that too much time has elapsed from the date of injury for any nasal problems to be related. But she is not an expert in these matters. Moreover, her opinion is inconsistent with Claimant's underlying medical records that demonstrate trauma to his nasal passage, collapse to his nasal passage, and surgery.

As found, a referral to a nasal specialist, or specialists, has a reasonable prospect for defining the extent of Claimant's nasal condition and the extent of future treatment that is needed due to the assault. As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the need for medical treatment from a nasal specialist, or specialists, to evaluate Claimant's nasal breathing problems is reasonably necessary and related to his work injury.

III. Whether Claimant has proven by a preponderance of the evidence that the Botox injections to the TMJ area of the jaw are reasonable, necessary, and related to his industrial injury?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, the assault fractured Claimant's jaw and damaged his left TMJ. As a result, Claimant underwent a left TMJ arthroplasty in 2012. Due to his injuries, and the TMJ surgery, Claimant has developed muscle spasms involving his TMJ. The muscle spasms reduce his range of motion, i.e., ability to open his mouth, and also cause facial pain.

As found, the Botox injections reduce Claimant's pain and increase his range of motion. As a result, the Botox injections relieve Claimant from the effects of his work injury.

Dr. Mason testified about the reasonableness and necessity of the Botox injections. She stated that Botox causes a temporary paralysis of the affected muscles, thereby reducing the spasm and pain. Thus, she concluded that the injections are reasonable and necessary because they reduced Claimant's spasm and associated pain coming from Claimant's TMJ and the muscles used for mastication. The ALJ finds Dr. Mason's opinions and conclusions to be credible and persuasive regarding the reasonableness and necessity of the Botox injections to treat Claimant from the effects of his work injury. Her opinion is found credible and persuasive because it is consistent with the underlying medical records that demonstrate Claimant gets temporary pain relief and functional improvement from the injections.

Dr. Fall, in her April 28, 2022, report concluded that she did not find an indication for ongoing Botox injections. But the ALJ found that the Botox injections reduced Claimant's pain and increased his function. Therefore, the ALJ rejects Dr. Fall's opinion that the Botox injections are not reasonable and necessary.

The ALJ finds and concludes that Claimant established by a preponderance of the evidence that the Botox injections are reasonable and necessary to treat Claimant from the effects of his work injury.

IV. Whether Claimant has established that he is entitled to his preferred nurse case manager?

The Act requires that Respondents offer medical case management. "Every employer or its insurance carrier shall offer at least managed care or medical case management…" § 8-42-101(3.6)(p)(II). The Act defines case management as "a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." § 8-42-101(3.6)(p)(A).

> It is now well established that the term "shall" refers to a mandatory act. *Salazar v. Industrial Claim Appeals Office*, 10 P.3d 666 (Colo. App. 2000). Further, the term "assign" is defined in Webster's II New College Dictionary, (1995) as the action of selecting, appointing and designating. Thus, by its plain language § 8-42-101(3.6)(p)(I)(A) requires the insurer to select the case manager.

Muir v King Soopers, W.C. No. 4-350-892, 4-5 (May 23, 2003).

Respondents fulfilled the requirements by selecting and assigning a new case manager. The Act does not require the same or preferred case manager, but only a "person" who is "knowledgeable in workers' compensation health care." Pursuant to the Workers' Compensation Guide, this could be '"a highly skilled nurse who specializes in managing workers' compensation injuries, whether it is a catastrophic injury or an injury that requires surgery." Workers' Compensation Guide § 2:14, Westlaw (database updated Apr. 2018)." *Macaulay v. Villegas*, 6 (Colo. App. April 7, 2022).

Respondents possess exclusive authority to designate the case manager who will be providing medical case management. Respondents are not required to assign Claimant's preferred or requested case manager. Instead, Claimant's recourse is his right to refuse the presence of a case manager at the Claimant's medical appointment. § 8-43-203(3)(b)(IV).

Moreover, as set forth in *Muir*:

> § 8-42-101(3.6)(p) contains no such procedure whereby the Claimant may seek the services of a case manager other than the one selected by the respondent, and we may not read non-existent provisions into the statute. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000). Under these circumstances we are compelled to conclude the General Assembly intended to vest

> the respondent with the exclusive authority to designate the person to provide case management services.

Muir v King Soopers, W.C. No. 4-350-892, 6 (May 23, 2003).

Respondents are not required to designate requested nurse case managers, even if recommended by an authorized medical provider:

> Relying on the decision in *Muir v King Soopers*, W.C. No. 4-350-892 (May 23, 2003), the ALJ concluded the statute specified 'case management' is to be a system "developed by the insurance carrier" and the insurance carrier "shall assign" the person to fulfill that role. A recommendation by a medical provider had no significance in that regard.

April Tatman v. Morgan County, W.C. No. 5-090-379 (September 8, 2022).

Likewise, nurse case management is not a medical benefit. Thus, a medical provider's opinion that only specific nurse case managers are reasonable, necessary, and related, is irrelevant as to who selects the Nurse Case Manager:

> Accordingly, the services of a case manager that are interchangeable with those of the guardian described in *Nanez*, would fail to qualify as a medical benefit…The ALJ's finding the recommendation of [requested nurse case manager] to be reasonable and necessary notwithstanding, we find the ALJ's determination he is without authority to authorize a case management provider does not represent error.

April Tatman v. Morgan County, W.C. No. 5-090-379 (September 8, 2022).

Claimant contends that the analogy of the designation in the first instance of a nurse case manager resembles the designation of an authorized treating physician in the first instance. Once a specific treating physician is authorized, there is no way for the Respondents to deauthorize that specific treating physician, unless done through a utilization process. Thus, Claimant contends that once a case manager is authorized, there is no way for Respondents to deauthorize the case manager. See *Granger v. Penrose Hosp.*, W.C. No. 4-351-885 (July 20, 1999); *Chapman v. The Spectranetics Corp*., W.C. No. 4-162-568 (May 30, 1997).

But based on a review of the statute, the ALJ does not concur that the analogy is appropriate. The Act requires the insurer to offer "medical case management." The Act then defines "case management" as "a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." Section 8-42-101(3.6)(p)(A).

A strict reading of the relevant statutory provisions leads this ALJ to conclude that the provision of "medical case management" is not the provision of medical treatment. Thus, the fact that a nurse, RN, is providing medical case management does not convert the medical case management service into medical treatment. The benefit at issue is "medical case management" and the insurer only has to provide a person who is

"knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." Thus, a person who is knowledgeable in workers' compensation health care could be an adjuster. Thus, merely assigning the task to a nurse, or even a physician, does not convert the medical case management service, an administrative function, into medical treatment governed by the same statutes and laws regarding the authorization of a physician. In other words, it is the type of service being provided pursuant to statute that dictates who gets to control the provision of that service, and not the type of person providing the service.

The ALJ is mindful that changing the medical case manager might result in consequences that are medical in nature. For example, a new medical case manager might cause Claimant to need additional medical treatment due to increased anxiety or depression. But again, the consequence of changing the medical case manager does not change the administrative, and non-medical, nature of the service being provided under the statute.

As a result, the ALJ finds and concludes that Respondents fulfilled their obligation by first offering and assigning case managers, who were nurses, at the beginning of the claim. Then, Respondents exercised their right to select a new medical case manager and assigning that new nurse case manager to Claimant. Claimant's statutorily granted recourse, if he was dissatisfied with the selected medical case manager, is to exercise his right of refusal. Claimant does not have the right pursuant to statute or case law to select a specific medical case manager of his choice. Moreover, pursuant to statute and case law, Respondents' liability does not require Respondents to accommodate Claimant's request for a prior medical case manager.

Claimant has thus failed to establish that he is entitled to ongoing medical case management services with a specific, or prior, case manager of his choosing.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay for reasonable and necessary medical treatment for Claimant's low back, which shall include medial branch blocks and radiofrequency ablations.
2. Respondents shall pay for Claimant to undergo Botox injections to treat Claimant's facial injuries, which includes the area involving his TMJ.
3. Respondents shall pay for the referrals for Claimant to be evaluated by a specialist, or specialists, to evaluate Claimant's nasal and breathing problems.
4. Claimant is not entitled to his preferred nurse case manager, even if it is a prior case manager.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2022

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on February 12, 2022.

2. On April 16, 2022, Respondents filed an Amended General Admission of Liability admitting for medical benefits and temporary total disability (TTD) benefits from February 13, 2022 through March 18, 2022 (4 6/7 weeks). Respondents admitted for an AWW of $304.20 at a TTD rate of $202.80, totaling $985.03 of TTD paid to Claimant. Respondents admitted AWW was based on the wages of a different employee.

3. Claimant's paystubs demonstrate that she earned the following wages during the following pay periods leading up to her work injury.

Pay Period	Gross Wages
11/5/2021-11/18/2021	$869.26
11/19/2021-12/2/2021	$922.72
12/3/2021-12/16/2021	$872.80
12/17/2021-12/30/2021	$1,083.68
12/31/2021-1/13/2022	$952.96
1/14/2022-1/27/2022	$283.52
1/28/2022-2/10/2022	$548.16
Total:	**$5,533.10**

4. Based on the above gross wages, Claimant's AWW is $395.22 ($5,533.10 divided by 14 weeks = $395.22). The corresponding TTD rate with an AWW of $395.22 is $263.48 ($395.22 multiplied by 66 2/3 = $263.48). A TTD rate of $263.48 multiplied by 4 4/7 weeks = $1,279.76.

5. Based on Claimant's AWW, Claimant is owed $294.73 in TTD ($1,279.76 minus $985.03).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and

medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

Claimant's paystubs provide an accurate basis for determining Claimant's actual gross earnings leading up to her work injury. As found, an AWW of $395.22, based on the average of Claimant's gross wages in the 14 weeks prior to her industrial injury, is a fair approximation of Claimant's wage loss and diminished earning capacity. As Respondents paid Claimant TTD based on a lower AWW ($304.20) and, thus, lower TTD rate ($202.80), Claimant is owed TTD in the amount of $294.73, per the calculations set forth in Findings of Fact #4-5.

ORDER

It is therefore ordered that:

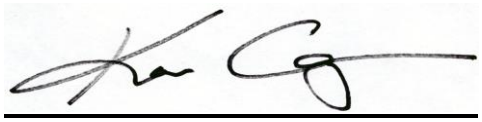
1. Claimant's AWW is $395.22, with a corresponding TTD rate of $263.48.

2. Respondents shall pay Claimant $294.73 in TTD owed to Claimant, based on Claimant's AWW and corresponding TTD rate determined herein.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is an employee of Respondent pursuant to a contract of hire.

II. Whether Claimant proved by a preponderance of the evidence she sustained a compensable industrial injury arising out of and in the course of her employment.

III. Whether Claimant proved by a preponderance of the evidence she and/or her health insurance carrier is entitled to reimbursement of reasonable, necessary and related medical expenses.

FINDINGS OF FACT

1. Claimant is 64 years of age. Claimant retired from her last paid employment approximately 15 years ago.

2. Respondent is a food bank serving southern Colorado.

3. Claimant credibly testified at hearing. She testified that she had personally been using the services of Respondent, then subsequently decided to volunteer for Respondent at a particular market.

4. Claimant provided volunteer services for Respondent beginning in approximately May 2021. Initially, there was no particular onboarding process for Claimant as a volunteer. Respondent subsequently required volunteers to complete volunteer paperwork online, including a "Volunteer Waiver and Release of Liability" form. The form repeatedly and solely refers to the signatory as a "Volunteer." The form states, in part,

> 1. Release and Waiver. Volunteer does hereby release and forever discharge and hold harmless [Respondent] and its successors and assigns from any and all liability, claims, and demands of whatever kind or nature, either in law or equity, which arise or may hereafter arise from Volunteer's activities with [Respondent]. Volunteer understands that that this release discharges [Respondent] from any liability or claim with respect to any bodily injury, personal injury, illness, death, or property damage that may result from the Volunteer's activities. Volunteer understands that [Respondent] does not assume any responsibility for or obligation to provide financial assistance or

other assistance, including but not limited to medical, health, or disability insurance in the event of injury or illness.

2. Medical Treatment. Volunteer does hereby release and forever discharge [Respondent] from any claim whatsoever which arises or may hereafter arise on account of any first aid, treatment, or services rendered in connection with the Volunteer's activities with [Respondent].

3. Assumption of the Risk. The Volunteer understands that the activities/work may be hazardous to the Volunteer, including, but not limited to lifting, loading and unloading, and other warehouse activities. Volunteer hereby expressly and specifically assumes the risk of injury or harm and releases [Respondent].

(R. Ex. L, p. 82).

Claimant testified that she did not specifically remember completing the form, although she remembered going online to fill out documentation. She acknowledged that the electronic signature on the form (her email address) dated June 28, 2021 was her correct information.

5. Claimant did not receive, nor was there any agreement between the parties that Claimant was to receive, any type of remuneration for her volunteer services. Claimant was not paid any wages and did not receive any fringe benefits for her volunteer services.

6. Claimant had access to free groceries at the market as did non-volunteer individuals. Claimant testified that, as a volunteer, she was able to for groceries at the market after her volunteer shift, resulting in her having first pick at the best foods on display. She further testified that, as a volunteer, the market did not watch her for food limits as they did for non-volunteers.

7. Claimant chose how many hours she wanted to volunteer per week, and signed up for the desired volunteer shift online. Claimant typically performed her volunteer services for 1-3 hours per week.

8. Claimant was supervised by Respondent's Market Manager, RS[Redacted]. As the Market Manager, Ms. RS[Redacted] was responsible, in part, for instructing the volunteers as to the tasks to be performed and overseeing the work of the volunteers. Claimant testified that she would arrive for her volunteer duty and be assigned a task, such as loading or unloading a pallet, cleaning the bathroom, or checking the refrigerator. Claimant testified that she was required to take directions from RS[Redacted] on what tasks to do and how to do them. Claimant testified that she would be reprimanded by RS[Redacted] if she did not do her work task according to RS[Redacted]'s standards. Claimant testified that RS[Redacted] was in control of her work tasks while she was at the market. Claimant testified that RS[Redacted] had the

authority to terminate volunteer employment, did terminate another volunteer in Claimant's presence on one occasion.

9. Claimant alleges she sustained an industrial injury while performing services for Respondent on November 4, 2021. Claimant testified that she was assigned to unload a pallet of Thanksgiving canned food, then stock the leftover boxes in the storage room. She testified that while performing this task she felt a back spasm in her shoulder blades.

10. Claimant testified that she did not immediately seek medical treatment and instead obtained a back brace on her own. Claimant testified that she contacted her rheumatologist, who prescribed her a course of steroids, which did not improve Claimant's symptoms. Claimant testified that she subsequently sought additional medical treatment when the pain worsened to the point she was having difficulties with mobility and performing activities of daily living.

11. Claimant presented to the emergency department at Parkview Medical Center on November 15, 2021 with complaints of low back pain radiating into her left buttock and throughout the entirety of her right leg. Claimant underwent a CT of the lumbar spine, for which Charles Westin, M.D. noted revealed acute fractures of the sacrum and no acute fracture or traumatic subluxation of the lumbar spine. It was suspected that osteoporosis likely contributed and there was a possible insufficiency fracture. CT imagining was also suggestive of neuroforaminal narrowing and spinal stenosis.

12. On November 16, 2021 Claimant underwent a neurosurgical consultation at Parkview Medical Center with Ali K. Murad, M.D. and Thomas J. Scruton, P.A. Claimant reported that her symptoms began after lifting some heavy boxes when she was volunteering about two weeks prior. Claimant reported that she experienced lower back pain at the time that evolved to radiating pain in the left buttock and right lower extremity. Dr. Murad noted that evaluation demonstrated lumbar degeneration, particularly at L4-5, and sacral fractures. He further noted that Claimant's past medical history was notable for osteoporosis, rheumatoid arthritis, and peripheral neuropathy. Dr. Murad gave the following assessment: Right L5 radiculopathy of unclear etiology; L4-5 changes on CT: Degenerative, infectious or autoimmune (very unlikely) differential; sacral insufficiency fractures; suspect severe osteoporosis; rheumatoid arthritis on leflunomide; peripheral neuropathy." (R. Ex. H, p. 36).

13. Claimant underwent a lumbar spine MRI on November 17, 2021 which revealed moderate central spinal stenosis L4-5; extensive degenerative disc disease with evidence of small posterior annual tear of L4-5 discs; mild grade 1 anterolisthesis of S1 upon S2 and slight anterior angulation of S1 with compression fracture of S1, with no evidence of cord or nerve root compression. PA Scruton documented, "Patient with acute minimally displaced fractures of the bilateral sacral alae likely insufficiency in setting of osteoporosis, no reported trauma. Likely secondary to chronic osteoporosis." (Cl. Ex. 000018.) PA Scruton noted, "She thinks her sacral fractures may actually be quit old and associated with a sacrococcygeal fracture she sustained in her 20s.

Notably she had no pain in palpation/percussion of the sacrum on exam yesterday. She has no lower back pain at this time." (Id. at p. 39).

14. Claimant underwent epidural steroid injections on November 19, 2021 from which she reported significant benefit. It was noted that Claimant's fractures appeared subacute versus chronic in nature. No surgical intervention was recommended at the time.

15. On November 29, 2021 Claimant presented to Eric Bernauer, M.D. at Physician Anesthesia of Pueblo. She reported that she experienced signification relief from the epidural steroid injection but continued to experience some persistent pain.

16. On January 26, 2022, Claimant returned to the emergency department at Parkview Medical Center after falling on pavement and fracturing her nose. She reported that she had been experiencing numbness in her right leg since November 2021, which resulted in occasional falls.

17. Claimant returned to performing her volunteer services for Respondent in approximately mid-January 2022 and continued to volunteer for Respondent for approximately 1-2 hours per week until April 21, 2022.

18. On April 25, 2022, SW[Redacted], Direct Services Manager, emailed Claimant and requested that she cease her volunteer work with Respondent until she resolved her legal matters (the alleged work injury).

19. Claimant testified that, despite referring to herself as a volunteer in correspondence with Respondent, she "feels like" she was an employee of Respondent due to the "setup."

20. Claimant further testified that, prior to the incident on November 4, 2021, she did not have prior back issues or difficulties performing activities of daily living. She testified that she continues to experience weakness in her right leg and tingling in her toes. Claimant testified that she cannot bend like she used to, has difficulties on inclines, and walks with a cane. Claimant stated that she has received medical bills in excess of $50,000. Claimant has private health insurance. Claimant testified that her doctors have recommended surgery for her back injury.

21. Mr. SW[Redacted] credibly testified at hearing on behalf of Respondent. Mr. SW[Redacted] testified that volunteers go online to sign up and sign a waiver. Mr. SW[Redacted] testified that volunteers are not paid or compensated in any manner, nor are they provided any fringe benefits. He further testified that there are managers who oversee the volunteers. Mr. SW[Redacted] explained that volunteers are given food safety training, while employees are provided additional training not given to volunteers. He testified that volunteers are not given any preferential access to the groceries offered at the market.

22. ZE[Redacted], Chief Financial Officer, credibly testified at hearing on behalf of Respondent. Mr. ZE[Redacted] testified that volunteers do not receive any wages,

benefits or other form of compensation. He explained that there is an onboarding, but no hiring process, for volunteers. Mr. ZE[Redacted] testified that volunteers dictate the number of hours they work. He further testified that Respondent does not carry workers' compensation insurance for volunteers.

23. Claimant failed to prove it is more probably true than not a contract of hire existed between Claimant and Respondent. Accordingly, there was no employer-employee relationship subjecting the parties to the provisions of the Act.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Employer-Employee Relationship

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." §8-40-203(1)(b), C.R.S. The term "employee" is defined as any person in the service of any person or corporation "under any contract of hire, express or implied." §8-40-202(1)(b), C.R.S.

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, WC 4-853-602 (ICAO, July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966); *In re Ritthaler*, WC 4-905-302-02 (ICAO, May 7, 2014).

Claimant argues that she was an employee of Respondent pursuant to an implied contract to perform work. She contends that the volunteer "hiring process" and the Volunteer Waiver and Release of Liability constitute a contract for hire as an agreement between parties regarding Claimant's services, containing mutual agreements and obligations between the parties.

As found, the preponderant evidence does not establish that an express or implied contract of hire existed between Claimant and Respondent. Respondent- had all volunteers execute the Volunteer Waiver and Release of Liability form, which specifically refers to claimant therein as a volunteer and does not contain any provision regarding any remuneration. That the waiver addresses some obligations on behalf of the volunteer (i.e. release of liability) does not constitute a contract for *hire*. Neither the waiver, nor the nature of the volunteer relationship between Claimant and Respondent, indicate there was any mutual agreement or meeting of the minds that Claimant would be providing services for remuneration.

Claimant strictly performed services for Respondent in a volunteer capacity without receiving, or any agreement to receive, remuneration. As a volunteer, Claimant had the ability to shop for groceries at the market just as other non-volunteer members of the community did. Mr. SW[Redacted] credibly testified that volunteers are not compensated in any manner, not provided any fringe benefits, and are not given any preferential treatment with respect to access to the groceries. That Claimant may have been able to pick her groceries first by virtue of being present in the market earlier than others due to her chosen volunteer shift, or that the market did not strictly enforce food limits, does not in these circumstances constitute remuneration sufficient to establish a contract of hire. There is no evidence Claimant volunteered with the expectation of remuneration. *See Aspen Highlands Skiing Corp. v. Apostolou*, 854 P.2d 1357 (Colo. App 1992), *aff'd*, 866 P.2d 1384 (Colo. 1994) (where the court, citing *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), noted that if the services are volunteered without any expectation of compensation in return, the fact that the alleged employer may provide some benefit on a gratuitous basis will not convert a volunteer into an employee). The evidence demonstrates Claimant provided services for Respondent solely as a volunteer. Claimant understood and acknowledged that she was a volunteer and Respondent did not obligate itself to provide any compensation or other benefit to Claimant in return for Claimant's volunteer services.

Claimant further argues that she was an employee because she was under direction and control of Respondent, who also had the right to terminate the relationship without liability. These factors are relevant to the determination of whether Claimant was an employee or independent contractor. See §8-40-202(2)(a) & (b), C.R.S. (any individual who performs services for pay for another shall be deemed to be an employee unless the person is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent business related to the service performed). An analysis of whether Claimant was an employee or independent contractor occurs when it has first been established that there was an employer-employee relationship subjecting the parties to the provisions of the Act. As the ALJ determined herein that Claimant was not performing services for pay and there was no contract of hire, the distinction between employee and independent contractor, as well as determination of whether any injury arose out of and in the scope of employment, are moot.

ORDER

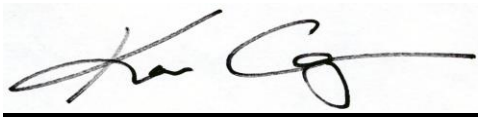
It is therefore ordered that:

1. Claimant's claim is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-142-174-003

ISSUE

- Did Claimant prove entitlement to medical benefits for treatment to his groin and hips are due to his admitted work related back injury?

FINDINGS OF FACT

1. Claimant works for Employer as a mechanic. He sustained an admitted low back injury on February 24, 2020. He injured himself using a 3" pipe lever to straighten a bent snowplow mount.

2. He treated with Dr. Lakin who referred him for x-rays and a MRI scan. The MRI scan showed L4-5 stenosis and degenerative disc disease. Dr. Lakin treated him with medications and returned him to light duty. He was referred to Dr. Sparr for back injections.

3. After conservative care did not help, he was seen in August 2020 by Dr. Kang who recommended consideration of an anterior lumbar interbody fusion at L4-5.

4. An IME was performed by Dr. Elfenbein on October 8, 2020 and he indicated that the pain generator was his right hip osteoarthritis. He indicated that this needed to be addressed before any further treatment for Claimant's lumbar spine.

5. The Claimant was referred by Dr. Sparr to Dr. Miner for evaluation of his hip. Claimant saw Dr. Miner on November 11, 2020. Dr. Miner diagnosed bilateral advanced hip osteoarthritis and recommended bilateral hip arthroplasty. He also noted in the history that the pain was isolated to the bilateral groin region. On December 10, 2020, he underwent bilateral total hip arthroplasty with Dr. Miner. Following the surgery, Dr. Miner noted on January 20, 2021 that Claimant's hip and groin pain had resolved.

6. Claimant returned to Dr. Miner on March 8, 2021. In his chart note, he states "Unfortunately patient sustained a large femoral DVT approximately 2 weeks ago . . . He states that he started developing symptoms in the groin 2 weeks prior to the clot itself and then noticed increasing leg swelling he called our office and we informed him to go to the emergency room for an evaluation and ultrasound." (Respondents Exhibit D-14 – 15). Dr. Miner questioned whether the pain was due to the DVT or psoas tendonitis. Dr. Miner evaluated Claimant virtually on April 12, 2021 and Claimant reported that his preoperative groin and thigh pain had essentially resolved.

7. The Claimant continued to have low back pain and he eventually underwent an anterior lumbar interbody fusion on May 27, 2021 with Dr. Kang.

8. Claimant's authorized treating provider for his occupational injury is Dr. George Johnson. He reported in his May 10, 2022 chart note that Claimant "had some PT following the surgery but discontinued due to his L groin pain which has been present since the surgery." Dr. Johnson stated Claimant needed additional work up for the left groin pain as it was uncertain if the current condition was due to the non-work related hip condition or his work related low back. (Respondents' Exhibit B page 2). Without explanation or new medical evidence to support his conclusions, Dr. Johnson stated in his July 14, 2022 report that it was his professional opinion "that Claimant's groin pain is due to his back surgery and, as it did not start until he had his back surgery, it should be covered by work comp.". (Claimant's Exhibit 4, page 35).

9. On June 13, 2022, Claimant was evaluated at UC Health by Dr. Finn. Dr. Finn stated that Claimant presented for ongoing left groin pain that began 6 days after the ALIF procedure. Dr. Finn opined that "His pain is somewhat atypical." Dr. Finn further stated "I do not know this is the result of the L4-5 fusion. It certainly would be an unusual result that I have not seen before." (Respondents' Exhibit E page 1)

10. Claimant was seen at UC Health by Andrew Donovan, MD (Resident) Neurological Surgery. Claimant had been evaluated post ALIF surgery with worsening left groin pain. The pain would shoot down the inside of his leg from the groin and extinguishing at the knee (nondermatomal pattern). After exam, Claimant was encouraged to follow up with Sports Hernia Clinic as the pain does not appear to be from his spine surgery in etiology. (Respondents Exhibit E, page 2).

11. The Claimant was evaluated by Dr. Lee and Dr. Rothchild on August 3, 2022. The possibility of a hernia was ruled out. Imaging and clinic exam did not show a hernia in the left groin. Extensive work up including CT, US, MRI and EMG were all unremarkable. The timing of it didn't make sense for a sports hernia as Claimant was recovering in bed after his spine surgery when he developed pain with left leg flexion. (Respondents' Exhibit F).

12. Respondents obtained an IME with Dr. Wallace Larson. In his September 28, 2022 report, Dr. Larson stated that "[a]t this time his left groin pain has not been definitely diagnosed but is most likely iliopsoas tendinitis either as an idiopathic condition or related to his total hip arthroplasty…it is not like related to his anterior lumbar fusion." Dr. Larson recommended "CT-guided iliopsoas injection with contrast material to document the precise location of the injection but that would be outside his occupational claim". Dr. Larson observed that "[a]lthough many entries in the medical records indicate his groin pain began only after the spine surgery, the note from Dr. Todd Miner of 3/8/2021 indicates left groin pain with a suspicion of iliopsoas tendinitis at that time." Dr. Larson opined that the request for physical therapy "is not likely to be beneficial and is not occupationally related." Dr. Larson further opined Claimant has reached MMI for his February 24, 2020 work injury as of the date of the IME. (Respondents' Exhibit G).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101,*et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

D. Once a claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d

448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra.*

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the Claimant has failed to sustain his burden of proof that his hips or groin symptoms are related to his admitted work injury. I am persuaded by the opinions of Dr. Larson, whom I find to be credible, that these symptoms are not related to the Claimant's work injury. I am unpersuaded by Dr. Johnson's opinions to the contrary since they are conclusory without any reported analysis supporting his opinions.

F. Claimant alternatively argues that the medical care for an unrelated condition is covered under a claim where such treatment optimizes recovery for the compensable injury. Claimant relies on *Price Mine Service v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App, 2003) and *Gardea v. Express Personnel Professionals*, W.C. 4-650-961 (I.C.A.O, 2011) for this proposition. However, I find that the Claimant has failed to sustain his burden of proof that treatment for the Claimant's hips are groin were or are necessary in order for him to receive optimum treatment of the industrial injury.

ORDER

1. The Claimant's request for medical treatment for his groin or hips is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

NOTICE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email

address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2022

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Respondents are precluded from challenging the impairment rating provided by the Division Independent Medical Examiner (DIME) per the July 30, 2020 stipulation of the parties.

- If Respondents are not precluded from challenging the DIME opinions concerning impairment, whether Respondent presented sufficient evidence to overcome the February 7, 2022 DIME opinion of Dr. Karl Larsen regarding permanent impairment.

- Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to maintenance medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Background

1. Claimant sustained a work injury to her left shoulder on March 28, 2019. There was initial confusion as to which shoulder Claimant allegedly injured; however, during the discovery process the parties determined that Claimant actually injured her left shoulder rather than the right shoulder as referenced in many of her medical reports.

2. On July 30, 2020, the parties filed a Stipulation and Motion for Approval wherein Respondents agreed to file a medical benefits only General Admission of Liability (GAL) admitting that Claimant injured her left shoulder on March 28, 2019. (Clmt's Ex. 2, p. 5-6). As part of this stipulation, Claimant agreed that she was not alleging an injury to the right shoulder or the left foot/ankle as a result of the March 28, 2019 incident. *Id*. at p. 6. She also stipulated that she was not seeking temporary total disability (TTD) benefits as a consequence of her left shoulder injury; however, the stipulation did not contain any terms/agreements concerning permanent impairment. *Id.* The Stipulation effectively retracted a September 20, 2019 "Notice of Contest" which denied liability for an alleged injury to the left shoulder. *Id* at p. 5. The stipulation was approved by an order of ALJ William Edie issued August 4, 2020. *Id*. at p. 8-9.

Claimant's Initial Post-Injury Treatment

3. Following her left shoulder injury, Claimant presented to the Parkview emergency room (ER) on April 8, 2019. While in the ER, Claimant complained of a left

upper injury two to three weeks prior while at work. She was moving while cleaning and may have over stretched her shoulder. Claimant had full range of motion. (Resp. Ex. H, p. 145-146).

4. Claimant saw Dr. Likes for the first time on April 11, 2019, nearly two weeks after the work incident. (Resp. Ex. G, p. 46). She underwent conservative medical care.

5. Claimant had an MRI of her left shoulder on May 29, 2019. It demonstrated anterior and superior rotator cuff tendinopathy with partial thickness tearing; mild to moderate AC joint arthrosis and subacromial subdeltoid bursitis. (Resp. Ex. G, p. 45). A second MRI of the left shoulder was obtained on November 16, 2020. It continued to demonstrate moderate subscapularis tendinosis. (Resp. Ex. G, p. 62).

Dr. Miguel Castrejon's Independent Medical Examination

6. Claimant underwent an independent medical examination (IME) with Dr. Miguel Castrejon at the request of Claimant's counsel on June 25, 2020. (Clmt's. Ex. 4). She reported to Dr. Castrejon that she experienced pain in her left shoulder while cleaning a bathtub. (Clmt's. Ex. 4, p. 48). She reported having been sent for an MRI of the left shoulder that revealed a tear. *Id.* As of the June 25, 2020 examination, Claimant was reporting ongoing, constant pain in her left shoulder that she reported had not been addressed through treatment. *Id.* Dr. Castrejon had few medical records and did not have a copy of Claimant's imaging report(s). *Id.* 49. Based on the available records and Claimant's reported history, Dr. Castrejon determined that Claimant had a compensable injury to her left shoulder. *Id.* He diagnosed her with a left shoulder rotator cuff strain with clinical findings of impingement and rotator cuff weakness. He also recommended that internal derangement be ruled out and noted that Claimant appeared to have an element of left shoulder girdle myofascial pain. *Id.* Dr. Castrejon opined that he would want to review the entire file before determining whether additional care was needed for the left shoulder, and if not, then to determine her impairment rating. *Id.* at 50.

Dr. William Ciccone's Independent Medical Examination

7. Respondents requested an IME with Dr. William Ciccone. Dr. Ciccone evaluated Claimant on August 4, 2021. Dr. Ciccone noted that Claimant was wiping down a bathtub when she experienced pain and clicking in her shoulder. She denied any fall on or impact to her shoulder. (Resp. Ex. F, p. 26). He attempted a physical exam prompting Claimant to report increasing pain. Consequently, he stopped the examination. (Resp. Ex. F, p. 28). Dr. Ciccone noted that Claimant demonstrated guarding during the examination and reported diffuse myofascial pain with palpation to the left shoulder. (Resp. Ex. F, p. 35). He commented further that Claimant's pain appeared to be worsening with treatment, which would be unusual. (Depo. Tr. p. 8:23-25). Dr. Ciccone noted that Claimant's range of motion initially was nearly full but a few months later was significantly restricted. (Depo. Tr. p. 9:2-8).

8. Dr. Ciccone opined that Claimant suffered a minor sprain/strain to the left shoulder. (Resp. Ex. F, p. 34). He explained that Claimant's mechanism of injury (MOI) was not substantial enough to cause a significant injury, including a rotator cuff tear. (Depo. Tr. p. 7:4-7, 23-25; 8:1). He noted that Claimant had a click in her shoulder and increased pain but there was no impact on the shoulder, no fall and no lifting injury. (Depo. Tr. p. 9:14-19). He opined further that there were no objective findings of a shoulder injury that would limit Claimant's range of motion. (Resp. Ex. F, p. 34). Finally, Dr. Ciccone explained that Claimant's MRI did not reveal an acute injury, but rather chronic degenerative changes. He clarified that tendinosis is a common natural aging process wherein the tendons degenerate as people age and that tendinopathy is not usually associated with trauma. (Resp. Ex. F, p. 34; Depo. Tr. p. 12:9-13-13:1-5). Finally, Dr. Ciccone noted that Claimant's rotator cuff was degenerated and undergoing tendonotic changes. Accordingly, he opined that there was no acute rotator cuff pathology seen on the MRI scans. (Depo. Tr. p. 12:12-23). Based on the MRI reports, Dr. Ciccone indicated that he would diagnose Claimant with tendinosis of the rotator cuff – which he concluded was a personal non work-related degenerative condition. (Depo. Tr. p. 22:16-18).

9. Dr. Ciccone opined Claimant was at maximum medical improvement (MMI) around May 23, 2019. (Resp. Ex. F, p. 39). He did not issue work restrictions or assign an impairment rating. (Resp. Ex. F, p. 36-37).

Respondents' Request for a 24-month Division Independent Medical Examination (DIME)

10. Respondents ultimately requested a 24-month DIME pursuant to the Workers' Compensation Act in order to determine whether Claimant had reached MMI and if so, whether she sustained permanent impairment. Dr. Karl Larsen was selected as the DIME examiner and he evaluated Claimant on January 31, 2022. Dr. Larsen issued a DIME report outlining his opinions concerning causation, MMI and impairment on February 7, 2022. (Resp. Ex. E, pp. 19-21).

11. During her 24 month DIME, Claimant reported "unremitting" shoulder pain since March 2019. She also told Dr. Larsen that she was working as a housekeeper cleaning a hotel bathtub when she felt a "pull" in her left shoulder. According to Dr. Larsen, Claimant noticed increasing pain afterwards while cleaning the walls of the tub. Claimant was able to keep working but noticed persistent pain at the end of her workday. While she reported the incident to her supervisor, Claimant did not obtain medical treatment until April 8, 2019 – about three or four weeks after the incident. (Resp. Ex. E, p. 19, see FOF ¶ 3).

12. At the outset of her physical examination, Dr. Larsen noted that Claimant was sitting comfortably but when asked to engage in "any sort of motion or examination of the shoulder, [she] winces and grimaces . . . a lot". (Resp. Ex. E, p. 20). According to Dr. Larsen's DIME report, Claimant demonstrated so much pain behavior; he asked if he needed to stop the examination. *Id*. He went on to note that Claimant's pain behavior

was out of proportion to the exam stresses, which he felt was compromising Claimant's range of motion measurements. *Id.*

13. In his February 7, 2022 DIME report, Dr. Larsen commented that Claimant had left shoulder pain secondary to rotator cuff tendinopathy that was part of the naturally progressive aging process. While Claimant became symptomatic at work, Dr. Larsen explained that the work injury was not of sufficient magnitude to produce a rotator cuff tear. He opined that Claimant's shoulder pain was related to the natural progression of her underlying degenerative process and not the result of a work injury. (Resp. Ex. E, p. 20).

14. Dr. Larsen opined that Claimant would benefit from treatment, but this treatment should be pursued outside of workers' compensation. He recommended physical therapy. (Resp. Ex. E, p. 20).

15. Dr. Larsen indicated that the conception of Claimant having reached MMI was "not really applicable . . . as [he] did not hold the opinion that [Claimant suffered] a work-related condition. Nonetheless, if he were "forced" to pick a date for MMI, Dr. Larsen indicated that he would fix it as of January 26, 2021, the date of her last appointment with Dr. Likes. (Resp. Ex. E, p. 21). Dr. Larsen stated no maintenance care was required, but again, this was premised on his statement that Claimant did not sustain a compensable left shoulder injury.

16. Regarding impairment, Dr. Larsen noted:

> ". . . I do not think an impairment rating related to her work injury is appropriate as her condition is not due to her work activities, but again due to the natural process of aging. That being said, I did take the measurements appropriately to generate an impairment rating. If one were to use those numbers to generate an impairment rating her range of motion deficits would leave her with a 14% upper extremity impairment which converts to an 8% whole person impairment rating.

(Resp. Ex. E, p. 21).

17. On February 18, 2022, the Division Independent Medical Examination (DIME) Unit sent a letter to Dr. Larsen asking him to provide a rationale for his stated impairment rating in light of his comment that Claimant's condition was not caused by her work activities. (Resp. Ex. D, p. 12). Indeed, the DIME Unit noted as follows: It is unclear why an impairment rating was assigned for the left shoulder if the injury was deemed to be non-work [related] that occurred on 03/28/2019". *Id.* Dr. Larsen did not timely respond to the inquiry. Consequently, on April 15, 2022, the DIME Unit issued a "DIME Process Concluded" notice to the parties. In the notice letter, the DIME Unit indicated that they previously issued an Incomplete Notice to the physician and the physician's response was not received. Accordingly, the DIME Unit advised the parties that they considered

the DIME process complete. Respondent Insurer was informed that they had 20 days from the date of the notice to admit liability consistent with the DIME report or file an application for hearing challenging the opinions of Dr. Larsen. (Resp. Ex. B, p. 6).

18. Respondents elected to file an Application for Hearing to overcome the DIME opinion regarding impairment on May 5, 2022. (Resp. Ex. C).

Dr. Larsen's Supplemental DIME Report

19. The parties engaged in discovery to prepare for hearing. When Claimant failed to timely respond to interrogatories, the parties proceeded to a prehearing conference before Prehearing Administrative Law Judge (PALJ) John Sandberg on July 29, 2022. During that prehearing, the parties learned that Dr. Larsen had issued a supplemental DIME report on April 23, 2022, which was sent to the DIME Unit only. PALJ Sandberg sent the supplemental DIME report to the parties at which time it was discovered that Dr. Larsen, per the DIME Unit's request for clarification regarding the degree of Claimant's work-related impairment, had issued a 0% impairment rating. The parties agreed to vacate and continue a hearing that was set for August 25, 2022. (Resp. Ex. D).

20. In his April 23, 2022 supplemental DIME Report, Dr. Larsen apologized for the confusion his original DIME report may have caused, noting that he was "simply attempting to provide information regarding what an impairment rating WOULD be *if* the injury were work-related". (Resp. Ex. E. p. 24)(Emphasis added). He then reiterated his "opinion that it [was] more likely than not that [Claimant's] shoulder condition was not the result of her work injury but is the result of the natural process of aging and degeneration over time". *Id.* Accordingly, and per the Division IME Unit's request for clarification, Dr. Larson completed a "new attached examiner's summary" reflected that Claimant had a 0% impairment rating for Claimant's left shoulder condition. *Id.*

Dr. Ciccone's Post DIME Records Review & Deposition Testimony

21. Dr. Ciccone issued a supplemental medical records review following the DIME on August 1, 2022. (Resp. Ex. F, p. 41). Dr. Ciccone's opinion did not change from his original report. Dr. Ciccone stressed that Claimant did not suffer a significant trauma to the shoulder; she just had pain with activities. (Resp. Ex. F, p. 42).

22. Dr. Ciccone commented that there was no basis for Dr. Larsen to issue an impairment rating based on his initial report. (Resp. Ex. F, p. 43).

23. Dr. Ciccone testified via deposition on September 28, 2022. He testified as a board certified, level II accredited expert in orthopedic medicine. (Depo. Tr. p. 6:11-14).

24. Dr. Ciccone testified that based upon the MOIs described by Claimant

there was insufficient force directed to the shoulder to cause a rotator cuff tear. (Dep. Tr. p. 7:1-25, p. 8:1). He concluded that Claimant suffered a "minor sprain or strain, but nothing serious. (Depo. Tr. p. 9:9-23). He indicated further that Claimant would have been at MMI between six and eight weeks following her March 28, 2022 injury. Id. at p. 11:7-17.

25. Dr. Ciccone reiterated his opinions that Claimant's left shoulder condition was related to tendinosis, which he noted is the natural degeneration of tendons that occurs with aging and that this opinion was supported by the objective evidence visualized on MRI. (Depo. Tr. p. 12:9-25; p. 13:1-23). According to Dr. Ciccone, Claimant's shoulder pain was caused by these degenerative changes. (Depo. Tr. p. 22:19-25).

26. Dr. Ciccone also agreed with Dr. Larsen that Claimant did not require medical maintenance treatment. He explained that Claimant did not suffer a significant injury that would require any maintenance treatment or work restrictions. (Depo. Tr. p. 15:17-25; p. 16:1-7).

27. Dr. Ciccone explained that Dr. Larsen's addendum DIME report was the more accurate opinion of his (Dr. Larsen's) opinion concerning impairment and that Claimant would not have any ratable impairment caused by a minor sprain/strain injury. (Depo. Tr. p. 17:10-25; p. 18:1-12). When asked if simply having an incident at work would automatically mean that a person suffered an injury, Dr. Ciccone noted: "No, you can have pain at work all the time and not have an injury". (Depo. Tr. p. 18:13-17). He also noted that merely because a person suffers an accepted work injury does not mean they are automatically entitled to an impairment rating. (Depo. Tr. p. 18:18-21). Finally, Dr. Ciccone noted that the AMA Guidelines do not require the assignment of an impairment rating in every case. Rather, an impairment rating should be assigned when there is a "work-related injury that [has] resulted in a loss of function [to] an extremity directed related or causally related to that injury". (Depo. Tr. p. 19:4-11).

28. The evidence presented persuades the ALJ that Dr. Larsen's true opinion regarding impairment is explicitly articulated in his April 23, 2022 DIME Addendum Report. The ALJ credits the content of this report to find that Claimant suffered no impairment, i.e. 0% as a result of her March 28, 2019 work injury. In fact, the ALJ finds that Dr. Larsen tried to articulate the same in his February 7, 2022 report; however, his choice of verbiage created ambiguity and confusion surrounding the issue prompting the DIME Unit to request clarification regarding the degree of Claimant's work-related impairment. (See generally, Resp. Ex. D, pp. 12-14). Indeed, the DIME Unit noted as follows: "It is unclear why an impairment rating was assigned for the left shoulder if the injury was deemed to be non-work [related] that occurred on 03/28/2019". Id. at p. 12-13. Because Dr. Larsen did not respond to the request for clarification promptly, the DIME Unit considered the "DIME Process Concluded" and notified the parties on April 15, 2022, that Respondent-Insurer had 20 days from the date of the notice to admit liability consistent with the DIME report or file an application for hearing challenging the opinions of Dr. Larsen. (Resp. Ex. B, p. 6). As noted above, Respondents then elected to file an

application for hearing to challenge the 14% scheduled impairment rating decision from Dr. Larsen's February 7, 2022 DIME report.

29. The ALJ credits the opinions of Dr. Larsen and Dr. Ciccone that Claimant's MOI was minor and would not have resulted in rotator cuff pathology or a significant injury as support for the finding that Claimant suffered 0% work injury related left shoulder impairment. Indeed, both Dr. Ciccone and Dr. Larsen noted that there was insufficient force to cause anything more than a minor sprain/strain to Claimant's left shoulder. Moreover, the imaging (MRI) in this case revealed an absence of acute rotator cuff pathology to support a finding that Claimant sustained a traumatic injury to the left shoulder on March 28, 2019. To the contrary, Dr. Ciccone noted that Claimant's rotator cuff was degenerated and undergoing tendonotic changes, which he opined was a personal non work-related degenerative condition. Similarly, as part of his independent medical examination, Dr. Larsen noted:

> The injury onset she describes is not likely to have caused her condition, specifically her MRI findings. Indeed, the first and second MRIs seem to demonstrate progression of the tendinosis to involve the infraspinatus as well as changes involving the subscapularis despite the fact that she was no longer working in the capacity of a housekeeper. This would make sense with a naturally occurring progressive condition.

(Resp. Ex. E, p. 20).

30. Based upon the evidence presented, the ALJ finds that Respondents have proven that Dr. Larsen's assignment of 14% scheduled impairment, as articulated in his February 7, 2022 DIME report was probably incorrect.

31. Claimant has failed to establish that she is entitled to maintenance medical treatment.

32. Based upon the evidence presented, the ALJ is not convinced that Respondents are precluded from challenging the impairment rating assigned by Dr. Larsen as referenced in his February 7, 2022 DIME report.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

The Parties July 30, 2020 Stipulation and Motion for Approval

B. Parties in workers' compensation proceedings frequently waive, by words or actions, various legal rights and stipulate to certain facts. See, *e.g., Jordan v. Black Gold Asphalt Co*., W.C. No. 4-562-913 (September 28, 2004) (parties stipulated to AWW), affd on other grounds, Colo. App. No. 05CA0198, Aug. 25, 2005 (NSOP). It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). Moreover, it has been recognized that "[a] party's participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein." *USI Properties East, Inc. v. Simpson*, 938 P.2d at 173. In this case, Claimant contends that Respondents are precluded from challenging the impairment rating initially provided by Dr. Larsen as part of his February 7, 2022 DIME report because they had entered into a stipulation regarding the compensable nature of Claimant's left shoulder injury. Indeed, Claimant urges the ALJ to "[find] that Respondents are bound by the July 30, 2020 stipulation as it pertains to advancing any legal theory contrary to the plain and unambiguous terms therein". Although the stipulation in question unambiguously states that Respondents are accepting liability for the "left shoulder injury" that occurred on March 28, 2019, it does not contain any terms/agreements concerning permanent impairment. Indeed, the stipulation contains no reference to impairment at all. Nonetheless, Claimant contends that by agreeing to accept liability and file a medical benefits only General Admission of Liability (GAL), Respondents agreed to accept any impairment associated with Claimant's compensable injury. The ALJ is not persuaded.

C. Careful review of the language comprising the stipulation persuades the ALJ that Respondents did not waive their right to challenge any impairment that may be associated with the stipulated compensable injury in this case. Rather, the stipulation only addressed Respondents agreement to "accept the left shoulder injury that occurred March 28, 2019 for medical benefits" by filing a General Admission of Liability. In this case, the ALJ is not convinced, as argued by Claimant, that the stipulation extends to matters beyond liability for the injury, e.g. impairment that may arise after treatment for the admitted injury in complete. Because Respondents challenge to Dr. Larsen's February 7, 2022 impairment rating does not advance any legal theory contrary to the plain and unambiguous terms of the stipulation, the ALJ concludes that Respondents are not precluded from disputing the rating.

Overcoming the DIME Opinion of Dr. Larsen Regarding Permanent Impairment

D. A DIME physician's findings concerning causation and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-

42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment the party challenging the DIME must demonstrate that the physicians determination in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. While a DIME physician's opinions are entitled to special weight on issues of MMI and whole person impairment, they are not entitled to any special weight when it comes to extremity ratings. §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. Indeed, in *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998), the Court of Appeals explained that the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries, i.e. whole person impairment. Consequently, where permanent impairment is limited to a portion of the body included on the list of scheduled ratings in C.R.S. § 8-43-107(2)(a) a DIME opinion merely has to be rebutted by a preponderance of the evidence to be overcome. *Delaney v. Industrial Claims Appeals Office,* 30 P.3d 691, 693 (Colo.App. 2000). In this case, it is clear that Dr. Larsen assigned 14% scheduled impairment to Claimant's left upper extremity per his February 7, 2022 DIME report. Accordingly, the ALJ concludes that Claimant's injuries involve body parts listed on the schedule and Respondents, as the challenging party, carry the burden of overcoming Dr. Larsen's scheduled rating opinion by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see also, Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019)(whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

F. In this case, Respondents assert that the opinions of Dr. Larsen concerning impairment are ambiguous and that a threshold determination of what his actual impairment rating opinion is must be resolved before the question of whether Respondents overcame his opinions can be addressed. Based upon the evidence presented, the ALJ agrees. If the DIME physician offers ambiguous or conflicting opinions concerning impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo.App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo.App. 05CA0491, January 26, 2006) (not selected for publication).

In this case, it is clear that a conflict exists between Dr. Larsen's February 7, 2022, DIME report and his subsequent April 23, 2022 addendum requested by the DIME Unit. After careful review of the reports in question, the ALJ concludes that Dr. Larsen's true opinions concerning Claimant's work related impairment are those expressed in his DIME addendum report issued April 23, 2022. As noted therein, Dr. Larsen opined that Claimant had 0% impairment as a result of the work incident.

G. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo.App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). After considering the totality of the evidence presented, the ALJ concludes that Respondents have produced unmistakable evidence establishing that Dr. Larsen's assignment of 14% upper extremity impairment per his February 7, 2022 DIME report was probably in error. In fact, the April 23, 2022 addendum to Dr. Larsen's February 7, 2022 DIME report persuades the ALJ that his original assignment of impairment in this case was highly probably incorrect.

H. As found, support for the conclusion that Dr. Larsen's February 7, 2022 impairment-rating opinion has been overcome, rests in the opinions of Dr. Larsen and Dr. Ciccone when they explained that there was insufficient force to cause anything more than a minor sprain/strain to Claimant's left shoulder and the imaging (MRI) in this case, which revealed an absence of acute rotator cuff pathology to support a finding that Claimant sustained a traumatic injury to the left shoulder on March 28, 2019 upon which a work injury impairment rating can be based. Accordingly, the ALJ credits Dr. Larsen's DIME addendum where he credibly explained why Claimant had 0% work related impairment to conclude that his prior February 7, 2022 impairment-rating opinion has been overcome.

Claimant's Entitlement to Maintenance Medical Benefits

I. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical

treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

J. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the record evidence persuades the ALJ that Claimant has failed to prove she is entitled to medical maintenance care. None of her authorized treating physicians have recommended that she undergo maintenance care. Indeed, then only opinions presented concerning medical maintenance treatment in this matter come from Dr. Larsen and Dr. Ciccone and Claimant did not testify. In Dr. Larsen's original January 2022 DIME report, he did not recommend medical maintenance treatment for Claimant. Rather, Dr. Larsen stated that no maintenance care was required. He specifically stated that any further care for Claimant's left shoulder should be pursed outside of workers' compensation. Similarly, Dr. Ciccone opined that Claimant did not require medical maintenance treatment under workers' compensation.

K. The evidence presented supports a conclusion that Claimant has failed to present any recommendations from a treating provider that she requires further medical treatment that is reasonable, necessary or related under workers' compensation to cure and relieve her of the effects of her work related left shoulder sprain/strain. Accordingly, Claimant's request for medical maintenance treatment must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the 14% scheduled person impairment rating associated with Claimant's left shoulder injury is granted. Claimant is at MMI without permanent impairment per the April 23, 2022 supplemental DIME report.

2. Claimant's request for maintenance medical treatment benefits is denied and dismissed

3. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-805-002

ISSUES[1]

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury on October 6, 2021, in the course and scope of his employment.

2. Whether claimant is entitled to medical benefits rendered related to his October 6, 2021 injury.

3. Whether Claimant should be awarded Temporary Total Disability (TTD) benefits, and if so, what was Claimant's Average Weekly Wage (AWW)?

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to § 8-43-408(5), C.R.S.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 29 year-old male who injured his right foot on October 6, 2021. Claimant suffered a displaced fracture of the medial cuniform. (Ex. 1).

2. Employer is an automotive repair shop with two locations in Colorado. JC[Redacted], one of the owners, appeared on behalf of Employer at the hearing. Mr. JC[Redacted] is also Employer's registered agent. (Ex. 17).

3. Claimant credibly testified that sometime in early October 2021, he saw a sign located in the back of a green pickup at Employer's south Broadway location that read "mechanic wanted". (Ex. 6).

4. Claimant testified that he went to Employer's office and applied for the mechanic position because he wanted a career change. Claimant was working for a locksmith company at that time, and he arrived at Employer's office in his locksmith van. Claimant testified he had previous experience as a lead mechanic, but he is not ASE certified.

5. Claimant credibly testified that he filled out an application and met with Mr. JC[Redacted] about a job as a mechanic. Claimant further testified that Mr. JC[Redacted] "hired him on the spot."

[1] Claimant's counsel raised the issues of disfigurement and permanent partial disability in the position statement submitted to the Court. These issues were not before the ALJ at the hearing. Claimant filed a brief withdrawing the issue of permanent partial disability on August 1, 2022, and stated at the beginning of the hearing that disfigurement was not an issue for the hearing.

6. Robin Freeman worked for Employer for approximately 45 days between September and October 2021 at the main office. Ms. Freeman testified that she put together employee files and handled general office work.

7. Ms. Freeman testified that Claimant applied for a mechanic position with Employer. She credibly testified that Claimant and Mr. JC[Redacted] spoke in the front lobby of the main building, and Claimant was hired as a mechanic to work at Employer's other location. Ms. Freeman testified that she compiled an employee file for Claimant that included his application and copies of his social security card and ID. Ms. Freeman did not know Claimant's rate of pay. Ms. Freeman credibly testified that she was terminated because she fell asleep at work.

8. Claimant testified that he quit his locksmith job to work for Employer. He further testified that he began working at Employer's south location on October 3, 2021. Claimant used his own tools, and was given direction as to what car to work on, and what to do. Claimant had not been given a uniform.

9. Claimant testified that between October 3 and October 6, 2021 he worked on the carburetor in Mr. C[Redacted]'s race car; he worked on a toe hitch lock; he worked on a couple of cars; he unplugged a hybrid battery on a Lexus RX 300, because he was supposed to work on the car; and he cleaned up around the shop.

10. Claimant testified that on October 6, 2021, Jack Walsh, who also worked for Employer, asked Claimant to help him move some oil tanks. Claimant testified that the three, 100 gallon tanks, were stacked on each other but they were crooked. The tanks began to fall. Even though Claimant tried to run, one tank hit him and injured his foot.

11. Mr. Walsh called Mr. JC[Redacted] and told him about the accident. Mr. JC[Redacted] came to the shop and took Claimant to Urgent Care. Claimant credibly testified that he did not have any health insurance.

12. Claimant went to Rocky Mountain Urgent Care on October 6, 2021. Jennifer Briggs, P.A. evaluated Claimant, and x-rays were taken of his ankle and foot. The only record regarding this visit submitted into evidence is an October 10, 2021 billing statement. (Ex. 13).

13. Claimant was evaluated at Orthopedic Centers of Colorado on October 12, 2021. Claimant testified that SC[Redacted], Mr. JC[Redacted]'s wife who also works for Employer, provided this referral for Claimant. Claimant was diagnosed with a displaced medial cuneiform fracture. (Ex. 11).

14. On October 20, 2021, Claimant had surgery on his right foot. A right foot cuneiform open reduction and internal fixation was performed. The medical records state that Claimant "injured his right foot in a work-related incident." (Ex. 1).

15. Claimant had follow-up appointments at Orthopedic Centers of Colorado on November 2, 2021 and November 23, 2021. At the November 23, 2021 appointment, Claimant was still in a boot and doing well. He was to follow up in four weeks and get

more x-rays. (Ex. 11). There is no evidence in the record that Claimant attended this follow-up appointment or received additional x-rays.

16. Claimant testified that it has been six to seven months since he has seen a doctor. Claimant further testified that he believed his surgeon recommended therapy. There is nothing submitted into evidence, however, indicating that therapy was recommended for Claimant.

17. A "Visit Charge Detail" from Mile High Surgicenter LLC, for Claimant's October 20, 2021, surgery was admitted into evidence. (Ex. 2). According to this document, the total billed charges were $29,624.05, and there is a balance due of $3,621.50. Claimant testified that Employer paid for part of his surgery. Mrs. SC[Redacted] wrote a check in the amount of $8,443.00 to Mile High Surgery Center, and the notation reads "Adrian Santa Rosa's surgery." (Exs. 15-16). An $8,443.00 payment is referenced on Exhibit 2. There is no credible evidence in the record as to whether Claimant paid any of the billed charges, nor is there any credible evidence in the record as to what amount, if any, is outstanding.

18. An "Account Inquiry" from Orthopedic Centers of Colorado was admitted into evidence. (Ex. 11). According to the document, there is an outstanding balance of $3,105.00. There is no credible evidence in the record, however, as to what amounts, if any, Claimant paid to Orthopedic Centers of Colorado.

19. An "Account Summary" from Englewood Rocky Mountain Urgent Care was admitted into evidence. (Ex. 13.). According to the document, there was a "patient payment" of $150.00, and an outstanding balance of $80.00. There is no credible evidence in the record indicating if Claimant paid the $150.00, and if $80.00 is still outstanding.

20. A bill from DJO, LLC, for crutches, in the amount of $53.12, was admitted into evidence. (Ex. 14). Claimant testified that this amount is outstanding and has not been paid.

21. The ALJ is unable to determine what amounts if any, Claimant has paid for his medical care to date. Similarly, the ALJ is unable to determine what medical expenses are still outstanding.

22. Other than the initial application, Claimant never completed any other paperwork for Employer. Additionally, Claimant never received a paycheck from Employer.

23. Following the accident on October 6, 2021, Claimant and Mr. JC[Redacted] exchanged multiple text messages. Mr. JC[Redacted] expressed concern over Claimant's injury and in one message wrote "like I've said several times I own my part . . . either way you need to be taken care of and I will own my part." (Ex. 23).

24. Mr. JC[Redacted] testified that he never hired Claimant, and Claimant was never an employee. Mr. JC[Redacted] testified that Claimant hung around the shop and made friends with the guys, but he was not supposed to be there, and he had not hired him. Mr.

JC[Redacted] testified that he paid some of Claimant's bills because he was trying to help someone who was hurt. The ALJ does not find this testimony credible.

25. On October 6, 2021, Claimant received an email from Tekmetric Shop Management System. The email read "JC[Redacted] has invited you to join Autolab 4000. Clink the link below to activate your account and start using Tekmetric Shop Management System." (Ex. 25). Claimant credibly testified that Tekmetric is an application that records what vehicle a person is working on.

26. The ALJ finds, based on the totality of the evidence, Claimant had been hired by Employer, Claimant was an employee, and Claimant suffered a compensable injury in the course and scope of his employment on October 6, 2021. The ALJ further finds that Claimant's surgery and related medical appointments were reasonable, necessary and related to his October 6, 2021 work injury.

27. Claimant testified that he was not able to work for six months because of his foot injury. This testimony was uncontroverted.

28. Claimant testified that he was supposed to earn $25 per hour working for Employer, and this was the standard rate in the industry. There is no evidence in the record to controvert this testimony. Claimant testified he currently works 10 hours per day as a mechanic. There is no evidence in the record, however, to demonstrate that Employer hired Employee to work any time over eight hours a day, or 40 hours per week.

29. The ALJ finds that Claimant's AWW at the time of his injury on October 6, 2021 was $1,000.00 per week ($25.00/per hour * 40 hours). The ALJ further finds that Claimant is entitled to TTD from October 6, 2021 through April 6, 2022.

30. Claimant endorsed the issue of penalties based on § 8-43-408(1),[2] C.R.S., specifically, Employer's failure to have workers' compensation insurance at the time of Claimant's injury. Mr. JC[Redacted] testified that Employer has workers' compensation insurance through Pinnacol Assurance, and he has no idea why he would not have had insurance coverage at the time of Claimant's injury. Mr. JC[Redacted] testified that Claimant was not an employee, so workers' compensation would not be triggered. Claimant presented no credible evidence to support the assertion that Employer does not have workers' compensation insurance.

31. The ALJ finds that Claimant did not prove by a preponderance of the evidence that Employer did not have workers' compensation insurance on October 6, 2021.[3]

[2] The applicable statute is § 8-43-408(5), C.R.S.
[3] The ALJ is not making a finding as to whether Employer has workers' compensation insurance.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

The ALJ credits the testimony of Claimant and Ms. Freeman that Mr. JC[Redacted] hired Claimant to work as a mechanic. Further, Mr. JC[Redacted] knew Claimant was at the shop, and he invited Claimant to join Autolab on the Tekmetric Shop Management System. As found, based on the totality of the evidence, Claimant proved by a preponderance of the evidence that he was an employee on October 6, 2021. (Findings of Fact ¶ 26).

An injury must arise out of, and in the course of, Claimant's employment to be compensable. § 8-41-301(2)(b)(c), C.R.S. As found, Claimant was working for Employer on October 6, 2021, when an oil tank fell and injured Claimant's right foot. According to the Act, an employer must pay for medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." C.R.S. § 8-42-101(1)(a). The

determination as to whether claimant's treatment is reasonable and necessary is one of fact for resolution by the ALJ. *Durango v. Dunagan*, 939 P.2d 496, 499 (Colo. App. 1997). In *Durango*, the ALJ determined the employer was liable for claimant's treatment because claimant's physician "agreed that surgery was a reasonable treatment for claimant's condition." *Id*. As found, Claimant's surgery and related medical appointments were reasonable, necessary and related to his work injury.

The ALJ, however, was unable to determine what amounts if any, Claimant has paid for his medical care. Similarly, the ALJ is unable to determine what medical expenses are still outstanding. (Findings of Fact ¶ 21).

AWW

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW was $1,000.00. (Findings of Fact ¶ 29).

TTD

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled for six months, during which time he was unable to work because of his injury. (Ex. 12 and Ex. A). Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days. Claimant is entitled to TTD benefits beginning October 6, 2021 and ending April 6, 2022. (Findings of Fact ¶ 29).

Penalties

Section 8-43-408(5), C.R.S. provides for a twenty-five percent increase in compensation where the employer, at the time of an injury, has not complied with the insurance provisions of the Act. Here, Claimant is seeking penalties pursuant to 8-43-408(5), C.R.S. Claimant bears the burden of showing that Employer did not maintain workers' compensation insurance at the time of the injury. *Maldanado v. Nirbhao, Inc.,* WC 5-122-747-001 (ICAO May 7, 2021) (claimant bears the burden of proof to justify penalty based on lack of insurance coverage); *McManus v. Oil Tools,* WC 4-481-926 (ICAO Apr. 29, 2002); *Smedley v. Calcomp/Access Graphics Tech.,* WC 4-210-382 (ICAO Oct. 3, 1995). Mr. JC[Redacted] testified that Employer has workers' compensation insurance, and he did not file a claim because Claimant was not an employee. Claimant presented no credible evidence to controvert Mr. JC[Redacted]'s testimony. As found, Claimant failed to prove that Employer did not have workers' compensation insurance on October 6, 2021. (Findings of Fact ¶ 31).

ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that he was an employee and he suffered a compensable injury on October 6, 2021, in the course and scope of his employment.

2. Respondent shall reimburse Claimant for his medical expenses. Since the ALJ was unable to determine Claimant's medical expenses, Counsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue.

3. Claimant's average weekly wage is $1,000.00.

4. Claimant has shown that due to his injury he was out of work from October 6, 2021 through April 6, 2022. He is entitled to TTD based on an AWW of $1,000.00.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove entitlement to permanent total disability ("PTD") benefits?

- At the outset of the hearing, the ALJ determined that the endorsed issues of average weekly wage and TTD were closed by the June 14, 2021 Final Admission of Liability (FAL), which was only contested with respect to permanent total disability.

- The endorsed issue of "medical benefits" is not necessarily closed because the June 14, 2021 FAL admitted for medical benefits after MMI. Medical benefits after MMI remain open, subject to Respondents' right to contest reasonable necessity, causation, or authorization of any specific treatment. However, at hearing Claimant could not identify any specific medical benefits recommended by an ATP that are disputed or denied. Accordingly, all issues related to medical benefits after MMI are reserved for future determination, if necessary.

FINDINGS OF FACT

1. Claimant worked for Employer as a cleaner. She suffered admitted injuries to her head, neck, and back in a slip and fall accident on December 3, 2019.

2. Claimant was referred to Concentra Medical Centers for authorized treatment. She was diagnosed with a head contusion, lumbar, thoracic and cervical strains, and adjustment reaction. Claimant underwent primarily conservative treatment, including PT, chiropractic, massage therapy, medications, injections, and a TENS unit. She required no surgery for the injuries.

3. Cervical and brain MRIs were normal, as was an upper extremity EMG.

4. A lumbar MRI on March 31, 2020 showed multilevel degenerative changes and a disc extrusion at L5-S1, possibly impinging the left S1 nerve root. Claimant had an epidural steroid injection (ESI) that did not help.

5. Claimant was referred to Dr. Kathy McCranie, a physical medicine and rehabilitation specialist. On July 27, 2020, Dr. McCranie noted Claimant "is now complaining of multiple and expanding symptomatology. . . . Her pain diagram shows nearly total posterior body pain, excluding only the right arm and leg, and top and posterior head." Similarly, on August 17, 2020, Claimant reported symptoms with in multiple areas including her face, forehead, bilateral knees, bilateral legs, low back, and left arm. Dr. McCranie saw nothing on the MRIs to explain Claimant's widespread symptoms.

6. To investigate Claimant's "expanding symptomatology," Dr. McCranie recommended a psychological evaluation to evaluate a somatic disorder. Dr. McCranie opined Claimant was a poor candidate for any type of surgery, "considering her multiple

and diffuse symptoms that do not follow specific pathology. She was also noted to have several positive Waddell findings on today's examination, indicative of a psychological component to her pain."

7. A repeat lumbar MRI on October 7, 2020 showed improvement of the L5-S1 disc extrusion.

8. On October 29, 2020, Dr. Reinsma, Claimant's primary ATP at Concentra, documented complaints of "pain to bilat LE with primary, localization to the front of her knee. Worse after rest. This is inconsistent with radicular pain as well as inconsistent with the MRI findings."

9. Claimant saw Dr. Andrew Castro for a surgical evaluation on November 4, 2020. Dr. Castro noted the disk herniation was significantly smaller and improving on its own. He suggested another ESI but saw no indication for surgery.

10. Claimant had a repeat ESI on November 24, 2020.

11. On November 30, 2020, Claimant told Dr. McCranie the second ESI provided no benefit. Claimant said she had felt "paralyzed" over the past two days with difficulty walking and doing basic chores. But physical examination showed normal gait, normal strength and sensation, and no evidence of neurological deficits.

12. Dr. McCranie determined Claimant was at MMI on December 14, 2020. She assigned an 18% whole person impairment rating for soft tissue injuries to the lumbar and cervical spines. Dr. McCranie deferred formal work restrictions to Dr. Reinsma but opined, "Based on my examination of the patient, her improvement, and objective pathology, I would anticipate that she would be able to work at least within the light work category."

13. On December 21, 2020, Dr. Reinsma agreed Claimant was at MMI on December 14, and adopted Dr. McCranie's impairment rating. Dr. Reinsma provided permanent restrictions of no lifting over 20 pounds and occasional bending and rotating at the waist.

14. Claimant underwent a DIME with Dr. James Regan on May 28, 2021. Dr. Regan diagnosed lumbar, thoracic, and cervical strains. He agreed Claimant reached MMI on December 14, 2020. Dr. Regan assigned a 23% whole person rating for the lumbar, thoracic, and cervical spines. Regarding work restrictions, Dr. Regan opined Claimant should "minimize bending at the waist [and] . . . avoid any lift[ing] over 25 pounds."

15. Respondents filed a Final Admission of Liability (FAL) based on Dr. Regan's DIME report. The FAL also admitted for al medical benefits after MMI. Claimant timely objected to the FAL and requested a hearing on the sole issue of permanent total disability.

16. Claimant participated in a Functional Capacity Evaluation (FCE) on June 8, 2021 with Sherry Young, OTR. Ms. Young concluded Claimant can lift up to 20 pounds occasionally, and tolerate occasional bending at the waist. She further opined Claimant

can sit on a frequent basis and stand or walk on an occasional basis. She can tolerate 60-90 minutes of continuous sitting or 10-30 minutes of continuous standing or walking. She opined Claimant needs a 5-10 minute break every 30-45 minutes. Mr. Young concluded Claimant can work four hours per day, five days per week within the aforementioned restrictions.

17. CatalystRTW investigated employment opportunities for Claimant, and identified a full-time Market Research Associate position with Solomon Group. This is a sedentary job that involves contacting businesses and consumers by telephone to gather, verify, and update survey information. The daily schedule was flexible and allowed for breaks and postural changes as needed.

18. In June 2021, Dr. Reinsma reviewed the job description and demands and opined Claimant could perform the work on a full-time basis. He reaffirmed that opinion in July 2022.

19. Katherine Harris performed a vocational evaluation for Respondents. She interviewed Claimant in January 2022 and wrote a report dated September 29, 2022. Ms. Harris testified at hearing consistent with her report. Ms. Harris noted Claimant was born and raised in Mexico and immigrated to the United States in 1999. Claimant is a US citizen. She completed the sixth grade in Mexico, with no other formal education. Claimant's primary language is Spanish, with limited ability to communicate in English. Her work history includes unskilled and semi-skilled occupations, including packing, food production, bread-making, housekeeping, and janitorial work. Ms. Harris interviewed Claimant, reviewed medical records, and performed labor market research regarding work opportunities in the Spanish-speaking labor market in the Denver metro area. She specifically considered jobs that offer training, and part-time, full-time, or flexible schedules. She also referenced free resources to help Claimant find and secure suitable work. She testified employers have become increasingly flexible and willing to accommodate workers with limitations over the past few years because of the tight job market and low unemployment. Ms. Harris opined Claimant is competitively employable in a variety of unskilled sedentary or modified-light occupations including food service, cashier, companion, sewing operator, counter clerk, hostess, hand packager, retail sales, usher, ticket taker, and lobby attendant.

20. After the injury, Claimant continued to work for Employer in a modified position until she voluntarily resigned in August 2021 for non-disability-related reasons. Before the accident, Claimant's job duties included cleaning machines, "proof" boxes, process mixers, and tables, sweeping floors and removing trash. After the injury, Employer provided modified duty consistent with the restrictions from Claimant's ATPs. The modified tasks included working on labels and sorting product.

21. Employer continued to provide modified duty after Claimant was put at MMI. There is no persuasive evidence Employer intended to terminate Claimant had she not resigned. Employer's General Manager, Mr. G[Redacted], credibly testified Claimant was a good worker and he would hire her "tomorrow" if she wanted to return to work. He credibly testified Employer would pay the "prevailing rate" and accommodate any restrictions currently in place.

22. Claimant testified to limitations that interfere with her ability to sustain basic activities, including routine activities of daily living. Claimant does not believe she can consistently sustain activity at a level required of competitive employment.

23. The severe limitations described by Claimant are not supported by the medical records or other persuasive evidence.

24. Dr. Reinsma, Dr. McCranie, and Dr. Regan's opinions regarding Claimant's permanent restrictions and work capacity are credible and persuasive.

25. Ms. Harris' vocational analysis and opinions are credible and persuasive.

26. Claimant can work and earn wages in a variety of occupations at the sedentary and modified-light levels.

27. Claimant failed to prove is permanently and totally disabled.

CONCLUSIONS OF LAW

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001). A claimant is not required to present expert medical or vocational evidence to establish permanent total disability, but can rely on any admissible evidence to support their claim. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Nevertheless, the presence or absence of expert opinion evidence is a legitimate factor to consider when evaluating the preponderance of persuasive evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

As found, Claimant failed to prove she is permanently and totally disabled. While the ALJ does not doubt that Claimant suffers residual pain and associated limitations from the work injury, the question is whether those limitations are severe enough to render her totally disabled as opposed to merely partially disabled. There is insufficient persuasive evidence to support a finding of permanent total disability under the applicable "any wages" standard. As Ms. Harris persuasively explained, Claimant can sustain

employment in a variety of occupations at the sedentary or modified-light level. Additionally, Claimant remains employable with Employer and could still be working had she not voluntarily resigned for non-disability-related reasons. The opinions of Drs. Reinsma, McCranie, and Regan regarding Claimant's restrictions and work capacity are credible and persuasive. Claimant's description of limitations that would preclude all competitive employment is unsupported by medical records or other persuasive evidence. Although a claimant is not required to present expert medical or vocational evidence to establish permanent total disability, the presence or absence of expert opinion evidence is a legitimate factor to consider when evaluating the preponderance of persuasive evidence. *E.g., Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Even though Claimant's permanent restrictions, education, limited English proficiency, and work experience significantly narrow the range of work she can perform, there are still numerous jobs in the competitive economy consistent with Claimant's limitations.

ORDER

It is therefore ordered that:

1. Claimant's request for permanent total disability benefits is denied and dismissed.

2. All issues not decided herein and not previously closed by operation of law are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 29, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the bilateral hip arthroscopy surgery recommended by Dr. Michael Ellman is reasonably necessary and related to the admitted August 15, 2019 work injury.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on June 14, 2022 listing the issues of medical benefits that were reasonably necessary and related to the August 15, 2019 work injury, specifically noting that a hip arthroscopy was denied.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 24 years old at the time of the hearing in this matter but only 21 years old at the time of the admitted incident. Claimant worked for Employer as an operation assistant for approximately five years before the accident starting in approximately 2014. The job required Claimant to lift cases of alcohol, food, moving kegs around, pushing heavy equipment. He also needed to walk extensively throughout the venues to do set ups and would typically walk 10,000 to 20,000 steps a day on concrete floors, going up and down stairs.

2. Claimant was injured in the course and scope of his employment with Employer on August 15, 2019 when he was taking a full liquor cage off of a box truck. The box truck had a raising platform gate that moved up and down in order to unload the cage. Claimant was taking the liquor cage off the box truck in order to set up a bar at a concert venue. The cage was a large enclosure that holds multiple liquor boxes locked up for security purposes. This cage was made of stainless steel approximately six feet tall, five feet wide and approximately two to three feet deep. The cage was full of cases of liquor bottles. Claimant stated that the full cage probably weighed approximately 500 to 600 lbs., including the cage weight.

3. Claimant was originally in the box car and wheeled the cage onto the lift gate platform. He stepped off of the lift platform in order to move it down. The cage started to wheel off of the lift gate and Claimant stepped in front of it to stop it from falling and damaging the contents. Claimant was unable to stop the cage's trajectory, and the cage fell off the lift gate, which was approximately four feet high, onto Claimant, who was

slammed[1] by the cage full of liquor, onto the ground. Claimant fell onto his back with the cage pinning him to the dirt floor. Claimant's lower body was centered directly underneath the cage. The top of the cage ended up right above his belly button, and his lower half was completely under the cage, with both of his legs and feet pointed to the left. His arms were free from the cage.

4. One coworker came to Claimant's aid to get the cage off of him but was unable to shift the heavy cage on his own, so he called two other coworkers to help him. Claimant observed they had to use all their strength to lift the cage. Then Claimant was able to extricate himself from under the cage with their help. Claimant estimated that the coworkers were approximately 6 feet, 150 pounds; 6 feet, 220 pounds; and 6 feet, 300 pounds. Claimant noted that he was accustomed to estimating weight because he had to do it on a daily basis.

5. Claimant was light-headed and felt pain and numbness in his lower extremities immediately after the cage fell on him. In the weeks following the injury, he experienced pain in the front of his body, right at his beltline, all the way across. The pain was on both sides of his hips, on both sides on his body, and in his groin area. The center of his groin area just below his beltline was tender to palpation. Claimant stated he was sent to Concentra by Employer. He assured that even though he was provided with some medical care, it was minimal, and he continued to have bilateral abdominal pain that extended across his hip, despite him being released to full duty. He continued to work despite the pain but required assistance with lifting heavy items. Further, he did not feel that Concentra left the door open to address his continuing problems. He was laid off for a couple a month, then, during COVID, his place of employment was converted to a homeless shelter and his duties were very light, serving meals and sitting around. In approximately November, he returned to his regular job, which was when the pain increased again with heavy lifting.

6. On the day of the accident, August 15, 2019, Claimant was taken to Concentra Medical Center and was evaluated by Karen Larson, M.D. within about an hour of the accident. Dr. Larson took a history that

> He was standing on the ground at the tail of a box truck with the with [sic.] the cage on the lift gate of box truck. Unfortunately, the cage slid off the lift gate an on top of him, pushing him down and pinning him to the ground. Lift gate was raised up to his waist, but cage is 5 feet tall. 150-200 lb. approx.[2]
>
> It knocked him to the ground and pinned him down onto his L side, twisted at the torso with the torso facing up and the legs facing sideways. It struck him in the side of the head, R shoulder, R wrist and hand, R hip, R knee, and L lower leg. Coworkers lifted the cage off him.

Claimant reported that he had pain over the right side of the scalp and jaw, the right shoulder, the right hip and groin pain radiating to the right low back pain, and lesser pain on the left low back. On exam, Dr. Larson noted evidence of trauma to the right parietal

[1] The hearing transcript states "slanted down" (Tr. p. 12:10) but this ALJ's notes reflect "slammed down." This ALJ determines that the transcription was incorrect.

[2] This ALJ infers Claimant was describing the weight of the empty cage, as he testified that the cage full of liquor was approximately 500-600 lbs.

scalp with a 4 cm abrasion that was tender with a tender right jawline. She noted that Claimant had joint pain, back pain, joint swelling, joint stiffness and limping. Dr. Larson observed that Claimant had a large abrasion on the right shoulder with some swelling over the superolateral aspect, and tenderness over same area, a small abrasion on the dorsum of the right wrist and hand.

She noted tenderness over the lateral right hip, right groin, low back, and buttock. He was unable to stand with full weight on the right leg and had an antalgic gait. He had pain in the right low back on back flexion, He had right lateral hip, groin, and back pain on left bending and R rotation. He had right low back pain with right straight leg raise. He had an abrasion and swelling over the right anterior knee. The left lower leg had a medial distal calf abrasion with some swelling. Claimant had a past medical history of right shoulder surgery. She ordered x-rays for the right shoulder and right hip, which she interpreted as normal. She also took Claimant off work and was instructed to return to modified duty on August 19, 2019 with restrictions of lifting/pushing/pulling a maximum of 15 lbs., could do limited bending, standing, and walking but could not squat or kneel.

7. On August 19, 2019 Claimant followed up at Concentra, and was evaluated by Dr. Karen Hill. The "History of Present Illness" was copy and pasted from the initial visit. On exam Dr. Hill noted all normal findings, but pain with range of motion. She expanded the work restrictions to 25 lbs. but otherwise kept the prior restrictions. Claimant was also seen by therapist Marcin Swiderski who noted Claimant had bilateral groin pain and right hip pain on manual muscle testing (MMT).

8. Claimant underwent five sessions of physical therapy at Concentra. His therapists noted "B groin pain 4+ /5"[3], worse on the right, in addition to stating Claimant had "soreness in lower abdomen TTP right inguinal lig, R pubic ramus tender and superior, lower abdomen tender" after trunk extension on August 19, 2019. The therapists made similar comments on August 22, 26, and 29, 2019, and September 4.

9. Dr. Larson attended Claimant on August 27, 2019 and noted that Claimant continued to heal his abrasions and was improving except for the right groin, hip, and inner thigh and that he continued to walk with a mild limp. She advanced his work activities to 35 lbs. and stated he could squat and knee occasionally. The therapist noted on August 29, 2019 that hip pain and limitations were less on days when he did not work, because at work he was constantly standing or walking.

10. On September 6, 2019 Dr. Larson noted Claimant's right hip was approximately 70% better except for pulling and tenderness in the groin right thigh and abdomen, and pain in his left toe with activity. She noted Claimant reported that he was wanting to ensure nothing was wrong with his toe. Dr. Larson recorded that Claimant was ready to try full duty work as he continued working with restrictions. She had the left toe x-rayed but preliminary findings were normal. She returned Claimant to full duty.

11. Dr. Larson placed Claimant at maximum medical improvement on September 20, 2019. She indicated that Claimant's injuries had resolved except for the abdomen pulling pain, right hip, and thigh pain with range of motion and tenderness. Claimant was released from care without impairment, restrictions, or maintenance care.

[3] This ALJ infers that "B groin pain" indicated that Claimant was complaining of bilateral groin pain.

12. Claimant was evaluated by PA-C Sarah Steele of SCL Health on November 17, 2020. Claimant was complaining of hip pain. She took a history as follows:

> 22 y/o male here today for physical.
>
> He has been having right hip pain, off/on since injury occurred last year at work. He had a heavy metal cage full of alcohol land on him, his initial xrays [sic.] were normal, negative for fracture, he underwent PT, was d/c'd. He has continued to stay active, doing regular stretching. He will occasionally not[e] (sic.) popping, at times this can be painful, "stop me in my tracks", Pain tends to be worse with activity.

They discussed his hip pain, recommended baseline x-rays in light of the previous years' mechanism of injury. On musculoskeletal examination, only right hip joint pain was noted. The radiologist, Jennifer Kemp, M.D., noted an "old fracture healed in deformity involving pubic symphysis. Ms. Steele suggested that they could try physical therapy again, but she suspected Claimant had a hip flexor strain. She noted that if pain persisted she would consider an MRI evaluation. She recommended rest, avoidance of aggravating activities/exercises, antiinflamatories as needed and regular stretching.

13. On November 17, 2020 Dr. Jennifer Kemp read the right hip x-rays from Touchstone Imaging. She noted a bone cyst intertrochanteric of the right femur measuring 1.5 cm and a bony deformity at the pubic symphysis greater on the left consistent with remote trauma. Dr. Kemp stated that the findings were consistent with an old fracture healed in deformity involving the pubic symphysis.

14. Sarah Steele, PA-C wrote Claimant a note on November 19, 2020 stating that the hip x-ray showed an old fracture to the pubic symphysis that had healed in 'deformity.' and recommended evaluation with a specialist.

15. Claimant had a "One Time Eval" on December 17 2020 with Dr. Patrick Antonio at Concentra. He documented that:

> Within the past two months, the patient states that the discomfort has been worsening without any known cause. He was seen by his PCP and new imaging of the pelvis performed on November 17, with the impression "old fracture healed in deformity involving pubic symphysis." He is concerned that the constant discomfort and recent worsening discomfort might be correlated to the injury in August 2019. He denies any new injuries to this area or activities that may have exacerbated the symptoms.

On exam he found mild tenderness to deep palpation at the medial to bilateral anterior superior iliac spine (ASIS), minimal discomfort over the pubic symphysis area and full extension and flexion of the hip. He stated that Claimant had joint pain and muscle pain. He diagnosed right hip contusion and strain, and ordered a re-read of the original pelvic x-ray as well as a physical therapy evaluation. He specifically noted that, while he had some doubts about the relatedness to the August 15, 2019 work injury, that the objective findings were consistent with the history and work-related mechanism of injury.

16. Claimant was attended by Ms. Swiderski on December 17, 2020, who documented that Claimant reported that a 500-600 lbs. liquor cage fell on his right hip and thighs. Claimant reported that the shooting pelvic pain became more frequent approximately two months prior, as well as bilateral ASIS pain.

17. Dr. Sheldon Feit, a radiologist from New York performed an independent radiologic document review. He stated that the film for the right hip from August 15, 2019 showed no evidence of fracture and a probable bone cyst within the right femur. He also reviewed the film of the pelvis on November 17, 2020 which showed an irregular fracture within the pelvis around the symphysis pubis and a plain film of the right hip, which showed the right pubic bone fracture. He also noted that there was evidence of a small cyst within the intertrochanteric region of the femur. Dr. Feit opined that since the initial films failed to show any lesion or fracture that the subsequently viewed fracture was unrelated to the August 15, 2019 work injury. [4]

18. Claimant had an MRI of the right hip performed on April 14, 2021 which was read by Dr. Vincent Herlihy and compared it to the November 17, 2020 radiographs. He noted that there was an osseous bump at the anterior right femoral head neck junction with a resulting 69 degrees right femoral alpha angle. Cam morphology of the right proximal femur with a 69 degrees alpha angle predisposes the patient to cam-type femoral acetabular impingement. There was a nondisplaced detachment of the anterior superior right acetabular labrum between the 2:00 and 3:00 positions. There was mild grade 2 and 3 chondromalacia in the right hip with physiologic joint fluid. There was mild to moderate arthrosis of the pubic symphysis with posttraumatic capsular hypertrophy and ossification. There was bilateral inferior capsular stripping which undermined the bilateral adductor longus origins. Those findings could be seen with a sports hernia/athletic pubalgia. There was a 15 mm chondroid lesion in the medullary bone of the anterior intertrochanteric right femur without aggressive features, most likely representing an enchondroma. There was a separate well-defined 20 mm STIR hyperintense lesion with a sclerotic rim in the posterior aspect of the right greater femoral trochanter which was visible on the comparison radiographs. No aggressive features were identified and differential considerations for this benign-appearing lesion included a fibroxanthoma, fibrous dysplasia, or a unicameral bone cyst.

19. On May 11, 2021 Claimant was evaluated at Next Level Physical Therapy. They took a history consistent with the August 15, 2019 injury noting that Claimant has continued to have intermittent bilateral hip pain. They noted that Claimant had a diagnosis of bilateral hip femoroacetabular Impingement as well as labral tears and had been referred for physical therapy for conservative care by Dr. Genuario. They also documented that Claimant's pain is mostly always through his anterior hip and is there throughout the day, however, is made worse with sitting for long periods of time, working out, and with various quick movements. Since the time of onset, his pain has slightly progressed. Claimant continued with physical therapy through June 2021 with continued bilateral hip irritation.

20. Claimant was seen by Dr. Genuario on May 20, 2021 regarding left knee pain and bilateral hip pain. At that time Dr. Genuario reviewed the left leg MRI and found that Claimant had a ruptured bucket handle meniscus tear with large meniscal displaced flap in the intercondylar space. He recommended knee surgery and did not make any

[4] Dr. Feit failed to state that the pelvis around the symphysis pubis bone was even shown on the original x-ray and this ALJ declines to make that leap.

comments with regard to the bilateral hip problem. On August 19, 2021 PA Jeremy Bradley noted that Claimant was progressing well regarding his left knee arthroscopy.

21. Dr. Michael Ellman of Panorama Orthopedics and Spine Center evaluated Claimant on January 7, 2022 noting the following regarding Claimant.

> His pain started when he was working in August of 2019 and a heavy cage full of liquor fell on top of him. He was subsequently found to have a pubic symphyseal fracture that has since healed. Unfortunately, he continues to struggle from a hip pain standpoint. His pain Is worse on the right over the left, getting up to a 6/10 in terms of rating in the c-type distribution. He has tried formal physical therapy for over a year as well as rest, activity modification, and anti-inflammatories. He Is quite frustrated with the amount of pain he Is In. He did get bilateral hip MRIs from Touchstone as well as x-rays from Touchstone

Claimant presented for a second opinion of his continued, daily bilateral hip pain with the right worse than the left in a "c-type" distribution across the abdomen. He described it as aching and sharp pain, occurring daily and rated it as 6/10, with associated symptoms of tenderness, exacerbated by activities for an extended period of lime, lifting, sports and twisting/turning, and alleviated by rest and stretching. He diagnosed bilateral hip strains and joint disorders. Dr. Ellman reviewed the x-ray images from November 17, 2020 that demonstrated equal and symmetric joint space throughout with no significant arthritic changes. He had evidence of a notable Cam deformity with an alpha angle on the right of 72 degrees and on the left an alpha angle of 68 degrees. He had Tonnis grade 1 changes, but no evidence of dysplasia.

Dr. Ellman reviewed the April 14, 2021 bilateral hip MRIs without contrast from Touchstone Imagine. He noted that the Images demonstrate evidence of bilateral anterior superior labral tears, with the right worse than the left. He noted that Claimant had some early chondromalacia, worse on the right than the left, but no other significant abnormalities. He did note that he had a chondral lesion on the medullary bone on the anterior right inner trochanteric region without aggressive features consistent with an enchondroma.

Dr. Ellman stated Claimant had evidence consisted with bilateral hip Cam predominant femoroacetabular impingement (FAI) syndrome with labral tears bilaterally. He had some early chondromalacia, worse on the right over the left but no advanced arthritic changes. Dr. Ellman emphasized that Claimant was a surgical candidate and that the plan was to proceed with the right hip arthroscopy, labral repair, Cam and pincer osteochondroplasty and capsule repair. He planned on staging Claimant's left hip surgery three months later.

22. On January 12, 2022 Dr. Ellman request authorization to proceed with a right hip arthroscopy with femoroplasty and labral repair and ordered a right hip abduction brace.

23. Dr. Mark Failinger, an orthopedic surgeon, performed an independent medical examination on March 19, 2022. He obtained a history which was consistent with the accident reported by Claimant involving the liquor cage falling on his abdomen and lower extremities. He reported he had pain in the hips and legs and multiple scrapes, following which he was treated at Concentra, where x-rays were taken, and he performed

physical therapy for a couple of months. Claimant stated he was approximately 60-75% back to normal but continued with continuous pain in both hips on the front, which would decrease and increase depending on exertion. Claimant informed Dr. Failinger that the pain in his bilateral hips increased over time, until approximately one year after the accident. He was attended by his primary care physician (PCP) but was directed back to the workers' compensation provider at Concentra, where he proceeded with another two months of physical therapy. He was eventually released, and Claimant returned to his PCP. He was sent to UCHealth where he was treated by Dr. Genuario for the hips. He was again sent to physical therapy at Next Level PT for several months with only a little improvement. Claimant then went on his own to Dr. Ellman for a second opinion regarding the hips. Dr. Ellman recommended surgery.

Dr. Failinger documented that Claimant continued to have bilateral hip pain and that the severity would depend on his level of activity. He would occasionally take ibuprofen and frequently do stretches or exercise. On exam, Dr. Failinger noted no pain behavior but groin pain with squats. On pain diagram Claimant noted anterior groin pain bilaterally with stabbing and aching pain, with a pain level of 3/10. Dr. Failinger specifically opined that Claimant's current complaint were not related to the August 15, 2019 accident. He opined that Claimant never reported any discomfort or pain in the left hip at the time of the injury, only in the left lower leg and right hip in addition to multiple abrasions to other body parts, which resolved.

Dr. Failinger opined that Claimant "was noted to have early groin pain and right-sided hip pain, which reasonably could have occurred with either a labral tear or with a pubic ramus fracture or even a pubic symphysis injury. The patient's symptoms were consistent with injury in those areas." However, he went on to state that because Claimant returned to his regular work within three weeks of the work injury, that it was not medically probable that Claimant's injuries to his right hip were caused by the August 15, 2019 work injury, especially since he was on his feet all day doing heavy physical lifting. He stated that "[R]ather, it is medically probable that the patient's symptoms are due at this time to bilateral femoroacetabular impingement." He goes on to state:

> It is not reasonable that the patient had left hip symptoms all along, but that such was never reported in the records. Similar to the right hip, [Claimant's name redacted]'s left hip femoroacetabular impingement has created hip labral symptoms for which the patient has ongoing discomfort and is seeking treatment at this point under the Workers' Compensation claim. Based on the above, the hip symptoms at this point are not medically reasonable or probable as being due to the work incident of August 15, 2019.
>
> …
>
> …it is not medically probable the patient could have returned to full duty in a manual labor job of being on his feet all day if, in fact, he had fractured his pubic ramus or had sustained a significant symphysis strain or had torn a labrum.
>
> …
>
> The x-rays and the MRIs that were performed when the patient sought treatment in November of 2020 are consistent with a developmental deformity called femoroacetabular impingement, of which he has a CAM variant. These

> are classically known to create labral tearing, which appears to have occurred in [Claimant's name redacted]'s case. For the reasons explained above, it is with high medical probability that the patient's current symptoms are due to the CAM deformity, which was not created by the work incident of August 15, 2019. That is a developmental phenomenon which causes labral tears and, in a fair number of patients, hip symptoms. However, that is not related in any way to the work incident of August 15, 2019.

24. On May 24, 2022 Respondents filed a General Admission of Liability stating that the claim was a medical only case with no lost time. Respondents further noted that they were admitting for liability for the contusion of the right hip only.

25. Claimant deposed Dr. Ellman on October 7, 2022. Dr. Ellman was accepted as an expert, board certified orthopedic surgeon at Panorama, in the field of orthopedics. A great majority of his practice involved treating hips.[5] Dr. Ellman testified he understood that a heavy cage fell on Claimant and created a lot of trauma around his pelvic region. He diagnosed Claimant with, and is treating him for, bilateral hip labral tears. He described the labrum as "a little gummy worm or fibrous tissue that lives around the socket and can peel off the bone and tear." Dr. Ellman explained that labral tears can be acute or chronic, and it is difficult to assess causality. More than 50% of people have labral tears. Some of them cause pain, some of them do not. Dr. Ellman stated that Claimant has symptomatic labral tears, and the pain he has described was consistent with labral tears. The pain typical would start in the hip and radiated to the anterior aspect or front of the hip, or in the groin.

26. Dr. Ellman stated that Claimant's mechanism of injury with the cage likely caused the traumatic tears of his labrums. He stated that "[A]s you rotate the hip, you can impinge that area of bone against the labrum. The labrum can peel off the bone…with any impact to the pelvis where that piece of bone just impinges against the pelvis, and it hits against it and the labrum peels off the bone." He stated the impact of the cage of bottles falling on Claimant with his legs to the side was consistent with the impact that would be sufficient to tear the labrums. Dr. Ellman explained that if Claimant had acutely torn his labrums on his date of injury, he would still be able to function. "The vast majority of patients with labral tears can lead a functional life, can walk, can run, can cut, can pivot. But...it kind of creates what I call a toothache of the hip, where you have… aching, sore-type pain deep in the hip that a lot of patients just deal with..."

27. Dr. Ellman stated that if Claimant had undiagnosed, asymptomatic torn labrums before his work injury, the injury with the cage aggravated the tears causing them to be symptomatic and in need of treatment. He explained that labral erythema, or bruising of the labrum, is a red inflammatory tissue seen inside the labrum on symptomatic tears. Dr. Ellman stated it is medically probable that Claimant's work injury either caused, accelerated, or exacerbated his bilateral labral tears. Dr. Ellman stated that Claimant's mechanism of injury, with both hips rotated and pelvis getting a direct impact on top of it, certainly supports an injury to both hips and both labrums.

28. Dr. Ellman stated that it is reasonable for Claimant's symptoms to wane and wax after the injury, based upon the amount of inflammation going on with the labrum at

[5] Dr. Ellman testified that 98% of his practice was treating hip complaints.

that time that can create pain. The nociceptor, or pain receptors, in the labrum can be triggered with certain activities and cause pain. It is reasonable that Claimant's symptoms could have improved after his date of injury with conservative treatment, and then worsen without a subsequent intervening injury. It is not improbable that Claimant could return to a physically demanding job four weeks after the injury. It is not unreasonable for symptoms to wane for 15 months. Dr. Ellman has "seen just about everything in the book" with hip symptom waning and waxing.

29. Dr. Ellman stated that the fact that Dr. Larson released Claimant to full duty on September 20, 2019 had no effect on his opinion that Claimant needs further treatment under this claim. Dr. Ellman opined that through no fault of his own, Claimant went to work a little early and did not allow everything to heal and aggravated his hips and pelvis. He personally would not have released a patient back to full activities until at least 8-12 weeks post-injury.

30. Dr. Ellman explained Claimant's finding of a Cam-type femoroacetabular impingement (FAI). Claimant has a bump on the ball of his hip joints. This is a "common finding" in the general population. Dr. Ellman stated that Claimant's finding of a Cam-type femoroacetabular impingement (or FAI), has no effect on his opinion about the causation or the acceleration of the labral tears being related to the work injury. "Again, he had no symptoms before. He had symptoms after. To me, in my head, it's pretty simple, CAM lesion or no CAM lesion."

31. Dr. Ellman explained Claimant's finding of a pubic ramus fracture. The pubic ramus is the part of the pelvis where two pelvic rings come together in the front. This finding demonstrates the significance of the trauma to Claimant's pelvis; it broke his bone. The fracture signifies a direct front to back impact of the pelvis. Dr. Ellman stated that he would expect Claimant's pubic ramus fracture to heal in three to eight weeks.

32. Dr. Ellman's requested surgery is a minimally invasive procedure where he goes in through a couple of "poke holes," fixes the labrum, and reattaches it to the acetabular rim. He will re-sculpt the ball and socket to take away any impingement. Claimant can expect three weeks on crutches and three to four months before full activities. Dr. Ellman expects full, permanent return to function for the hips following the surgery. Dr. Ellman stated the surgery is medically necessary. Claimant has tried therapy, anti-inflammatories, and non-operative treatment for three years. Dr. Ellman did not expect him to get much better without surgery and the labrums were not likely to heal or reattach themselves without surgery. Dr. Ellman stated that Claimant's need for labral repair of both right and left hips was medically probably related to his work injury. Dr. Ellman stated there is nothing medically unreasonable about moving forward with surgery. His diagnosis is very clear. Diagnostic injections are not necessary, and cortisone injections are bad for the hips, long-term, especially in young, active patients.

33. Dr. Ellman saw nothing on exam, review of diagnostic studies or patient discussion that indicated a subsequent intervening injury to Claimant's hips. Dr. Ellman assessed his patients' credibility, as there were no situations where the description of the injury and/or development of symptoms did not make sense or gave him pause on how to move forward with regard to surgeon. He found Claimant credible.

34. Claimant identified the picture of a liquor cage, similar to the one that fell onto him, but stated that the photographed one was not as full as the one that fell on him. The picture showed a cage containing multiple shelves holding full boxes of liquor, at least five cases wide per shelf, holding approximately two cases tall on the top shelf and at least one tall on the two other shelves. Claimant testified that the full cage weighed approximately 500 to 600 lbs. when full.[6]

35. Claimant stated that he continued to work for Employer after the work-related injury and did not incur any other injuries since the work-related injury of August 15, 2019. Further, he had no hip problems prior to the trauma of August 15, 2019.

36. Claimant continued to have constant pain, which continued since the work injury. It was throbbing and aching and involved some numbness as well. He learned to push through the pain and keep working. However, he had to ask for help to perform some of the activities he used to perform on his own, such as heavy pushing, pulling, and lifting at work. There was a period, during COVID, when he was laid off. However, when he returned to his regular work in November 2020, the pain increased. He went to his personal provider to ask for further care. After he had the MRI, his PCP told him to reach out to Insurer as his problems were related to the work injury, and that is when they authorized the one-time visit with Concentra. He stated that he could no longer tolerate the symptoms and wished to proceed with the surgery recommended by Dr. Ellman in order to move forward and heal. He stated he had completed at least six months of physical therapy without lasting relief.

37. Following his release from Concentra, he stated he continued to exercise and work out at the gym, though he was limited in what he was able to do. He specifically stated he could not perform leg presses or squats. He also attempted running, jumping jacks and rope jumping without success.

38. Claimant explicitly noted that he did not have any difficulties with his hips, pelvis, or groin before the work-related crush injuries. Prior to his work injury, he played with his nephew, played slow-pitch softball, and worked out at the gym. He was able to squat, deadlift, leg press, treadmill, and stair climber with no issues due to hip, groin, or pelvic pain. Claimant played catcher for four years of high school baseball before his injury. He had no problems being in a deep squat due to hip or groin pain.

39. Claimant stated that PA Steele referred Claimant to Dr. Joseph Hsin, who in turn referred Claimant for the MRI of the right hip, which took place on April 14, 2021. Ms. Steele also referred Claimant to Dr. Genuario at UCHealth for evaluation regarding his bilateral hip and abdomen/pelvis pain.

40. Respondents deposed Dr. Failinger on October 19, 2022, after the hearing, a Board-Certified physician in orthopedic surgery and sports medicine as well as a Level II accredited physician retained by Respondents to perform an independent medical examination (IME) of Claimant. He stated that fifty percent of his income was for performing IMEs, at the rate of two to three IMEs per week. Dr. Failinger did not recall

[6] This ALJ noted that a typical case of liquor weighs between 30 and 40 lbs., which multiplied by fifteen cases per cage, could indicate a weight of between 500 to 600 lbs., including the weight of the cage itself, which probably weighed between 100 to 200 lbs.

Claimant, nor did he remember Claimant's face. Dr. Failinger's surgery practice was limited to knee and shoulders, not hips. Dr. Failinger performed no hip surgeries. Dr. Failinger opined that the surgery proposed was for Claimant's hip FAI, and not a traumatic injury. Dr. Failinger testified, "There was multiple things that hurt, but the right hip was focused, and it was the last thing to resolve."

41. Dr. Failinger testified that labral tears can wax and wane. If Claimant had symptoms for months and it kind of got better and worse, it's more reasonable that he could have accelerated or extended his pre-existing tearing. Dr. Failinger testified several times that Claimant requested to go back to work and to full duty. However, Dr. Failinger testified that Claimant did not report during the IME that he had asked to go back to work. He testified Claimant only told him he worked the entire time, and only missed the day after the injury. He testified that he asked Claimant no questions about his job duties. He did not base his description of Claimant's "very heavy job" on anything that came from Claimant, but on his general knowledge of the type of job Claimant had. Dr. Failinger testified that it was his "understanding, he did return back to full duty, but he still had ongoing symptoms. It's consistent with the [medical] records."

42. Dr. Failinger testified that he was unaware that as soon as COVID hit, the Employers locale turned into a homeless shelter, and Claimant's only job was to stand/ sit around serve dinner. He first testified that this could change his opinion, then stated that it would not change his opinion because Claimant continued to perform his regular job for six months before COVID hit. Dr. Failinger testified that "the most reliable thing of what actually occurs is not patient history, but the actual medical records."

43. Dr. Failinger testified he placed a lot of significance on that fact that Dr. Larson released Claimant to full duty in September 2019 and that Dr. Larson did not have a reason or motive to close a case if Claimant was symptomatic. Dr. Failinger testified that Dr. Larson's records focused right-sided hip pain were significant to him.

44. Dr. Failinger opined, consistent with his report, that it's not medically probable that Claimant's admitted injury involving a crush trauma by a metal cage filled with glass and liquid accelerated/ exacerbated or caused a need of treatment of Claimant's labral tears. However, he stated that impact activities, torquing and twisting activities could have accelerated the labral tearing that occurs with a Cam lesion causing a worsening.

45. Dr. Failinger testified, consistent with his report, that there was a significant discrepancy in the reported initial weight of the cages in the Concentra note and what was later reported as the weight of the cages, yet, in terms of causation, the weight was not really a factor in this case as far as he was concerned. He stated that, even if the cage was only 150-200 pounds, that weight falling on the front of Claimant's hips could cause trauma to his labrums. He testified that he received no information that employer was refuting Claimant's demonstrative photo of a similar but less-stocked cage, or that it took three men to remove the cage from Claimant. He testified that, with his life experience of the weight of metal, glass, and liquid, is it was not probable that the cage only weighed 150 pounds.

46. As found, Dr. Failinger's opinion that the cage did not have a significant impact on Claimant's injuries to his bilateral hips is not credible. The cage full of liquor

and mixes, fell off of the lift gate, which was four feet in the air, and onto Claimant, pinning him to the ground. One co-worker alone could not shift the cage to move it off of Claimant. Three large workers exerted all of their strength to shift the cage off of Claimant so he could get out from underneath it. Further, Dr. Failinger heavily relied on Dr. Larson's September 5 and September 20, 2019 notes as stating that Claimant was recovered. This ALJ does not read those records in the same manner. Dr. Larson, in fact noted Claimant continued to have tenderness across his abdomen with exertion or range of motion. In light of Claimant's youth, his failure to understand his right to request ongoing care related to the workers' compensation injuries and his testimony that he continued to have problems after he was released as well as the reasoning behind his failure to insist on medical care for his work-related injuries, Claimant's testimony is credible and persuasive over the opinions of Dr. Failinger.

47. As found, Claimant was injured in the course and scope of his employment when the very heavy cage fell four feet onto Claimant's hips and lower extremities. This crush injury caused an aggravation or acceleration to the Cam deformity, which in turn caused the labral tears. He continues to have ongoing pain across his abdomen, and the bilateral labral hip tears for which he requires medical care, including the surgery recommended by Dr. Ellman.

48. As found, Claimant and Dr. Ellman are more persuasive than the contrary opinions and testimony proffered by Dr. Failinger or Dr Feit. Dr. Ellman persuasively addressed the issue of causation in this matter that the traumatic events of August 15, 2019 caused the aggravation of the Cam deformity and the labral tears. Claimant has shown that it is more likely than not that the continued bilateral hip conditions were caused or aggravated by the work injury. Claimant has shown that it is more likely than not that the continuing need for treatment of the bilateral hips is due to the work-related accident of August 15, 2019.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal

relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Causation of Left Hip Condition

This is an admitted case. On May 24, 2022 Respondents filed a General Admission of Liability stating that the claim was a medical only case with no lost time. Respondents further noted that they were admitting for liability for the contusion of the right hip only. Therefore, before determining medical benefits in this matter, the issue of causation of the left hip condition must be assessed and determined.

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work-related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant has shown that the aggravation of the Cam deformity and the bilateral labral tears was proximately caused by the August 15, 2019 work related accident when the heavy liquor cage fell off the lift gate directly onto Claimant's hips and legs and more likely than not the cause for the need for further medical care as recommended by Dr. Ellman. Dr. Ellman persuasively explained that hip labral tears are very different from meniscal tears, for example. This ALJ infers from Dr. Ellman's testimony that many individuals, especially young athletes, continued working out, playing sports, and doing demanding activities despite having hip labral tears caused by trauma, while they likely could not continue with those demanding activities if, for example, they had a tear in the knee joint. Further, this ALJ specifically finds that the records of Dr. Larson are somewhat repetitive or duplicative of prior visits and that the Concentra physical therapists records that note Claimant has bilateral hip pain with exertion to be more accurate. Lastly, this ALJ does not find Dr. Failinger's opinion provided in his report or through testimony persuasive. Dr. Failinger's expertise centers on orthopedics of the

knees and shoulders, and not specifically with regard to hips. Dr. Ellman is persuasive and convincing over the contrary testimony and opinions of Dr. Failinger.

As found, Dr. Failinger's opinion that the cage did not have a significant impact on Claimant's injuries to his bilateral hips is not credible. Claimant's testimony is credible and persuasive. The cage full of liquor and mixes, fell off of the lift gate, which was four feet in the air, and onto Claimant, pinning him to the ground from the hips down. One co-worker alone could not even shift the cage to move it off of Claimant. Three large workers exerted all of their strength to shift the cage off of Claimant so he could get out from underneath it. Further, Dr. Failinger heavily relied on Dr. Larson's September 5 and September 20, 2019 notes as stating that Claimant was recovered. This ALJ does not read those records in the same manner. Dr. Larson, in fact noted Claimant continued to have tenderness across his abdomen with exertion or range of motion. In light of Claimant's failure to understand his right to request ongoing care related to the workers' compensation injuries following his release, his testimony that he continued to have problems after he was released and continued to work through the pain, as well as the reasoning behind his failure to insist on medical care for his work-related injuries, Claimant has persuasively explained the delay in obtaining care. And Dr. Ellman's opinions and testimony were also more persuasive and credible over the opinions of Dr. Failinger.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that it is more likely than not that he requires reasonable and necessary medical treatment for these bilateral labral tears. As found, Claimant was injured when the very heavy cage fell four feet onto Claimant's hips and lower extremities, which cause the crush injury to his hips,

aggravating or accelerating to the Cam deformity, which in turn caused the labral tears. He continues to have ongoing pain across his abdomen from the bilateral labral hip tears for which he requires medical care, including the surgery recommended by Dr. Ellman. As found, Claimant and Dr. Ellman are more credible and persuasive than the contrary opinions and testimony proffered by Dr. Failinger or Dr Feit. Dr. Ellman persuasively addressed the issue of causation in this matter that the traumatic events of August 15, 2019 caused the aggravation of the Cam deformity and the labral tears. Claimant has shown that it is more likely than not that the continued bilateral hip conditions and pain were caused or aggravated by the work injury. Claimant has shown that it is more likely than not that the continuing need for treatment of the bilateral hips is due to the work-related accident of August 15, 2019.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for Claimants' continuing need for reasonable, and necessary medical care for the aggravation of the Cam deformity and bilateral labral tears as recommended by Dr. Ellman, caused, or aggravated by the traumatic work-related accident of August 15, 2019.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of November, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-185-498-001

STIPULATIONS

The parties stipulated that if the claim is reopened that Claimant would not be entitled to TTD after September 26, 2022, the date he began his new employment.

ISSUES

- Did Claimant prove the claim 5-185-498 should be reopened based on a change of condition?
- Did Claimant prove entitlement to medical benefits including treatment for herniated discs in his neck?
- Did Claimant prove entitlement to temporary total disability benefits prior to September 26, 2022?

FINDINGS OF FACT

1. Claimant worked for Employer as a Client Care Aide. Claimant sustained an admitted injury on September 25, 2021 to his neck when he was involved in a patient restraint. The Claimant was initially seen at the Emergency Department on September 26, 2021 at 11:56 p.m. by Dr. Honig. The ED notes indicate that he had pulled a muscle in his neck while at work and then after the incident, he was taking ibuprofen for the pain and he tossed his head back to swallow the pills and heard a pop in his neck and had worsening pain along his left trapezius region. A CT angiogram scan was performed on this date, which was interpreted as "unremarkable". Dr. Honig noted that the CT was negative for vertebral artery injury or other obvious injury. He felt it was appropriate for Claimant to undergo outpatient treatment of cervical sprain.

2. The Claimant was next seen by Nurse Practitioner Brendon Madrid at Concentra on September 27, 2021. Mr. Madrid's diagnosis was neck strain. The claim was admitted and treatment was provided. Claimant was referred to Dr. Donald Dressen for chiropractic treatment.

3. The Claimant was placed at maximum medical improvement on November 19, 2021. The Claimant was released to return to work full duty at that time. The claim closed by final admission on December 27, 2021. At the time of MMI, Mr. Madrid made the following notations: "No pain today. Feeling better. Chiro with Dr. Dressen completed. No numbness or tingling." He was assigned no permanent impairment. (Claimant Exhibit 5, pp. 87 – 92).

4. The Claimant did not object to the final admission of liability or request a Division IME.

5. The Claimant testified at hearing that after he was placed at MMI he continued to experience headaches.

6. The Claimant later developed tingling from his shoulder down to his pinky on his left arm. He also has constant aching going up from the neck to the left side of his skull.

7. He returned to Parkview Medical on January 16, 2022 when he had neck pain when he slept wrong and woke up with worsening neck pain. Dr. Rogers noted that the pain in his neck did not radiate and Claimant denied arm or leg weakness or numbness. Claimant requested that an MRI be performed. However, Dr. Rogers did not think that an emergent MRI was required given his otherwise reassuring exam and recent normal CT.

8. Claimant returned to Concentra on February 3, 2022 for a one time examination for increased neck pain. He was seen by Brendon Madrid. He reported constant pain and had pain of 9 out of 10. He reported that he was diagnosed with COVID-19 on January 1, 2022. When he had COVID, he had hard coughing episodes. These coughing episodes resulted in increased neck pain. Although Mr. Madrid did not feel the second event, namely the coughing episode was work related, he would order an MRI.

9. The MRI was taken on February 22, 2022. The MRI showed a circumferential bulge with broad based posterior herniation at C3-4, C6-7 causing bilateral neural foraminal stenosis. It also showed circumferential bulge with broad based posterior and left foraminal herniation at C4-5 causing moderate left and mild right neural foraminal stenosis The MRI also showed circumferential bulge with broad based posterior herniation at C5-6 causing moderate bilateral neural foraminal and mild central canal stenosis.

10. Claimant stopped working on April 22 or 25, 2022[1] because he could no longer perform his job duties to work on the floor. He was asked to sign a document that he had restrictions for a non-work related condition on June 25, 2022.[2] When he refused to sign that document, he was terminated.

11. Claimant had an epidural steroid injection into his neck after a referral from Brandon Madrid. Following the injection, he felt better for about a month. After the month, he developed pain again. This includes constant headaches and constant tingling down his left arm when he holds things too long.

[1] According to the Employment records, (Claimant Exhibit 13, p. 309) the Claimant had restrictions of no takedowns and no over head work over 20 lbs. on April 19, which approximately coincides with his testimony.

[2] Although not critical to this order, the date of separation is documented as 6/24/2022. (Claimant Exhibit 13, p. 309).

12. Claimant currently works at a family support center for autism as a registered behavioral technician. He works with children on the spectrum. He started this job on September 26, 2022.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Renz v. Larimer County, 924 P.2d 1091 Colo.App. 1996).* The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Whether a particular condition represents a natural progression of the industrial injury or is the result of an efficient intervening cause is one of fact for determination by the ALJ. *Lutgen v. Teller County School Dist. No. 2*, WC No. 3-846-454 (ICAO June 12, 1986), *aff'd*, *Teller County School Dist. No. 2 v. Indus. Claim Appeals Office*, (Colo. App. No. 96CA1194, December 27, 1996) (not selected for publication).

I find that the Claimant has failed to sustain his burden of proving that his worsened condition is due to the natural progression of his work injury. While he sustained a compensable neck strain, that neck strain resolved November 19, 2021. It was not until he contracted COVID-19 and had bouts of hard coughing that he developed pain again that prompted the taking of an MRI that showed the disc disease at multiple levels of his cervical spine. The Claimant has provided no credible evidence that the pathology of the spine as evidenced on the MRI was caused by the work related incident or was symptomatic due that incident. It was not until the Claimant developed the COVID induced hard coughing bouts that the Claimant had increased symptomatology in his neck that resulted in him obtaining medical treatment.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen W.C. No. 5-185-498 for medical benefits is denied and dismissed.

2. Claimant's request for medical treatment for his neck is denied and dismissed.

3. Claimant's request for temporary disability is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 30, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 18, 2022 on issues that included medical benefits and denial of surgery. On August 17, 2022 Claimant moved, before PALJ Susan Phillips, to endorse the issue of compensability, which was granted.

The parties attended a hearing on September 1, 2022. Respondents moved for a continuance of the hearing as counsel for Respondents had been hired the prior day, was unable to appropriately prepare for hearing, and had not submitted any pleadings. This ALJ granted Respondents' motion for a continuance for good cause shown, over Claimant's objection, and the matter was rescheduled for September 30, 2022. This ALJ further allowed Respondents to submit responsive pleadings. Finally, this ALJ granted Claimant's motion to add the issues of temporary total disability benefits and average weekly wage, and Respondent's issue of termination for cause to the issues set for hearing.

This ALJ also modified the record exchange deadline pursuant to W.C.R.P. Rule 9-1(A) and allowed the parties to exchange medical and employment records by no later than 10 days prior to the continued hearing. Discovery in the matter was frozen as of the September 1, 2022 hearing.

STIPULATIONS OF THE PARTIES

The parties stated that medical benefits had been paid to date, with the exception of the surgery pursuant to Dr. Pehler's request for prior authorization. The parties agreed, if the claim was found compensable, that medical providers to date, including but not limited to Occupational Medical Partners, Dr. Matthew Lugliani, Dr Robert Broghammer, Dr Zachary Jipp, Patricia Dockter PT, as well as the referral physicians, Dr. Do Long Vu, Dr. Scott Primack, PA Maria Kaplan, and Dr. Stephen Pehler, were all within the chain of referral and authorized treating providers. Respondents continued to deny the surgery in light of the W.C.R.P. Rule 16 report issued by David H. Elfenbein, M.D. on March 30, 2022. The stipulation of the parties is approved by this ALJ and becomes part of this order.

The parties stipulated that, if Claimant proved compensability, Claimant was a maximum wage earner, and his temporary total disability benefits rate is $1,158.92. This stipulation of the parties is approved by this ALJ and becomes part of the order.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained an injury in the course and scope of his employment with Employer on September 17, 2021.

IF THE CLAIM IS FOUND COMPENSABLE:

II. Whether Claimant has shown by a preponderance of the evidence that he is entitled to medical benefits that are reasonably necessary and related to the injury including surgery per Dr. Pehler recommendations.

III. Whether Claimant has shown by a preponderance of the evidence he is entitled to temporary disability benefits related to the work injury of September 17, 2021.

IV. If Claimant has proven he is entitled to temporary disability benefits, whether Respondents have shown by a preponderance of the evidence that Claimant was responsible for his termination and not entitled to temporary disability.

V. Whether Claimant has proven by a preponderance of the evidence what his average weekly wage is.

FINDINGS OF FACT

Based on the evidence presented in this matter, the ALJ enters the following findings of fact:

1. On September 17, 2021, Claimant was employed as a biomechanical services specialist III for Employer for approximately eight years, since he was hired on July 9, 2013. His job involved maintenance of multiple machines at different Employer locations, including dialysis machines and equipment, water treatment equipment, as well as training nurses and ancillary staff on the use of the equipment. He also trained new hires for biomechanical services. The job included a lot of pushing, pulling, moving and lifting very heavy equipment including water tanks, carbon tanks or reverse osmosis industrial machinery that could weigh a couple hundred pounds. They would try to have other staff available to lift the heavier equipment but sometimes Claimant would have to do the lifting independently.

2. On Friday, September 17, 2021 Claimant was servicing a dialysis machine when one of the hoses or blood tubes was stuck under the wheel of the machine. Claimant bent down to lift the machine to untangle the hose. While trying to disentangle the hose, his back popped, which caused immediate pain and spasming as well as numbness going down his lower extremities. He felt the pop, not just heard it. At the time, he was tilting the middle section of the heavy machine to get the quarter inch tubing out from under it. He could not stand up immediately, so he slowly crept back in a bent down position and sat on a chair to see if the pain eased. He realized that something serious had happened to his back. He slowly made his way out to his vehicle and noticed that his lower legs and feet had a numbness and tingling feeling. He sat in his car for a while before going home. Claimant contacted his supervisor by email, as he was not onsite, to let him know what had happened to him. They discussed the injury and agreed to have Claimant wait until the following Monday to see if he continued to have symptoms, before going to the workers' compensation provider. Claimant felt that the injury, while serious, was not life threatening, so he did not go to an emergency room.

3. Claimant was initially seen by Dr. Robert Broghammer on September 21, 2021. Dr. Broghammer noted Claimant went to pick up a dialysis machine a little bit to get the thing caught underneath the wheels and he strained is back. Dr. Broghammer noted no pain behaviors on exam. He found no particular exam concerns but referred Claimant to physical therapy. He stated that "[T]he worker's history is consistent with a work-related injury." But that he considered it to be "an exacerbation of the chronic pre-existing condition."

4. Respondents filed an Employer's First Report of Injury (FROI) noting a work-related injury on September 16, 2021 at approximately 11:28 a.m., which was reported to Employer the same day. It also noted that Claimant was picking up the machine when he "tweeked" [sic.] his back and they referred Claimant to Dr. Robert Broghammer for treatment at Occupational Medical Partners. Lastly, it noted that Claimant sought medical treatment on September 20, 2021.[1] The FROI was completed by Claimant's supervisor on September 23, 2021.

5. Claimant testified that he had a back injury when he was approximately 20 years old, which resolved with conservative care, such as physical therapy and one injection. He stated that he did not have any problems with his back since then and specifically in the last five to ten years. Claimant was 41 years old at the time of the hearing. Claimant stated that he would not have been able to carry out his job in biomechanical services for the last eight years if he had ongoing back problems because of all the heavy lifting required. He also stated that he had been very active, doing his job and things like biking, without difficulty. He stated that he had not had any treatment in the last twenty years related to his back and that his providers took down incorrect histories if they mentioned otherwise. Lastly, Claimant stated that he had no limitations on his work or outside activities or in any way missed any work due to physical problems prior to the back injury. Claimant was credible and persuasive.

6. Claimant explained that he never had problems with numbness and tingling in his legs like he has now and did not understand where the providers obtained the information, but it was not from him. He has had numbness and tingling since his work injury from the calf down to his foot. When he was twenty years old, he had sciatica pain, which included pain in the buttock area going down his leg to right above the knee but that it resolved with treatment. He denied he told providers that he had "chronic pain" in his low back at any time immediately before this injury, as he did not use the word chronic, and vehemently denied that he told his providers he had pain continuously since he was 20 years old. He was able to perform his heavy work and his recreational activities without any problems with either his back or his lower extremities. Claimant was credible.

7. Claimant returned to see Dr. Broghammer on September 28, 2021 but had had no improvement yet, as he had just started physical therapy. Dr. Broghammer noted that Claimant was in too much pain to return to his work and his supervisor had told him 'to not come in' to work. The provider also noted Claimant continued to have back pain

[1] The Employer's First Report of Injury states September 16 and September 20, 2021. However, the medical records show that the first appointment was on September 21, 2021, so this ALJ infers, Employer was simply off by one day and should have noted September 17, 2021 and September 21, 2021 respectively.

and bilateral foot numbness and tingling. He stated that "the worker will continue modified activities and physical therapy." Work restrictions were lifting up to 10 lbs., carrying 10 lbs., push/pull 20 lbs., no prolonged standing or sitting and should change positions as necessary.

8. Claimant was evaluated by Patricia Dockter, P.T. on September 28, 2021. She noted as follows:

> 40 yo male with c/o's LBP. B feet N/T after he was bending over to pick up dialysis machine to free up a piece of tubing from underneath the machine. Pt experienced he felt a 'sharp pain in my lower back. area.".
>
> Pt has history of chronic LBP since he was 20 years old. No history of surgery. Pre-injury pain baseline levels: symptom free, except for in B feet after a couple hours of standing, walking. Pt works as a biomedical technician for DaVita. N/T Per pt, he repairs, maintains dialysis equipment. AGG factors: standing>5min increases B feet N/T, Wearing flip flops or barefoot increases N/T B feet. Sitting> 5min increases his back pain. Sitting/driving in his car, L/R S/L increases back pain. Difficulty with lower body dressing. Alleviating factors: sitting helps get rid of B N/T feet but he has increased pain from pressure at his coccyx with sitting. Lying in prone 'seems to open it (back) up". Pt reports that squatting "all the down helps the back pain, B foot N/T".

9. On October 14, 2021 Dr. Broghammer reported that Claimant had not made progress and ordered an MRI of the lumbar spine. Restrictions were similar but added no crawling, kneeling, squatting or climbing and no bending or twisting. He noted that the objective findings were consistent with the work-related mechanism of injury, diagnosing low back strain.

10. Claimant underwent a lumbar spine MRI on October 23, 2021 at Health Images. The images were read by Dr. Saidmunib Sana, who stated that there was:

> Central disc herniation at L4-5 causing mild bilateral subarticular zone narrowing. This may be irritating the bilateral L5 nerve roots.
>
> Right paracentral disc herniation at L5-S1 which mildly posteriorly displaces the right S1 nerve root.
>
> Severe L5-S1 spondylosis where there are prominent type I endplate changes. There is moderate to severe bilateral foraminal narrowing at this level.

11. On October 25, 2021 Insurer filed a Notice of Contest, for further investigation.

12. Dr. Broghammer referred Claimant to physical medicine and rehabilitation (PMR) specialist, Dr. Scott Primack, on October 27, 2021, after reading the MRI report.

13. Claimant consulted with Do Long Vu, DO, on November 3, 2021. Dr. Vu noted that Claimant had loss of range of motion of the lumbar spine but otherwise a negative exam. Claimant complained of low back pain and numbness and tingling of the lower extremities. His assessment was as follows:

> Patient has signs and symptoms consistent with discogenic low back pain due to the lumbar disc extrusion at L5-S1 on the MRI of the lumbar spine as noted above. He also does have type I Modic endplate changes at L5-S1. The symptoms he feels in his legs the tinging numbness paresthesias likely neuritis from the inflammation of the disc extrusion. He does not have weakness on exam today though he does feel unsteady in his on his feet at times. He is concerned that he may trip and fall If he returns to work at this time.

Dr. Vu also stated that he thought Claimant "would benefit greatly from lumbar epidural steroid injection for the discogenic low back pain and inflammation from the disc extrusion."

14. Claimant was transferred to Dr. Matthew Lugliani and the Claimant saw him on November 16, 2021 for the first time. Under "Chief Complaint" Dr. Lugliani has the identical history, wording and poor grammar as Dr. Broghammer.[2] Under "subjective" Dr. Lugliani noted that Claimant had worsening symptoms with ongoing mid and low back pain, numbness and tingling in the bilateral feet. Under "Review of Systems" Dr. Lugliani noted back pain and difficulty walking. He noted that inspection of the back revealed scoliotic posture, a left anterior hip rotation and elevation, SI tenderness. Back range of motion was limited with positive facet loading maneuvers in all planes. He noted Claimant was seeing a PMR specialist and was awaiting injections. He further ordered chiropractic and massage therapy, as well as referred Claimant to Dr. Vu.

15. Zachary Jipp, D.C., evaluated Claimant on December 9, 2021 noting a history as follows:

> His injury occurred on 9/17/21. At the time he worked for [Employer] kidney dialysis company. He bent over to pick up something heavy and immediately felt a sharp pain in his lower back. He does report a history of chronic back pain from an injury that occurred 20 years ago. He received a couple injections for this previous injury. Regarding this most recent work-related injury, his low back pain continues. If he sits for too long or stands for too long both of his feet will go numb but he denies radiating leg symptoms. He no longer works with a company. Prolonged sitting, standing aggravate his pain. He also reports disturbed sleep due to pain. He has tried physical therapy with minimal relief. He has been referred for an epidural but that is awaiting insurance approval. Recent MRI findings show disc herniations at L4-L5 and L5-S1. He denies bowel/bladder incontinence. saddle paresthesia.

16. Dr. Lugliani saw Claimant on December 17, 2021 but the report will not be summarized here as it is a duplicate chief complaint from Dr. Broghammer's report of September 21, 2021 and the exam is exactly, word for word, with errors and everything, the same from his November 2021 report. The only remarkable statement is his concern regarding Claimant not getting recommended EMG and injections authorized.

17. On January 5, 2022 Claimant was evaluated by Dr. Primack, who obtained the following history:

> [Claimant] is a 40-year-old right-handed male presents for a comprehensive electrodiagnostic consultation of his ongoing back pain with rating symptoms going into the right lower extremity as well as the left lower extremity. He works at [Employer]. He remembers that he was doing well up until 9/17/2021. While working in the capacity as a biomedical technician, hosing was stuck underneath 1 of the wheels of a dialysis machine. He bent over to lift up to to dislodge the low hose by moving the machine. He had sudden severe back pain. In time, he did begin to have radiating symptoms going into his right lower extremity as well as his left lower extremity.

Dr. Primack determined that, considering the "clinical examination as well as the imaging studies," the injections with Dr. Vu were considered reasonable, appropriate, part of the injury. He diagnosed intervertebral disc degeneration of the lumbar region and

[2] This ALJ infers that this was just a copy and paste job.

spondylosis without myelopathy or radiculopathy of the lumbar region and stated that they would go forward with the EMG/NCS.[3]

18. Dr. Lugliani noted on January 26, 2022 the same copied chief complaint, which is not credible. He noted that Claimant had a 70% improvement from the epidural lumbar injections with decreased pain and increased range of motion. The exam was also almost identical to the prior report, with the exception of stating that the spine curvature resolved, hips were aligned, and Claimant had minimal tenderness to palpation in the paralumbar area. He noted that back range of motion was full with mild facet loading maneuvers. He decreased work restrictions at this point to 30 lbs. lifting.

19. By February 16, 2022 Claimant reported to Dr. Lugliani that the benefit of the injections had decreased, and his low back pain and lower extremities increased exponentially. He noted a left anterior hip rotation with scoliotic curvature of the spine, paralumbar tenderness and positive facet loading maneuvers. Dr. Lugliani referred Claimant to Dr. Pehler for an orthopedic evaluation.

20. On February 17, 2022, Claimant treated with Dr. Vu and reported that he had more than 80% relief of his back and leg pain/symptoms following the January 14, 2022 injection. Dr. Vu maintained Claimant's treatment plan and recommended a second injection. On March 11, 2022, Dr. Vu performed a bilateral S1 transforaminal lumbar epidural steroid injection.

21. Claimant was attended by Dr. Lugliani on March 22, 2022, who noted that the second ESI was not of benefit and Claimant continued to have increasing lumbar spine and lower extremity complaints, especially in his bilateral feet.

22. Claimant was first evaluated at Dr. Stephen Pehler's office by physician assistant Maria Kaplan of Orthopedic Centers of Colorado on March 23, 2022. PA Kaplan took a history of present illness consistent with Claimant's testimony. She recommended surgical intervention due to Claimant's continued pain despite physical therapy, anti-inflammatories, rest, two lumbar epidural steroid injections and noted that the surgery would be a bilateral L4-5 microdiscectomy as well as L5-S1 lumbar disc replacement.

23. On March 28, 2022 Dr. David H. Elfenbein issued a report stating that pathology was not limited to one level as required by CO guidelines for artificial disc replacement. He stated that it was unclear what the pain generator was. He stated that because Claimant did not respond to ESIs, it was unclear if the L4-L5 disc was a source of his complaints. He recommended further injection therapy (i.e., selective facet injections, possible discogram) would be appropriate to help define the pain generator. Therefore, he recommended denial of the request for bilateral L4-L5 microdiscectomy and L5-S1 lumbar disc replacement as not medically necessary.

24. On March 30, 2022 Insurer sent a denial of the request for prior authorization.

25. Dr. Pehler attended Claimant on April 1, 2021 and noted that at this point in time, Claimant had attempted multiple rounds of conservative treatment including physical therapy as well as epidural steroid injections, anti-inflammatory medicines, and

[3] EMG/NCS are electromyography and nerve conduction studies.

rest without significant symptomatic relief. He noted Claimant had a spondylosis at L5-S1 with bilateral neuroforaminal stenosis and a central disc protrusion with central stenosis at L4-5. Dr. Pehler's recommendation continued to be for bilateral L4-5 hemilaminotomy with microdiscectomy and L5-S1 lumbar disc arthroplasty, because Claimant was a young healthy patient, they would like to preserve his motion and a bilateral L5-S1 hemilaminotomy with foraminotomy would only address his neurocompression element and would not address his low back pain component of his clinical symptoms.

26. On April 22, 2022 Dr. Pehler wrote a letter to Insurer in response to the denial of surgery based on Dr. Elfenbein's peer review. Dr. Pehler specifically disagreed with Dr. Elfenbein opinion as there was clear indication for surgery. He specifically opined that the MRI images of the mid sagittal cut clearly showed severe collapse at the L5-S1 and central protrusion of the L4-5. The next two images of the parasagittal cuts going from the right to the left showed severe compression of the L5-S1 nerve root and an active lumbar radiculopathy. He went on to describe additional images that show the central protrusion and lateral recess stenosis and disc protrusion of the L4-5 compressing the descending roots bilaterally and at the L4-S1 levels that demonstrate bilateral recess stenosis. He stated that his recommendation for a lumbar disc replacement at the L5-S1 and bilateral microdiscectomy/decompression at the L4-5 level was reasonable, supported, and medically indicated. The L5-S1 disc replacement would address Claimant's severe collapse at the L5-S1 and severe bilateral foraminal stenosis. The L4-5 bilateral discectomy/decompression would address the compression at the L4-5 and allow Claimant to preserve the motion of his spine. Lastly, he indicated that this surgery was appropriate as it would address Claimant's ongoing complaints that have not been addressed by conservative care, allowing Claimant to have long term relief and be able to return to work.

27. On June 21, 2022 Dr. Lugliani stated that Claimant's symptoms had persisted and not changed, with low back pain and radiating symptoms into his bilateral feet. Dr. Lugliani specifically stated that he agreed with the Orthopedic Spine specialist regarding surgical intervention. He also made a referral to Dr. Disorbio, a psychologist due to Claimant's ongoing extra stress associated with the injury and other biopsychosocial factors. Dr. Lugliani's last report is for August 9, 2022 which specifically states that Claimant was to continue with self-directed exercise and massage therapy, to follow up in six weeks and the same restrictions. The M-164 form stated that Claimant was not at maximum medical improvement, which was unknown.

28. Claimant testified that he would like to proceed with the surgery recommended by Dr. Pehler because he would like to get better. He specifically stated as follows:

> Q Okay. And, I mean, you want to go forward with the surgery, correct?
>
> A Yeah. Uh-huh.
>
> Q Okay. And why?
>
> …
>
> A You know, number 1, for the last 20 years, I've been working in dialysis, taking care of patients. It's what I do. You know, it's a big part of my life. And I want to get back to doing that. This last year, not being able to work and do what I do, which is save lives, take care

> of people, it's been really hard, especially coming off of the COVID pandemic. You know, things were pretty intense right there, and it was pretty awesome to help people out. So after the COVID pandemic, to hurt my back and be out for a year like this, it's really difficult. And then just, you know, getting back some quality of life. I'd love to get back on my bicycle again and lose this weight. So it's not good for my health, you know?

29. Claimant credibly testified that he continued to have pain, sometimes aching and sometimes stabbing sensations, in the low back, which was especially painful when he was sleeping, and the pain wakes him up. He stated that "sleeping is horrible" for him. He generally had about four hours of restful sleep before the pain becomes intolerable. He also continued to have problems with his lower extremities. When he walks, his legs get numb and sometimes causes him to have to drag his legs, like the leg has gone to sleep. He does do yoga, which helps somewhat, giving him temporary relief.

30. Claimant testified that he reviewed his 2021 tax return for wages he earned from Employer. From January 1, 2021 through his last day working, on September 17, 2021, Claimant earned $68,723.00. Employer was his only employment at that time. No other evidence regarding wages was submitted and Respondents did not contradict or challenge Claimant's testimony. Claimant is found credible. September 17 is the 260th day of the year. Claimant's average weekly wage if found to be $1,850.61

31. Claimant stated that he was terminated from his employment with Employer but did not recall receiving anything documenting that termination. He never received any offer of light duty employment, though his supervisor briefly discussed the possibility of some light duty but never confirmed if any was available nor received an offer letter. He further stated he was not aware of any work policy changes that were to take effect by the end of September 2021.

32. Claimant was more persuasive in his testimony and explanations that he did not have any problems following his back injury when he was in his twenties. He testified that he reported the old injury in the spirit of disclosure, and never reported that the problems continued following his care many years ago. Claimant had been working at heavy duty job for Employer, performing maintenance on heavy equipment and dialysis machines which he had to lift or move around in order to do his job. He was very persuasive in his testimony that he had no limitations or problems with either his back or his lower extremities until the September 17, 2021 lifting incident at work, when he heard his back pop and felt immediate debilitating pain and subsequent numbness and tingling in both his lower legs/feet. Claimant has shown by a preponderance of the evidence that he sustained work related injuries to his low back and lower extremities on September 17, 2021.

33. Respondents designated Dr. Broghammer and the parties stipulated that the providers in this matter were authorized. Claimant sustained a work-related injury on September 17, 2021 for which he required care. The care provided by the authorized treating providers to date has been reasonably necessary and related to the compensable injuries to Claimant's low back and lower extremities. Further, Claimant has already tried multiple types of conservative care that would likely provide Claimant relief without success and now requires more aggressive care in the form of surgery as recommended by Dr. Pehler and that Dr. Lugliani agreed was a proper course of care. The opinions of Dr. Pehler and Dr. Lugliani are more persuasive than the contrary opinion of Dr. Elfenbein.

Claimant has shown by a preponderance of the evidence that he is entitled to receive the recommended bilateral L4-5 hemilaminotomy with microdiscectomy and L5-S1 lumbar disc arthroplasty (artificial disc replacement).

34. Claimant had an acute injury on September 17, 2021. He was so incapacitated by the pain to the lumbar spine on that day he could not straighten up and had to sit down. He slowly made his way to his vehicle and went directly home, where he contacted his offsite supervisor. While he waited through the weekend, the following Monday he requested medical care and was seen on September 21, 2021 and thereafter by the designated providers who provided restrictions. These restrictions were incompatible with Claimant's described job duties as they were sedentary to light duty and Claimant's job included lifting and moving heavy equipment. Claimant continued to have restrictions and was likely not able to perform his regular job. His ATPs have not stated that Claimant is at MMI. Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability beginning on September 18, 2021, which should continue until terminated by law.

35. Further, Claimant was not provided an offer of modified employment, and has now been terminated from employment with Employer. Claimant provided credible and persuasive testimony that he could not perform his regular duties and that, while he discussed tangentially with his supervisor the possibility of returning to work, the persuasive evidence is that Claimant was not at fault for his termination. Respondents failed to show that Claimant participated in a volitional act in this matter which caused his loss of employment.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant

presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); see also, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. Id.;

Aragon v. CHIMR, et al., W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Claimant was within the course of his employment as he was engaged in performing maintenance on a dialysis machine for Employer. This job required Claimant to perform various tasks including testing the machine that was being repaired. This involved making sure that all the parts were working appropriately. Claimant was in the process of doing just that when he noticed that one of the blood tubes was under the wheel of the dialysis machine and he was bent over and lifted the dialysis machine to get the tubing out from under the wheel. That is when Claimant felt the pop in his low back and the immediate onset of pain that caused him to be unable to straighten out and had to scooch backwards in order to sit down. Claimant knew it was a serious injury and reported it the same day to his supervisor. They both agreed that he should wait it out during the weekend to see if the problem would resolve on its own. The following Monday, Claimant requested to see a provider and was sent to Dr. Broghammer. Claimant credibly testified that, while he had a prior injury to his low back at the age of 20, that problem had resolved, and Claimant was able to carry out his heavy-duty job for Employer for over eight years without limitations or restrictions. It is specifically found that the providers spun Claimant's notification that he had had a prior back injury into his having a chronic low back problem. It is also found that the providers were incorrect in this assumption. This ALJ finds Claimant to be credible in this matter. Claimant has shown that he sustained compensable work-related injuries to his low back and bilateral lower extremities in the course and scope of his employment as a biomechanical services specialist for Employer that are proximately cause by the incident of September 17, 2021.

Respondents argued that Claimant had a preexisting condition which was the cause of Claimant's ongoing low back pain. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work-related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption

that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Based on the MRI findings showing the underlying genetic abnormality of a small ventral canal and the underlying degenerative disc disease, it is clear that Claimant had some preexisting condition. However, Claimant credibly testified that he was asymptomatic from the time he was hired by Employer to the date of the accident of September 17, 2021. This is supported by the fact that he was able to perform the requirements of his job, which involved moving and lifting heavy machines on a daily basis. The fact that multiple medical providers copied and pasted the same medical history is not persuasive to this ALJ. The multiple providers even used the same language and grammatical errors. Claimant has shown that it is more likely than not that the mechanism of injury, the lifting of the dialysis machine while bent over to stretch to reach the blood tube stuck under the dialysis machine wheel, did, in fact, cause the injuries and aggravation of the asymptomatic degenerative condition. Claimant has shown that the specific accident that happened on September 17, 2021 caused the injury or aggravation of the underlying degenerative condition causing both disability and the need for medical care which are the proximate result of the work-related accident.

C. Medical Benefits

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country*

Squire Kennels v. Tarshis, 899 P.2d 362 (Colo. App. 1995). Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 11 (Colo. App. 2004). A Claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's preexisting condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). An injury, nevertheless, must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability. See *Colorado Fuel & Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). A claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

Here, Claimant was initially seen by providers that were designated by Employer and those within the chain of referral. Claimant was diagnosed with an acute injury on September 17, 2021 to the lumbar spine. The MRI imaging show both degenerative and congenital conditions as well as the acute herniated discs at two levels (L4-5 and L5-S1). Claimant did not have any symptoms or restrictions prior to his injury or during the eight years he worked for Employer performing a heavy job, which included lifting and moving heavy machinery. Even if some of the underlying conditions are not work related, it is found that Claimant had an aggravation of those congenital and degenerative conditions which caused the immediate symptoms following the lifting incident on September 17, 2021. This accident caused the underlying condition to require medical care. Claimant has shown by a preponderance of the evidence that the work-related accident of straining his low back while lifting was the direct causal event that precipitated the need for medical care in this matter. Claimant has shown that the medical care that he obtained from the

authorized treating providers was reasonably necessary medical care and related to the September 17, 2021 work-related injury.

It is further found that, but for the work-related injury Claimant sustained on September 17, 2021, Claimant would not have required the surgical care recommended by Dr. Pehler. Dr. Pehler is both credible and persuasive, in light of the MRI findings, and the fact that Claimant has failed conservative care, that the proposed two-level surgery is reasonably necessary and related to the accident of September 17, 2021. Claimant has proven that it is more likely than not that the need for the proposed surgery was proximately caused by the September 17, 2021 work related accident.

D. Temporary Disability and Responsibility for Termination

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits from the date following his September 17, 2021 injury until terminated by law. Claimant sustained work related injuries and aggravation of the underlying preexisting disease on September 17, 2021 that caused a disability lasting more than three work shifts and caused him to leave work and lose wages. Claimant was continued to be incapacity at the time of the hearing, causing continued wage loss. Claimant has not been placed at maximum medical improvement by an authorized treating provider nor has he returned to modified or regular employment. Claimant has shown that it is more likely than not that Claimant was disabled and is entitled to receive indemnity benefits as a cause of the work injuries.

Respondents argue the affirmative defense of Claimant's responsibility for termination as a defense to payment of TTD benefits. The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. "Fault" requires that the claimant must have performed some volitional act or exercised a

degree of control over the circumstances resulting in the termination. See *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). Whether the claimant is responsible for the termination of his employment must be based upon an examination of the totality of circumstances. *Id.* The burden to show that the claimant was responsible for his discharge is on the Respondents. See *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). Therefore, Respondents bear the burden of proof to establish the applicability of these provisions. *Witherspoon v. Metropolitan Club,* W. C. No. 4-509-612 (Dec. 16, 2004). Respondents averred at hearing that Claimant's statements that he was in too much pain to return to work showed his complicity in failing to return to work or accept a light duty job, and therefore, was a volitional act that merits termination of temporary disability benefits. Respondents also argued that Claimant admitted he was not vaccinated for COVID-19 and that Employer had a new policy, which Claimant was not aware of, that all employees had to be vaccinated, and alluding to Claimant's knowledge that his employment would be at an end because of his position regarding vaccination. However, the question of whether Claimant acted volitionally or exercised a degree of control over the circumstances of the termination is one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, as found, the evidence at hearing was not sufficient to persuade this ALJ. Claimant clearly was under significant restrictions from the injuries as he was having problems both standing or sitting for extended periods of time. Claimant described his job as heavy as he had to move and lift dialysis equipment, water tanks, carbon tanks and other equipment and materials and there was no persuasive evidence that a job within Claimant's limitations was available. Respondents did not submit any persuasive evidence that Respondents tendered a light duty job offer, nor that Claimant knew or how Claimant should have known about a policy instituted by Employer. Respondents have failed to show that Claimant's indemnity benefits should be denied under the termination statute.

E. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). In calculating the fair approximation of Claimant's average weekly

wage, wages were considered from January 1, 2021 through his date of injury on September 17, 2021, his last day of employment. Claimant testified that his tax return showed wages earned from Employer were $68,723.00. Employer was his only employment for 2021. His earnings divided by 260 days results is an average weekly wage of $1,850.37.[4] As Claimant was earning in excess of the maximum wage, Claimant's temporary total disability benefits are limited as of July 1, 2021 by statute to the maximum rate, which was $1,158.92.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained compensable work-related injuries to his lumbar spine and causing lower extremity sequelae on September 17, 2021 within the course and scope and arising out of his employment with Employer.

2. Respondents shall pay for Claimant's reasonably necessary and related medical benefits as provided by the stipulated authorized treating providers, including the lumbar spine surgery recommended by Dr. Pehler.

3. Claimant's fair approximation of his average weekly wage is $1,850.37.

4. Respondents shall pay for temporary total disability benefits as of September 18, 2021 at the maximum rate of $1,158.92 per week until terminated by law. Respondents failed to show Claimant was responsible for his termination.

5. Respondents shall pay interest at the statutory rate of eight percent on all amounts not paid when due.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when

[4] January 1, 2021 through September 17, 2021 is 260 days. 260 days divided by 7 days a week is 37.14 weeks, which when you divide $68,723 by 37.14 is a total of $1,850.37. This divided by 2/3 would equal $1,233.58, which is in excess of the maximum TTD benefits any Claimant injured after September 7, 2021 but before July 1, 2022 could receive.

filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of November, 2022.

Digital Signature

By: _____ Elsa Martinez Tenreiro _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-074-200-007

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

2. Claimant's entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury on April 5, 2018 when a brake rotor fell out of a box and landed on her left foot while working for Employer.

2. After substantial treatment, Claimant was diagnosed with complex regional pain syndrome. Claimant was placed at maximum medical improvement (MMI) on January 19, 2019, and assigned a 25% permanent impairment rating by her authorized treating physician. Respondents requested a Division Independent Medical Examination (DIME), which was performed by Justin D. Green, M.D., on April 29, 2019. Dr. Green initially assigned Claimant a 25% whole person impairment, and agreed with the ATP's MMI date of January 19, 2019. (See Ex. D).

3. Respondents then filed an application for hearing challenging the DIME's impairment rating. Claimant filed a response to the application for hearing seeking permanent total disability benefits. Respondents obtained surveillance video of Claimant on multiple dates in November 2018, December 2018, January 2019, and June 2019. taken in November which showed Claimant standing and walking for hours with no apparent difficulty. The surveillance video was inconsistent with Claimant's representations to her treating providers and the DIME physician related to her ability to walk and stand, and her representations that she required the constant use of a cane. Respondents took Dr. Green's deposition on April 28, 2020, after he had the opportunity to review the surveillance videos. After reviewing the available information, Dr. Green amended his permanent impairment rating, and assigned Claimant a 10% whole person impairment rating. (See Ex. D).

4. Following a hearing on Respondents' application for hearing, ALJ Patrick Spencer issued an Summary Order dated December 20, 2020, in which Respondents' request to set aside the DIME's 10% whole person impairment rating was denied. He ordered Insurer to pay Claimant's PPD benefits based on a 10% whole person impairment rating, and permitted Insurer to take credit for any temporary disability benefits paid after Claimant reached MMI on January 9, 2019. ALJ Spencer also denied Claimant's claim for permanent total disability benefits. (Ex. E).

5. On December 23, 2020, Respondents filed a Final Admission of Liability (FAL) consistent with ALJ Spencer's Order, and asserted an overpayment in the amount of $23,189.22. (Ex. C).

6. On December 27, 2020, the ALJ issued a full Findings of Fact, Conclusions of Law, and Order (FFCL), consistent with his December 20, 2020 Summary. (Ex. D)

7. Claimant was entitled to receive temporary total disability benefits from April 6, 2018 through May 31, 2018 in the amount of $3,844.40, and temporary partial disability benefits from June 1, 2018 through January 8, 2021, in the amount of $12,086.69. Based on her 10% whole person impairment rating, Claimant was entitled to permanent partial disability benefits in the amount of $19,222.00. Respondents paid Claimant indemnity benefits in the amount of $58,342.31. Thus, Claimant received an overpayment of $23,198.22 representing benefits to which she was not entitled.

8. Claimant is 72 years-old and currently unemployed. Her sole source of income is monthly social security benefits, paid at the rate of $1,782.00 per month. Claimant lives with her adult son and his family in South Carolina. Claimant testified her monthly expenses total approximately $1,650 per month. Claimant testified that her monthly expenses include $625 and $175-$200 in utilities she pays to her son.

9. Claimant submitted Exhibits 13 and 14, which are her bank statements from October 2021 through August 2022. Claimant's bank statements are consistent with her testimony, with several notable exceptions. Specifically, Claimant's bank statements do not reflect rent and utility payments she testified she pays to her son. Claimant's bank statements show no direct payments to her son and reflect cash withdrawals from ATMs averaging $302.00 per month . Although Claimant testified she gets cash from Walmart when she makes purchases to pay her son, the amounts spent at Walmart and her ATM withdrawals are not sufficient to cover Claimant's rent and utilities, and also the $140 per month she testified she spends at Walmart. Claimant's bank statements show she spends an average of $510.00 per month at Walmart. The ALJ finds, more likely than not, that Claimant does not pay rent or utilities in the amounts she to which she testified. Claimant has approximately $660.00 in monthly expenses for credit cards, insurance, cell phone, and health expenses. In addition, based on her testimony, Claimant incurs expenses for food, fuel, and other necessities on a monthly basis of approximately $350.00. The ALJ does not find credible Claimant's assertion that she would be required to forego basic necessities such as health care, food, fuel, or transportation if she were required to make repayment of any amount.

10. As the result of her injury, Claimant has sustained disfigurement of her left foot, including a visibly lower arch, visible atrophy and visible discoloration of her left foot compared to her right. The condition of Claimant's left foot is a disfigurement sustained as a direct and proximate result of her April 5, 2018 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Disfigurement

Section 8-42-108(1), C.R.S., provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her April 2018 work injury. Claimant is awarded $850.00 for disfigurement.

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[1] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish, by a preponderance of the evidence, that a claimant received and overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009). Respondents have established by a preponderance of the evidence that Claimant received $23,189.22 in disability benefits to which she was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $23,189.22.

Repayment

Under § 8-43-303 (1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

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[1] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive " from the definition of "overpayment." However, the matter before the ALJ is based on an Application for Hearing filed on December 13, 2021, and payments and events that occurred prior to January 1, 2022, consequently the operative, applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities); *Martinez v. People*, 484 P.2d 792 (Colo 1971) (repealed statutory provisions remain in force as far as pending actions, suits and proceedings are concerned).

Respondents may offset their liability for Claimant's disfigurement award against the existing overpayment. Claimant contends, without support, that "[d]isfigurement benefits are identified as medical benefits," and as such may not be offset against an overpayment of indemnity benefits. Claimants are entitled to medical benefits to "as may reasonably needed at the time of injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." §8-42-101(1)(a), C.R.S. In contrast, disfigurement compensation is "additional compensation" available to injured employees who are "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, and are in addition to all other compensation benefits …." § 8-42-108 (1), C.R.S. Thus, medical benefits and disfigurement compensation are available to claimants under different circumstances and are thus separate and distinct. Consequently, "a respondent may offset their liability for [a] disfigurement award … against [an] existing overpayment." *In re Claim of Peoples*, W.C. No., 4-819-262-113 (ICAO Oct. 24, 2018).

As found, Claimant is awarded $850.00 for her disfigurement. Respondents may offset this amount against the overpayment Claimant received, leaving a balance of $22,339.22 (*i.e.*, $23,189.22 - $850.00 = $22,339.22).

As found, Claimant's monthly income is $1,782.00 per month, and derived solely from social security benefits. Claimant's argument that she would be forced to forego food, fuel, transportation, or medical care if required to make repayment is unavailing. Claimant's monthly expenses, as documented in her bank statements average $1,781 per month. Of this amount, Claimant has fixed monthly expenses for car insurance, cell phone, credit card payments and loans totaling $659.95 per month. Claimant also spends an average of $510.51.65 at Walmart, and incurs approximately $150 per month in bank "safety net" charges and ATM service charges. Claimant's testimony that she pays $625.00 per month in rent to her son, and pays $175-200 per month in utilities is not credible, given that such payments cannot be accounted for in her bank statements.

Nonetheless, the ALJ concludes requiring Claimant to make substantial payments would impose a financial hardship. The ALJ concludes that Claimant is able to make monthly payments of $50 per month without sustaining significant financial hardship.

ORDER

It is therefore ordered that:

1. Claimant is awarded disfigurement in the amount of $850. Claimant's disfigurement award is credited against Respondents' overpayment of $23,198.22.

2. Claimant received an overpayment in the amount of $23,189.22, after credit for Claimant's disfigurement award, Respondents are entitled to repayment of $22,339.22.

3. Claimant shall repay the overpayment balance of $22,339.22 at the rate of $50.00 per month.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 1, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-972-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on Jun 24, 2022.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of medical benefits reasonable and necessary to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence that medical treatment received on June 29, 2022 and June 30, 2022 at UC Health and Advanced Medical Imaging was reasonable and necessary to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

Procedural History

1. The ALJ takes judicial notice of the following procedural history based on Office of Administrative Courts records and files. See *Habteghrgis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAP, March 31, 2006) ("A court can take judicial notice of its own records and files."):

   a. On July 29, 2022, Claimant filed an Application for Hearing in this matter, identifying as issues for consideration compensability, medical benefits, authorized provider, reasonably necessary and temporary disability benefits. The Application for Hearing was mailed to Employer at 390 Union Blvd., Lakewood, CO 80228. The Application for Hearing was not served on insurer because Employer had not identified an insurer. Respondents did not file a Response to the Application for Hearing.

   b. On August 11, 2022, the Office of Administrative Courts mailed a Notice of Hearing to Employer at 390 Union Blvd., Lakewood, CO 80228, which advised the parties that hearing was scheduled for November 17, 2022, at 1:30 p.m.

   c. Respondents did not respond to the Notice of Hearing, and have not appeared or otherwise filed any documents with the Office of Administrative Courts.

2. On July 19, 2022, Claimant, through counsel, submitted a Worker's Claim for Compensation and counsel's entry of appearance to the Division of Workers' Compensation. (Ex. 2, p. 9-12).

3. On September 6, 2022, Insurer sent Claimant a letter listing Employer, the alleged date of injury (6/24/22), a claim number assigned to Claimant's claim, and identifying an insurance carrier. (Ex. 2, p. 5).

4. Also on September 6, 2022, the Division of Workers' Compensation sent a letter to the identified insurance carrier notifying the carrier that a position statement either admitting or denying liability was required to be filed within 20 days of the Division receiving notice of Claimant's claim. (Ex. 2, p. 6).

5. On November 3, 2022, Claimant, through counsel, sent a letter to Insurer providing a copy of Claimant's Worker's Claim for Compensation dated July 19, 2022; Claimant's July 29, 2022 Application for Hearing, Claimant's Hearing Confirmation Notice, the August 11, 2022 Notice of Hearing, and copies of medical bills. (Ex. 2, p. 8).

6. On November 11, 2022, Claimant, through counsel, filed her Case Information Sheet in this matter, and served a copy on Insurer at P.O. Box 6569, Scranton, PA 18505-6569. (Ex. 5, p. 32).

7. Respondents did not appear for hearing on November 17, 2022.

Relevant Historical Facts

8. On June 24, 2022, while working as a security guard for Employer, Claimant was involved in an accident when a deer collided with her work vehicle. The collision caused the airbags in the vehicle to deploy, striking Claimant.

9. As a result of the June 24, 2022 accident, Claimant sustained injuries to her neck, upper back, and lower back. Claimant timely reported the accident and her injuries to her supervisor at Employer. Claimant's injuries arose out of the course of Claimant's employment with Employer and are, therefore compensable.

10. When Claimant's symptoms did not improve, Claimant sought medical treatment at UC Health on June 29, 2022. Claimant's treatment included evaluations at UC Health and an MRI. As a result of the treatment, Claimant incurred medical bills of $4,752.67 for treatment at UC Health on June 29, 2022, $16,408.22 at UC Health on June 30, 2022, and $564.00 at Advanced Medical Imaging on June 30, 2022. (Ex. 1).

11. The medical treatment Claimant received was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

12. Respondents have not paid for Claimant's medical treatment.

13. Claimant credibly testified at hearing that she sustained injuries to her neck, upper back, and lower back as the result of the June 24, 2022 accident, and that she received

medical treatment at UC Health and an MRI on June 29, 2022 and June 30, 2022. Claimant further credibly testified that she has incurred the medical expenses identified above as the result of her industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

<u>Compensability</u>

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is

narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by a preponderance of the evidence that she sustained injuries to her neck, upper back, and lower back arising out of the course of her employment with Employer on June 24, 2022 when she her work vehicle collided with a deer causing the airbags to deploy. Claimant's testimony was credible and unrebutted.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits designed to cure or relieve the effects of her industrial injury. Claimant credibly testified that she sustained injuries arising out of her June 24, 2022 work accident, and that she has received medical treatment directed at those injuries.

Claimant has further established by a preponderance of the evidence that the treatment she received at UC Health and Advanced Medical Imaging, on June 29, 2022 and June 30, 2022, was reasonable and necessary to cure or relieve the effects of her industrial injury. Respondents shall pay the outstanding medical expenses incurred pursuant to the workers' compensation fee schedule.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable injuries to her neck and back arising out of the course of her employment with Employer on June 24, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's June 24, 2022 injuries.

3. Respondents shall pay the medical expenses incurred by Claimant for treatment at UC Health and Advanced Medical Imaging on June 29, 2022 and June 30, 2022, pursuant to the workers' compensation fee schedule.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 5, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-161-321-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening her claim.

2. If Claimant established grounds for reopening, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits and medical benefits.

FINDINGS OF FACT

1. On December 27, 2020, Claimant sustained admitted injuries arising out of the course of her employment with Employer while assisting a nursing home resident that slipped and fell.

2. On January 4, 2021, Claimant began treatment with David Frank, M.D., for a sprain of the lumbar spine and pelvis. Dr. Frank's evaluation and treatment included a lumbar MRI, and physical therapy. The lumbar MRI, performed on February 4, 2021, showed degenerative disc disease at L5-S1, mild facet arthrosis at L4-5, and L5-S1, an no spinal canal or neuroforaminal stenosis. (Ex. A). On February 10, 2021, Dr. Frank reviewed the MRI and characterized it as showing "no major pathology." Between February 45, 2021 and March 26, 2021, Claimant attended multiple physical therapy visits to address back pain until. (Ex. B).

3. On April 21, 2021, Claimant underwent an MRI of the cervical spine which showed no disc herniation, no significant disc degeneration, spinal canal or foraminal stenosis. (Ex. A).

4. On May 24, 2021, Dr. Frank placed Claimant at maximum medical improvement (MMI), indicating Claimant had sustained no permanent impairment, did not require permanent work restrictions, and did not require maintenance medical treatment. (Ex. B).

5. After being placed a MMI, Claimant saw a Dr. Pehler on June 14, 20221. Dr. Pehler's impression was spondylosis with radiculopathy of the lumbar region and bilateral neck pain. He indicated Claimant's clinical findings were out of proportion to imaging findings and there was no evidence of significant neural compressive pathology to the cervical or lumbar spine. He noted a very mild disc herniation at the L4-S1 level, but no evidence of cervical pathology. Dr. Pehler referred claimant to physical therapy and for steroid injections. The record does not reflect whether Claimant received either additional

physical therapy or steroid injections. (Ex. A).[1] No evidence was presented to indicate that Dr. Pehler was an authorized treating physician or a referral from an authorized treating physician.

6. On July 12, 2021, Claimant underwent a lumbar MRI which showed an L5-S1 left paracentral disc protrusion with annular fissure, no central stenosis, and L5-S1 facet arthropathy producing minimal bilateral neuroforaminal narrowing. (Ex. A).[2] No credible evidence was admitted indicating any physician attributed Claimant's MRI findings to her December 27, 2020 work injury.

7. On November 4, 2021, Claimant underwent a Division Independent Medical Examination (DIME), performed by Kathy McCranie, M.D. Dr. McCranie agreed with Dr. Frank that Claimant was at MMI on May 24, 2021, and that Claimant did not qualify for an impairment rating of the cervical, thoracic, or lumbar spine. She opined that although Claimant continued to report symptoms after being placed at MMI, there was no clear objective basis for her continued symptoms, and the findings at her DIME examination were inconsistent and out of proportion to the objective findings of every provider. She noted that although a lumbar MRI showed some minor findings, there was no indication the pathology shown on the MRI was the cause of her symptoms. Dr. McCranie further noted that Claimant did not require maintenance care or work restrictions. (Ex. A).

8. On December 29, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for medical treatment only and consistent with Dr. McCranie's DIME report (*i.e.*, MMI date of May 24, 2021, and no impairment rating). (Ex. F). Claimant did not seek to overcome Dr. McCranie's DIME opinion.

9. Claimant testified at hearing that she is seeking to reopen her case to obtain medical care and temporary disability benefits. She testified that she has continued pain in her back, neck and from her head to her feet. Claimant did not offer any credible evidence that her condition has changed or worsened since being placed at MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

[1] No records from Dr. Pehler were offered or admitted into evidence. The only evidence of his examination of Claimant is the summary contained in the DIME physician's report. (Ex. A).
[2] The only record of the MRI offered or admitted into evidence is the summary contained in the DIME physician's report. (Ex. A).

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING FOR CHANGE IN CONDITION

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004).

Claimant has failed to establish by a preponderance of the evidence that she sustained a change in condition causally connected to her original work injury of December 27, 2020. Claimant's claim was closed pursuant to the Final Admission of Liability filed on December 29, 2021. Claimant presented no credible evidence establishing her condition has changed. Claimant testified she wished to reopen her claim to obtain temporary disability benefits and additional medical care, but offered no credible evidence in support of that claim, other than stating that she continues to experience pain throughout her body. Because Claimant has failed to meet her burden of establishing a change in condition causally related to her December 27, 2020 work injury, the ALJ finds no basis for reopening Claimant's claim.

Because Claimant has failed to establish a basis for reopening her claim, her claims for temporary disability benefits and medical benefits are denied as moot.

ORDER

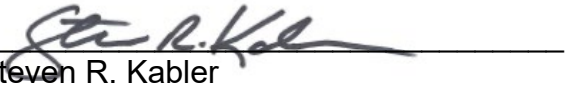
It is therefore ordered that:

1. Claimant's request to reopen her workers' compensation claim based on a change of condition is denied and dismissed.

2. Claimant's request for temporary disability benefits and medical benefits are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2022



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-200-690-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant did not sustain an injury arising out of the course of his employment with Employer on or about February 17, 2022.

2. If Claimant's injury is compensable, whether Claimant has established by a preponderance of the evidence entitlement to temporary disability benefits.

3. If Claimant's injury is compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as a courier delivering packages from Denver International Airport to end customers. As part of his job responsibilities, Claimant was required to sort packages of varying weights, with occasional packages weighing up to seventy pounds. Claimant was then required to load packages into his delivery vehicle, and deliver the packages to end customers.

2. On February 17, 2022, Claimant was performing his normal job duties for Employer. That morning, Claimant clocked in at 8:02 a.m., and clocked out at 9:02 a.m. Employer's records for that day include a notation that Claimant "went home with back pain." (Ex. 7). No evidence was offered to establish who placed the notation in Employer's records. That day, Claimant informed his supervisor, [Redacted, hereinafter KR], that he was experiencing back pain, but did not communicate to KR[Redacted] that he sustained a work-related injury, or that the back pain was the result of lifting a package at work. Claimant was not provided with a list of designated providers and Employer did not initiate the process of starting a workers' compensation claim.

3. Later that day, Claimant saw chiropractor David Estis, D.C. Dr. Estis' record (Ex. J) for February 17, 2022, states:

February 17, 2022

S: The patient states that a mild pain in the lower back region is present today with knots and tightness in the muscles around the neck, shoulders, and back area. Symptoms are consistent with the patient's chief complaint.
O: Decrease range of motion is noted in multiple areas of the spine along with edema and hyper tonicity of the surrounding soft tissue and musculature.
A: The patient had restrictions in the cervical, thoracic, and lumbar spine causing nerve pressure which results in today's reported complaints.
P: The patient received a chiropractic adjustment to the cervical, thoracic, and lumbar spine with mechanical traction as well as manual traction of the occiput. The purpose of the adjustment is to reduce subluxation and segmental dysfunction throughout the spine. The traction helps the patient to sustain their chiropractic adjustment as well as restoring range of motion while decompressing the spine. Heat therapy was recommended for 15-20 minutes at home to help increase circulation to provide protein, nutrients, and oxygen to aid in healing.

4. During the evening of February 17, 2022, Claimant sent a text message to his supervisor KR[Redacted], stating: "Yea my back is really hurt I'm gonna be off tomorrow to see my doctor if you can pls give me ur email so i can send u the proper paperwork." (Ex. 8).

5. Claimant returned to Dr. Estis on February 18, 2022, and five additional times until March 7, 2022. Dr. Estis SOAP notes for Claimant's seven visits from February 17, 2022 and March 7, 2022, are identical with two exceptions. On February 24, 2022, and March 3, 2022, in addition to repeating the identical SOAP note for February 17, 2022, Dr. Estis included a second "SOAP" note which states:

February 24, 2022

S: low back px
O: Tx i n erectors, qls, hamstrings and gastrocs, adhesions along iliac crest, gastrocs, qls, hamstrings

A: deep tissue, injury work, stretcehd legs, fbm

P: 3-4 wsk

The additional SOAP note entry for March 3, 2022 is identical to the February 24 ,2022 note, and includes the same typographical errors and misspellings. (Ex. J).

6. Although Dr. Estis' February 24, 2022 and March 3, 2022 records include the words "injury work" in the "assessment" section of his notes, no credible evidence was admitted explaining the meaning of the entry.

7. Claimant had previously seen Dr. Estis thirty-three times for vaguely defined back pain between January 4, 2019 and November 14, 2019. As with his notes in 2022, Dr. Estis' records during 2019 contain little to no specific information regarding Claimant's condition, and consist of a few different boilerplate templates for each section of the SOAP notes repeated multiple times throughout his thirty-three visits without modification.

8. With the exception of including the second "SOAP" note on February 24, 2022 and March 3, 2022 records, Dr. Estis' records for Claimant's treatment on and after February 17, 2022 are verbatim repetitions of Claimant's treatment note from September 25, 2019.

The ALJ finds Dr. Estis' records to be of little evidentiary value, other than reflecting Claimant attended chiropractic visits for ill-defined back issues.

9. On February 20,2022, Claimant texted KR[Redacted] again, stating: "I sent u the X-rays and the doctors note I won't be in until I'm cleared I'm getting another X-ray Wednesday to see the progress but I will be going in tomorrow to fill out any paperwork I need to for workers comp." (Ex. F). KR[Redacted] responded: "I got the letter sending to the head office." (Ex. F). (No credible evidence was offered or admitted identifying the "letter" referenced in KR[Redacted]'s text).

10. On February 22, 2022, Claimant texted KR[Redacted] again stating: "Hey I wanna go in today to fill out any paperwork I need to for the workers comp what time u think would be good for me to head over that u guys aren't too busy?" (Ex. F). KR[Redacted] responded: "Between 1pm and 2pm." (Ex. F).

11. On February 22, 2022, Claimant provided Employer with "Courier Statement of Accident," in which he described his injury and accident as follows:

> During the morning sort I attempted to load a package, that was labeled as 26kg, onto my van. As it was an oversized package I did my best to pick it up using a proper posture but as I lifted the item up I felt a jolt of pain run down my leg. At that point I set it back down and informed my supervisor that it was too heavy to lift." (Ex. E).

12. Also on February 22, 2022, Employer's operations manager, [Redacted, hereinafter MA] completed an Accident Report, in which it is stated: "He says it was due to picking up heavy packages[.] That statement is disputed by the supervisor who says he was told previously by [Claimant] that he hurt his back helping his mother-in-law on his time off of work." (Ex. E).

13. On March 8, 2022, Claimant saw Kristina Robinson, M.D., at Concentra. Claimant reported he was at work and lifted a heavy box into his van resulting in a back injury. Clamant reported that he felt pain and numbness into his left knee, and that his symptoms had not improved. He denied any further numbness or tingling in his extremities. Dr. Robinson documented tenderness in the left paraspinal muscles, full range of motion with painful flexion, and an equivocal straight leg raise test. She diagnosed Claimant with lumbar strain. She and prescribed a muscle relaxant. In addition, Dr. Robinson referred Claimant for physical therapy. Dr. Robinson assigned Claimant work restrictions including limiting lifting to twenty pounds. (Ex. 3).

14. On March 15, 2022, Claimant, through counsel, submitted a Workers' Claim for Compensation, indicating Claimant had sustained a low back injury on February 15, 2022, while "lifting heavy boxes off a truck and felt pain in back." (Ex. A).

15. Claimant returned to Concentra on March 16, 2022, and saw Paul Schadler, M.D. Claimant reported he had been attending physical therapy and noted a "marked reduction in pain and improved function," although he was stiff and had intermittent pain after activating. He reported pain in the left posterior buttocks shooting into his posterior leg at

times, without numbness, tingling or weakness. Dr. Schadler's only relevant objective finding was tenderness in the left paravertebral muscle and SI joint. He revised Claimant' work restrictions to include a 30-pound lifting limit, no kneeling, squatting, or climbing. (Ex. G).

16. Claimant saw Dr. Schadler again on March 23, 2022, reporting he felt he had pulled a muscle while doing stretches. Claimant reported that he had been pain free, gut after a physical therapy session he had a flare of pain with radicular symptoms. Dr. Schadler diagnosed Claimant with a lumbar strain and lumbar radiculitis. (Ex. G).

17. On April 12, 2022, Respondent filed a General Admission of Liability, admitting for medical treatment only. (Ex. 1).

18. On June 13, 2022, Claimant saw Kristin Mason, M.D., at Rehabilitation Associates of Colorado. Claimant reported he had injured his back while trying to lift a package from the ground that was heavier than he expected, and felt sharp pain in his lower back which shot into his left leg. Claimant indicated that he continued to work that day, and eventually contacted his supervisor after the pain started to radiate more significantly. Claimant reported his care to date had been through Concentra and that he had no prior history of low back injury or pain, (omitting his history of seeing Dr. Estis). Claimant reported that he was working for Employer doing alternate duty sorting packages, but indicated the conveyor belt was "a little too low for him." Dr. Mason performed a physical examination, and opined that Claimant's reported mechanism of injury and exam were most suggestive of a discogenic pain generator, most likely L5-S1. Dr. Mason recommended Claimant see a different non-Concentra physical therapist, and continue chiropractic care within Concentra with Dr. Mobus. (No records from Dr. Mobus were offered or admitted into evidence). She also referred Claimant for a lumbar MRI. She assigned work restrictions to include a 40-pound lifting/carrying limit, and repetitive lifting to twenty-five pounds. (Ex. 4).

19. On June 17, 2022, Claimant had an MRI at SimonMed Aurora. The MRI showed a focal age-indeterminate disc protrusion at the L5-S1 level, compressing the left S1 nerve root. (Ex. I).

20. Claimant returned to Dr. Mason on August 4, 2022, reporting a pain level of 2./10, and that his back was much better with chiropractic care and physical therapy. He reported only experiencing pain in the left buttock. Dr. Mason indicated Claimant remained off work at that time, but was still subject to the same work restrictions (i.e., 40-pound lifting/carrying; 25-pound repetitive lifting; 60-pound pushing/pulling; no crawling, kneeling, squatting, or climbing). (Ex. H). No credible evidence was offered to determine whether Claimant's work restrictions have been further modified since August 2022.

21. KR[Redacted] was Claimant's supervisor and testified at hearing. KR[Redacted] testified that Claimant phoned him the week before February 14, 2022 and reported that he injured his back while out of town at his mother's house, and that he would not be able to come to work because he needed to rest his back. KR[Redacted] could not recall the date of the conversation, and indicated that Claimant later texted him an informed him

that he could not work due to a fever. He credibly testified that Claimant informed him on February 17, 2022 that his back hurt, but did not indicate that the injury was work-related. KR[Redacted] credibly testified that had Claimant notified him of a work-related injury on February 17, 2022, he would have investigated the claim by taking a picture of the package and shown it to his manager, and also would have provided Claimant with workers compensation paperwork before Claimant left that day.

22. Claimant texted KR[Redacted] on Monday February 14, 2022 indicating he had a fever and would not be coming to work. (Ex. F). On February 15, 2022, Claimant again texted KR[Redacted] and informed him that he would be returning to work on February 16, 2022. (Ex. F).

23. At hearing, Claimant testified that he injured his back attempting to load a package into a van. Claimant testified that he informed both KR[Redacted] and another supervisor, [Redacted, hereinafter DR], that he was injured on February 17, 2022. In rebuttal testimony, Claimant testified that although he hurt his back, he continued to load his truck and made two deliveries before returning to Employer's facility. Claimant's testimony was not consistent with his time records showing he worked one hour on February 17, 2022.

24. Claimant testified that following his injury, he was placed on a modified duty job, working as a dock worker. Claimant testified that he was told not to return to work for Employer after July 3, 2022. At some point, Claimant began a part-time job as a "promoter" handing out pamphlets and t-shirts at Broncos games earning $25.00 per hour, but has not returned to full-time employment. Claimant did not testify as to the date he began such work.

25. Claimant provided interrogatory responses indicating he had traveled to Florida from late February 11, 2022 until late on February 14, 2022. Claimant testified that his interrogatory responses were not accurate, that he had traveled during February 2022, but was not sure of the weekend he traveled. Claimant testified he assumed he traveled from February 11 to 14, and assumed that was why he was not at work on February 14 and 15. Claimant's testimony was not credible. Exhibit E is Claimant's time record for February 1, 2022 to February 17, 2022, and shows Claimant did not have two consecutive days off prior to February 11, 2022, during which travel to Florida would have been feasible. (See Ex. E). Notwithstanding, even if Claimant did travel to Florida, the timing of his Florida trip is inconsistent with KR[Redacted] testimony that Claimant contacted him the week before February 14, 2022 and reported he injured his back while out of town.

26. Claimant testified that he did sustain an injury to his shoulder helping his mother move a chair, but that the injury occurred in December 2021, and he missed two days of work due to that injury.

27. MA[Redacted] is employer's station operation manager who oversees Employer's operations at its Denver location. MA[Redacted] testified that his first interaction with Claimant after February 17, 2022 was between February 20 and 22, 022. He testified that Claimant informed him on February 22, 2022 that he injured is back picking up a package on the job. MA[Redacted] provided Claimant with a list of designated providers.

MA[Redacted] prepared the February 22, 2022 Accident Report based on information provided by Claimant and KR[Redacted]. MA[Redacted] testified that Claimant was provided with modified duty based on the restrictions provided by his doctors, and that Claimant performed modified duty for a couple of months. Claimant has not returned to full duty work with Employer.

28. [Redacted, hereinafter JH] is Employer's general manager, and he oversees Employer's operations at multiple locations in eleven states. JH[Redacted] testified that in on July 12, 2022, he recommended that Claimant "go home and convalesce" and that he did not see any benefit to providing Claimant with additional light duty work. He testified that Claimant's final date of employment with Employer was on July 12, 2022.

29. The parties stipulated that if Claimant's average weekly wage at the time of injury was $947.91.

30. Following his injury, Claimant continued to work for Employer in a modified capacity at reduced hours until July 12, 2022. For the twenty weeks from February 18, 2022 until July 12, 2022, Claimant earned $6,499.87 in wages. Claimant's AWW for this twenty-week period totals $18,958.20, resulting in a wage loss of $12,458.33. Claimant is entitled to temporary partial disability (TPD) benefits during this period of $8,305.55. After JH[Redacted] terminated Claimant's modified duty position, Claimant began working as a promoter earning $25.00 per hour. The evidence is insufficient to determine the date Claimant began such work, the dates Claimant worked, or the wages earned as a promoter.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Withdrawal of Admission

When respondents attempt to modify an issue previously determined by an admission, they bear the burden of proof for the modification. § 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO Sept. 1, 2006

Respondents have failed to establish by a preponderance of the evidence sufficient grounds to withdraw their General Admission of Liability. Claimant's contemporaneous time records from February 17, 2022 document that Claimant left work complaining of back pain. When Claimant saw an ATP at Concentra, he was diagnosed

with a lumbar strain, and consistent with the mechanism of injury Claimant reported. Claimant's reports to providers were generally consistent, in that he reported back pain with pain shooting down his left thigh while loading a package onto a truck. Although some providers documented slightly different descriptions of the mechanism of injury, the ALJ finds that such discrepancies are trivial in nature and do not establish that Claimant did not sustain an injury or aggravate a pre-existing condition.

It is undisputed Claimant reported to KR[Redacted] that he was experiencing back pain on February 17, 2022. However, more likely than not Claimant did not advise KR[Redacted] the injury was work-related until February 22, 2022, when he completed the accident report. While the failure to immediately report the injury as work-related casts some doubt on the veracity of Claimant's claim, it does not make it more likely than not that Claimant did not sustain an injury or aggravate a pre-existing condition.

KR[Redacted]'s testimony that Claimant reported injuring his back while helping his mother-in-law while off work is insufficient to establish by a preponderance of the evidence that Claimant did not sustain a work-related back injury. KR[Redacted] testified that he spoke to Claimant the week before February 14, 2022, reported injuring his back, and indicated he would be missing time from work to recover. If, as Respondents contend, Claimant injured his back while in Florida from February 11 to 14, 2022, KR[Redacted] conversation with Claimant would have occurred before that trip. Thus, the ALJ finds the issue of whether Claimant traveled during that period to be irrelevant. Even assuming *arguendo*, Claimant traveled to Florida from February 11, 2022 to February 14, 2022, no credible evidence was admitted indicating Claimant sustained a back injury during that trip.

Alternatively, Respondents speculate that Claimant sustained an injury to his back sometime earlier in February. However, Claimant's employment records are inconsistent with a back injury sufficient to prevent Claimant from working. Claimant's work records with Employer shows Claimant worked each day from Monday February 7, 2022 through Friday, February 11, 2022, averaging 9.2 hours per day during this time.

Although Claimant had vaguely-defined back issues in 2019 and saw Dr. Estis for something related to his back, no credible evidence was admitted establishing Claimant had any complaints of, or received any care for lower back issues between November 2019 and February 17, 2022. Dr. Estis' records are too vague to establish that Claimant's current back condition is the same condition as in 2019. Nor does a remote history of back pain establish that Claimant did not sustain a lumbar strain two years later.

Respondents, not Claimant, bear the burden of proof to establish that Claimant did not sustain a compensable injury on February 17, 2022. The ALJ finds that Respondents have failed to meet this burden.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to temporary disability benefits, Claimant must prove his industrial injury caused a disability lasting more than three work shifts, he left work as a

result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD or TPD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) Temporary disability benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), or § 8-42-106 (2), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Temporary disability benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3), and § 8-42-106(2) C.R.S.

Claimant's authorized treating provider (ATP) assigned Claimant work restrictions which precluded Claimant from performing his full duties as a courier for Employer. Employer did accommodate Claimant's work restrictions until July 12, 2022. At that point, JH[Redacted] made the decision to end Claimant's light duty work based on his personal observation that he did not see any benefit to providing light duty work to Claimant. No credible evidence was presented to establish that Claimant was responsible for the termination of his light duty work. Moreover, no credible evidence was admitted establishing the work restrictions provided by Dr. Mason on August 4, 2022 have been modified since that time. Claimant has engaged in some work, but has not returned to full-time employment. Claimant has established an entitlement to temporary disability benefits continuing until terminated pursuant to statute.

As found, Claimant is entitled to TPD benefits during for the period ending July 12, 2022 in the amount of $8,305.55. Claimant is entitled to TPD benefits after July 12, 2022 considering the amounts earned as a promoter, until terminated pursuant to statute. The evidence is insufficient to determine the time period or calculation of Claimant's TPD (or TTD) benefits after July 12, 2022. The parties shall confer concerning benefits after July 12, 2022 to determine any benefits to which Claimant is entitled.

AVERAGE WEEKLY WAGE

As found, the parties have stipulated that Claimant's average weekly wage at the time of injury was $947.91.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw their General Admission of Liability is denied and dismissed.

2. Claimant's average weekly wage at the time of injury was $947.91.

3. Respondents shall pay Claimant TPD benefits for the period ending July 12, 2022 in the amount of $8,305.55.

4. Claimant is entitled to temporary disability benefits beginning July 13, 2022, and continuing until terminated pursuant to statute in an amount to be determined by the parties.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 28, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-169-078-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the left shoulder surgery performed by Dr. Black was reasonable and necessary to cure or relieve the effects of Claimant's April 3, 2021 work injury.

FINDINGS OF FACT

1. Claimant sustained admitted injuries arising out of the course of his employment with Employer as a ski instructor. On April 3, 2021, Claimant fell while working as a ski instructor and sustained fractured ribs, and a left shoulder injury. At the time of his injury, and Claimant also worked for [Redacted, hereinafter US] as a package handler, loading delivery trucks.

2. Claimant did not seek care on April 3, 2021 because the occupational health clinic was not open. The following day, April 4, 2021, Claimant was seen at St. Anthony's in Frisco, Colorado, with complaints of pain in his left posterior ribs in the infrascapular area. (Ex. D).

3. Claimant was then seen at CCOM on April 9, 2021, where he reported rib, left flank, and left shoulder pain. On evaluation of Claimant's left shoulder, he was noted to have decreased range of motion, but additional evaluation was deferred because Claimant's rib pain made it too uncomfortable to do a proper assessment of his left shoulder. Claimant was diagnosed with contusions of the left wall of the thorax, lower back and pelvis, and a sprain of the left shoulder. (Ex. E).

4. On April 12, 2021, Claimant underwent x-rays which showed fractures of multiple ribs, and negative for left shoulder fractures or bony abnormalities. (Ex. G).

5. On April 26, 2021, Claimant reported clicking in his left shoulder and that he had not been using his left arm much due to rib pain. (Ex. I). Dr. Graham ordered an MRI of Claimant's left shoulder. (Ex. I).

6. On May 3, 2021, claimant was evaluated by Taryn Barrette, PA-C, at CCOM. Ms. Barrette noted Claimant had normal range of motion of the left shoulder, but a loud click with abduction and posterior rotation. She diagnosed Claimant with a sprain of the left shoulder and rib fractures. (Ex. J).

7. On May 7, 2021, Clamant had a MRI of the left shoulder which was interpreted as showing a tear of the posterior superior glenoid labrum decompressing into a 2.6 mm para labral cyst, tendinopathy of the supraspinatus and infraspinatus tendon, and AC joint arthropathy. (Ex. FF).

8. On May 19, 2021, Claimant saw Aaron Black, M.D., at Panorama Summit Orthopedics. Dr. Black reviewed Claimant's MRI and diagnosed Claimant with a superior glenoid lesion of the left shoulder. Dr. Black completed a Physician's Report of Worker's Compensation Injury ("WC 164") in which he indicated that the findings were consistent with Claimant's mechanism of injury, and that Claimant's work-related medical diagnoses were a left shoulder SLAP tear and multiple rib fracture. He recommended physician therapy for biceps and rotator cuff strengthening and scapular stabilization, and advised Claimant to follow up in six weeks. Dr. Black also indicated Claimant could return to work with lifting restrictions "as tolerated" noting Claimant "should never left anything that causes pain. No formal lifting restrictions but pt might limit weight temporarily." (Ex. N).

9. In June 2021, approximately two months after his injury, Claimant returned to work at US[Redacted] working full duty. He did not return to work for Employer at that time because of the seasonal nature of his employment, but he did return to work for Employer in the winter of 2021-22. Claimant testified that his left shoulder had improved, but that he was continuing to experience clicking, pain and weakness in his left shoulder.

10. Claimant returned to Dr. Black on June 25, 2021, reporting that his shoulder range of motion and stability had improved, although he continued to report joint pain, soreness, and "crunchy" movement of his shoulder. Dr. Black's examination showed tenderness over the bicipital groove, a positive O'Brien's test and a positive load and shift test. Dr. Black advised claimant to continue with physical therapy, but that if he did not continue to improve over the next 3-6 months, they would consider a biceps tenodesis surgery to address the clicking in his shoulder. (Ex. U).

11. Claimant saw Dr. Black again on August 6, 2021, reporting improving left shoulder pain, exacerbated by lifting. On examination, Dr. Black noted tenderness over the biceps tendon. He also found full range of motion, strength, and stability of Claimant's left shoulder with negative Hawkins', O'Brien's, and Speed's tests. Claimant was advised to continue with physical therapy and to follow up with Dr. Black in six weeks. (Ex. X).

12. On September 17, 2021, Claimant saw Dr. Black, noting his shoulder had been improving and that he felt he had plateaued, and was nearing 100%. Claimant continued to have tenderness over the bicipital groove, and had a normal examination, with the exception of positive Hawkins and O'Brien's tests. Dr. Black recommended six to eight weeks of additional physical therapy. (Ex. BB). Claimant testified, credibly, that Dr. Black advised that if his shoulder worsened, he would consider surgery.

13. Claimant attended additional physical therapy from September 21, 2021 through October 21, 2021. During these visits, Claimant reported continued left shoulder pain with movement, and that his work for US[Redacted], primarily repetitive lifting, aggravated his left shoulder. Claimant did not report any distinct new injury to his left shoulder during this period. (Ex. M).

14. On March 21, 2022, Claimant saw Janet Graham, NP, at CCOM. Claimant reported that he was continuing to experience left shoulder pain with certain movements,

and he was having difficulty sleeping at night due to his pain. Claimant indicated he would like to proceed with SLAP surgery. Ms. Graham referred Claimant back to Dr. Black for evaluation. (Ex. DD).

15. On April 4, 2022, Respondents filed a General Admission of Liability, admitting for medical benefits, and temporary disability benefits through June 10, 2021. The GAL noted that Claimant had returned for treatment on March 21, 2022. (Ex. 1).

16. Claimant saw Dr. Black on April 11, 2022, noting that he continued to have shoulder pain exacerbated by overhead and reaching activities. Dr. Black indicated Claimant had done five months of physical therapy and was not working his normal job delivering packages due to his shoulder pain. Dr. Black noted positive Hawkins, Neer's, O'Brien's, Speed's and Yergason's tests. He reviewed Claimant's May 7, 2021 MRI, and noted that it showed an obvious SLAP tear, and with tendinopathy of the supraspinatus and infraspinatus tendons, with AC joint arthropathy. He indicated Claimant had failed extensive conservative measures and would benefits from shoulder surgery, including biceps tenodesis with possible labral repair. (Ex. EE). On April 12, 2022, Dr. Black submitted to Insurer a request for authorization of an open repair of the left biceps tendon, and included a WC 164 form indicating that Claimant's left shoulder SLAP tear was work related, and that his need for surgery was related to his April 3, 2021 injury.. (Ex. FF).

17. On April 20, 2022, Insurer submitted Claimant's request for surgery to Timothy O'Brien, M.D., for a medical record review. Dr. O'Brien opined that the only injury Claimant sustained as the result of his April 3, 2021 work accident was left rib fractures. He further opined Claimant's left biceps tendon was a "new onset" pain that occurred after a six-month gap in treatment and was unrelated to his work injury. Thus, he opined, the surgery recommended by Dr. Black was not work related. Dr. O'Brien's opinion is not credible or persuasive. Contrary to Dr. O'Brien's report, Claimant's biceps tendon issues were not new onset symptoms in March 2022. Claimant's records show he was experiencing biceps tendon issues in May 2021, when Dr. Black referred him for physical therapy for biceps and rotator cuff strengthening. Dr. Black had also noted the possibility of a biceps tenodesis in June 2021. (Ex. B).

18. Based on Dr. O'Brien's report, Insurer denied authorization for the surgery recommended by Dr. Black. (Ex. 3).

19. On July 25, 2022, Dr. O'Brien performed an independent medical examination (IME) of Claimant at Respondent's request. Based on his examination, Dr. O'Brien indicated Claimant's shoulder exam was normal for his age. He reiterated his opinion that Claimant's April 3 2021 work incident resulted in an isolated left chest wall contusion and rib fractures. He opined "The work incident did not result in a left shoulder injury of any kind." As with his April 20, 2022 report, the opinions expressed in Dr. O'Brien's July 25, 2022 report are neither credible nor persuasive. (Ex. A).

20. Dr. O'Brien was admitted as an expert in orthopedic surgery and testified at hearing. Dr. O'Brien testified consistent with his reports, and opined that Claimant's May

7, 2021 MRI demonstrated significant degeneration in the soft tissue and bone, that the MRI did not demonstrate an acute tear of tissue, and characterized Claimant's left shoulder as functional but "diseased." Dr. O'Brien testified Claimant's left shoulder has no surgical indications, but to the extent Claimant requires surgery, the need for surgery is unrelated to his April 3, 2021 work injury. He further opined that Claimant's US[Redacted] job duties have the potential to aggravate Claimant's shoulder. Dr. O'Brien reiterated his opinion that he does not believe Claimant sustained any shoulder injury and his only work-related injury was to his rib cage. Dr. O'Brien's opinions were not persuasive.

21. On October 5, 2022, Claimant underwent an IME with Gary Zuehlsdorff, M.D. Dr. Zuehlsdorff did not testify, but his report was admitted into evidence as Exhibit 4. Dr. Zuehlsdorff opined that Claimant left shoulder injury is causally related to his April 3, 2021 ski accident, and that Claimant had no evidence of a pre-existing left shoulder condition. He agreed with Dr. Black's treatment approach of conservative care, and surgery after the failure of conservative measures. (Ex. 4).

22. On October 10, 2022, Claimant had a second MRI of the left shoulder, but with contrast. The MRI showed a 270-degree labral tear including a significantly large SLAP tear with evidence of shoulder instability. (Ex. 7).

23. On October 14, 2022, Dr. Black issued a report (Ex. 7) in which he opined:

> I do believe that [Claimant] has a significantly large SLAP tear with 270 degrees of extension. I further believe that this almost certainly happened at the time of his initial injury as the forces that are involved are reasonable for this. This would have been very difficult to assess when he had multiple broken ribs sustained from his initial injury as those are quite painful. He was initially assessed as having at least a SLAP tear if not more labral pathology and the full diagnosis was significantly limited by the fact that his initial MRI was non-contrast without intra articular gadolinium. The patient attempted extensive nonsurgical management in attempt to avoid surgery including rest, activity modification, NSAID usage, and physical therapy, but none have provided relief and his symptoms have actually worsened over time.

24. Dr. Black indicated he believed it was reasonable to proceed to an arthroscopic labral repair and biceps tenodesis. (Ex. 7). Claimant testified he had the surgery on October 25, 2022.

25. Claimant credibly testified he had begun to approach full recovery by September 2021, but was not yet at 100% when released from care by Dr. Black. He continued to experience pain, weakness, and limitations of range of motion, but not so severe that he could not function or work. He credibly testified that Dr. Black informed him if he was not fully recovered within six months after discharge, they would revisit the potential of surgery on his shoulder. Between the end of October 2021 and March 2022, Claimant

testified his shoulder did not return to baseline. He credibly testified that before the April 3, 2021 accident, he had no issues with his left shoulder, no clicking, no pain, and no weakness. Between October 2021 and March 2022, Claimant worked for both Employer and US[Redacted]. He testified he did not sustain any other injury while working as a package handler for US[Redacted], although he did have pain after working, and that he never woke up "pain free." Claimant's testimony was consistent with his medical records, and was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the left shoulder/biceps surgery performed by Dr. Black was reasonably necessary to cure or relieve the effects of Claimant's April 3, 2021 injury. The evidence established that Claimant sustained a left shoulder injury as the result of his April 3, 2021 work accident, including a left shoulder SLAP tear, as diagnosed by Dr. Black and MRI. Dr. Black initially discussed the possibility of performing a biceps tenodesis in June 2021, if conservative treatment did not resolve Claimant's complaints. Claimant then underwent significant conservative treatment to arrive at a point in September 2021 where his shoulder felt near normal, although not fully recovered. Claimant continued physical therapy through October 21, 2021, and continued to report left shoulder symptoms during this period. Although Claimant had a four-month gap between his last physical therapy appointment and returning for evaluation with Ms. Graham in in March 2022, no credible evidence was admitted indicating Claimant sustained a second injury to his shoulder. Although Claimant's work with US[Redacted] aggravated his shoulder symptoms, no credible evidence was admitted indicating Claimant's shoulder pathology, or the need for surgery was caused by his work at US[Redacted]. The ALJ finds the opinions of Dr. Black and Dr. Zuehlsdorff that Claimant sustained a left shoulder injury and that the left shoulder surgery was causally related to the April 3, 2021 accident credible and persuasive. Dr. O'Brien's opinions that Claimant's only work-injury was left rib fractures, and that shoulder surgery was not work related are not credible or persuasive.

ORDER

It is therefore ordered that:

1. The surgery performed by Dr. Black on Claimant's left shoulder and biceps was reasonably necessary to cure or relieve the effects of Claimant's April 3, 2021 work injury.

Respondents shall pay the cost of Claimant's left shoulder/biceps surgery according to the workers' compensation fee schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 29, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-695-003

ISSUES

- Did Claimant prove he suffered a compensable injury arising out of, and in the course and scope of, his employment on March 3, 2022?
- Did Claimant prove entitlement to reasonably necessary medical benefits?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to temporary total disability (TTD) benefits?
- Did Claimant prove Employer should be penalized for failure to admit or deny liability pursuant to § 8-43-203(2)(a), C.R.S.?[1]

PROCEDURAL HISTORY

On June 15, 2022, Claimant filed an Application for Hearing endorsing: compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, disfigurement, TTD, PPD, and PTD. Claimant also endorsed a claim for penalties pursuant to §8-43-203(2), C.R.S. A hearing was set for October 6, 2022. On June 30, 2022, Claimant filed an Application for Expedited Hearing based on there being an urgent need for a prior authorization of healthcare services. On August 10, 2022, Claimant filed an Amended Application for Expedited Hearing and plead, "***Respondents*** have filed a Notice of Contest within the previous 45 days on ***May 5, 2022***, and the Claimant requests an expedited hearing on compensability and medical benefits." (emphasis added). The Notice of Contest attached to Claimant's Amended Application for Expedited Hearing, however, is dated ***August 12, 2022***, and it is signed by ***Claimant's counsel***. ALJ Spencer ordered the June 15, 2022 and August 10, 2022 Applications for Expedited Hearing stricken, and "[a]ll issues endorsed on Claimant's June 30 and August 10 expedited applications shall be consolidated with the June 15 application and shall be heard of October 6, 2022."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 32 year-old man who worked for Employer as an installation technician. Claimant testified he was hired by [Redacted, hereinafter RS] in October 2019.

[1] In his position statement, Claimant argues for the imposition of penalties pursuant to § 8-43-409(1), C.R.S., but that specific claim for penalties was not endorsed on Claimant's Applications for Hearing.

2. RS[Redacted] is the sole owner of Employer, and was Claimant's supervisor. He and Claimant were the only employees in March 2022.

3. Claimant testified he did not have a set daily schedule. RS[Redacted] would text him each morning and direct his work for the day. Claimant's work included such things as installing speakers, installing cameras, hanging televisions, and wiring a house for electronics.

4. On March 3, 2022, Claimant was repairing a surveillance camera on the side of a house at a residential property in Franktown, Colorado. Claimant testified he fell from a ladder to the ground, landed on his heels, and shattered both heel bones. It is uncontroverted that Claimant was injured in the course and scope of his employment.

5. The homeowners drove Claimant to Castle Rock Adventist Hospital where he was evaluated and treated for his injuries. Claimant was diagnosed with bilateral calcaneal fractures, which required surgery. (Ex. 1).

6. RS[Redacted] was notified of Claimant's injury. Employer never referred Claimant to a physician for treatment. The right to select a physician passed to Claimant.

7. Claimant underwent an open reduction internal fixation of the bilateral calcaneus fractures on March 5, 2022. Jeremy Christensen, DPM, of Rock Canyon Foot & Ankle, performed the surgery. (Ex. 1).

8. Claimant spent approximately a week after surgery at a rehabilitation center participating in occupational therapy and physical therapy so he could go home. He was not weight bearing for approximately four months following surgery.

9. Claimant testified he was unable to put any weight on his feet or heels for approximately four months after surgery. Claimant further testified he had to wear casts on each leg for two and a half months following surgery, and then he used walking boots on each leg.

10. Claimant continued to receive follow-up medical treatment from Dr. Christensen, and other providers, following his surgery. Claimant continues to see Dr. Christensen and to engage in physical therapy. According to Dr. Christensen, Claimant will require ongoing medical treatment to address his work-related injury. (Ex. 4).

11. Claimant testified he received bills for medical treatment related to the March 3, 2022, injury. He further testified that Employer did not pay for any of the medical treatment. Claimant testified he has incurred medical expenses of approximately $300,000.00. Multiple invoices and bills were admitted into evidence (Ex. 1 pp 1-7-124). It is unclear from the evidence in the record, however, what amounts have been paid, and what amounts are outstanding.

12. Claimant testified Employer terminated him in April 2022. On April 5, 2022, RS[Redacted] e-mailed Claimant and said "[s]orry to say this but until we figure what claim is that you made against [Redacted, hereinafter SD] to the State of Colorado all payroll

checks have stopped. We have paid you up to date for all your payroll and you made a claim that you have not received your normal payroll. We will continue paying for the medical visits until we get the Insurance claim worked out. Once we get the State of Colorado resolved we can look at back payroll. You might want to look at short term disability until then." (Ex. 3). Claimant testified he received paychecks until the last one in April.

13. Claimant's medical records from Castle Rock Adventist Hospital indicate under "Social History" that Claimant utilizes marijuana daily. (Ex 1, page 19). RS[Redacted] testified that Claimant's marijuana use, per his medical records, would have been a basis for termination. RS[Redacted] testified, however, that he did not terminate Claimant, but stopped paying him since he was not working.

14. Claimant credibly testified he was not under the influence of marijuana at the time of his work-related injury on March 3, 2022.

15. The ALJ finds that RS[Redacted] terminated Claimant on April 5, 2022.

16. Employer does not currently maintain a workers' compensation insurance policy, nor did Employer have workers' compensation insurance on March 3, 2022. RS[Redacted] testified that the policy lapsed in November 2021. RS[Redacted] testified that Covid and supply chain issues forced Employer to restructure and reorganize, and this was why he allowed his policy to lapse.

17. RS[Redacted] testified that as of April 5, 2022, he was aware Claimant filed a Workers' Claim for Compensation, and received copies of everything that was filed.

18. The ALJ finds that RS[Redacted] was aware Claimant filed a Workers' Claim for Compensation on April 5, 2022. RS[Redacted] had until April 25, 2022 to file a notice admitting or denying liability. The ALJ finds that RS[Redacted] did not file any notice with the Division admitting or denying liability.

19. Claimant filed a Notice on Contest on August 12, 2022, but plead on the Amended Application for Expedited Hearing that Respondent filed the Notice of Contest on May 5, 2022.

20. At the time of Claimant's injury, Employer paid Claimant $2,020.60 every two weeks, after taxes. (Ex. 2). There is no evidence in the record of Claimant's pre-tax wages. The ALJ finds that Claimant's Average Weekly Wage (AWW) at the time of his injury was $1,101.30 ($2,020.60 / 2). This equates to a weekly TTD rate of $734.20 and a daily rate of $104.88.

21. Employer paid Claimant through April 15, 2022. (Ex. 2).

22. Claimant proved he is entitled to TTD benefits commencing April 16, 2022 and ongoing. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. § 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the

employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury out of and in the course of his employment on March 3, 2022. The injury resulted from Claimant falling from a ladder and fracturing both heals. The onset of disability occurred on March 3. 2022 when he could no longer continue working. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business.

Medical Benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. The employer has the right to choose the claimant's treating physician "in the first instance." § 8-43-404(5)(a)(I)(A), C.R.S. If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, the right to select a treating physician passed to Claimant, and after receiving emergency treatment at Castle Rock Adventist Hospital, he selected Dr. Christensen. Employer is liable for the emergency treatment Claimant received, and reasonably necessary treatment from Dr. Christensen and his referrals to cure and relieve the effects of Claimant's industrial injury.

Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But section 8-42-102(3), C.R.S. gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

At the time of his injury, Claimant was earning $2,020.60 every two weeks after taxes. There was no objective evidence of Claimant's wages before taxes. As found, Claimant's AWW at the time of his injury was $ 1,010.30.

Temporary Disability Benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his injury and could no longer work following his injury on March 3, 2022. Claimant has not returned to work since then. There is no persuasive evidence Claimant has been released to regular duty or been put at MMI by an authorized treating physician. Accordingly, Claimant is entitled to TTD benefits commencing April 16, 2022 and continuing until terminated by law. The TTD rate is $734.40 per week ($1,101.30 x 2/3 = $734.20). Employer must pay statutory interest of 8% per annum on all benefits not paid when due. § 8-43-410(2), C.R.S.

Penalties for Failure to Admit or Deny

Claimant seeks a penalty under § 8-43-203, C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." § 8-43-203(1)(a). An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. § 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means the imposition of a penalty under § 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm'n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under § 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew Claimant filed a Workers' Compensation Claim on April 5, 2022, so the deadline to admit or deny liability was April 25, 2022. Employer has never filed an admission or denial of liability regarding Claimant's injury. But Claimant's August 10, 2022, Amended Application for Expedited Hearing asserted that Respondents filed a

Notice of Contest on May 5, 2022. The Notice of Contest attached to the application was filed by Claimant on ***August 12, 2022***, and references and attaches RS[Redacted]'s ***April 5, 2022*** email.

Claimant's hearing took place on October 6, 2022. Claimant's case has not been delayed, nor prejudiced, by Employer's failure to admit or deny liability. Claimant's multiple filings, including the Notice of Contest, have created procedural challenges in this case with respect to Claimant's penalty claim.

The ALJ finds Employer should be penalized $ 1,048.80, for failure to admit or deny liability from April 25, 2022 to May 5, 2022. The allowable penalty is mitigated by the procedural irregularities in this case and Claimant's assertion that a Notice of Contest was filed on May 5, 2022. This penalty is based upon 10 days at the daily compensation rate of $104.88. The penalty of $ 1,048.80 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund.

ORDER

It is therefore ordered that:

1. Claimant's injury on March 3, 2022 is compensable.

2. Dr. Christensen in an authorized provider.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury, including the emergency treatment Claimant received at Castle Rock Adventist Hospital.

4. Employer shall reimburse Claimant for any medical expenses related to his March 3, 2022 injury. Since the ALJ was unable to determine Claimant's medical expenses, Counsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue

5. Claimant's average weekly wage is $ 1,101.30.

6. Employer shall pay Claimant TTD benefits from April 16, 2022 and continuing until terminated by law.

7. Employer shall pay statutory interest of 8% per annum on all TTD owed on or after April 16, 2022, not paid when due.

8. Employer shall pay $ 1,048.80 in penalties for failure to admit or deny liability. Fifty percent of the penalty shall be paid to the Claimant, and

fifty percent of the penalty shall be paid to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-852-001

ISSUE

- Did Claimant prove by a preponderance of the evidence that he suffered compensable injuries to his back and right arm on August 10, 2021?

- Did Claimant prove by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits?

- What is Claimant's average weekly wage (AWW)?

- Did Claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits for the period of August 10, 2021 through August 20, 2021 and ongoing?

STIPULATIONS

At the beginning of the hearing, Respondents acknowledged that Claimant suffered a compensable injury to his right arm, and Claimant missed ten days of work because of the injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 49 year-old male who worked for Employer as a siding installer. On August 10, 2021, around 10:30 a.m., Claimant was installing siding and fell from the scaffolding. Claimant testified that he felt pain in his lower back after falling. Claimant testified he grabbed a pole as he was falling to try to catch himself, and he lacerated his right arm as he fell. Claimant estimated the scaffolding was 10 to 12 feet high. When Claimant fell, he landed in a standing position. (Tr. 15:18-16:24).

2. [Redacted, hereinafter RC], Claimant's co-worker, witnessed Claimant's fall. RC[Redacted] credibly testified Claimant landed on his feet, and did not seem to land hard. Claimant's right arm, however, was bleedings profusely. RC[Redacted] wrapped Claimant's arm with a shopping bag and he made a tourniquet. RC[Redacted] took Claimant to the Emergency Department at Banner Health McKee Medical Center (Banner). (Tr. 29:6-30:14).

3. The emergency triage note from Banner indicated Claimant had a right arm laceration from sheet metal. The medical record noted that Claimant was working at a construction site and throwing away trash when a piece of sheet metal inadvertently tore into his right forearm, lacerating him. (Ex. A, p. 30).

4. Claimant speaks Spanish and communicated with the English-speaking staff at Banner through a screen monitor that served as a translation device. (Tr. 16:14-18). Claimant credibly testified he did not tell anyone at Banner that he lacerated his arm when throwing away trash, but that he lacerated his arm when he fell from the scaffolding. (Tr. 17:23:18-4).

5. The ALJ finds that Claimant fell from scaffolding while working, and injured his right arm.

6. In the emergency room, Claimant rated his pain as 2 out of 10. The medical record noted Claimant's injury was not head or spine related. (Ex. A, p. 36). Claimant testified that while he was in the emergency room, he did not report any injuries to, or problems with, his back. (Tr. 16:19-22).

7. Claimant's laceration was cleaned, irrigated, and sutured. Claimant was provided discharge instructions solely for a laceration, and these were provided in English and Spanish. (Ex. A, pp. 1-15).

8. Claimant was restricted to modified duty from August 10 to August 20, 2021. Claimant was to not use his right arm, and keep the laceration clean and covered. The work-related diagnosis listed on the August 10, 2020, WC 164 form was a right arm laceration. There is no mention of any back injury. (Ex. A, p. 58).

9. On August 18, 2021, Claimant filed a Worker's Claim for Compensation. On the form, Claimant asserted he fell seven feet from scaffolding, and injured his right arm and back. The nature of the injury is listed as laceration and sprain. (Ex. 1).

10. Claimant returned to Banner on August 20, 2021, to have his sutures removed. Claimant reported no pain and none was suspected. (Ex. A, p. 78). Claimant's clinical assessment was a laceration of the anterior right arm. (Ex. A, p. 84).

11. Claimant testified he reported his back issues at the time he had his sutures removed. (Tr. 16:19-25). But there is no objective evidence in the medical records that Claimant reported any injury to his back or any back pain.

12. Claimant testified Employer terminated him because he went to the emergency room for treatment. (Tr. 19:11-16). This testimony was uncontroverted.

13. Claimant testified he continues to have pain in his lower back, which he did not have prior to the fall, and has not worked since August 10, 2021. (Tr. 19:23-20:6). He further testified the physicians released him from care on August 20, 2021, and no physician has kept him off of work. (Tr. 22:5-23:12).

14. When questioned on direct examination, Claimant testified it was possible that the translation system at the hospital did not record correctly his mechanism of injury or the body parts involved. (Tr. 18:15-19: 3). While some details may be lost in translation, it is not credible that Claimant's alleged complaints regarding his low back would have been misinterpreted or not recorded.

15. Claimant testified he has not seen a doctor for his low back pain because he does not have insurance. (Tr. 22:1-3). The ALJ finds Claimant's testimony to be credible, but there is no objective medical evidence to support Claimant's complaints of back pain, and his alleged inability to work.

16. Claimant was restricted to modified duty from August 10, 2021 until August 20, 2021. It is uncontroverted that Employer terminated Claimant on August 10, 2021. Further, Claimant testified he was released to return to work on August 20, 2021.

17. The ALJ finds that Claimant is entitled to TTD from August 10, 2021 through August 20, 2021.

18. Claimant testified he earned $30.00 per hour and worked 35 to 45 hours per week, which equates to an average of 40 hours per week. Claimant submitted a copy of "check history" from [Redacted, hereinafter MT] (Ex. 13). The most recent check from Employer dated August 6, 2021, was in the amount of $1,400.00. This would equate to 46 plus hours of work. As Claimant's work hours were variable, it is reasonable to calculate Claimant's AWW based on a 40 hour workweek.

19. The ALJ finds that Claimant's AWW at the time of his injury on August 10, 2021 was $1,200.00. This is based on a 40 hour workweek at $30.00 per hour.

20. Based on the totality of the evidence, the ALJ finds that Claimant failed to prove by a preponderance of the evidence that he suffered an injury to his back on August 10, 2021 when he fell from the scaffolding.

21. The ALJ finds that the medical care Claimant received for the laceration on his right arm was reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts

in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. § 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury to his right arm in the course of his employment on August 10, 2021. The injury resulted from Claimant falling from scaffolding and lacerating his right arm. As found, there is no persuasive evidence that Claimant injured his back in the fall. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back.

Medical Benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. Claimant received emergency treatment at Banner. This treatment was reasonable, necessary and related to Claimant's injury to his right arm. Employer is liable for the emergency treatment Claimant received.

Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But section 8-42-102(3), C.R.S. gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

At the time of his injury, Claimant was earning $30.00 an hour, and he worked 35-45 hours a week. As found, Claimant's AWW at the time of his injury was $ 1,200.00.

Temporary Disability Benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his injury and was restricted to modified duty. Claimant could not return to work because Employer terminated him. The doctors released Claimant to full duty work on August 20, 2021. Accordingly, Claimant is entitled to TTD benefits from August 10, 2021 through August 20, 2021.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his back on August 10, 2021.

2. Claimant sustained a compensable injury to his right arm on August 10, 2021.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's

injury, including the emergency treatment Claimant received at Banner.

4. Employer shall reimburse Claimant for any medical expenses related to his compensable injury on August 10, 2021. Counsel for Claimant and counsel for Respondents shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue

5. Claimant's average weekly wage is $ 1,200.00.

6. Employer shall pay Claimant TTD benefits from August 10, 2021 through August 20, 2021.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 16, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-468-004

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence he sustained a work related injury in the course and scope of his employment with Employer on April 30, 2020.

IF COMPENSABAILITY IS PROVEN, THEN:

II. Whether Claimant has shown by a preponderance of the evidence that Claimant is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown by a preponderance of the evidence who is the authorized treating physician.

IV. Whether Claimant has shown by a preponderance of the evidence he is entitled to a change of physician.

V. Whether Claimant has shown what is his average weekly wage.

VI. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary disability benefits from May 27, 2020.

STIPULATION

The parties stipulated that Claimant's average weekly wage was $1,041.40. The stipulation of the parties is approved and incorporated in the Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 68 years old at the time of the hearing. Claimant was the head of public works for Employer and started working there in 2019. He would care for the grounds, performing maintenance of machinery and park maintenance. He had multiple different duties including maintenance of equipment and machinery, including a tractor, street sweeper (which was the biggest piece of equipment), dump truck, motor grader, and pickup with a plow. He was the only public works employee for Employer.

2. On or about April 30, 2020, it was springtime in the area and he had to sweep the streets, to get rid of the stones and debris that had accumulated on the streets during the winter months. He was not certain of the exact day but within a day or so on either side of April 30, 2020 is when the accident happened.

3. He was very familiar with the sweeper, which picked up the sand and dirt left over from the winter snow treatment of the roads. He had to do maintenance checks and adjust each machine before use and had to make sure the sweeper was ready to do the street sweeping. He had to perform preventative maintenance on the sweeper, including on the chains that held up the attachment, or hopper. Several parts needed lubrication because it had dried up over the winter, caused by the sand and dirt in the hopper (stores the sand and dirt). He also had to spray water on it to clear the filter of the clogged hoses. The sweeper would barely fit through the shop 12 foot doors. He would have to get on the ground to get under it, had to sit on the ground because it was too big to use a mechanical lift to get to the underside.

4. On or about April 30, 2020, he likely right before lunch, when he was getting up from servicing the chain, he struck his head. He was on his side under the machine, had just fastened the chain, and he tried to get up, from underneath. He struck his head on the metal bar of the car lift just proximal to the sweeper, about 1 foot away from the sweeper. It was a very solid strike, as he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He was not paying attention to how he was walking. He sat for one or two minutes. But he had a lot of work on his schedule to do, so he pushed forward to get everything done despite the headache. At the time he said some curse words, but no one was in the shop to hear him. He worked alone.

5. He struck his head on the temple, right above his right ear. He thought he was wearing regular glasses, not his protective goggles, because they were bifocal, and he could not see without them. The glasses did not fall off of him. The area on his head felt bruised for one to two (1-2) days following the incident. He continued working the complete day because he had a long list of machinery maintenance to complete but had problems completing the work.

6. Following this accident, he started to have cognitive issues, difficulty with memory, word search problems. He did not notice right away, as he was by himself most of the time, but at the end of day he would go into the office around quitting time. He did not recall reporting the injury to anyone but did mention it to his wife who worked for Employer. After this accident, he would get dizzy and feel fuzzy, and had memory problems. The medical records mentioned cognitive issues, problems with cognition and memory. He first noticed the cognition problems because he was told by family members. Then he started seeing small things that he would normally do but he did not recall doing them.[1]

7. In the days following the accident Claimant would notice himself that he had continual problems remembering things at work and at home. For example, he had to perform a sprinkler system job and could not work out how to get it done, though it was something he was very familiar with completing. He knew the controller wiring was off. He was also very frustrated that he could not get to the wires he needed to work on because his hands would tremble excessively. This was also after the accident but he could not remember exactly when after the work incident when he hit his head.

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[1] The ALJ infers from tis that he would complete everyday tasks and have no recollection of actually performing the tasks.

8. Claimant ended up going to the hospital on May 26, 2020. The office manager and Town Administrator[2] had sent him home because of the memory problems and the shaking. He remembered he had only wanted to go to his primary care provider at Franktown Family Health, but his wife took him to the emergency room (ER) at Parker Adventist instead.

9. Claimant knows he had a craniotomy. Now he cannot drive safely anymore, anywhere. He lives in a community of approximately 600 people, and few residents drive the roads. He had been driving to the store, but he had the shakes, sometimes severely, though some days were better than others. A lot of the time he simply went with his wife everywhere. His symptoms were multiple, such as his limbs shaking, right hand worse than the left; balance issues, would drag his left foot; serious attention issues, it is hard to focus and to stay focused; memory issues, he would forget what he would be doing on a regular basis and fail to complete tasks. Claimant emphasized that there was no way that he could return to work. He continued working after April 30, 2020, but from May 26, 2020 he stayed at home after his surgery. He did not recall what happened for some months following the surgery. He was frequently fatigued and would sleep a lot. He has not returned to work.

10. Claimant and his wife reported to the emergency room personnel that there were three potential incidents that they specifically recalled involving his head. The first incident was at work, when he was getting up from the ground and hit his head on the metal bar of the car lift. (Work incident) the month prior. The second one was approximately one week before going to the hospital, when he scraped his head on the door frame of his shed, which was approximately one inch shorter than he was. It scrapped his forehead at about the hair line. He had had the shed for 20 years and never hit or scraped his head before that time. The scrape on his head was not very serious, just surprising. He did not recall exclaiming in pain, cursing or bleeding from the scrape but he did mention it to his wife. (Shed incident). The third incident occurred the day before he was hospitalized. He was in the boat, in the process of getting out. He had one foot over the rail, or side of the boat, and felt very weak, he could barely get the other foot over. He recalled he was holding onto the side of the boat, could not push himself up, so he got kind of stuck. He had a grip on the edge of the boat and as he had a foot on the ground and could not stay up though he thought he had a firm grip on the side of the boat. He did not recall hitting his head but thought he might have hit his head on the ground. (Boat incident). Of the three incidents, the injury at work was a lot more serious. He had never had shaky hands before the April work incident. He had not suffered from any cognitive issues before, and no prior problems with memory issues, loss of focus or attention.

11. There were no other significant incidents that he could recall. He stated that he had hit his head a work before, but it was a long time ago, long before he started working for Employer. There was certainly nothing in the last 5 years before this work incident. He had never been diagnosed with a hematoma before May 26, 2020.

12. He did not recall immediately reporting the incident to Employer and did not think it had been immediately after the accident. If he did, he certainly did not complete

[2] The title of Town Administrator is noted on the unsigned designated provider list, Exhibit K.

any formal report himself. He did mention the incident to the Town Administrator but never received a list of doctors to see. His wife also worked for Employer and may have also mention the incident to the Town Administrator.

13. Claimant stated that he was foggy when he was admitted to the hospital, and he noted that his wife likely answered a good portion of the questions he was asked. He was having problems with thought process. He went to look for a bathroom in the hallway and was disoriented and urinated on himself. He was dragging his left foot too.

14. Claimant's wife (Wife) testified at the hearing. She noted that she and Claimant had been married for 33 years. She was employed by Employer as a Utility Clerk at the Town Hall, working part time, and part time as a realtor. Outside of work she would spend a significant amount of time with Claimant, and occasionally had lunch with Claimant, while at work. She stated that she did not recall that Claimant reported the incident to Employer. Around the beginning of May, 2020, she noted that Claimant was having shaking in his left arm. She noted that other strange things were happening to Claimant, such as he could not open a bag of chips. This ALJ infers that he did not have any problems doing that activity before. He could not find the light switch in the bedroom, and he was doing everyday things in a slow-motion kind of way.

15. Claimant's wife stated that Claimant, prior to the injury at work, was very strong, and had a very high work ethic. They had to remove their windmill, as Claimant was unable to pound the stakes into the ground, implying that it was an activity that he would perform frequently before. She journaled everything and put a timeline together of things that Claimant would not remember. She became very alarmed by what was happening to her husband as he had problems remembering things he had done or said. He had weakness of his limbs. On one occasion, they were out to breakfast with one of their daughters and his arm kept shaking so hard that it caused him to slam a glass full of juice on the table and it splashed everywhere. On the day that Claimant went to the emergency room, she had spoken with the Town Administrator and was advised that Claimant had been sent home because she had noticed Claimant not doing well, was dragging his left foot, and was alarmed by the symptoms he was displaying. Wife thought that Claimant was having a stroke or something because his speech was impaired. She personally witnessed the boat incident and denied that Claimant hit his head that day.

16. The day Claimant was admitted to the hospital, Wife spoke with several people about the claim, including the Town Manager and the Town Attorney, who mentioned she should consider filing a claim on behalf of Claimant. She did not see any designated provider list and she did all the paperwork for Claimant as he was dealing with memory loss problems. Claimant continued to see his personal providers and the providers referred by the emergency room providers. She stated that Claimant attempted to return to work, but it was not successful. He was prohibited from driving, and she had to spend all her time with Claimant as he needed supervision. She had to quit her job because of Claimant's impairments and need for help.

17. Wife noted that she now had to go behind Claimant and finish his tasks because he was unable to focus and complete tasks. Even simple things like, flushing the toilet after going to the bathroom. She stated that Claimant was very good with math and now could not do math without help. She testified that Claimant, after the surgeries,

would sleep a lot and was advised that it was because his brain was trying to heal. She also stated she took Claimant to all his medical appointments and none of the providers had suggested that alcohol had anything to do with the SDH.

18. Claimant assumed that there would be a time of recovery, that would allow an occasional drink, but he had not had any alcohol since the hospitalization and brain surgery. Claimant stated he did not continue having his evening drinks after the initial admission to the hospital.

19. The parties submitted over 2,200 pages of records in this matter, which are summarized below only in pertinent part, addressing only those records that might be relevant to the issues to be addressed in this matter.

20. Employer issued a First Report of Injury (FROI) completed by an administrative assistant for Employer on January 28, 2021. The FROI specifically noted that Claimant had reported the incident on April 30, 2020. It also noted that Claimant was inspecting the brushes of the street sweeper and that he was wearing a helmet. He was getting up off the floor when he stood up, striking the right temple against the "A frame" steel dual post car lift.

21. Claimant stated that he was working for Employer as a salaried employee. He thought he was earning around $50,000.00 per year. The FROI indicated that Claimant was earning an average weekly wage of $1,014.40.

22. Claimant filed a Workers' Claim for Compensation on February 4, 2021. It noted that, as he was standing up after leaning over to repair a chain, he hit his head on a car lift and reported it to the Town Administrator. It noted that Claimant was being treated at Franktown Family Medicine.

23. Employer issued a February 9, 2021 document entitled Employer's First Report of Injury.[3] This document also stated that Employer was notified on April 30, 2020 and that Claimant's disability began on May 26, 2020. This form also lists Insurer's information and notes that Insurer received notice of the claim from Employer on January 28, 2021.

24. Employer submitted Exhibit K, with a designated provider list (DPL), and a cover letter dated February 11, 2021 from Respondents' counsel to Claimant's counsel. The DPL was undated and unsigned.

25. Insurer filed a Notice of Contest on February 11, 2021, denying that Claimant's injuries were work related.

26. Claimant was attended by Reiner Kremer, PA-C of Franktown Family Medicine, LLC, (supervised by Paula Castro, M.D.) beginning October 14, 2015 for multiple conditions including cardiology issues, cervical spine issues, dizziness, myalgias and cervicalgia. On April 2, 2020 Claimant was seen for a regular follow-up. PA Kremer assessed hypercholesterolemia, hypertension, lumbalgia, hip pain, coronary arteriosclerosis, and aortic arteriosclerosis. Other prior records indicate maintenance and

[3] Not a Division of Workers' Compensation standard form.

cardiology concerns as well as lifestyle concerns such as weight, regular exercise, diet and proper sleep.[4]

27. Claimant was admitted to Parker Adventist emergency room on May 26, 2020 with a history of headaches for the last week in the right parietal and base of his neck. The medical records highlighted that Claimant's wife noted that Claimant had bilateral arm weakness that was fairly equivalent and left leg weakness which was most prominent. She noted that over the last 3 days he would be dragging his left foot toward the end of the day though seems to be better in the morning. He had had some difficulty walking because of this. She noted that his speech was slow, and he seemed to be moving in "slow motion." Claimant denied vertigo or imbalance, but his wife reported his complaints of a sensation of lightheadedness and his tendency to fall towards the left. Claimant reported that he would drink two beers and one shot of whiskey daily but denied any withdrawal symptoms or seizures, and upon discharge, there was no evidence of alcohol withdrawal. Claimant and his wife were cautioned with the risk of alcohol withdrawal which could dramatically complicate the course of his SDH. The records noted that "In hindsight," Claimant and wife noted that Claimant had an injury at work "3 months ago" but did not make anything of it. Then a week ago "he had (sic.)[5] his forehead on the door of the shed." Symptoms may have started shortly thereafter. Then the day prior to admission, he rolled out of their boat, falling, one foot to the ground and hit the left side of his head but denied associated loss of consciousness (LOC).

28. Dr. Michael Rauzzino performed a right craniotomy for evacuation of a subdural hematoma with microscopic technique on May 26, 2020. He stated that indications for the surgery were Claimant's right sided headaches and altered mental status. He noted that diagnostics showed a large right sided holohemispheric subdural hematoma with significant mass effect and midline shift without any unresolved problems. Claimant also had a speech and language evaluation as Claimant reported confusion when he awoke from a brief nap, not knowing where he was. He was able to reorient himself after a couple minutes. His wife noted slower processing than normal. Upon assessment of the Montreal Cognitive Assessment (MoCA) screening, Claimant had mild cognitive deficiencies overall with most significant deficits noted with immediate and delayed recall, verbal fluency, and calculations. During his stay, therapists noted that Claimant demonstrated decreased insight into deficits and mild impulsivity.

29. Claimant was discharged from Parker Adventist on May 29, 2020. The primary diagnosis was acute on chronic intracranial subdural hematoma, daily consumption of alcohol, coronary artery disease, tobacco use disorder, Class 1 obesity with a body mass index (BMI) over 32, benign prostatic hyperplasia and prediabetes. The discharge addressed in-hospital care, including physical therapy and occupational therapy evaluations with gait training and lower extremity strengthening, range of motion exercises and neuromuscular reeducation. Upon discharge and the records from admission through discharge, there was no persuasive evidence of alcohol withdrawal.

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[4] There was no mention of dizziness issues by April 2, 2020.

[5] There are several possibilities regarding this mistake, it could mean that a word was missing like "he had scrapped/hit/struck his forehead" or that that there was a typo as in "he scrapped/hit/struck his forehead." This ALJ declines to make any assumptions in this regard like Dr. Morgenstern in his report.

30. The discharge note described the findings of the at least five CT scans performed while in the care of Parker Adventist. The comparison from the CT performed on May 26, 2020, which showed a large mixed attenuation nearly holohemispheric right convexity SDH with areas that may reflect acute on chronic hemorrhage. Near the cranial vertex it measured 3.2 cm. Substantial mass-effect and right hemisphere with sulci that were effaced, right lateral ventricle was effaced, approximately 1.2 cm right greater than left midline shift (MLS). While the CT post craniotomy and evacuation of the SDH on May 26, 2020 showed smaller than on prior diagnostics, measuring 15 mm, there was increased acute hemorrhage within the collection anteriorly. The May 29, 2020 CT showed a decreased mass-effect with left MLS down to 7 mm with residual mixed density right hemispheric subdural collection measuring 1.3 cm in thickness with 7 mm subfalcine midline shift, which was an improvement from the prior day's head CT, with no new intracranial hemorrhage, cortical infarct, mass or other new or acute intracranial pathology. He was discharged with multiple recommendations for outpatient PT/OT/SLP, and medications.

31. Claimant returned to the emergency room and was readmitted on May 30, 2020 with left arm movement suspicious for secondary focal seizure. The CT on readmission showed a recurrent SDH with new loculation of acute SD blood along the anterior and superior margins of the prior craniotomy, with a 13 mm defect. Overall, the size of the residual mixed right SDH was unchanged, measuring 14 mm. Not change in the 9 mm MLS. They assessed that Claimant had a "recurrent subdural hematoma for which he had craniotomy 4 days ago by Dr. Rauzzino." Dr. Rauzzino was consulted, and he wanted Claimant to be admitted to the hospital. After he reviewed the CT scam, Dr. Rauzzino would see him in the morning to decide if any other interventions were needed.

32. On June 2, 2020 Claimant was prepped for surgery as following the prior procedure he had done well but after a week, he had worsening symptoms. Diagnostics indicated that Claimant had a recurrent subdural and epidural[6] hematoma. Dr. Rauzzino proceeded with a revision right craniotomy with evacuation of epidural hematoma and recurrent subdural hematoma. The head CT postoperatively on June 3, 2020 showed a right mixed density smaller SDH with maximum thickness 0.7 cm (compared to 1.4 cm), showed less mass-effect, decreased leftward MLS, now only 0.5 cm (compared to 0.9 cm) and a decreased overall size of right posterior falx SDH with maximum thickness 0.4 cm. By discharge Claimant was showing cognitive linguistic skills within functional limits.

33. Claimant was evaluated by Derrick Winckler, PA-C from Dr. Rauzzino's office, on June 8, 2020 at Front Range Spine and Neurosurgery. PA Winckler took a history and noted that Claimant continued to have tingling in the fingertips of his left hand, but otherwise improved since the craniotomy. He had some drainage at the site of a staple. It was replaced and the drainage stopped. He was advised to return the following week for a wound check.

34. On June 11, 2020 PA Kremer noted Claimant's recent release from the hospital with subdural bleed that was repaired twice by Dr. Rauzzino. PA Kremer noted

[6] Epidural hematoma is a blood accumulation between the dura and the skull, while subdural hematoma means a bleed between the dura and brain matter.

Claimant's use of a cane and that he was on short term disability (STD). It noted a referral to neurology for further evaluation. Claimant's physical exam was unremarkable.

35. Claimant started physical therapy with Fyzical Therapy & Balance Centers on June 16, 2020. They noted complaints of balance and residual left sided strength deficits, with limited ambulation outside the home and with an assistive device. He was discharged on November 24, 2020 due to Claimant's inability to get to his appointments as he was having increased cognitive therapy visits.

36. He returned to Dr. Rauzzino's office on June 17, 2020. Claimant no longer had issues with tingling extremity sensations but continued to ambulate with a cane and continued with his seizure medications. On July 16, 2020 Claimant reported to PA Winckler that he had taken a turn for the worse with worsening headaches and problems with confusion and lethargy. PA Winkler noted that the July 2, 2020 CT scan showed no recurrent hemorrhage and only a small residual subdural hygroma.[7]

37. Pamela Kinder, M.D., a neurologist, first saw Claimant on August 4, 2020 for evaluation and continued seizure medications management, which were increased after his June 2, 2020 admission. The headaches had abated but he continued having fatigue and increased symptoms with stress. Dr. Kinder noted that Claimant would frequently drink nightly except that since his first hospitalization, he had stopped that altogether. Neurological exam was essentially within normal limits except for gait, as Claimant had a tendency to sway to the left. Dr. Kinder noted that Claimant would not be able to drive for approximately one year, recommended a change in medication and gradual exposure to aggravating factors. On August 24, 2020 Claimant indicated to Dr. Kinder that he had almost immediate change in mood with the new medication. She diagnosed localization-related (focal) (partial) idiopathic epilepsy and epileptic syndromes with seizures of localized onset without status epilepticus and traumatic subdural hemorrhage without loss of consciousness.

38. At a follow-up on September 21, 2020 PA Stephen Ladd of Dr. Rauzzino's office, noted that Claimant was recovering fairly well still with complaints of fatigue and shakiness towards the end of the day, but improving strength. Claimant also reported that towards the end of the day he had increasing speech difficulties. PA Ladd recommended continued follow up with the neurologist for control of seizure medications and continued physical therapy. He also reviewed the last CT scan.

39. On October 29, 2020 Dr. Kathryn Polovitz, M.D. conducted an EEG with a finding of persistence of amplitude asymmetry with overlying frequencies appreciated throughout the right frontoparietal region consistent with a breath rhythm, seen in the setting of skull manipulation or underlying skull defect, as well as mild intermittent focal slowing appreciated in the right frontoparietal region suggestive of a mild focal dysfunction in the region. Claimant followed up with Dr. Kinder who noted that Claimant suffered a significant injury to his brain, his studies were still reflecting ongoing impairment at his right frontal/parietal area that could cause confusion, risk of accident and could impair his judgement.

[7] A hygroma is a collection of spinal fluid without blood.

40. The CT of the head and brain from December 31, 2020, as read by David Solsberg, M.D., showed a nearly isodense subdural fluid collection deep to the craniotomy site, that measured 4 mm. There were no mass effects or acute hemorrhage or progression of the hemorrhage since the prior study. Dr. Solsberg noted, at this time, some cerebral atrophy.[8]

41. On January 25, 2021 Claimant was readmitted to Parker Adventist after suspicion of a seizure. EEG and EKG were normal without indication of continued seizures. CT showed an acute 4 mm right frontoparietal subdural hemorrhage with no midline shift. Dr. Rauzzino, from neurosurgery, was notified, he reviewed the films then called back and stated that he felt this was likely old. However, after discussion with the patient's family and wife, they were more comfortable with Claimant staying overnight for evaluation, therefore he was admitted to the medicine service unit. He was discharged and was recommended further neurologist evaluation with Dr. Kinder as well as continued with antiseizure medications.

42. Dr. Kinder reevaluated Claimant on February 1, 2021 noting he was alert but could not recall recent events, had a slightly ataxic gait and immediately lost his balance with eye closure. Dr. Kinder again explained to both Claimant and his wife the extent of the brain injury, that blood had "clotted", but remained an irritant to his brain, noting that both Claimant and his wife only now comprehended the extent of the Claimant's disability, finally realizing Claimant would not be fit to drive or work for some time. Dr. Kinder also stated that Claimant should be on long-term disability as he was not able to meet the demands of his job.

43. On February 24, 2021 Claimant followed up with PA Kremer who noted that Claimant continued to follow up with neurology and was disabled as a result of the brain hemorrhage. He was enrolled in a cognitive rehabilitation program in Parker, Colorado. He complained of left sided shoulder problems as well as right sided headaches. PA Kremer ordered a new CT to evaluate whether there were any new brain bleeds. In addition to his prior diagnosis, he was diagnosed with shoulder pain and right sided headaches. Prior exams were also similar and provided no other insightful notations other than Claimant had frequent lab workups.

44. Dr. Bruce L. Morgenstern performed a medical records review independent medical evaluation (IME) at Respondents' request on April 28, 2021. He did not examine Claimant. The records provided to Dr Morgenstern included Dr. Rauzzino's at Front Range Spine, Franktown Family Medicine, FROI, Neurology of the Rockies and Parker Adventist. Dr. Morgenstern specifically associated use of alcohol as a possible cause of the subdural hematoma in Claimant as alcohol consumption or abuse leads to both atrophy of the brain, which stretches the bridging cerebral vein tissue and may lead to increased risk of SDHs, and risks of falls due to intoxication. Dr. Morgenstern heavily relied on discrepancies regarding whether the work incident occurred one month or three months prior to the May 26, 2020 admission. He, erroneously, assumed that Claimant filled out the FROI instead of Employer's representative. Dr. Morgenstern stated that "[I]n summary, significant discrepancies exist both in the documented time course as well as

[8] This was the first CT report to document any atrophy.

the severity of any associated work-related injury," questioning Claimant's credibility as a historian in his final analysis and opinion.

45. Dr. Rauzzino wrote a letter dated January 31, 2022. He stated as follows:

> I treated Mr. [Claimant] directly including having performed surgery and having assessed the hematoma. I have also looked at the images at length. This was a large hematoma, mostly chronic and likely present for at least one month. It is not something that would have occurred from an injury five days earlier. The vast majority of the hematoma, or perhaps all of it, was relatable to the event that occurred one month earlier. There were chronic membranes found at the time of surgery; these membranes take time to develop over the course of weeks, not a few days. It is therefore my opinion as a level II accredited physician that the etiology of his hematoma and the need for surgery had to have been caused by an event that had occurred at least one month prior to his presentation. If he struck his head at work and if this can be documented, it would be my opinion that this was an occupational injury and not related to the minor trauma that may have occurred one week prior to his presentation.

46. Dr. Michael Rauzzino testified as an expert in neurosurgery and as a Level II accredited physician by deposition on October 17, 2022 on behalf of Claimant, as a treating provider. Dr. Rauzzino was Claimant treating neurosurgeon since his first admission in May 2020, when he treated Claimant at Parker Adventist Hospital. Dr. Rauzzino first evaluated Claimant in the emergency room at Parker Adventist, where Claimant was complaining of headaches, left sided weakness, trouble with thinking, and diagnosed Claimant with an "acute on chronic subdural hematoma." This was based on the CT study of Claimant's head. The CT showed a large fluid collection on the right side of his head compromising or compressing the right side of the brain down. Dr. Rauzzino explained that a subdural hematoma is a blood clot or an area of bleeding between the skull and the dura, and the brain. He could tell that it was acute on chronic because of the size of the hematoma. The brain would not have been able to tolerate an acute hematoma the size Claimant had, because it was several centimeters, comprised of the whole side of the brain. The radiologist measured it at 3 centimeters and noted that the brain had shifted approximately one centimeter pushing the brain to the middle. All of which lead Claimant to have a neurologic deficit.

47. Dr. Rauzzino testified that Claimant's symptoms were consistent with a subdural hematoma, he recommended surgery and performed the surgery. Claimant then had recurrence of blood clotting, so Dr. Rauzzino performed a second surgery to clean out the recurrent clot. Dr. Rauzzino noted that most (greater than 90%, nearly 100%) subdural hematomas are caused by trauma to the head. To assess the causality of the hematoma, he would normally take a history, generally traumatic, viewed the imaging, looking for color and size of the hematoma, and reviewed past records.

48. In this case, Dr. Rauzzino took a history from Claimant that he struck his head at work, which was consistent with the history Claimant provided at hearing, of an incident where he was getting up after working on the sweeper and had a solid hit on his head on a car lift bar. Dr. Rauzzino stated that this type of hit was more than sufficient to have caused the subdural hematoma, even if Claimant had been wearing a helmet. He stated of the three incidents Claimant had, the one the day before had no probability

of causing the hematoma of the size Claimant had because not enough time had transpired. The one where Claimant scrapped his head on the frame of the shed, could not have caused it either, because the type of hematoma noted was older than a week prior. Dr. Rauzzino stated that "the only of those three incidents, the only one that had the potential to have caused this was the one that occurred about a month prior." He went on to state:

> Having an injury about a month prior would have been enough time for the bleeding to occur, the hematoma to expand, and the blood to have lysed. So while I try -- you know, very rare in life you can say absolutely, a hundred percent, I can actually say a hundred percent that the injury didn't occur a week prior, and it didn't occur a day prior.
>
> The analogy that I would give you is if you took an oyster and you dropped it to the ground and the pearl rolled out, we know that that pearl didn't develop just from hitting the ground, and it didn't develop a week prior. It takes time for a pearl to develop. It starts with a grain of sand, it grows, and you know, that sort of thing. The hematoma he had was like that. That is something that took weeks to develop, you know, to occur. So I can say with surety that of those three incidents, the one that is most plausible is -- or the only one that is plausible would be the injury he described at work.

49. Dr. Rauzzino noted that it takes time for a subdural hematoma to grow and individuals don't always present with symptoms right away because it takes time for the blood clot to form, to a point where the brain can no longer tolerate the change. At the beginning, right after the head trauma, Claimant could not have expected to have any symptoms other than the fact that he hit his head.

50. Dr. Rauzzino opined that individuals, generally, that abuse alcohol, have a tendency to fall and suffer trauma to the head, but Claimant did not provide a history of alcohol abuse to Dr. Rauzzino or any other history separate from the three instances, the shed, the boat and the work incident. Dr. Rauzzino noted that alcohol can cause the brain to shrink and atrophy but not to create a subdural hematoma. Further, in this case, Claimant's brain showed no signs of shrinkage. Also, when performing the brain surgery to remove the clot, Dr. Rauzzino noted a chronic membrane which had encased the blood and stated that chronic membranes take several weeks to form, not just a week or days.

51. Dr. Rauzzino also noted that the color of the blood on CT showed that most of the blood was isodense, meaning that it had already broken down after clotting and showed as a gray color. He noted that there was only very little blood that showed any acute findings, as a very white color. He noted that:

> …someone with a chronic subdural hematoma, they can have bleeds into it and, you know, sometimes it happens spontaneously. That is how a subdural hematoma develops. You have a little bit of bleeding.
>
> I don't know if Dr. Morgenstern went through this. But there are veins on the surface of the brain that connect to the dura. And if you have an injury and you shear one of those veins, blood will start to ooze out. And as the blood oozes out, it presses against the brain, and since it can't push the skull out, it pushes the brain down, and as the brain gets pressed down, other veins can stretch and they can tear and they can bleed.

> So sometimes you can catch it right after one of the other veins has gone, started the bleed, you will see acute blood on top of the other blood, which is more chronic in nature.

52. Dr. Rauzzino stated that within a week after the head trauma, an individual could show signs of weakness, confusion. But as time passes, the symptoms become more pronounced as the subdural hematoma continues to grow over the next weeks. "People hit their head, they don't realize how hard they hit it, they shake it off, they just go about things, and they didn't realize they started a process which is going to lead, you know, to potential death, which is what happens if these things aren't treated."

53. Dr. Rauzzino testified that while the patient was suffering from symptoms of the SDH that his mind could be cloudy but once he had been treated, his mind would have cleared from the effects of the SDH and may have been able to provide a more detailed or accurate history of the trauma. He stated that "it is hard to get an accurate history when your brain is under so much pressure."

54. Dr. Rauzzino stated that Claimant "almost died. His brain was so compressed that he was having neurologic symptoms, and to ask him to give an accurate history is difficult in that situation." Dr. Rauzzino noted that following the surgery, when Claimant was recovering, he obtained a history of the three incidents and that of the three, his opinion was that Claimant's injury at work more likely than not, caused the initial bleed, which started the hematoma and that it continued to bleed up until he was seen in the hospital emergency room. At that time, the hospital called him in as they had detected a large, acute on chronic intracranial subdural hematoma.

55. On November 7, 2022 Respondents deposed Dr. Bruce L. Morgenstern, a Board-Certified expert in neurology who conducted a record review. Dr. Morgenstern noted that most SH are caused by trauma and that it was rare for a SH to be spontaneous or not have a history of trauma. He explained as follows:

> The -- the blood forms, as we said, between the · inter table of the skull below a membrane called the dura and the brain. So it basically squeezes the brain between the skull and the brain.· When one leads (sic.) acutely certainly into the brain, or around the brain, blood has iron in it. And on a CAT scan, iron is white.· So acute blood looks hyperdense or white.
>
> After about three days, the blood begins to deteriorate.· So it goes from bright to kind of gray, which we call isodense.· It's about the same color -- same shade of the brain itself.· And then beginning about a week or so after that, the blood further deteriorates and becomes hypodense or dark.· So we have acute blood, which is white; subacute blood, which is isodense, so sort of gray; and chronic blood, which is dark.
>
> Mr. -- on his CAT scan, Mr. [Claimant] had a combination of -- of hypodense, that is, dark blood, which was chronic, but also areas of acute blood, which were bright white. So it was interpreted as acute superimposed upon chronic.

56. Dr. Morgenstern testified that there were multiple possible causes for Claimant's SH, including excessive alcohol consumption which could have caused a fall,

such as the “shed incident:” and the “boat incident” or shrinking of the brain which could have sheered the blood vessels leading to the skull. He also noted that three months as noted in the ER visit report was the outside limit for symptoms to occur from a SH. He also criticized Claimant’s change in reports from the ER visit of three months to the FROI report of approximately one month. Lastly, he noted that because Claimant was wearing a helmet, it was less likely the cause of the SDH, that “it would blunt the injury.” The ALJ infers from this statement that it was also his opinion that it could occur.

57. Dr. Morgenstern questioned Claimant’s credibility because of the three-month notation taken during the May 26, 2020 emergency room visit. He stated that individuals with SHs can suffer or develop cognitive difficulties as a result of the SDHs and that Claimant was reporting cognitive issues, and that he had presented to the ER with a history of headaches for the last week in the right parietal side.

58. As found, Dr. Rauzzino’s opinions are more credible and persuasive than the opinions of Dr. Morgenstern. Dr. Rauzzino was the one to perform the craniotomies in this case and found that there was no brain atrophy present at the time of the craniotomies. He studied the CT imaging, not just the reports from the radiologists, both prior to surgery and after surgery. Dr. Rauzzino credibly explained that Claimant was under the influence of the SDH, that showed a midline brain shift, which caused brain damage, affecting cognitive awareness, memory, and speech. He noted specifically that the SDH could not have been caused by the boat incident because the imaging showed isodense, hypodense and hyperdense. This combination of blood deterioration indicated to Dr. Rauzzino that the shed incident, which occurred approximately one week before the May 26, 2020 admission was not the cause of the SDH. Lastly, he opined that whether the work accident was one month or three, that the CT scan indicated that it was greater than two weeks old but certainly could have been up to three months old due to the isodense blood (degradation of the blood). Dr. Rauzzino’s opinion established that the head trauma was probably caused by the work injury. Dr. Rauzzino’s opinions are more persuasive over the contrary opinion of Dr. Morgenstern. As found, the fact that Dr. Rauzzino viewed the actual CT scans, not just the reports, as well as performed the surgeries on Claimant’s brain and viewed firsthand the condition of the SDH and the surrounding brain tissue showed that it was more likely than not that the SDH was caused by an incident greater than one week before the admission, any time around three weeks to three months. Lastly, Dr. Rauzzino spoke with Claimant in person and obtained a history from Claimant after the surgeries took place, consistent with Claimant’s testimony at hearing, noting that any history of present illness taken on the date of admission, would have likely not been fully reliable, not because Claimant was not credible, but because Claimant had a large SDH deforming his brain matter, which was causing brain injury, causing both physical and cognitive deficits.

59. Further, as found, Claimant’s testimony was credible and persuasive. Claimant described the incident which occurred on or about April 30, 2020, where he was getting up after working on the sweeper’s chains and hitting his head on the car lift that was immediately adjacent to the sweeper and described it as a “very solid hit.” The incident was so traumatic that he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He sat there for one or two minutes. But he had a full schedule so pushed forward to get

everything done. At the time he said some curse words, but no one was in the shop to hear him. While the medical records documented that Claimant "did not think anything of it," as found, Claimant did not have the experience or expertise to recognize that the significant hit to the head would or could cause trauma or injury to his blood vessels sufficient enough to cause bleeding in his brain and causing the midline shifting of the brain. As found, Claimant's detailed description of the work incident was not casual or transient or fleeting but was very memorable, which in and of itself is very persuasive. Claimant has proven by a preponderance of the evidence that it was more likely than not that the traumatic event at work caused the SDH and brain injury. This is in conjunction with Dr. Rauzzino's opinion that the SDH, which was isodense upon admission to the ER, was probably caused by the trauma at work.

60. The fact that Claimant did not specifically take notice of or write down the particular date of the injury was not unexpected, as, while he had a solid hit to his head, he was able to continue working, though with some difficulty. As stated previously in this analysis, Claimant did not have the expertise to know that there was a cerebral brain vein that was bleeding in his head. Claimant was persuasive in explaining that the accident at work would have been on or about April 30, 2020 because it was springtime and he needed to do maintenance on the sweeper in order to be able to use it to pick up all the debris on the roads from the winter road maintenance.

61. As found, Respondents had notice of the work injury, as the FROI established that Claimant advised his employer of the work incident on April 30, 2020. Respondents failed to designate a medical provider in this matter and Claimant selected his provider, Franktown Family Medicine, and PA Kremer as his authorized treating physician. Further, any provider within the chain of referral were also authorized. PA Kremer referred Claimant to the neurologist, Dr. Kinder, as well as to the neurosurgeon that performed the craniotomy for follow up. PA Kremer also made referrals to multiple other providers, including physical therapy and speech therapy. These providers are authorized.

62. Claimant received appropriate care in this matter. Claimant sought treatment, after the initial emergency care, with Franktown Family Medicine. They referred Claimant to multiple other providers, back to his neurosurgeon, Dr. Rauzzino, for neurologic consultation with Dr. Kinder, for physical therapy with Fyzical Therapy, and to a speech therapist. All these are reasonably needed care to address the work-related subdural hematoma and the sequelae of the SDH, including possible seizure disorder and care. Claimant has shown that the medical treatment was authorized, reasonably necessary and related to the injury. Claimant has failed to show that a change of provider is proper in this matter as no persuasive testimony was tendered on this issue, a new physician identified or a plausible reason for requesting a change of physician.

63. Lastly, Claimant has shown by a preponderance of the evidence that he was disabled due to the work-related injury, SDH and the diagnosed seizure disorder and was unable to return to work from May 26, 2020 to the present. Claimant is entitled to temporary disability benefits. This is supported by Dr. Rauzzino, Dr. Kinder and PA Kremer's opinions as set forth above.

64. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive or not relevant.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Rauzzino, Dr. Kinder, and PA Kremer are more persuasive than the contrary opinions of Dr. Morgenstern. The record shows that Claimant clearly was at work, within the course and scope of his employment, when he hit his head on the metal bar of the car lift, which was immediately adjacent to the large industrial sweeper. Regardless of whether Claimant had a helmet on or not, the hit was sufficient to cause the trauma and damage to a vein in his brain, which in turn caused bleeding and the subdural hematoma. Claimant and his wife started to notice the effects and symptoms of the SDH shortly after this incident, including changes in speech, slowness of reactions or actions, memory loss and loss of function in his upper extremities. Clearly, even the Town Administrator noticed that something was not right as she was the one to send Claimant home the day he was admitted to the emergency room at Parker Adventist. It was not until a CT of his head was performed at the ER that they realized that Claimant had a SDH causing midline shift of the brain, which was significant and life threatening. Dr. Rauzzino was also persuasive and credible in stating that the two incidents one week before being admitted to the ER and one day before (shed incident and boat incident respectively) were probably not the cause of the SDH

and the incident at work, whether he was using a helmet or not was the probable cause of the trauma to Claimant's head and the proximate cause of the subdural hematoma and subsequent seizure disorder. Claimant credibly testified that he was immediately dizzy and had an immediate headache. The fact that he continued working was only a sign that he had a great work ethic, as his wife testified. Dr. Rauzzino's testimony that because most of the blood was not bright white (hyperdense), it was actually isodense and some that was hypodense was extraordinarily persuasive. Dr. Rauzzino's opinions were credible and persuasive. Claimant has shown that the proximate cause of Claimant's injuries to his head and brain was the work-related accident of April 30, 2020. Claimant's injuries arose from the accident at work in the course and scope of his employment on April 30, 2020.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Pursuant to Section 8-43-404(5) (a) (I) (A) the employer or insurer must provide "a list of at least four physicians or four corporate medical providers …in the first instance, from which list an injured employee may select the physician who attends the injured employee." Pursuant to W.C.R.P. Rule 8-2 (A) "[w]hen an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider." Further, pursuant to Rule 8-2(A)(1) "[a] copy of the written designated provider list must be *given to the injured* worker in a verifiable manner within seven (7) business days following the date the employer had notice of the injury." (*Emphasis added*.) Pursuant to Rule 8-2(E) "[I]f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing."

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the injuries. As found, Respondents had notice of the accident on April 30, 2020 as established by the completed Division

form, the Employer's First Report of Injury. Also, the Town Administrator and Town Attorney had notice at least by May 26, 2020 when Claimant's wife contacted them to advise Claimant was I the hospital and likely injured in the accident when he hit his head on the car lift. The Town Attorney actually mentioned to Claimant's wife that Claimant could file a claim to that effect. Further, Employer failed to designate the medical providers in a verifiable manner in order for Claimant to choose a provider. Both Claimant and his wife credibly testified that they had never received a designated provider list. Lastly, the DPL that was in evidence failed to show that it was sent to Claimant within seven day following notice to Employer of the work injury or potential work injury.

D. Change of Physician

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Franktown Family Medicine and PA Kremer were authorized treating providers when Claimant initially selected the providers and by choosing to continue to receive treatment through them. Now Claimant is requesting a change in medical provider but provided no persuasive testimony to support a change in provider nor provided an alternative medical provider. Claimant's request for a change of provider is denied.

E. Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he

left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Sec. 8-42-105(3)(a)-(d), C.R.S.

Claimant alleges impaired earning capacity from May 26, 2020 through the present. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits. Claimant credibly testified that he would be unable to drive to and from work or drive the equipment needed to perform his work. Further, PA Kremer and Dr. Kinder have both addressed that Claimant continues to be disable from work as he would not be capable of engaging in work activities. Dr. Kinder specifically stated that Claimant should be on long-term disability as he was not able to meet the demands of his job. Claimant was first disabled when he was admitted at Parker Adventist and was not able to return to work beginning May 27, 2020 to the present.

There is some mention in the medical records that Claimant volunteered to assist training the new head of public works for Employer and Claimant's wife also mentioned that Claimant attempted to return to work without success. Therefore, Respondents may take credit for any money paid by Employer to Claimant from May 27, 2020 to the present. Further, there is mention of short-term and long-term disability benefits. If Claimant received either type of benefit or Respondents paid for any portion of the disability benefits policies, they are entitled to an offset in the appropriate proportion.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to his head on April 30, 2020 in the course and scope of his employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at Parker Adventist, Dr. Rauzzino, Front Range Spine and Neurosurgery, Franktown Family Medicine, Fyzical Therapy & Balance Centers, Neurology of the Rockies and Dr. Kinder as well as any other provider within the chain of referral to treat the SDH and seizure disorder.

3. Claimant has failed to show he is entitled to a change of physician.

4. The stipulation of the parties is approved and granted. Claimant's average weekly wage is $1014.40.

5. Respondents shall pay temporary total disability benefits beginning May 27, 2020 until terminated by law. Respondents are entitled, in accordance with the law, to offset any benefits paid.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 7th day of December, 2022

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-191-066-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a work-related injury on November 8, 2021.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to a November 8, 2021 work accident, specifically Concentra and Physical Medicine of the Rockies.

PROCEDURAL HISTORY

Claimant filed an Application for hearing on June 28, 2022 on issues that included compensability, medical benefits that were authorized, reasonably necessary and related to the injury, average weekly wage, temporary total and partial disability benefits beginning November 8, 2021 until terminated by law.

Respondents filed a Response to the June 28, 2022 Application for Hearing on July 28, 2022 on issues that included temporary total disability benefits, pre-existing condition; apportionment, if applicable; natural progression of unrelated condition; causation; termination of temporary disability benefits pursuant to 8-42-105(3)(a-d), and 8-42-106(2)(a-b); C.R.S. 8-43-404(7), termination for cause and/or voluntary resignation; insurer not liable for unauthorized medical care; idiopathic injury; unexplained injury; intervening injury; SSDI, unemployment, income from other employment, and/or any other offsets or credits; medical benefits sought not reasonable, necessary, or causally related.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant's average weekly wage would be $760.00, if the claim was found compensable. The parties also stipulated that the only issues that needed to be heard were compensability and medical benefits. They stipulated that the parties would negotiate, at a later time, the remaining issues, if the claim was found compensable.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 42 years old at the time of the hearing. He was working as a foreman for a landscape maintenance crew for Employer, and performed general ground maintenance alongside his crew.

2. On November 8, 2021 Claimant was working, trimming bushes when he started to have low back pain. He reported the incident to Employer on the same day.

Respondents filed an Employer's First Report of Injury on November 9, 2022 which stated Claimant was trimming the bushes all day and it was a heavy week. He thought it started hurting when he bent down or from bending down all day from trimming the bushes.

3. Claimant had a well-documented history of chronic low back pain stemming from the work-related injury which occurred on November 10, 2016.

4. A lumbar MRI was completed on December 16, 2016. It showed a small left subarticular protrusion and annular fissure at the level of L5-S1 with contact and mild displacement of the left descending S1 nerve and no evidence of spinal or foraminal stenosis at any level.

5. On February 23, 2017, Claimant was seen by Dr. Roberta Anderson-Oeser from Ascent Medical Consultants, who was authorized treating provider (ATP) in the 2016 claim. The record documents "stabbing/aching pain in his low back and right lower extremity, which is worsened with lifting and bending and improved by massage and physical therapy." Dr. Anderson-Oeser reviewed Claimant's lumbar MRI and noted "no evidence of nerve root compression on the right. He does have a disc protrusion at L5-S1 – off to the left. It is unclear as to what is causing his right lower extremity symptoms."

6. Nerve conduction studies were performed on August 22, 2017. The EMG/NCS testing was normal. Dr. Anderson-Oeser noted that there was no electrophysiological evidence of a right or left lumbar radiculopathy, lumbosacral plexopathy or peripheral nerve entrapment neuropathy. On October 312, 2017 Dr. Anderson-Oeser noted that Claimant had two surgical evaluations and both surgeons advised he was not a surgical candidate but recommended facet injections, which she performed on November 27, 2017. The bilateral L4-5 and L5-S1 facet joint steroid injections, which Dr. Anderson-Oeser documented were not diagnostic as they provided minimal change in his pain levels and was very temporary. She stated that a psychological evaluation was necessary.

7. Claimant was seen by Dr. William Boyd of Ascent Medical Consultants, who diagnosed Claimant with depression, anxiety, and adjustment disorder due to the chronic pain. He recommended psychological testing.as well as cognitive therapy.

8. On April 23, 2018, Dr. Otten, an ATP, from US HealthWorks placed Claimant at MMI. Dr. Otten documented that the FCE was "self-terminated" by the patient. Dr. Otten noted that Claimant continued to take medications including Lyrica and stated that "[h]e has undergone injections without much relief. He has been deemed not a surgical candidate by two spine surgeons…. He is frustrated that the case is being closed, but he does understand that we have exhausted all the options." Dr. Otten assigned a 17% whole person permanent impairment for the lumbar spine and assigned permanent work restrictions of maximum lifting of 40 pounds, and repetitive lifting of 30 pounds.

9. Claimant returned to see Dr. Anderson-Oeser for maintenance though he was weaned off of all his medications due to poor liver functions. However, by September 26, 2018, he was back on multiple medication including cyclobenzaprine, Lyrica and Lexapro. Dr. Anderson-Oeser noted that he continued to have a 5/10 on the pain scale with 7/10 at its worst and 4/10 at its best.

10. On July 19, 2018, Dr. John Hughes preformed an IME on Claimant's behalf. Dr. Hughes stated Claimant "presents with a perplexing medical history. What is perplexing is his lack of improvement over a course of multiple therapies and spinal injections." He agreed with the ATP that claimant was at MMI. Dr. Hughes went on to note that "I agree as well that he has been left with permanent impairment involving both his cervical and lumbar spine regions." Dr. Hughes assigned a 20% whole person permanent impairment for the lumbar spine.

11. On August 6, 2018, a DIME physician, Dr. Frederick Scherr he did not to assign an impairment rating with respect to Claimant's lumbar spine condition. In support of his decision, Dr. Scherr stated that Claimant's "imaging and bone scan did not indicate any acute process of lumbar spine injury per review by both Dr. Gerlach and Dr. Castro spine surgeons. An EMG performed on his LE's was found to be normal." He noted that Claimant continued with pain in his low back coupled with the paresthesia of the right lower extremity with no objective findings. His examination indicated mostly subjective complaints with minimal objective findings and since he did not believe that there was a Table 53IIB diagnosis (AMA Guides, 3rd Edition Rev.), Claimant did not qualify for an impairment of the lumbar spine. He also relied on the Division's Impairment Rating Tips, which stated there must be objective pathology for a spinal rating.

12. On December 31, 2018, Dr. Anderson-Oeser documented that Claimant "has stabbing, aching, numbing pains in the low back, burning and aching in the right buttocks, aching in the left buttocks and pins and needles sensation in his feet." And that "despite all of his treatment to date, his symptoms have not resolved." At that time, Dr. Anderson-Oeser prescribed methocarbamol to address his muscle spasms, lidocaine 5% topical pain cream for his chronic pain, escitalopram (Lexapro) for his depression, and Lyrica to address neuropathic pain.

13. On January 31, 2019, claimant returned to Dr. Anderson-Oeser. The record documents "low back pain, bilateral lower extremity pain and paresthesias." Pain severity documented at 6/10, worst was 7/10. Dr. Anderson-Oeser recommended that Claimant increase his Lyrica for better control of his neuropathic pain. She encouraged Claimant "to remain diligent with his independent range of motion, stretching and exercise program." Dr. Anderson-Oeser also recommended massage therapy, which took place at Ascent Medical Consultants form February 8, 2019 through March 15, 2019 in part to address his lumbar spine flare up.

14. Claimant testified at hearing that he settled his 2016 workers compensation claim in April of 2019 on a full and final basis, so he did not return to see Dr. Anderson-Oeser under this claim.

15. On September 18, 2019, Claimant was seen at the Salud Family Health Centers by Daniel Norton PA-C. The record documents: "Chronic low back pain since work related injury 3 years ago." PA Norton goes on to note "case with workmen's compensation has closed. The patient was now requesting Salud to provide his care. Most bothersome was ongoing right sided sciatica symptoms." Claimant advised that Lyrica had been the most helpful of everything he had been previously taking for his lumbar spine complaints. He also continued to report depression and PA Norton prescribed Lexapro again. Claimant continued to complain of right sided sciatica symptoms and low back problems on October 16, 2019 and January 18, 2022, and they

continued both his Lyrica and Lexapro medication. On December 11, 2019 Claimant continued to report he was taking both medications as well. This continued on April 6, 10, and 13, 2020.

16. On January 21, 2021 PA Norton again documented Claimant's current medications included Lyrica and Lexapro but he recommended Claimant taper off the Lexapro and replace it with Wellbutrin (bupropion). On May 4, 2020, February 22, 2021, March 10, 2021, March 24, 2021, August 2, 2021 both of those medication continued to be listed and noted that the "[m]edication [l]ist reviewed and reconciled with the patient." Also, on May 4, 2020, the record documented "chronic sciatica" and on February 22,2021 both depression and right sided sciatica were diagnosed.

17. Claimant made a claim for date of injury of July 29, 2021 for a bilateral inguinal hernia against Employer, for which he received medical care from Concentra Medical Centers and Dr. Lori Long Miller. He was placed on light duty restrictions. Dr. John Weaver evaluated Claimant on August 5, 2021 and ordered ultrasounds. On September 16, 2021 Dr. Weaver stated that the ultrasound did not reveal any evidence of bilateral inguinal hernias. Claimant also participated in physical therapy from September 22, 2021 through at least October 7, 2021. By October 11, 2021, Claimant continued to complain of improving groin pain but also complained of hip pain. On November 1, 2021 Claimant was still under modified duty restrictions and was to return to Concentra within a month.

18. Claimant was evaluated by Dr. Long Miller on November 11, 2021 with complaints of low back pain and radiation to the left gluteal area. The record noted that Claimant was engaged in heavy labor using a trimmer. She noted that Claimant had been with Employer for approximately two years and that he had recently changed from residential work to commercial jobs. Dr. Long Miller documented that Claimant had a prior low back claim in 2016, not treated at Concentra, for which Claimant had an MRI, injections, an impairment (though not from the DIME physician and from which he had only recovered approximately 50%. Dr. Long Miller noted that Claimant's symptoms were a result of repetitive activity as the pain was caused "without trauma or incident."

19. On November 18, 2021, Claimant returned to Concentra for recheck with Jennifer Thomas, NP. The record noted bilateral low back pain and no radiation. The record documents that "he stated that he feels about 80% improved." He had lifting restrictions of 20 pounds, and he requested they be increase to 30 pounds. He was in physical therapy and stated that it was helping tremendously.

20. On December 6, 2020, Claimant returned to Concentra complaining of low back pain with bilateral radicular symptoms down to his toes. Symptoms also included back stiffness and decreased spine range of motion, but no lower extremity numbness, no lower extremity tingling and no lower extremity weakness. Exacerbating factors included bending, lifting, sitting, standing, twisting and walking. Relieving factors included physical therapy. On exam, Dr. Long Miller noted that the spinal alignment exhibited a loss of normal lordosis, so she ordered an MRI. Dr. Long Miller reviewed his MRI from 2016 which showed a small disc protrusion but was unable to obtain the US HealthWorks records.

21. On December 22, 2021, a lumbar MRI was completed at Health Images Boulder. Dr. Virginia Scoggins Young reviewed the 2021 lumbar MRI, compared it to the prior 2016 lumbar MRI and stated Claimant had "mild lumbar spondylosis, not significantly changed when compared to 12/16/16."

22. On December 28, 2021, Claimant was evaluated at Concentra. Dr. Lori Miller documented "constant bilateral low back pain and intermittent radiation of pain to bilateral upper thighs." Exam showed tenderness present in the left paraspinal, but not lumbar spine and not right paraspinals. Palpation revealed no bilateral muscle spasms, though he had limited range of motion but normal motor strength. The neurologic exam showed that sensation was intact to light touch in all dermatomes tested, muscles tested displayed no weakness nor muscle atrophy.

23. Claimant disclosed to Dr. Long Miller, for the first time, he had continued being prescribed Lyrica since the 2016 injury as maintenance together with a home exercise program. Dr. Long Miller reviewed the MRI and noted that there was no change from the December 2016 lumbar MRI. Dr. Long Miller referred claimant to Dr. Shoemaker for further evaluation.

24. Respondents filed a Notice of Contest on January 10, 2022 denying that the Claimant was injured and or that any injury was work related.

25. On January 11, 2022, Claimant was seen by Dr. Eric Shoemaker, D.O., at Physical Medicine of the Rockies. The record documents that Claimant's symptoms began on November 8, 2021 noting that "[T]here was no trauma or incident." The record goes on to state that "[i]n November of 2016 at work in which he had multiple injuries including lumbar spine and had multiple injections. After this case was closed his low back continued to bother him. His pain is similar to his chronic baseline, but it is just worse. He has been taking Lyrica since 2016."

26. Dr. Shoemaker reviewed the two lumbar MRI's (from 2016 and 2021) and stated "[t]his was compared to prior MRI dates 12/16/16 and there is no significant change. Indeed 2016 MRI does describe left subarticular protrusion at L5-S1. In comparison to these imaging I agree similar findings." With respect to pain levels, Claimant reported to Dr. Shoemaker "worse pain in the last few weeks was a 6 out of a 10." Dr. Shoemaker noted "chronic axial extension based right greater than left low back pain since work-related polytrauma in 2016 which became worse without particular trauma or incident while just trimming bushes on 11/8/21." Dr. Shoemaker noted Claimant had a "[p]ain disability questionnaire score is 94 consistent with moderate to severe disability which seems somewhat out of proportion to objective findings."

27. On January 18, 2022 Claimant was seen at the Salud Clinic. The record documents "on Lyrica since work accident several years ago." The record goes on to note "he plans to see a physiatrist in near future for ongoing pain."

28. On March 4, 2022, Dr. Albert Hattem, M.D., performed a Physician Advisor review for the claim regarding the low back complaints. Dr. Hattem reviewed medical records and issued a report. Dr. Hattem stated that Claimant did not sustain a work injury on November 8, 2021. In support of his conclusion, Dr. Hattem noted that Claimant denied a specific injury or any trauma to the spine to both Dr. Shoemaker and Dr. Long Miller. Ne opined that in the absence of a specific work injury, it would have to be a

repetitive type condition which would be guided by the Medical Treatment Guidelines (MTG) pertaining to low back conditions and Claimant did not meet the threshold under the MTGs for a cumulative type low back condition. Dr. Hattem stated that Claimant clearly had a pre-existing history of chronic low back pain since 2016 where he received years of various treatments. He noted that on January 11, 2022, Claimant informed Dr. Shoemaker his current pain was similar to his chronic baseline pain, just worse and that he had continued to take Lyrica since 2016. Dr. Hattem highlighted that on January 31, 2019, Claimant had returned to Dr. Anderson Oeser complaining of low back pain and rated his pain at 6/7 out of 10, then eight months later, on September 18, 2019, he returned to the Salud Clinic complaining of chronic low back pain since 2016. Dr. Hattem opined that there was no objective evidence to support that an injury occurred on November 8, 2021. In fact, Dr. Hattem noted that the two MRI's that were done (one in 2016 and one on December 22, 2021) showed findings that were essentially unchanged. Dr. Hattem further noted that Claimant's subjective report that his pain was worse compared to his chronic baseline pain is not supported by the contemporaneous records, that on January 31, 2019, Claimant rated his pain to Dr. Anderson Oeser at 7/10, and then gave the same pain rating to Dr. Shoemaker two and a half years later. Dr. Hattem opined that Claimant's current pain complaints were due to his pre-existing chronic pain disorder and that there were behavioral factors contributing to his subjective pain complaints.

29. Dr. D'Angelo, M.D., testified at the hearing on November 17, 2022. Dr. D'Angelo was admitted as an expert in occupational medicine and had previously prepared an IME report on behalf of Respondents on October 18, 2022. Dr. D'Angelo testified consistent with her report. Dr. D'Angelo opined that there was no traumatic incident or physical trauma to the spine on November 8, 2021, that Claimant had a long-standing history of low back pain with radicular symptoms dating back to his 2016 workers compensation injury and that Claimant's reported symptoms from the November 8, 2021 incident at work were virtually identical to his symptoms that are well documented from his 2016 workers compensation claim. Dr. D'Angelo stated that the location of Claimant's symptoms from the November 8, 2021 incident at work are virtually identical to the location of his symptoms from his 2016 workers' compensation claim. She opined that his lumbar MRIs from December 16, 2016 and December 21, 2021 were read as unremarkable and virtually identical. She stated that there was no objective evidence that an acute injury occurred on November 8, 2021 based on the recent lumbar MRI. She noted that Claimant's subjective pain levels after the November 8, 2021 incident at work were virtually identical to the pain levels, he was reporting following the 2016 workers compensation injury. She observed that Claimant had ongoing, well documented low back pain and radicular symptoms in 2016, 2017, 2018, 2019, 2020, and 2021, and that she has no indication in the records or from her examination that Claimant's pain suddenly dissipated just prior to the November 8, 2021 incident. Rather, the evidence demonstrated the opposite, that Claimant continued to have low back pain and radicular complaints since 2016 and any reduction in his medical visits after he settled his 2016 claim in April of 2019 were most likely due financial considerations, a deterrent to obtaining treatment.

30. Dr. D'Angelo opined that trimming trees on or about November 8, 2021 did not permanently aggravate and/or accelerate, or cause the need for medical treatment,

rather, Claimant's symptoms were the direct result of his long standing 2016 industrial injury. She also reviewed Dr. Hattem's report and agreed that Claimant would not meet the criteria for a cumulative trauma condition according to the Medical Treatment Guidelines. Dr. D'Angelo was not surprised that Claimant had symptoms after doing physical labor at work on November 8, 2021 given his pre-existing history and the fact that he reported to her that physical activity in general hurts his back. However, she opined that having symptoms following physical activity at work does not medically equate to being injured and that Claimant acknowledged to her that his level of back pain is directly tied to his level of physical activity. Dr. D'Angelo agreed with other providers that Claimant had a somatoform disorder and pain out of proportion to objective findings. She explained that somatoform disorder is not in any way suggesting that Claimant is lying about his symptoms. Yet, she opined that it is not sound medical judgment to rely solely on Claimant's subjective report of pain and symptoms.

31. As found, Claimant has failed to show that it was more likely than not that he was injured in the course and scope of his employment with Employer. The history, medical records and documentation is rife with Claimant's continued care for his lumbar spine injury of 2016. What was particularly persuasive was that Claimant was on multiple medications including methocarbamol to address his muscle spasms, lidocaine 5% topical pain cream for his chronic pain, escitalopram (Lexapro) for his depression, and Lyrica to address neuropathic pain from Dr. Anderson-Oeser as of one of the lasts visits Claimant had prior to settling his 2016 claim. He followed up with his personal provider to request ongoing medication. However, he only requested prescriptions to address the neuropathic pain and depression, not for any muscle spasms or the topical chronic pain medication. This ALJ is persuaded by both Dr. Hattem and Dr. D'Angelo that Claimant did not suffer a new injury, an aggravation of his preexisting condition nor sustained an occupational repetitive injury. Claimant clearly required all of his maintenance care for his ongoing lumbar spine problems from his prior 2016 work related injury. He continued to have similar symptoms and complaints as when he was treating for the 2016 work related injury and this ALJ perceives no difference in the symptoms or complaints as documented by his providers in the 2021 claim.

32. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d

6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work-related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Drs. Hattem and D'Angelo, Claimant has failed to show that it was more likely than not that he suffered work related injuries to his lumbar spine and right lower extremity due to either a specific incident or an occupational injury. Here, it is clear from the records that Claimant had a work related back injury in 2016 to the same or similar body parts that Claimant claimed in this matter. Claimant was prescribed a maintenance program for his 2016 claim that Claimant failed to continue after he settled his claim despite ongoing lumbar spine pain as documented by the Salud clinic. Here, there is little persuasive evidence that Claimant showed it was more likely than not that any mechanism of injury, specifically using the trimmer and performing repetitive bending caused an injury or an aggravation of the prior injury. The above facts show a pattern that Claimant required ongoing maintenance care from his 2016 claim not that he needed treatment for any 2021 claim. The proximate cause of Claimant's need for treatment were his ongoing symptoms from the 2016 work related injury and the direct and natural consequence of the pre-existing condition.

This ALJ declines to address the issue of medical benefits as Claimant failed to show that he had a November 8, 2021 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim of November 8, 2021 is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 8th day of December, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Claimant sustained an occupational disease with an onset date of December 19, 2020 and/or January 5, 2021.

IF CLAIMANT PROVED COMPENSABILITY THEN:

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the occupational disease and that the surgery proposed by Dr. Pehler is reasonably necessary and related to the injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was a 71-year-old ramp agent for Employer at the time of the hearing. He was rehired by Employer on June 4, 2007 and continues working for Employer. Between 1984 and 2007 he worked for other employers as an account manager. From 1976 through 1984 he had been previously employed by Employer as a ramp agent.

2. As a ramp agent Claimant would load and unload bags from airplanes, lift and carry bags from one area to another within the airport, loading and unloading belt loaders, carts and containers to put the baggage in and out of the airplanes, drove a tractor or tug and, and between flights he occasionally had down time when he will sit down to rest. He would be required to lift up to 70 lbs. and sometimes up to 100 lbs. if the bags were tagged as heavy. The job required the agents to lift while bending and twisting to perform the job.

3. The Employer's Functional Job Description of a Hub Station Ramp worker included resource, receiving inbound aircraft, dispatching outbound aircraft, unloading inbound aircraft, loading outbound aircraft, product sort equipment runner, product sort pier worker, product sort matrix, cargo, ramp operation control and station operation center. The resource tasks included receiving assignments from the board lead, secure tractor and rolling stock, attaching rolling stock to tractor if needed, which required up to 65 lbs. push/pull, drive tow motor to gate. It included a notation that the tow motors have little to no suspension and whole-body vibration was common. Agents received bags and small package deliveries from five to ninety-nine lbs. with an average of 45 lbs. They loaded and sorted baggage as needed according to delivery location, drive to delivery locations and unload bags onto a cart, belt loader or baggage system conveyor at each location, then stored the rolling stock in designated areas by disconnecting the hitch and

lifting the tongue to apply break, which required up to 85 lbs. of push. They were required to open the baggage compartments of the aircraft, position loaders at the aircraft doors, enter the aircraft and unload the cargo onto the loader, then receive the cargo at the bottom of the loader and load the baggage onto the carts or carriers. The positional requirements were sitting in tow motors or standing and walking frequently on concrete. The job included frequent bending, stooping, squatting, crouching, kneeling, and forward reaching.

4. Claimant stated that he would perform these activities on a daily basis and was required to perform them for up to eight hours a day, since he returned to the job in 2007, but at least for six hours a day. He performed the lifting, bending and twisting for the most part greater than seven hours per week and greater than 9.5 years since he went back to work with Employer.

5. Claimant has had previous injuries to his low back. Once was in 2013 when he had an onset of low back pain with lower extremity radiculopathy which was not job related. He had an MRI performed on August 6, 2013, according to Dr. Khan, which included a notation of a developmentally small central canal. Claimant underwent conservative treatment at that time with therapy, and epidural steroid injections at the Spine One Surgery Center on September 9 and 23, 2013 by Dr. Hahim Khan, which alleviated his back pain as documented by Shaun Gabriel, M.D. on October 21, 2013.

6. On June 2, 2015 Claimant had a recurrence of the low back pain, specifically back pain that radiated to his right buttocks. Dr. Fredric Sonstein noted on exam that extension of the thoracolumbar spine induced severe low back pain and ordered a repeat MRI. Dr. Sonstein diagnosed severe lumbar stenosis at L4-L5 in a patient who presented with back pain and neurogenic claudication.[1]

7. Claimant underwent a bilateral L3-S1 laminal foraminotomies for decompression of the lumbar spine with Bradley Duhon, M.D. due to severe "lateral recess stenosis." The surgical report dated October 28, 2015 noted that Claimant had severe bilateral buttock and leg symptoms, worse with being upright and walking. It went on to state:

> When he sits and rests, symptoms abate. MRI reveals severe stenosis at L3-4, L4-5, and, to a lesser extent, L5-S1 with severe foraminal stenosis on the left side L5-S1. He tried an epidural injection which gave him some relief for a period a time. Other therapies and anti-inflammatories were helpful, but he was not able to go to work and carry on his job successfully without significant pain due to this intractable claudication.

Dr. Duhon specifically noted that the L4-5 disc appeared quite solid. His post-operative diagnosis was lumbar stenosis with neurogenic claudication.

8. Claimant testified that the surgery was successful in relieving his symptoms and he was released to return to full duty as a ramp baggage handler in 2016. Claimant testified that after surgery, he felt great relief and did well. He had no further problems

[1] This ALJ understands neurogenic claudication as the symptoms that occur from pressure on the spinal nerves as a result of stenosis and disc herniations, causing pins and needles, tingling or weakness into the lower extremities.

with his low back except a temporary aggravation of low back pain on March 25, 2020, while at work.

9. The March 25, 2020 Concentra record by NP Allison Haldien documented that Claimant had an onset of low back pain that radiated to his left hip, groin and testicle after bending over repeatedly picking up pieces of paper. He was diagnosed with a lumbar strain and strain of the left iliopsoas muscle.

10. The therapist, Jessica McAlee, P.T., of Concentra, documented on March 30, 2020 that since being slower at the airport (related to COVID), supervisors would have the ramp agents pick up debris off the ground. Claimant reported that ramp agents were given dippers but they ran out, so Claimant was not provided one and resulted in him having to do a lot of repetitive bending to pick debris up, after which he noticed some gradual onset of low back pain especially when he stood up after the break, experiencing some sharp pins and needles sensation on the left side of low back.

11. Claimant underwent a course of physical therapy and was released full duty with no restrictions on April 20, 2020 by Dr. Amanda Cava. Claimant advised Dr. Cava he had no significant ongoing low back problems, radiculopathy, numbness or tingling at that time and requested to be returned to full duty.

12. On December 19, 2020, while waiting to punch out at the time clock, Claimant felt sudden numbness going into his legs, he fell backwards and was caught by one of his fellow coworkers. This was the first time he had ever had this kind of situation happen to him. He stated that he had never experienced numbness or weakness in his legs like he did on that occasion. The experiences he had previously were more like pain in his left hip that radiated down his leg and up through his scrotum area. He did not know if this was or not work related because he did not have an instantaneous onset of pain.

13. Claimant contacted his personal provider the following day but was not able to obtain an appointment until January 5, 2021. Claimant was seen by Jeffrey Amundson, M.D. of Colorado Physician Partners, Garrison Family Physicians on January 5, 2021. He noted Claimant had complaints of leg numbness with worsening symptoms of pain radiating down his posterior buttocks and thighs to the knees. Claimant did not identify a particular trigger other than standing and walking when he had the onset of the leg numbness. On exam he found the low back nontender, with normal leg strength and a mildly positive Phalen's sign. He assessed bilateral low back pain with sciatica and spinal stenosis.

14. Dr. Amundson documented that Claimant could not stand continuously for greater than 15 minutes at a time, so he had to alternate sitting and standing. The standing caused his legs to go numb, and have pain going down his leg with weakness, and it caused him to have to bend over to alleviate the numbness. The pain concentrated in his buttocks, his thighs and the back of his legs. He did not have back pain. He noted that Claimant had not performed any strenuous activities at home or away from work. He differentiated the type of symptoms he had with his prior 2015 complaints because they had affected his hip, and leg that radiated down to his toes and up through his scrotum. Those were not the symptoms he had at the time of the exam.

15. Claimant stated that Dr. Amundson ordered an MRI of the lumbar spine. Once he had the results, Claimant was referred to Dr. Pehler, who advised him that he had problems with the discs and spine and recommended surgical repair. At the time of the hearing Claimant had not yet had the surgery performed and had not missed any work related to his low back condition. However, following his consultation with the surgeon, Dr. Pehler, Claimant undoubtedly believed that his heavy work with Employer had caused the problems with his discs and the need for surgery.

16. The MRI of January 13, 2021 was read by Eric Lyders, M.D., from Diversified Radiology, a fellowship trained neuroradiologist with Certificate of Added Qualifications. His impressions were as follows:

> 1. Disc bulging with right paracentral extrusion and facet arthropathy at L4-L5 contributing to severe central spinal stenosis, right greater than left lateral recess stenosis, and moderate bilateral foraminal narrowing.
>
> 2. Disc bulging with left extraforaminal protrusion and facet arthropathy at L3-L4 contributing to severe central spinal stenosis, left greater than right lateral recess stenosis, as well as moderate bilateral foraminal narrowing.
>
> 3. Other multilevel lumbar spondylosis, detailed above. There is moderate central spinal stenosis at L2-L3 with mild central spinal stenosis at L5-S1. There is scattered lateral recess stenosis with severe foraminal narrowing bilaterally at L5-S1.

17. Maria Kaplan, PA at Orthopedic Centers of Colorado noted on February 2, 2021 that the MRI demonstrated multilevel lumbar spondylosis, L2-3 through L5-S1 spinal stenosis, with severe spinal stenosis at L3-4 and L4-5 due to disc herniation. She noted that it greatly reduced his quality of life due to not being able to stand or walk for more than 10 minutes at a time and recommended surgery from L2 to pelvis for lumbar decompression and fusion.

18. Stephen Pehler, M.D. also of Orthopedic Centers of Colorado, wrote a letter to Dr. Amundson on February 2, 2021 emphasized that Claimant had a severe spinal stenosis at L3-4 and L4-5 due to disc herniation.

19. Dr. Pehler examined Claimant on February 15, 2021, who documented that Claimant continued to have significant buttock and leg pain, with progressive difficulties with any standing and extension, noting that this was following a work-related event. Claimant reported that his symptoms were affecting his quality of life as well as his ability to work. On exam he documented back pain with numbness, unsteadiness and weakness. Dr. Pehler opined that, considering Claimant's severe and almost critical levels with spinal stenosis most significantly at the L4-5 level, a dynamic spondylolisthesis as well as a slight underlying spinal deformity that proceeding with L2 to pelvis lumbar decompression and fusion surgery was recommended in this matter, as isolated decompression would lead to instability.

20. Dr. Pehler submitted a request for prior authorization on March 3, 2021 to Insurer for the spine laminectomy, decompression and fusion from L2-S1 with interbody titanium cage. The record is devoid of any exchange of designated provider list or response to the request for prior authorization.

21. Despite the issues that Claimant was having with the leg numbness and pain with standing and walking Claimant has continued to work while waiting for the approval for the low back surgery.

22. Claimant was evaluated by Dr. Brian Reiss, an orthopedic spine surgeon, on March 16, 2022. He noted that he had received 127 pages of medical records to review. Following review of the January 5, 2021 records he specifically opined that

- More likely than not there was no actual work injury.
- More likely than not his symptoms are not related to his work activity.
- Having pain while being active at work is not equivalent to a work injury.
- More likely than not this symptomatology represents a recurrence of his chronic pre-existing condition combined with the natural history of progression of that condition.
- This is not a work-related condition.
- His symptoms and treatment thereof should be considered non-work related

23. Dr. Reiss reviewed the MRI films directly stating that the images were extremely grainy and opined that "[a]ll the findings probably represent degeneration and postoperative changes with no acute pathology." With regard to the March 2020 lumbar spine claim, Dr. Reiss commented that the flare up was not likely work related and that Claimant should "find another job that does not create low back soreness." Lastly, he opined that "the proposed surgical intervention is for treatment of a chronic preexistent multilevel degenerative condition unrelated to any effects of the work situation. The proposed treatment is not work-related," and that the multilevel decompression and fusion was not indicated pursuant to the Medical Treatment Guidelines because the pain generator had not been clearly identified.

24. Claimant testified that he wished to proceed with the L2-S1 decompression and fusion recommended by Dr. Pehler. He understood from Dr. Pehler that he has herniated discs for which he required the surgery. He continued to have the numbing sensation going into his bilateral legs, which was somewhat relieved by sitting.

25. Dr. Reiss testified at hearing as a Level II accredited, board certified orthopedic spine surgeon and consistent with his report. Dr. Reiss explained that stenosis is a narrowing of the spinal canal and that claudication is simply a descriptor for the symptoms one gets from that kind of problem, including causing lower extremity symptoms, numbness, tingling, and pain. Dr. Reiss noted that Dr. Pehler described in his report that Claimant had moderate to severe narrowing of the canal or the foramina, and which was possible but not clear from the available studies. Dr. Reiss stated that Claimant's diagnosis were "pretty much the same" as Clamant had in 2015 before his surgery. He stated that Claimant had a developmentally small central canal and that, as he aged, the structures around the canal thickened and took ups space to narrow it further and caused compressed nerves.

26. The W.C.R.P. Rule 17, Medical Treatment Guidelines, Exhibit 1, Table 5 state that there is "Good Evidence: Trunk flexion, rotation, and lifting in the workplace cumulatively is associated with low back pain." It further stated that there is "Good Evidence: Work related factors, such as lifting and bending of the trunk or bending and twisting of the trunk, increase a workers' risk of developing lumbosacral radiculopathy." Lastly, the MTGs state that there is some evidence that

> Cumulative exposure to lifting in the workplace is associated with the development of low back pain. Exposures of 7 hours per week or greater, over more than 9.5 years, is associated with low back pain in an apparent dose-response relationship. The effects of lifting may only become apparent when considered in combination with other work exposures.

27. As found Claimant's testimony was credible and persuasive with regard to the nature and onset of his symptoms. The ALJ credits the medical records, the opinions of Ms. Kaplan and Dr. Pehler and finds that Claimant has demonstrate that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with Employer. A fact that was particularly persuasive was that Dr. Duhon noted in 2015 that the L4-5 disc appeared quite solid. The 2021 MRI, as noted by both PA Kaplan and Dr. Pehler, showed severe spinal stenosis at L3-4 and L4-5 "due to disc herniation." After review of the MRI reports of August 6, 2013, and June 11, 2015, the stenosis as described in those reports appears to be less significant, and less affected by disc herniations as described in those reports when compared to the MRI study of January 13, 2021.

28. Dr. Reiss' opinion that Claimant had a history of similar complaints and symptoms related to the congenitally small spinal canal and stenosis as the cause of his current symptoms is not persuasive. Claimant had the stenosis addressed by surgery in 2015. Claimant returned to work in 2016 and continues to work to this date in a heavy job, moving luggage that weighs an average of 45 lbs. from one area to another, including from inside the airplanes onto the belt loaders and then from the belt loaders to carts. He would lift, push and pull heavy weight in excess of 70 lbs. as noted by the job description, and pushed in excess of that to hook and unhook the carts from the tractors. While Claimant may have had a predisposition of a small spinal canal, Claimant had an aggravation of his preexisting condition, including disc herniations, which resulted directly form the work he performed for Employer. The aggravation was proximately caused by the type of work he performed and as a result of the heavy nature of the employment, that required Claimant to continuously lift, push, pull, twist, bend and reach. Further, the aggravation caused him to require medical attention. Claimant was not exposed to the same type of conditions outside of his work environment, including at home or non-work activities. Claimant credibly testified that he did not perform the same kind of activities outside of work. Claimant has shown that the onset of Claimant's occupational disease was December 19, 2021, when his symptoms caused by the aggravation, resulted in the need for medical care. Claimant scheduled an appointment for the first available time he was able to obtain.

29. The ALJ is persuaded by Ms. Kaplan's opinion and Dr. Pehler's opinion Claimant requires surgery to address the occupational injuries to his lumbar spine which cause the claudication symptoms including numbness, tingling and pain into his lower extremities.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimant must also prove by a preponderance of the evidence that that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993).

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by Section 8-40-201(14), C.R.S. that defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "equal exposure" element, the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

The Colorado Workers' Compensation Medical Treatment Guidelines (MTGs) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTGs "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

The Division has adopted the MTGs to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. W.C.R.P. Rule 17, Exhibit 1 effective as of April 30, 1993 and most recently updated effective January 30, 2022. Under Sec. 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTGs are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive).

As found Claimant's testimony was credible and persuasive with regard to the nature and onset of his symptoms as well as the nature of his job. The ALJ credits the medical records, the opinions of Ms. Kaplan and Dr. Pehler and finds that Claimant has demonstrated that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with Employer.

As found, Claimant returned to work in 2016 and continues to work to this date in a heavy job, moving luggage from one area to another, including from inside the airplanes onto the belt loaders and then from the belt loaders to carts. He would lift, push and pull heavy weight in excess of 70 lbs. as noted by the job description of having to hook and unhook the carts from the tractors. It is also of note that the tugs have little suspension and likely caused further aggravation to Claimant's condition. He clearly met the criteria

as laid out in the Medical Treatment Guidelines under W.C.R.P. Rule 17, Exhibit 1, Table 5 as Claimant performed heavy lifting on a daily basis for greater than ten years. While Claimant had a preexisting small spinal canal, the work he perform for Employer more likely than not caused significant disc damage, including herniated discs and proximately cause further aggravation of the stenosis and accelerated his preexisting condition causing him to require medical attention. In other words, but for the work performed by Claimant for Employer as a ramp agent, Claimant would likely not have needed the medical care he now requires. Claimant was not exposed to the same type of conditions outside of his work environment, including at home or non-work activities. Claimant was a credible witness and was persuasive in his descriptions of the type of work he performed. Claimant was also credible that he did not perform the same kind of activities outside of work. As found, Dr. Duhon noted in 2015 that the L4-5 disc appeared quite solid but both PA Kaplan and Dr. Pehler noted that the 2021 MRI showed severe spinal stenosis at L3-4 and L4-5 "due to disc herniations." PA Kaplan and Pehler's opinions were credible and persuasive over the contrary opinions of Dr. Reiss. As found, Claimant had the stenosis address by surgery in 2015 and the continued heavy lifting, twisting, reaching of heavy bags that weighed an average of 45 lbs. caused disc herniations and aggravation of Claimant's underlying stenosis. Claimant has shown that he sustained an occupational disease to his lumbar spine with an onset of Claimant's occupational disease on December 19, 2021, when his symptoms caused by the aggravation, resulted in the need for medical care.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

30. Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for the occupational diseased with a date of onset of December 19, 2021 which caused work related injury and need for medical care. As found, Claimant was attended by Dr. Amundson, who in turn referred Claimant to Dr. Pehler. As found, after examining Claimant and reviewing diagnostic results, Dr. Pehler and PA Kaplan recommended the five level decompression and fusion

of the lumbar spine from L2 through S1 due to the significant damage cause by the combination of the herniated discs and stenosis at L2-3 and L4-5, which significantly aggravated the severe spinal stenosis. The stenosis is causing claudication, which is causing Claimant to have symptoms into the lower extremities, including weakness, pins and needles, and tingling sensations. Claimant has proven by a preponderance of the evidence that the need for spine surgery proposed by Dr. Pehler was causally related to the December 19, 2021 work related occupational disease and injury. As further found, Dr. Pehler's opinion that the five level surgery is necessary as "isolated decompression would lead to instability," so anything less than the five level fusion would place Claimant at risk for further complications. Therefore, as found, Claimant has shown that the proposed surgery to address the occupational injuries to his lumbar spine which cause the claudication symptoms including numbness, tingling and pain into his lower extremities is authorized, reasonably necessary and related to the occupational disease.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained occupational injuries to his lumbar spine with a date of onset of December 19, 2021.

2. Respondents shall pay for the reasonably necessary and related medical care including the surgery as recommended by Dr. Pehler.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 22nd day of December, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that the surgery recommended by Dr. Arthur was reasonably necessary and related to the admitted June 19, 2021 work-related trauma.

STIPULATIONS

The parties stipulated that the New West Physician records were exchanged late but that they waived the 20-day deadline in this matter.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 68 years old at the time of the hearing. At the time of the admitted work-related injury, on June 19, 2021, Claimant was working for two separate employers. Claimant's first job was working for Employer for the prior seven years as a ramp agent, primarily in the "makeup" area transporting transfer travelers' luggage to carts that would then be transported to the appropriate plane. The second job was as a shuttle driver for a hotel chain, where he was picking up and dropping off passengers from the airport to the hotel. He had been performing this job for approximately one and a half years.

2. Claimant was seen by Aedine Prummer, PA-C at New West Physician on March 4, 2020, with a primary complaint of low back pain, which had persisted for the prior three months. Claimant described symptoms as an ache with aggravating factors of sitting and alleviating factors as running. PA Prummer ordered x-rays of the lumbar spine. She provided a diagnosis of low back pain, which was a diagnosis previously provided by Dr. Kevin Scott on November 16, 2018, when he ordered an MRI of the lumbar spine.

3. Claimant was seen at New West for an annual physical exam by Dr. Scott on June 1, 2020, who noted Claimant was an athletic healthy age-appropriate male. He indicated that Claimant was maintaining an exercise regime of 30 minutes a day. Claimant had complaints of pain in his hips and hands as well as his low back. Dr. Scott noted that an MRI was denied by Insurance. He assessed that the low back pain was chronic but stable and that physical therapy provided him no relief. He also assessed arthralgia that was chronic and progressive, and suspected osteoarthritis from an athletic life and increasing age. Dr. Scott ordered a rheumatoid factor, labs, and pelvic x-rays, but the record reflected that Claimant had had diffuse arthralgia, worse in hands and hips.

4. On May 5, 2021, PA Prummer examined Claimant for a primary complaint of right hip pain. She took a history that:

> Patient is a 66 y/o M here with a complaint of R hip pain. He cannot remember when pain first started. but it has at least been 1 year. The pain comes and goes. Sometimes the pain is felt in his R groin. He feels like his hips are weaker than before. The pain is worse with leaning on the R side when he is sitting. The pain is better with Aleve. He works at the airport and lifts a lot of bags. He wants to make sure his hips are okay before retiring. He has a past medical history of degenerative disc and joint disease in lumbar spine seen on x-ray in 3/2020.

On physical exam Ms. Prummer noted that Claimant's left hip strength was 5/5 but the right hip strength was only 4/5. Claimant specifically requested x-rays of both hips and she assessed his condition as chronic and was considering a diagnosis of osteoarthritis. She stated Claimant should continue with ibuprofen and would consider ordering physical therapy once the x-ray results were known.

5. Claimant stated that the pain in the hip would come, stay a few days and then resolve. He noted that it just happened to be bothering him on the day he was in to see the doctor on another health issue.

6. On June 19, 2021 Claimant was moving a military bag, which Claimant testifies weighed between 60 to 80 pounds, twisted, and felt a pop in his right hip. Following this incident, his hip problem never subsided or went away. Claimant stated that he was seen at Concentra four days later and was provided with work restrictions, which continued through the day of the hearing.

7. On June 23, 2021 Claimant was seen at Concentra by Lea Johansen, M.D. who took a history as follows:

> Patient reports he was lifting heavy bags and injured his low back, shoulders and R groin on Saturday. Called off work the next day and then had Mon and Tues off work. Today he called off and came in for evaluation. Tried tylenol [Sic.] w/o relief. Rest is helping. Shoulder and lumbar pain worse on R and worse with lifting. No radiculopathy. Denied R groin bulge or lump. No scrotal swelling or hernaturia. No h/o hernias in past. *Does have a h/o[1] lower back pain and shoulder injury a few years ago* but has been working as a ramp agent since then w/o problems. PE does not suggest a R hernia; appears to be a groin strain. Will hold off imaging with US[2] for now but discussed at length signs to watch for hernia. Patient endorsed understanding. Will start PT, diclofenac, and methocarbinal [Sic.]. f/u Monday. (*Emphasis added.)*

On physical exam, Dr. Johansen found tenderness in the anterior shoulder and in the lateral shoulder including with palpation and limited range of motion. Claimant was tender to palpation over the deep anterior hip flexor, inferior to ASIS,[3] and had abnormal range

[1] This ALJ infers that h/o means "history of."
[2] This AlJ infers that US is an ultrasound of the abdomen, a diagnostic tool frequently used to identify hernias.
[3] This ALJ infers ASIS is the anterior superior iliac spine.

of motion with pain.[4] She assessed that Claimant had a lumbar strain, repetitive strain injury of the bilateral shoulders and a groin strain on the right.

8. Claimant immediately started physical therapy at Concentra on June 23, 2021. Zachary Fox, P.T. took a history that Claimant had right sided low back pain felt achy, sore, and stiff. He did not have any proximal or distal pain, but pain did wrap around the right side to the front of his hip. Mr. Fox noted abnormal range of motion, positive FADIR, positive FADER, positive piriformis test, was significantly tender to palpation along the right hip gluteus medius, minimus, piriformis, and TFL.[5] P.T. included therapeutic exercises, therapeutic activities, manual therapy, neuromuscular reeducation, and dry needling.[6] Therapy with Mr. Fox continued through October 12, 2021, with some interruptions.

9. Also on June 23, 2021, Claimant attended an appointment at New West Physicians for an annual exam. The list of conditions being assessed, primarily consisted of an annual exam, and there was no mention of a work-related injury on June 19, 2021. However, the list of current, active problems lists the lumbar spine pain, lumbar degenerative disc disease, radicular pain, pelvic pain and hip pain.

10. Claimant was evaluated and treated by multiple Concentra providers, including PA Valerie Skvarca on June 28, 2021, on July 6, 2021, and July 20, 2021. The history is clearly a cut and paste job as it is repeated verbatim on each of the medical records. On the last date Claimant was reported having right hip pain and groin pain, in addition to the shoulder pain and low back pain. It noted that the reason for the visit was lower back pain, bilateral shoulder problems as well as groin pain and minor aches in the groin and 'left' hip (not the right one). Ms. Skvarca ordered x-rays and had Claimant on modified duty restrictions. On exam both hips had normal appearance, with no deformity or tenderness and had normal strength. Claimant returned to Concentra on August 11, 2021 and was then evaluated by PA Kathryn Miller, for continued hip complaints but an essentially normal exam, with only tenderness in the gluteus maximus and gluteus minimums.

11. Deana Halap, NP attended Claimant on August 31, 2021 and recommended MRIs of the lumbar spine and hip in order to identify the cause of the right hip and groin pain. Claimant returned with PA Miller on September 15, 2021 for reevaluation, and she referred Claimant to an orthopedic specialist for the right hip strain as he had a focal tear of the right hip labrum.

12. The September 14, 2021 MRI, as read by Adam Williams, M.D. of Invision Sally Jobe and provided an impression that Claimant had a focal chondrolabral separation located anteriorly, mild thickening of the gluteal tendons bilaterally without evidence of a tear; and mild advanced L5-S1 degenerative disc disease. He did note that there was no

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[4] Unfortunately, Dr. Johansen failed to document specific tests to assess right hip labral integrity, such as FABER/Patrick's test.

[5] This ALJ infers that TFL is the tensor fasciae latae, a muscle that is proximal to the anterolateral thigh, between the superficial and deep fibers of the iliotibial (IT) band, and works in conjunction with the gluteus maximus, gluteus medius, and gluteus minimus to perform hip movements, including flexion, abduction, and internal rotation.

[6] There are multiple comments by physicians that state Claimant had acupuncture treatment but this ALJ only found evidence in the record of dry needling.

evidence of any substantial joint effusion. Of note, the left hip was also visualized in the imaging and showed marginal osteophyte formation at the superior acetabular rim undermining the left acetabular labrum.

13. On September 15, 2021 PA Miller made referrals to both Dr. Nathan Faulkner for the hip complaints and to Dr. Brian Castro for lumbar spine issues.

14. Claimant was first evaluated by Nathan Faulkner on October 1, 2021 at the Concentra facility. Dr. Faulkner took a history as follows:

> …he was lifting some heavy bags onto a cart when he felt pain initially in his back. He subsequently noticed pain in his hip when leaning to the right and has had persistent pain over the lateral aspect of the hip and groin since that time. The pain is sharp in nature. He has noticed painful popping over the lateral aspect of his hip since the injury and *denies any antecedent right hip pain or dysfunction*. He has tried 3 months of physical therapy, which has helped with his strength, but not his pain. He has not had any previous injections and has tried ibuprofen without relief. He has also tried ice, heat, lidocaine patches, and acupuncture. He denies any numbness/tingling in the right leg. He has been off work for the past 2 weeks as he completed 3 months of light duty. (*Emphasis added).*

Dr. Faulkner noted on exam that Claimant had a mildly positive Trendelenburg sign (indicative of hip abductor weakness in the gluteus medius and minimus) but otherwise a slightly abnormal hip exam, including range of motion, mildly positive McCarthy and extension/adduction/internal rotation test, positive Patrick test with negative FABER test, normal strength, flexors and abductors with some pain and normal neurovascular exam. He reviewed the hip x-rays and the MRI, which showed moderate hip DJD with circumferential femoral head osteophytes and degenerative labral tear. Dr. Faulkner provided two proposed treatments, the first was a steroid injection into the right hip under ultrasound, the second a total hip replacement. Dr. Faulkner stated that Claimant was not eligible for any other kind of surgery in light of the significant degenerative condition of the hip, and that he should be seen by Dr. Arthur for the arthroplasty of the hip.

15. Respondents filed a General Admission of Liability on October 6, 2021, admitting for temporary total disability benefits beginning on September 13, 2021. Respondents did not specify what conditions they were admitting to in filing the GAL.

16. Claimant was seen by Dr. Bryan Castro, an orthopedic specialist. After reviewing records, Dr. Castro noted that Claimant appeared to have sustained a work related right hip injury on June 19, 2021. However, the history taken was not specific nor focused on preexisting conditions. Dr. Castro specifically opined that

> Dr. Faulkner has already recommended a right hip joint injection under ultrasound. Dr. Castro discussed with the patient that would be reasonable to go ahead with the hip injection. We discussed that this may help significantly with his pain symptoms, but it would also be a diagnostic injection. If he gets temporary resolution of his symptoms, then his hip *is* likely the main source of his pains. If he gets no benefit from a hip joint injection, then we could consider a right-sided transforaminal epidural steroid injection at L5 for diagnostic and therapeutic purposes.

17. PA Miller noted on October 7, 2021 that Claimant was concerned with the recommended steroid injections into the hip and lumbar spine as he was under the care of an eye specialist for retinal changes caused by his uncontrolled diabetes and was aware that there are higher risks for patients with diabetes. PA Miller stated that:

> After a lengthy discussion about plan of care and timeline of PCP today and eye dr in 1 month, then FU w/ us in 4-6 weeks, pt was at checkout and began asking back office staff for referral to Dr. Arthur to discuss THA . I interveined (Sic.) and stated that we had discussed he would talk w/ PCP and eye doc about steroid injections but he states he has changed his mind and would like to persue (Sic.) surgical consultation at this time. I will place ortho referral to DR. Arthur for R THA consult as recommended by DR. Faulkner should pt NOT want steroid injection

18. Also, on October 7, 2021 Claimant was evaluated again by PA Prummer. She took a history that Claimant was complaining of chronic hip pain. She specifically noted that:

> He cannot remember when pain first started. but it has at least been 1 year. He was last seen for this in 5/2021. *The pain comes and goes.* Sometimes the pain is felt in his R groin. He feels like his hips are weaker than before. The pain is worse with leaning on the R side when he is sitting. The pain is better with Aleve. He works at the airport and lifts a lot of bags. He has a past medical history of degenerative disc and joint disease in lumbar spine seen on x-ray in 3/2020. Last x-ray was done in 5/2021, which revealed *symmetric bilateral hip osteoarthritis*. He is was [Sic.] seeing an orthopedist through workman's comp who suggested he receive steroid hip injections. He requests a referral to a different orthopedist today.
>
> He is also here to follow up on diabetes. His home glucose levels have been around 200s, fasting. He requests a referral to an endocrinologist as he would like to make sure his sugars are well-controlled prior to initiating steroid injections for his hip.

19. Claimant continued seeing the providers at Concentra. He saw Dr. Cava on November 5, 2021 who stated that Claimant was not working as he ran out of light duty time. He continued with complaints of unchanged hip pain in the right lateral hip, and groin with associated symptoms of gait disturbance, decreased range of motion, hip stiffness and a click inside of hip when bending over. The exacerbating factors included crossing legs, stair climbing and exercise like elliptical. Relieving factors included nonsteroidal OTC anti-inflammatories. Claimant discussed with Dr. Cava during this visit his hesitancy to proceed with steroid injections due to side effects that might be caused by his uncontrolled diabetes, which he also discussed with PA Miller on December 1, 2021. He also discussed with Dr. Cava on January 21, 2022 that he definitely wished to proceed with surgery instead of steroid injections which could cause serious side effects due to his uncontrolled diabetes. Dr. Cava noted that Claimant was not at maximum medical improvement as he was awaiting surgery.

20. On November 17, 2021 Claimant was evaluated by Jeffrey Arthur, D.O. of Orthopedic Centers of Colorado. He noted the following assessment:

> Patient is a pleasant 67-year-old male who presents today for second opinion regarding his right hip evaluation and options. We had a lengthy discussion regarding the options based on his current situation. *He had no issues with this hip prior to this injury.* He felt a pop and now has evidence of a labral tear. He had

> seen a hip arthroscopy specialist who per the patient's report said that he would not do a hip arthroscopy. But would refer him for hip replacement. … *Do not feel that going straight to hip replacement is the next reasonable option.* Do feel that if there was more evidence of arthritis and/or chronicity to this issue then would be more open to going straight to hip replacement. *I was very honest with the patient and that I do perform injections and hip replacements routinely and that based on his overall clinical evaluation and imaging would still want to start with injection.* This would also be for diagnostic and therapeutic purposes. Explained the reasoning for this. He was somewhat more interested in hip replacement and just getting everything done. (*Emphasis added.)*

21. Claimant returned to Dr. Arthur's office and was seen by PA Rachel Sauvageau on December 17, 2021. Claimant advised he really did not want to proceed with a steroid injection "as he feels this is more of a Band-Aid than anything." Claimant stated he wanted to have the total hip replacement/arthroplasty (THA) surgery and requested that a request for authorization be completed and sent to Insurer. Dr. Arthur's office submitted the request for authorization for the on January 11, 2022.

22. Claimant complained to Dr. Cava on February 11, 2022 that his right hip continued to get worse. Dr. Cava also noted that the delay in proceeding with the hip surgery was due to a pending independent medical examination (IME). Claimant continued to follow-up with the providers at Concentra while awaiting the IME.

23. Claimant was evaluated by Stephen Pehler, M.D., an orthopedic surgeon, at Respondents' request on March 18, 2022. He issued a report on April 4, 2022. From the fax trace, the report was not actually sent to the Insurer adjuster until May 11, 2022. He noted that he reviewed the medical records provided, took a history from Claimant and completed an examination. Claimant reported prior low back and shoulder injuries several years prior to the admitted work injury of June 19, 2021, but did not disclose any complaints of prior hip pain or injuries and Dr. Pehler denied the receipt of any records documenting symptoms or pain related to the hip condition immediately prior to the work injury. Dr. Pehler noted it was possible that Claimant suffered a permanent exacerbation of his degenerative hip arthritis and degenerative lumbar spondylosis at L5-S1. However, Claimant needed to have a diagnostic injection before making that determination. He noted that there were concerns for diabetes management in the setting of a steroid injection. As a result, he stated that it would be reasonable to perform a local-only based injection of his right hip and assess his clinical response to determine if Claimant's pain and symptoms were coming from the hip or a referred pain from his severely compressed L5 nerve root. A local-only injection of the lumbar spine could then be performed on the right at L5-S1 to assess Claimant's clinical response. Dr. Pehler noted that Claimant may ultimately be a candidate for a THA. However, there would first need to be some, even limited, clinical response to a local-only injection. He noted that Claimant would not be at MMI until the injection was done and the pain generator was clarified.

24. On April 29, 2022 he had no change in symptoms of the right hip and groin but reported that symptoms increased with walking and performing twisting activities like sweeping or cleaning floors. PA Skvarca noted that it was unknown if Claimant had reached MMI as they were awaiting Dr. Pehler's IME results.

25. He still had not been provided the IME by June 6, 2022, as noted by Eric Chau, M.D, who finally discussed the results of the IME with Claimant on July 7, 2022, noting that Claimant would schedule a follow up appointment with Dr. Faulkner for a diagnostic local injection. The records noted that Claimant had provided histories of diabetes, hypertension, repetitive bilateral shoulder problems, right trapezius muscle strain and thoracic myofascial strain. It is not clear from the record whether this information was derived from Claimant because in one section of the report it showed that Claimant was not working and in the same report, it showed that he was currently working. He did, however, inform Dr. Chau that he was willing to proceed with the injection without steroid in order to proceed with the surgery.

26. On July 22, 2022 Claimant was evaluated by Dr. Faulkner, who documented a history of groin and lateral hip pain with a 7/10 on a pain rating scale, on average. He was working as a baggage handler when he injured his right hip on June 19, 20221, while lifting some bags into a cart. He continued to have intermittent popping over the lateral aspect of his hip. His pain was refractory to several months of physical therapy as well as ice, heat, lidocaine patches, acupuncture, and NSAIDs. He has not worked for several months. Dr. Faulkner reviewed x-rays which showed mild hip degenerative joint disease, with a lateral acetabular osteophyte and medium cam deformity. He also had advanced L5-S1 degenerative disk disease with grade l L4-L5 spondylolisthesis. He noted that the MRI images of the right hip dated September 24, 2021 were reviewed, which show moderate chondromalacia of the hip joint with small circumferential femoral head. Dr. Faulkner discussed the pros and cons of steroids versus platelet rich plasma (PRP) injections, and considering that Claimant did not have his diabetes under control, PRP was the better recommendation. He noted that if Claimant failed to respond to the PRP injection, that he would continue to recommend a total hip replacement, given Claimant's arthritis and age.

27. On September 23, 2022 Dr. Faulkner prescribed PRP and proceeded to perform a PRP injection of the right hip on September 25, 2022, in light of both Dr. Arthur and the IME recommending injections before proceeding with a THA.

28. Claimant testified at hearing that he had had right hip pain off and on for approximately one year before the June 19, 2021 work related injury. He also agreed that he had groin pain before and after the admitted injury. The difference was that before it was off and on and now it was constant groin pain.

29. Claimant stated that he was never asked if he had had prior problems with his hip by the ATPs in this case. Had he been asked, he would have advised that he had intermittent times when he would have pain in his right hip but it would only last for a few days and then go away. He stated that after the June 19, 2021 incident when he was lifting a heavy military bag and heard the popping in his right hip and his low back, he has had continuous pain and problems. He also stated that he had never had problems with crossing his leg, for example, and now just trying to do that, caused him more pain. He stated that immediately before the incident of June 19, 2021 he was not having any pain in his hips at all until he heard the popping.

30. Claimant stated that he never advised his workers' compensation providers about his prior problems with his hip. He did comment about his diabetes, hypertension,

prior back and shoulder problems, but never commented about his prior hip problems because those would come and go and did not think that his prior hip problems were relevant, despite providers including Dr. Arthur, Dr. Faulkner and Concentra providers stating in their records that Claimant had no prior problems with his hip.

31. In fact, when Claimant answered interrogatory No. 8, which stated “Please indicate whether you have ever had any symptoms or injuries to your back or any other body part you allege is work-related prior to June 19th, 2021." Claimant failed to state he had prior back or hip problems, even though it is clear from the June 1, 2020 and May 5, 2021 New West Physician records that Claimant had both. He only disclosed that he had had a prior shoulder injury in 2018 and thought the question only related to work-related injuries.

32. Claimant stated that he had the injection that Dr. Faulkner recommended and it provided no relief of his right hip pain. Claimant requested leave to proceed with the THA, as recommended by Dr. Arthur now that the PRP injection was not successful.

33. Dr. Stephen Pehler, a Board Certified orthopedic surgeon with a fellowship in spine surgery, testified at hearing on behalf of Respondents. He explained that Claimant had wear and tear of the component of cartilage in the hip joint that allows the joint to move, causing the degenerative labral tear. Dr. Pehler also explained that Claimant has a cam deformity that caused additional wear and tear of the hip joint. Claimant also has a chondrolabral separation where the cartilage and the labrum itself can, during the degenerative or wearing process, become separated from the attachment to the bone. He explained that the radiological MRI report specifically identifies that Claimant has a pattern of joint degeneration and there was no evidence of the hip having a traumatic event such as a flipped cartilage into the joint. He specifically noted that the findings on the MRI were consistent with pathology as identified on May 5, 2021 by PA Prummer. Dr. Pehler stated:

> … sometimes people that have labrum degeneration or even if it's a labral tear, it can present with groin pain as opposed to isolated buttock. You can have just literally primary osteoarthritis of the hip, which can present with groin pain. So you can have groin or buttock, some people can have leg, there are several presentations you can have clinically when it comes to a symptomatic right hip, and this is certainly one of them.

Dr. Pehler went on to state that groin pain is consistent with a degenerative labral tear as well as consistent with the symptoms he was having when he saw PA Prummer at New West Physicians. Considering Claimant’s ongoing diabetes, Dr. Pehler recommended a lidocaine injection to anesthetize the hip or the low back to better identify the situs of the symptoms, identify what is driving Claimant’s clinical symptoms coming from the back or the hip. He stated that since the PRP did not provide any results he opined that Claimant continued to need the anesthetic injection to pinpoint the condition that needs to be treated given Claimant’s ongoing symptoms and the mild to moderate labral pathology and the very real lumbar spine pathology. Dr. Pehler’s expert opinion was that Claimant had a preexisting degenerative pathology in the hip that likely sustained an acute exacerbation and that the total hip arthroplasty was not related to the work-related event though may be, eventually reasonably necessary, after the anesthetic injection. It was more patent to Dr. Pehler that Claimant has a legitimate and severe pathology in the spine

that might be causing the hip symptoms and that is why he heartily recommended the anesthetic injection before embarking on any surgery.

34. Dr. Pehler also stated that:

> [Claimant] did not have any other presentations for his hip other than the couple of months before this event and before his work related injury, and there is a distinct and now sustained and permanent change in his symptoms and quality of life since that event, then we have to go with it was a permanent injury.
>
> In my opinion, there's still more diagnostic work that should be done before he has a surgery, but at least based on [Claimant]'s presentation to now multiple providers that he's continued to have symptoms, that was a different pattern and a different cadence before this event.
>
> In my clinical opinion, doing a PRP injection, for his right hip, if that did not work, it points more towards a degenerative condition. Whereas if a PRP injection works, it points more towards a traumatic condition. That's not absolute, that's not crystal clean, there's a heck of a lot of gray there. But it's at least a piece of data that helps kind of push you one way or another.
>
> Right, so you're not going to scope [Claimant]'s right hip for a degenerative labral tear, because that'd be the wrong procedure, in your 60s. You would get a total hip replacement, it's 100 percent the right call. It's just my opinion that you should just at least try to figure out what's -- what's driving what. I don't think that a total hip replacement is the wrong answer, it very well could help him a lot, but there's still more pathology and at least one more step that should be done before he has surgery.
>
> …
>
> *I think he likely sustained an acute injury that exacerbated a preexisting condition. (Emphasis added.)*

35. As found, the fact that Claimant reported a prior history of low back and shoulder problems but failed to disclose that he had seen Dr. Scott and PA Prummer on June 1, 2020 and May 5, 2021, respectively, complaining about a history of problems with his hips and/or groin for approximately one year, prior to the May 5, 2021 visit, including that his provider had ordered x-rays of the hips, were significant and relevant facts. These were not provided to his Concentra ATPs, Dr. Faulkner, Dr. Castro, or Dr. Arthur for their consideration. Neither were they provided to the IME, Dr. Pehler until after he wrote his report. As found, Dr. Pehler noted that they were important facts to the causation analysis of the claim. Here, it is clear that Claimant has a preexisting condition and that it was not disclosed. However, it is also clear that Claimant had an aggravation of the preexisting condition. The ATPs in this case had access to diagnostic testing, including x-rays and MRIs that showed Claimant had a clear underlying condition, yet they continued to state that Claimant was not at MMI because he continued to await surgery for the hip.

36. The question here is what was the extent of the aggravation that Claimant sustained, and this is answered by Dr. Pehler who explained that it was an acute injury that exacerbated the preexisting condition. As found, it is more likely than not that Claimant sustained an aggravation of a preexisting condition. As further found, Dr.

Pehler's testimony was more credible and persuasive than Claimant's testimony. Claimant, in fact denied that he was ever asked by anyone, including medical providers, Insurer or Respondents' attorney, about prior history of his hip condition and this ALJ doubts the accuracy of Claimant's explanations.

37. As found, Claimant sustained an exacerbation of his preexisting hip degenerative condition on June 19, 2021 when he lifted the heavy military bag and twisted, feeling a pop in his lumbar spine and right hip. This is supported by Claimant's ATPs medical records, his PCP and the IME physician, Dr. Pehler.

38. As further found, Claimant has failed to show that the surgery proposed by Dr. Arthur, a total hip arthroplasty, is reasonably necessary at this point in time, as anesthetic injections to both the right hip and the lumbar spine are required to properly assess Claimant's pain generator. This is supported by Dr. Pehler's credible testimony that it was more likely than not that Claimant required this diagnostic tool to assess the true pathology that needs to be treated in this matter. This is also supported by Dr. Arthur's opinion that he did not feel that going straight to hip replacement was the next reasonable option.

39. Testimony and evidence inconsistent with the above findings are either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity oairf any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the

industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Reasonably Necessary and Related Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general

admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant alleged that surgery recommended by Dr. Arthur for the right total hip arthroplasty was reasonably necessary and related to the admitted work injury of June 19, 2021. Respondents argued that while it may be reasonably necessary it is not related to the June 19, 2021 injury as they alleged the hip condition was a preexisting or degenerative chronic condition.

However, a preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

As found here, Claimant sustained an aggravation or exacerbation of his underlying degenerative hip condition as explained by Dr. Pehler, Respondents' expert witness.

However, as further found, Claimant failed to show that the proposed surgery, the THA, is reasonably necessary at this point in time. Claimant has two specific conditions. The first is a mild to moderate aggravation of a right hip labral tear. The second is a more significant pathology of the lumbar spine that is serious, as explained by Dr. Pehler. While Claimant is understandably unable to undergo steroid injections to assess and appropriately diagnose Claimant's true clinical pathology causing symptoms due to his uncontrolled diabetes, he is able to undergo anesthetic injections into the hip and the spine, without the steroid component, to identify the pain generator in this matter, also explained by Dr. Pehler. Claimant's request for authorization to proceed with the THA is denied at this time.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained an aggravation of his underlying right hip labral tear.

2. Claimant's request for a determination that the total hip arthroplasty prescribed by Dr. Arthur on January 22, 2022 is reasonably necessary is denied at this time, subject to further diagnostic work-up with anesthetic injections into the lumbar spine and right hip.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of December, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-204-072-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on April 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. Christopher George on July 11, 2022 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. Christopher George on July 11, 2022 was authorized medical treatment.

4. The parties stipulated that the claimant's average weekly wage (AWW) for this claim is $704.82.

5. At hearing, the parties agreed to reserve the remaining endorsed issues (temporary total disability (TTD) benefits; temporary partial disability (TPD) benefits, and whether the claimant was responsible for the termination of his employment) pending a ruling on the issue of compensability.

FINDINGS OF FACT

The ALJ has considered all evidence and testimony presented at hearing and finds the following to be true:

1. The employer operates a hospital. The claimant worked for the employer as a dishwasher in the hospital cafeteria. On April 12, 2022, the claimant clocked in at 6:12 a.m. and clocked out at 7:51 a.m.

2. Executive Chef [Redacted, hereinafter SM] was the claimant's direct supervisor on April 12, 2022. [Redacted, hereinafter RD] is the employer's Director of Food and Nutrition Services. RD[Redacted] oversees the department in which both SM[Redacted] and the claimant worked.

3. On April 12, 2022, RD[Redacted] met with the claimant regarding his continued failure to park in employee designated parking. RD[Redacted] typically arrives at work by 8:00 a.m. The April 12, 2022 meeting with the claimant occurred close to 8:00 a.m.

4. Shortly after meeting with RD[Redacted], the claimant informed SM[Redacted] that his knee hurt and he needed to go home. The claimant did not indicate to SM[Redacted] that he hurt his knee while at work.

5. Prior to going to the ED, the claimant met with [Redacted, hereinafter CG], Workers' Compensation and Employee Health Case Manager. The claimant informed CG[Redacted] that he was walking in the kitchen and felt pain in his knee. The claimant specifically denied carrying any items at the time he felt pain. CG[Redacted] sent the claimant to the employer's emergency department (ED) for treatment. CG[Redacted] also scheduled the claimant to see Dr. Julie Cohen as his authorized treating provider (ATP).

6. The claimant was seen in the ED at 8:06 a.m. on April 12, 2022. The ED triage assessment portion of that medical record includes the following: "patient states he was walking and felt [pain to] inside left knee" and that "patient took ibuprofen 600 mg at 0700". Dr. Benjamin Peery noted in that same medical record that the claimant "was walking in hospital cafeteria when he felt pain inside the left knee". Dr. Peery also noted that the claimant "did take ibuprofen this morning prior to coming to work".

7. Dr. Peery ordered x-rays of the claimant's left knee. The x-rays showed no acute abnormalities. Dr. Peery diagnosed the claimant with a mild sprain of his medial collateral ligament (MCL). He recommended use of a knee brace, anti-inflammatory medication, ice, and elevation. The claimant was excused from work for one week.

8. On April 14, 2022, the claimant spoke with [Redacted, hereinafter BC] Senior Claims Specialist with the insurer. During a recorded statement, the claimant told BC[Redacted] that the Monday prior he was "walking around" and "twisted wrong" and felt pain in his knee. The claimant also reported that the following day it was sore and he went to the ED. After completing the recorded statement, BC[Redacted] informed the claimant that it sounded as if he had suffered an idiopathic injury, which would not be work related. At that point, the claimant changed his story to state that he was carrying dishes when he felt pain.

9. On April 14, 2022, the claimant was first seen by his ATP, Dr. Cohen. The claimant told Dr. Cohen that he was walking around the kitchen at work and felt a pop in his left knee. Dr. Cohen opined that the claimant suffered an MCL tear or strain. Dr. Cohen released the claimant to return to work as of April 19, 2022 with restrictions of no crawling, crouching, or kneeling.

10. The claimant returned to work on April 19, 2022 and continued to work his normal job duties until he resigned from his position on June 2, 2022.

11. On May 19, 2022, the claimant was seen by Daniel Greene, PA-C at Valley View Ortho. At that time, the claimant reported to PA Greene that he injured his knee at work. Specifically, the claimant stated that he "was lifting something and pivoted, felt a pop/pain". PA Greene diagnosed internal derangement of the left knee and ordered magnetic resonance imaging (MRI) of the claimant's left knee.

12. The claimant was not referred to Valley View Ortho by Dr. Cohen or CG[Redacted]. BC[Redacted] testified that the insurer did not receive a request for authorization regarding treatment with PA Greene or Valley View Ortho. Nor did the insurer receive a request for authorization of a left knee MRI.

13. The recommended left knee MRI was performed on May 19, 2022. The MRI showed a high grade radial tear of the medial meniscus at the junction of the posterior horn and body; a grade 2 sprain of the MCL; advanced chondromalacia of the patellofemoral compartment; and a nondisplaced subarticular insufficiency fracture of the weight bearing medial femoral condyle.

14. On May 20, 2022, the claimant returned to PA Greene to discuss the MRI results. At that time, PA Greene noted that the claimant had a medial meniscus tear and a subchondral medial condyle fracture. PA Greene recommended surgical intervention that would include a left knee arthroscopy with partial medial meniscectomy.

15. On May 24, 2022, the claimant returned to Dr. Cohen and reported that he had undergone an MRI and left knee surgery was recommended by orthopedics. Dr. Cohen recommended physical therapy, but the claimant declined that treatment. Dr. Cohen noted that the claimant was working without restrictions and that the claimant "does not want restrictions at this time".

16. On June 1, and June 2, 2022, the claimant contacted the Department of Veterans Affairs (VA) and requested an orthopedic referral to address a torn meniscus.

17. On June 7, 2022, the claimant was seen at the VA by Dr. Carla Tillery. The claimant reported that he "was at work when he developed knee pain" and "felt a pop". On that date, Dr. Tillery reviewed the MRI results and made a referral for an orthopedic evaluation.

18. On July 11, 2022, Dr. Christopher George performed a left knee arthroscopy with partial medial meniscectomy.

19. On August 5, 2022, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton obtained a history from the claimant and performed a physical examination. With regard to the mechanism of injury, the claimant told Dr. Bernton that while "lifting 'big pots for the soup' " at work, he turned and felt a pop in his left knee. In his IME report, Dr. Bernton noted that the only medical record he was provided was the May 24, 2022 record of the claimant's visit with Dr. Cohen in which Dr. Cohen referenced the claimant's meniscal tear and MCL tear. Dr. Bernton opined that the claimant's

description of the incident was consistent with a medial meniscus tear and/or an injury to the MCL. Based upon the information he had at that time, Dr. Bernton opined that the claimant suffered a work related injury to his left knee.

20. On September 23, 2022, Dr. Bernton authored an addendum to his IME report after receiving additional medical records for his review. Specifically, Dr. Bernton was provided with records from the VA as well as the May 19, 2022 MRI report. Dr. Bernton noted that the records from the VA were not related to a left knee condition. With regard to the MRI, Dr. Bernton noted that the report indicated a high grade radial tear of the medial meniscus; a grade 2 sprain of the MCL; and a "nondisplaced subarticular insufficiency fracture". Based on this additional information, Dr. Bernton opined that the medial meniscus tear and MCL tear are work related. He further opined that the insufficiency fracture is not work related.

21. After reviewing additional medical records, on October 3, 2022, Dr. Bernton authored a third report. At this time, Dr. Bernton was provided with the April 12, 2022 ED report. Based upon his review of these additional records, Dr. Bernton changed his opinion regarding the work relatedness of the claimant's left knee condition. Specifically, Dr. Bernton noted that the mechanism of injury recited in the ED record is that the claimant was "walking into work" when he felt pain in the inside of his knee. Dr. Bernton opined that this mechanism of injury is not consistent with a work injury. Dr. Bemton opined that the claimant appears to have suffered an injury to his left knee while simply walking.

22. Dr. Bemton testified consistent with his October 3, 2022 report. Dr. Bemton explained why his opinion changed regarding whether the claimant suffered a work injury.

23. The claimant testified that he did not report feeling left knee pain while walking into work. Rather, he felt pain in his left knee while he was walking at work.

24. The ALJ does not find the claimant's testimony regarding the nature and onset of his left knee symptoms to be credible or persuasive. The ALJ credits the medical records and the testimony of RD[Redacted], SM[Redacted], and BC[Redacted], regarding the sequence of events on April 12, 2022 and thereafter. The ALJ credits Dr. Bernton's opinion as expressed in his October 3, 2022 report and his testimony at hearing. The ALJ finds that it was reasonable for Dr. Bernton's opinion to change once he had access to the ED records. Additionally, the statement the claimant gave to BC[Redacted] is indicative of the claimant feeling pain while engaging in the ubiquitous act of walking. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on April 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer. The ALJ finds that the claimant felt pain in his left knee while simply walking.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page V. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. V. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse V. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on April 12, 2022 he suffered an injury arising out of an in the course and scope of his employment with the employer. As found, the testimony of RD[Redacted], SM[Redacted], and BC[Redacted] is credible and persuasive. As found, Dr. Bernton's testimony and the opinions expressed in his October 3, 2022 report are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an April 12, 2022 date of injury is denied and dismissed.

Dated December 12, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on January 27, 2020 she suffered an injury arising out of and in the course and scope of her employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she has received from Lake Chiropractic beginning on January 28, 2020 was reasonable, necessary, and related to her work injury.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the bilateral total hip arthroplasties performed by Dr. Brinceton Phipps were reasonable, necessary, and related to her work injury.

FINDINGS OF FACT

1. The claimant works for the employer as a front counter employee. The claimant testified that when she reported to work on January 27, 2020, she slipped on a patch of ice in the employer's parking lot. She further testified that both of her feet went out from under her, causing her to fall to the ground. It is the claimant's testimony that her left elbow struck the ground first, followed by her buttocks/low back area. The claimant testified that she immediately felt pain in her left elbow and low back.

2. On January 27, 2020, the claimant notified her direct supervisor, [Redacted, hereinafter JL], of her fall. JL[Redacted] instructed the claimant to notify human resources. The claimant notified [Redacted, hereinafter AB] with the employer's human resources office that same day.

Medical Treatment Prior to January 27, 2020

3. On January 23, 2018, the claimant began treatment with chiropractor, Dr. Andrew Lake at Lake Chiropractic. At that time, Dr. Lake identified the claimant's issues as: chronic posterior cervical and upper thoracic complaints; chronic lumbar, left and right SI joint complaints; and chronic bilateral thumb complaint. The claimant continued regular treatment with Dr. Lake throughout 2018 and 2019. The claimant was seen three times by Dr. Lake in December 2019. The claimant testified that she considers this to be "maintenance treatment".

Medical Treatment After January 27, 2020

4. On January 28, 2020, the claimant was continuing to have pain. As a result, AB[Redacted] instructed the claimant to seek treatment with Dr. Lake. The claimant was seen by Dr. Lake on January 28, 2020. The medical record of that date lists the claimant's complaints as pain in her lumbar area, left and right sacroiliac (SI) joints. In that same record, the claimant described her January 27, 2020 fall as "slipping on the ice and landing on her buttock and left elbow".

5. The claimant was seen by Dr. Lake ten times between January 28, 2020 and March 2020. In March 2020, Dr. Lake's office was closed due to COVID-19 restrictions. Dr. Lake's office reopened to patients in approximately July 2020. The claimant returned to Dr. Lake on July 23, 2020 and continued to seek treatment from him weekly throughout the remainder of 2020 and into 2021.

6. In 2021, the claimant continued to have pain in her low back and hips. On April 29, 2021, Dr. Lake referred the claimant to Animas Orthopedic Associates for consultation.

7. On June 3, 2021, the claimant was seen at Animas Orthopedic Associates by Dr. Brinceton Phipps. At that time, the claimant reported bilateral hip pain with weakness, stiffness, and instability. The claimant reported that she fell onto her right hip when she fell in early 2020. The claimant also reported that the pain was greater in her left hip. Following x-rays, Dr. Phipps diagnosed the claimant with bilateral osteoarthritis of the hip. Specifically, the June 3, 2021 x-rays showed: "moderate to advanced hip arthritis on the right side with near bone-on-bone contact and associated osteophyte formation. On the left side, [h]er joint space narrowing is more mild to moderate with some minor osteophyte formation."

8. As the claimant reported a fall onto her right hip, but greater pain in her left hip, Dr. Phipps ordered magnetic resonance imaging (MRI) of the claimant's left hip.

9. On June 16, 2021, an MRI of the claimant's pelvis "with attention to left hip" was performed. Dr. Brett Englund reviewed the MRI and issued a report. In that report, Dr. Englund identified extensive marrow edema involving the left femoral head and neck, with edema involving the acetabulum with subarticular cysts. In addition, there was focal flattening of the superior medial aspect of the femoral head "consistent with sequela of previous avascular necrosis or advanced cartilage loss and osteoarthritis". Dr. Englund also noted degenerated acetabular labrum and left hip joint effusion and synovitis. With regard to the claimant's right hip, Dr. Englund noted mild reactive marrow edema involving both sides of the right hip joint with moderate effusion, synovitis, and labral tear.

10. On June 23, 2021, the claimant returned to Dr. Phipps to discuss the MRI results. Dr. Phipps noted that the claimant's right hip is more arthritic, but her left is more painful. Dr. Phipps recommended bilateral hip arthroplasty. The claimant requested the left hip surgery first.

11. In July 2021, the claimant reported to the employer that she would need to undergo surgery. At the direction of the company owner, on July 19, 2021 AB[Redacted] prepared a First Report of Injury regarding the January 27, 2020 incident. The injured body part was identified as "hip". In addition, the nature of the injury was described as "[d]islocation - [p]inched nerve, slipped/ruptured herniated disc, sciatica, HNP subluxtion (sic), MD dislocation".

12. On July 27, 2021, the respondents filed a Notice of Contest regarding the January 27, 2020 incident.

13. On July 30, 2021, Dr. Phipps performed a left total hip arthroplasty.

14. On November 23, 2021, Dr. Phipps performed a right right total hip arthroplasty. Following her surgeries, the claimant attended physical therapy for approximately one year.

15. The claimant testified that prior to the January 27, 2020 incident, she was very active. The claimant engaged in activities such as hiking, hunting, skydiving, scuba diving, and horseback riding. The claimant further testified that since January 27, 2020, she has not been able to engage in any of these activities.

16. At the request of the respondents, on July 19, 2022, the claimant attended an independent medical examination (IME) with Dr. John Burris. In connection with the IME, Dr. Burris reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant described her January 27, 2020 fall. Specifically, she reported to Dr. Burris that she slipped on ice, both of her feet slipped from beneath her and she struck the ground with her left elbow and low back/buttocks. Dr. Burris opined that as a result of the January 27, 2020 fall, the claimant suffered a left elbow contusion and a lumbar/buttock contusion. In addition, Dr. Burris identified the claimant's date of maximum medical improvement **(MMI)** for those contusions as March 16, 2020. It is Dr. Burris's opinion that the claimant's bilateral end stage hip osteoarthritis was not caused by the January 27, 2020 fall on ice. In addition, Dr. Burris opined that the January 27, 2020 fall did not accelerate or aggravate the claimant's pre-existing bilateral hip osteoarthritis.

17. On August 12, 2022, the claimant attended a virtual IME with Dr. Sander Orent. Dr. Orent also reviewed the claimant's medical records and obtained a history from the claimant. Due to the virtual nature of the IME, he did not perform a physical examination. The claimant described her January 27, 2020 fall as both feet going out from under her, and falling on to her left elbow, low back, sacrum, and pelvis. It is Dr. Orent's opinion that the claimant's January 27, 2020 fall aggravated the preexisting and asymptomatic osteoarthritis in her bilateral hips. In support of this opinion, Dr. Orent

noted that the claimant engaged in a number of physically demanding activities prior to her fall, and she is now unable to engage in those same activities. Dr. Orent also opined that the avascular necrosis present in the claimant's hips occurred between the time of her 2020 fall and her 2021 diagnosis. Therefore, it is Dr. Orent's opinion that the need for bilateral hip arthroplasties is directly related to the claimant's January 27, 2020 slip and fall.

18. Dr. Burris's testimony was consistent with his IME report. Dr. Burris reiterated his opinion that the claimant's January 27, 2020 fall resulted in soft tissue contusions to her left elbow and low back. He further testified that these contusions have resolved. Dr. Burris also testified that the claimant's fall in January 2020 was not the cause of her hip condition. Nor did the fall aggravate or accelerate the pre-existing condition of the claimant's hips. It is Dr. Burris's opinion that pre-existing end stage osteoarthritis is what led to the need for bilateral hip replacements. Dr. Burris explained that avascular necrosis is a condition where the bone begins to die because of a lack of blood flow.

19. Dr. Orent's deposition testimony was consistent with his IME report. Dr Orent testified that it continues to be his opinion that the claimant's need for bilateral hip replacements is related to her fall on January 27, 2020. Dr. Orent reiterated his reasoning with regard to the claimant's previously asymptomatic hip condition became symptomatic with the January 2020 fall. Dr. Orent also testified that since the onset of the COVID-19 pandemic, he meets with patients virtually because his spouse is immunocompromised. That is why the claimant's IME was conducted virtually. It is Dr. Orent's opinion that lack of a physical examination of the claimant does not impact his opinions.

20. The ALJ credits the medical records and the opinions of Dr. Burris over the conflicting opinions of Dr. Orent. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that she suffered an injury while at work when she slipped and fell on January 27, 2020. The ALJ credits the opinions of Dr. Burris and finds that on January 27, 2020, the claimant slipped and fell while at work, resulting in a left elbow contusion and lumbar/buttock contusion. The ALJ further finds that this injury resolved by March 2020, as opined by Dr. Burris. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that her first ten visits with Dr. Lake for chiropractic care beginning January 28, 2020 and into March 2020 was reasonable, necessary, and related to the claimant's work injury.

21. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that treatment in 2021 of her hips is reasonable, necessary, and related to the work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her need for bilateral hip replacements was related to the work injury. While it is clear to the ALJ that bilateral hip replacements were reasonable and necessary in treating the claimant's condition, those surgeries were not related to the work injury. The ALJ finds that the claimant's fall on January 27, 2020 did not cause the end stage osteoarthritis or avascular necrosis in the claimant's hips. Nor did the

January 27, 2020 work injury aggravate or accelerate the claimant's pre-existing hip conditions to necessitate total hip replacements.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H* & *H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H* & *H Warehouse v. Vicory, supra.*

5. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that on January 27, 2020 she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

7. As found, that the claimant has successfully demonstrated, by a preponderance of the evidence, that as a result of her January 27, 2020 fall at work, the first ten treatments with Dr. Lake beginning January 28, 2020 and into March 2020 were reasonable, necessary, and related to the work injury. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

8. As found, that the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of her bilateral hips, including bilateral hip replacement is related to the work injury. The claimant has failed to demonstrate by a preponderance of the evidence, that the fall at work caused the end stage osteoarthritis or avascular necrosis in her hips. In addition, the claimant has failed to demonstrate, by a preponderance of the evidence, that the January 27, 2020 work injury aggravated or accelerated the end stage osteoarthritis or avascular necrosis in her hips. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant suffered a compensable work injury on January 27, 2020.

2. The respondents shall pay for the first ten visits with Dr. Lake (beginning with January 28, 2020), pursuant to the Colorado Medical Fee Schedule.

3. The claimant's request for payment of her medical treatment of her bilateral hips, including bilateral hip replacements, is denied and dismissed.

4. All matters not determined here are reserved for future determination.

Dated December 16, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-124-750-003

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.$., due to a change in condition.

2. If the claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that the denied medical treatment (consisting of lumbar spine **MRI;** physical therapy; consultation with Dr. Lewis for injections; consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal); is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 29, 2019 work injury.

3. If the claim is not reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that the denied medical treatment (consisting of lumbar spine **MRI;** physical therapy; consultation with Dr. Lewis for injections; consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal}; is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

FINDINGS OF FACT

1. On November 29, 2019, the claimant suffered an admitted work injury when he slipped on ice and fell, resulting in pain in his right knee. During this claim the claimant treated with Dr. Craig Stagg as his authorized treating physician (ATP).

2. On June 12, 2020, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Raschbacher opined that the claimant had reached maximum medical improvement **(MMI)** for his right lower extremity as of the date of the IME. Dr. Raschbacher also assessed a permanent impairment rating of three percent for the claimant's right lower extremity, (which converts to one percent whole person). Dr. Raschbacher recommended that the claimant continue with a home exercise program and avoid crawling, kneeling, and squatting. With regard to the claimant's reports of hip and back symptoms, Dr. Raschbacher opined that those symptoms are not work related. In support of this opinion, Dr. Raschbacher pointed to the claimant's prior history of chronic back pain. In addition, he noted that if the claimant had injured his left hip and low back at the time of the fall, he would have experienced immediate symptoms.

3. On August 27, 2020, the parties proceeded to hearing before ALJ Sidanycz on the issue of whether treatment of the claimant's left hip and low back complaints constitutes reasonable, necessary, and related medical treatment. On October 13, 2020, ALJ Sidanycz issued Findings of Fact, Conclusions of Law, and Order (FFCLO). In that order, treatment of the claimant's low back and left hip was found to be reasonable, necessary, and related to the work injury.

4. On February 26, 2021, the Industrial Claim Appeals Office affirmed the October 13, 2020 FFCLO.

5. On October 22, 2021, the claimant was seen by Dr. Stagg and reported that his knee was "basically the same". With regard to his back, the claimant reported that he received some relief from prior injections, but was continuing to have low back pain. On that date, Dr. Stagg placed the claimant at maximum medical improvement (MMI) and assessed whole person permanent impairment of 13 percent. This was based on a nine percent impairment for the claimant's right lower extremity (which converts to four percent whole person), and a nine percent whole person impairment for the lumbar spine. With regard to maintenance medical treatment, Dr. Stagg recommended three to four follow•up visits.

6. On October 27, 2021, the respondents filed a Final Admission of Liability relying upon Dr. Stagg's October 22, 2021 report.

7. The claimant contested the FAL, and a Division sponsored independent medical examination (DIME) was scheduled with Dr. Caroline Gellrick. The claimant attended the DIME with Dr. Gellrick on February 3, 2022. In connection with the DIME, Dr. Gellrick reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her February 23, 2022 DIME report, Dr. Gellrick agreed with the MMI date of October 22, 2021. In her report, Dr. Gellrick listed the claimant's work related diagnoses as right knee contusion; lumbosacral pain; left hip pain; and right ankle pain. Dr. Gellrick assessed a scheduled impairment rating of 22 percent for the claimant's right lower extremity[1], specifically the right knee.

8. Dr. Gellrick opined that the November 26, 2019 work injury did not result in permanent impairment to the claimant's left shoulder. In support of this opinion, Dr. Gellrick noted that the claimant had prior bilateral shoulder injuries, but no current shoulder injuries. Dr. Gellrick further opined that the November 26, 2019 work injury did not result in permanent impairment to the claimant's lumbar spine. Specifically, Dr. Gellrick stated "[i]mpairment [r]ating of the [lumbar]-spine is questionable in the mind of this examiner and determined not to be ratable with further VA Hospital/Clinic records review." Dr. Gellrick went on to note that it was reasonable for Dr. Stagg to find a causal connection between the need for physical therapy and lumbar spine evaluation as a result of gait issues arising from the claimant's knee surgery.

[1] This converts to a whole person impairment rating of nine percent.

9. In the DIME report, Dr. Gellrick listed a number of maintenance medical treatment modalities for the claimant. Those recommendations included four follow up maintenance appointments with Dr. Stagg; access to Dr. Pevny; knee brace replacement; a lumbar spine TFESI with Dr. Campion (as recommended by Dr. Ceola); and access to a gym program once COVID-19 restrictions were lifted.

10. On March 9, 2022, the respondents filed an FAL which relied upon Dr. Gellrick's DIME report. Specifically, the DIME identified the claimant's date of MMI of October 22, 2021 and a scheduled impairment rating of 22 percent for the claimant's right lower extremity.

11. Initially, the claimant objected to the FAL and filed an Application for Hearing (AFH) on the issues of overcoming the DIME and permanent partial disability (PPD) benefits. The parties did not proceed to hearing on those issues.

12. On March 24, 2022, the claimant left a message with Dr. Stagg's practice indicating that his back was "completely out" and he was unable to lift his right leg. The claimant was instructed to seek treatment in the emergency department.

13. On March 29, 2022, the claimant was seen by Dr Stagg. On that date, the claimant reported significant pain and requested "his third injection". The claimant also reported that over the last several months he had experienced more pain in his back with radiation into both lower extremities. Dr. Stagg opined that the claimant's condition had worsened and recommended magnetic resonance imaging (MRI) of the claimant's lumbar spine. Dr. Stagg also referred the claimant to Dr. Lewis for injections, to Dr. Ceola for consultation, and physical therapy. The respondents denied authorization for these recommended treatment modalities.

14. On April 15, 2022, the claimant filed an Application for Hearing (AFH) on the issues of reopening; authorized provider, reasonably necessary; average weekly wage **(AWW),** temporary total disability (TTD) benefits; and temporary total disability (TPD) benefits. In addition, under "other issues" on the AFH, the claimant included change of physician and "not at MMI". The April 15, 2022 AFH is at issue in the present case.

15. The claimant testified that his condition has worsened since he was placed at MMI. He further testified that his current symptoms include burning pain in the center of his back, his left hip "goes out", and his right ankle swells.

16. On May 4, 2022, Dr. Rashbacher issued a report following his review of the claimant's medical records. In his report, Dr. Raschbacher stated that his opinions have not changed. In addition, Dr. Raschbacher stated that he agrees with the opinions of the DIME physician, Dr. Gellrick.

17. Dr. Raschbacher's deposition testimony was consistent with his written reports. Dr. Raschbacher testified that he agrees with the impairment rating issued by Dr. Gellrick and reiterated his opinion that the claimant's only work related impairment is to his right knee. Dr. Raschbacher further testified that the claimant is not entitled to an impairment rating for any other body part. Dr. Raschbacher testified that there is no evidence of anatomic disruption or any objective finding that would attribute the claimant's hip or low back issues to his knee injury. Dr. Raschbacher noted that Dr. Stagg has not rescinded MMI or stated that the claimant is no longer at **MMI.** It is Dr. Raschbacher's opinion that the claimant could be seen at the VA for his low back.

18. The ALJ credits the medical records and the opinions of Dr. Gellrick and finds that the claimant has failed to demonstrate that it is more likely than not that he has suffered a worsening of his condition. Therefore, the claimant has failed to demonstrate that his claim should be reopened.

19. Although the claim shall not be reopened at this time, the ALJ must now determine if the medical treatment denied by the respondents constitutes reasonable maintenance medical treatment necessary to maintain the claimant at MMI.

20. In Colorado workers' compensation cases, the opinions of a DIME physician are given great deference. As a result, as a general matter, a party attempting to overcome the opinions of a DIME physician bears the greater burden of proof of clear and convincing evidence. The claimant has not sought to overcome the opinions of the DIME physician in the present case. However, the ALJ finds that the opinions of Dr. Gellrick, in her role as the DIME physician in this case must be given consideration in the present matter.

21. Therefore, the ALJ credits the opinions and recommendations of Dr. Gellrick. Specifically, Dr. Gellrick recommended that the claimant receive maintenance medical treatment as follows: four follow up maintenance appointments with Dr. Stagg; access to Dr. Pevny; knee brace replacement; a lumbar spine TFESI with Dr. Campion (as recommended by Dr. Ceola); and access to a gym program once COVID-19 restrictions were lifted.

22. The ALJ credits Dr. Gellrick's recommendations for maintenance medical treatment. However, the modalities identified by Dr. Gellrick are not the same as the denied modalities at issue in the present case. The denied medical treatment before the ALJ are: a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal. With regard to these medical treatments, the ALJ credits the opinions of Dr. Gellrick and the testimony of Dr. Raschbacher and finds that the claimant has failed to demonstrate that a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal; constitute reasonable medical treatment necessary to maintain the claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.$. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos,* 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers,* W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Travelers Ins.* Co. *v. Industrial Commission,* 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen

an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he has experienced a worsening of his condition. Therefore, the claimant has failed to demonstrate, by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303(1), C.R.S. As found, the medical records and the opinions of Dr. Gellrick are credible and persuasive on this issue.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

8. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

9. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that recommended maintenance medical treatment (specifically a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal) is reasonable and necessary to maintain the claimant at MMI. As found, the opinions of Dr. Gellrick and Dr. Raschbacher's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant's claim shall not be reopened at this time.

2. The claimant's request for denied maintenance medical treatment (specifically a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal) is denied and dismissed.

Dated December 27, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.